v. *Rathgeb*, 32 Ohio St. 66, and authorities cited.

The plaintiff would not have been injured if the gun had not been snapped, and as he contributed directly, or at least proximately, to that act by inviting it, he should not have been permitted to recover.

Lake Shore & M. S. R. Co. v. *Miller*, 25 Mich. 274.

Messrs. **Humphrey & Grant**, for defendant in error:

A very high degree of care is required from all persons using firearms in the immediate vicinity of other people, no matter how lawful or even necessary such use may be.

Sedgw. Damages, § 587; Shearm. & Redf. Neg. § 686; 7 Am. & Eng. Enc. Law, pp. 523, 524; 1 Thomp. Neg. ed. 1880, 238-248; 4 Wait, Act. & Def. 702, 703, and cases cited; Addison, Torts, § 544, and notes.

The act of the defendant in this case constituted a trespass *vi et armis*, and it is the rule that under such circumstances the defendant must show that the injury done to the plaintiff was inevitable, and that the defendant was not chargeable with any negligence, for it is said that no man should be excused of a trespass, unless it may be adjudged utterly without his fault.

Morgan v. *Cox*, 22 Mo. 373, 66 Am. Dec. 623; *Castle* v. *Duryee*, 2 Keyes, 169; *Judd* v. *Ballard*, 66 Vt. 668; *Vincent* v. *Stinehour*, 7 Vt. 62, 29 Am. Dec. 145; *Morris* v. *Platt*, 32 Conn. 75; *Bullock* v. *Babcock*, 3 Wend. 391; 1 Smith, Lead. Cas. 560; *Leame* v. *Bray*, 3 East, 593; *Welch* v. *Durand*, 36 Conn. 182, 4 Am. Rep. 55; *Claflin* v. *Wilcox*, 18 Vt. 605; *Howard* v. *Tyler*, 46 Vt. 683.

The declaration is in case. It is perfectly competent to bring an action on the case for an injury to a person produced by the wrongful act of another, and for which wrongful act an action for trespass might by law be brought, and it makes no difference whether the act was wilful or accompanied by force, or as to whether the injury was the direct and immediate consequence from such wrongful act.

See How. Ann. Stat. § 7759; *Bellant* v. *Brown*, 78 Mich. 294; *Wood* v. *Michigan Air Line R. Co.* 81 Mich. 361; *Moore* v. *Thompson*, 92 Mich. 498.

The sections of the statute, which the circuit judge told the jury were violated by the defendant by his action, are §§ 9110-9113, How. Ann. Stat.

These statutes are general statutes of the state of Michigan, and by § 9113 a right of action is given to the party maimed or injured by the discharge of a fire arm, under the circumstances pointed out in the statute.

People v. *Chappell*, 27 Mich. 486; *People* v. *McCully* (Mich.) 2 Det. L. N. 680.

If the statute applies in this case, and the circuit judge was correct in his ruling, the violation of the statute, upon the part of the defendant, was negligence *per se*.

See Bishop, Non-Cont. L. § 445, subd. 10, and authorities there cited; *Keyser* v. *Chicago & G. T. R. Co.* 56 Mich. 559, 56 Am. Rep. 405; *Marcott* v. *Marquette, H. & O. R. Co.* 47 Mich. 9, 49 Mich. 99; *Keyser* v. *Chicago & G. T. R. Co.* 66 Mich. 396; *Chicago & N. E. R. Co.* v. *Miller*, 46 Mich. 532; *Flint & P. M. R. Co.* v. *Lull*, 28 Mich. 510; *Grand Rapids & I. R. Co.* v. *Southwick*, 30 Mich. 444; *Talbot* v. *Minneapolis, St. P. & S. S. M. R. Co.* 82 Mich. 66; *Parker* v. *Lake Shore & M. S. R. Co.* 93 Mich. 607.

If it should be held by the court that the statute did not apply, but that the instruction of the circuit judge to the jury was correct as a common-law proposition, then we say that the verdict of the jury will not be disturbed because the circuit judge gave a wrong reason for the ruling.

Wilson v. *Wagar*, 26 Mich. 452; *Wellover* v. *Soule*, 30 Mich. 481; *Kellogg* v. *Lovely*, 46 Mich. 131, 41 Am. Rep. 151; *Olmstead* v. *Farmers' Mut. F. Ins. Co.* 50 Mich. 200; *Hatzenbuhler* v. *Lewis*, 51 Mich. 585; *Dunning* v. *Calkins*, Id. 556; *Monaghan* v. *Agricultural F. Ins. Co.* 53 Mich. 238; *Swain* v. *Baldwin*, 54 Mich. 120.

If, on examining the facts, the court is satisfied that the plaintiff in error was not prejudiced by any ruling or instruction, the judgment will be affirmed.

Monroe Twp. v. *Whipple*, 62 Mich. 560.

The reasons given by the circuit judge for directing a verdict are immaterial if his action was correct.

Toomey v. *Eureka Iron & S. Works*, 89 Mich. 249; *Lentz* v. *Teutonia F. Ins. Co.* 96 Mich. 445; *Wilson* v. *Michigan C. R. Co.* 94 Mich. 20; *Tillotson* v. *Webber*, 96 Mich. 144.

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

This is an action on the case for damages for injuries caused by the defendant's carelessly and negligently discharging a gun, the bullet from which passed through plaintiff's right thigh and hip, permanently disabling him. It appears that the defendant at the time of the accident was a resident of Saginaw, this state, and had gone to Otsego lake on a hunting trip. He had formerly lived at that village for some years, and he and the plaintiff were well acquainted. On the evening of November 13, 1894, the plaintiff, learning that the defendant was at the hotel in the village, called to visit him. As the plaintiff entered the public room of the hotel, he found the defendant seated in front of a washing stand on the east side of the room, fixing his gun. He had taken the stock off and the works out, and was fixing the spring, the barrel of the gun laying across his lap. The plaintiff became seated near the defendant, when some conversation was had between them in reference to the gun. During the day the defendant had loaded the gun,—that is, had put a number of loaded cartridges into the magazine,—but had had trouble with discharging some of them. The gun had twice failed to explode the cartridges during the day, and he took it back to the hotel with the cartridges in the magazine. He testifies that before he commenced working on the gun to take it apart, he worked the lever which extracts the cartridges from the gun until it failed to throw out any more cartridges, and then took the gun apart, and it was in that condition when the plaintiff came in. The parties differ as to the position of the gun and the position occupied by each after the plaintiff came into the room. The plaintiff testified that after he had spoken to the defendant he "asked him about the gun,

and what was the matter with it, and defendant said the spring was not stiff enough; that it wouldn't set the cartridges off,—meaning the fire. I said, 'Perhaps if you put a piece of leather under the spring, it will make it so it will stand during the hunting season.' He finally took it apart and put the piece of leather under the spring, and put the spring, with the rest of the works, back into the gun, turned it up, like that (indicating), and drew the gun up like that (indicating), and discharged it. . . . The gun was pointed so that when it went off it hit me in the leg." He further testified that the gun was on the defendant's knees, and that he put the works in, and "then it was ready to see if the spring was any stiffer. He just turned it and drew it onto me." On cross-examination he testified that the gun was not pointed at him until the spring was fixed and defendant brought it up to try it. He was asked:

Q. Did you say anything about trying it?

A. Yes, sir. After he put the leather under the spring, then I told him to try it,—see if we could get it any better.

Q. There was only one way for him to try it?

A. He could try it by raising the hammer and not letting it snap down.

Q. Didn't he do that,—raise it with his thumb?

A. No; he raised the hammer and snapped it, and drew it onto me. I didn't tell him to draw it onto me. I leaned back in my chair. I saw him do this. In order to get away, I had to get forward. It happened so quick I didn't have time to take a second thought. . . .

Q. When you said to him to try it, of course the only thorough way to try that would be to cock the gun, and let it pull the trigger, and let it strike down?

A. But he needn't point it at any body. . . .

Q. Did you think the gun was loaded?

A. No, sir, I didn't; but I ain't in the habit of pointing a gun at anybody, or having it pointed at me, whether it is loaded or not.

The witness further testified that during all the time he was in the room, and up to the time when the gun was snapped off, he was not in range with the muzzle.

The defendant's statement of the affair is that he had been in the woods, and had shot at a deer or two that day, and that the gun had failed to go off; that that evening he was trying to tighten the mainspring; that, when the plaintiff came in, defendant showed him the cartridge which the gun had refused to break, and had only dented the top of it a little; that after fixing the spring, he was working the hammer, when the plaintiff said, "Snap it off; it wont hurt it:" that he did snap it off, when it went off, and the plaintiff was injured. He testified further that the gun was in the same condition from the time he started to work at it until it was discharged; that he believed it was entirely unloaded, and there was nothing that occurred there that night to indicate that there was anything wrong with the magazine of the gun; the lever operated as it usually did when emptying the gun and magazine of the cartridges; that he has no recollection of any change in the plaintiff's position or of his own after the plaintiff sat down there; that the gun pointed in his direction all the time from the time he sat down until it was discharged; that he did not pick it up, raise the hammer and bring it around towards the plaintiff, and then pull it off. The defendant further testified that he supposed he had all the cartridges out of the gun and out of the magazine; that his attention was called to this before the plaintiff came in by a Mr. Callahan, who asked, "Is there anything in that gun?" and defendant told him there was not, and that he said to him, "Do you suppose I would go to work to fix a gun with any loads or cartridges in it. I pumped the lever to show him there was not, probably five or six times;" that this was the usual way of throwing the cartridges. It was shown, however, by the testimony of other witnesses, that, after the cartridge was carried from the magazine to the barrel by working the lever after the works had been put back into the gun, the cartridge would come in plain view of the one working the lever.

The defendant presented several requests to charge to the court, relating to the question of defendant's negligence. These the court refused, but charged the jury upon that question as follows: "It seems from some cause,—the witnesses are not able to explain just how,—one cartridge was not removed, and the result was this accident. The pointing of the gun, under such circumstances, at another, is made an unlawful act by the statutes of this state. The fact that the defendant had used the precautions which he has enumerated, for the purpose of determining whether the gun was or was not loaded, will not relieve him from liability from the consequence of his negligent act in pointing the gun at the plaintiff, raising the hammer, and pulling the trigger, which were the immediate acts which caused a discharge of the gun and resulted in injury to the plaintiff. A man is not excused from his act in injuring another by pointing and discharging a gun at him from the fact that he supposed he had taken all necessary precautions prior to the doing of this for the purpose of ascertaining and determining that the gun was not loaded. The act of pointing a gun at another, cocking it, and pulling the trigger, is of itself a negligent act; and the person so doing, if the gun chances to be loaded and is discharged, and injures another, is not excused from the consequences of this negligent act on account of the care which he took prior to its commission to determine whether the gun was loaded. I therefore charge you, gentlemen of the jury, that, under the undisputed evidence in this case, the act of the defendant in pointing the gun at the plaintiff, raising the hammer, and pulling the trigger, which caused the gun to be discharged and to injure the plaintiff, was a negligent act on the part of the defendant, and rendered him liable to the plaintiff in this action, and your verdict must be in his favor, unless you find that the plaintiff himself was guilty of contributory negligence. The plaintiff, in order to recover, must establish, by a preponderance of evidence, two facts: First, that the injury was caused by the negligence of the defendant; second, that he himself was not guilty of contributory negligence. And the burden of proof is upon the plaintiff

to establish both of these propositions. I have already instructed you that, as a matter of law, the plaintiff has established the first proposition,—that the defendant, in so pointing the gun and discharging it, was guilty of negligence."

The sections of the statute referred to by the court in its charge to the jury are 9110-9113, inclusive, of Howell's Annotated Statutes. The act was passed in 1869, and is entitled "An Act to Prevent the Careless Use of Firearms." In *People* v. *Chappell*, 27 Mich. 486, this statute was under consideration, and it was held that a prosecution would not lie, and a conviction would not be sustained, under it, where the use of firearms was not careless, or was intentional or malicious. Mr. Justice Campbell, in speaking of the act, said: "The statute was designed to punish a class of acts done carelessly, but without any design of doing mischief, and the various sections must, under our Constitution, be construed so as to conform to the title. The absence of malice is as necessary an ingredient in the statutory definition as the use of firearms. And the offense is purely statutory." Section 9113 provides: "Any party maimed or wounded by the discharge of any firearm as aforesaid. . . . may have an action on the case against the party offending, for damages which shall be found by a jury," etc. The general rule, and without reference to this statute, is that a very high degree of care is required from all persons using firearms in the immediate vicinity of others, no matter how lawful or even necessary such use may be. 7 Am. & Eng. Enc. Law, p. 523. This same principle is stated in Shearm. & Redf. Neg. 4th ed. § 686. In *Morgan* v. *Cox*, 22 Mo. 373, 66 Am. Dec. 623, it was held, where injury to another is caused by an act that would have amounted to trespass *vi et armis* under the old system of actions, it is no defense that the act occurred through inadvertence, or without the wrongdoer's intending it; it must appear that the injury done was unavoidable, and utterly without fault on the part of the alleged wrongdoer.

Defendant's counsel contended that if the jury found that the defendant had used ordinary and usual means of unloading the gun, and satisfied himself by such means that the gun was unloaded, then he could not be charged with negligence. We think the court very properly refused that instruction. As was said in *Castle* v. *Duryee*, 2 Keyes, 173: "It is not the law, that if one supposing a musket to be unloaded or to be charged only with powder, snaps it at another, and he is wounded, he is irresponsible in a civil action; and it is of no consequence, so far as maintaining the action is concerned, that he acted upon the most plausible or the most reasonable grounds, and fully believed that the gun was not charged with anything which could injure another." In *Judd* v. *Ballard*, 66 Vt. 668, decided by the supreme court of Vermont in 1894, it appeared that the plaintiff was injured by the discharge of a revolver in the hands of the defendant while the two were facing each other, lying in the bottom of an express wagon. The defendant had discharged one of the barrels for amusement, and was fixing the hammer, preparatory to returning the revolver to his pocket, when the discharge which injured the plaintiff occurred. It was said by the court that "upon the facts presented the defendant is clearly answerable for the damages." It was further said: "The shooting of the plaintiff was an accident, but in no sense an unavoidable accident. It would not have occurred but for the defendant's carelessness. The test of liability is not whether the injury was accidentally inflicted, but whether the defendant was free from blame,"—citing *Vincent* v. *Stinehour*, 7 Vt. 62, 29 Am. Dec. 145; *Morris* v. *Platt*, 32 Conn. 775; *Bullock* v. *Babcock*, 3 Wend. 391. It was further stated in that case: "The injury was the direct result of a force put in motion by the defendant. The fact that the force was put in motion through negligence does not preclude the plaintiff from maintaining trespass. Neither an intention to injure the plaintiff, nor an intention to do the act which caused the injury, is essential. It is sufficient if the defendant does a positive act from which the plaintiff suffers an immediate injury,"—citing 1 Smith, Lead. Cas. p. 560; *Leame* v. *Bray*, 3 East, 593; *Welch* v. *Durand*, 36 Conn. 182, 4 Am. Rep. 55; *Claflin* v. *Wilcox*, 18 Vt. 605; *Howard* v. *Tyler*, 46 Vt. 683. The court, continuing, further said: "It was proper to direct a verdict. There was no room for conflicting views as to the essential feature of the defendant's conduct. The question was not whether it was proper to place the hammer between two cartridges, nor whether the defendant was handling the hammer in a proper manner. However proper it may have been to place the hammer in that position, and whatever the care with which the defendant was moving the hammer, it was negligence to be adjusting it with the revolver so held that an accidental discharge would injure the plaintiff. There was no evidence tending to show that the position of the revolver at the time of the discharge was due to any controlling outside force, and no circumstances from which the presence of such a force could be inferred. Any danger that might arise from the jolting of the wagon the defendant was bound to consider. The undisputed facts admit of no inference which could relieve the defendant from liability." In *Tally* v. *Ayres*, 3 Sneed, 677, it was said: "To constitute an available defense in such cases, it must appear that the injury was unavoidable, or the result of some superior agency, without the imputation of any degree of fault to the defendant. The lawfulness of the act from which the injury resulted, is no excuse for the negligence, unskilfulness, or reckless incaution of the party. Everyone in the exercise of a lawful right is bound to use such reasonable vigilance and precaution as that no injury may be done to others. Nor is it material, in a civil action for the recovery of damages, whether the injury was wilful or not." See also *Queen* v. *Salmon*, L. R. 6 Q. B. Div. 79; 29 Moak, Eng. Rep. 503. It is apparent from the defendant's own testimony that he was responsible for the cartridges having been left in the gun. He had been hunting that day, and had loaded it with cartridges. The fact that he believed that he had removed them all from the gun would not relieve him from responsibility in snapping it, when he knew it was pointed directly towards the plaintiff. Had he exam-

ined the gun, he would, of necessity, have seen the cartridge there, as it was shown that it would have been in plain view when placing the works back in the gun; also, that, when pulling the lever, the cartridge being raised into the barrel, had he then looked, he could have seen the cartridge in the barrel. He testified that the gun was pointing at the plaintiff all the time he was fixing it, and that it was in the same direction when he snapped it off. The statute is aimed at just such cases as the present. It was also a plain violation of the statute to snap the gun while it pointed directly towards the plaintiff, and this violation of statutory duty is negligence *per se;* but, aside from this, we think that under the well-settled rules, and under the authorities above cited, the defendant was guilty of negligence, and was liable in a common-law action.

The only other contention in the case which we deem it necessary to discuss is the claim made by the defendant that the plaintiff was guilty of contributory negligence. That question, however, we think, was fully and fairly submitted to the jury. The court charged them upon that proposition as follows: "The claim of the plaintiff is that, when he came into the hotel there that evening for the purpose of having a friendly visit with the defendant, he found him engaged in repairing the lock of his gun. He says he took his seat a short distance from him, but out of the range of the gun, as the defendant was then handling it; . . . that, after the defendant had repaired the lock and put it together again, that he took this gun up, after some remarks had been made in regard to snapping it or trying it, and shifted its position so that it then was pointing towards him, and snapped the gun. His claim is that this changing of the gun as he took it up in order to cock it was done so soon that he had no opportunity to protest or get out of the way. If you find that this occurred as claimed by the plaintiff, then he was not guilty of contributory negligence. On the other hand, it is claimed by the defendant that, during all the time the plaintiff remained there, he was sitting either in actual range of this gun, or so near that a slight movement of it would have brought him in range. His claim is, too, that after the lock had been repaired, and while the defendant was operating the hammer to test the strength of the mainspring, that the plaintiff requested him to try or snap the lock while it was pointed (he made the request, rather, at a time when the gun was pointed right towards the plaintiff in the case); that this request was made twice; that then the defendant did snap the gun; that it proved to be loaded; there was an explosion, and the bullet penetrated the thigh of the plaintiff. If you find that the defendant's version of this is true, I charge you that if you find that during the twenty minutes or so that the plaintiff sat by the defendant before the accident, and while the defendant was repairing the gun the plaintiff sat in range of the gun, or so nearly within the range of it that a slight movement of it might bring him within range, and if, while sitting there, he knew the defendant was about to snap the gun to try the lock, and had time either to protest or get out of the way, and did neither, or if you find that the plaintiff invited the defendant to try it or snap it, meaning thereby to allow the hammer to strike so as to discharge the cartridge, if one happened to be in the gun, —then the plaintiff was guilty of contributory negligence, and he is not entitled to recover. As I have said to you, the burden of proving that he was not guilty of contributory negligence is upon the plaintiff."

There is a claim made in the case that the court improperly allowed certain expert testimony to be given, bearing upon the question of defendant's negligence in handling the gun; but inasmuch as we hold the court was correct in charging the jury, as matter of law, that the defendant was guilty of negligence, this question is of no importance, and will not be discussed.

The judgment must be affirmed.

The other Justices concur.

ILLINOIS SUPREME COURT.

ILLINOIS CENTRAL RAILROAD COMPANY, *Appt.*, *v.* John W. CARTER.

(165 Ill. 570.)

1. A carrier by accepting for shipment goods marked to a point beyond its termination impliedly agrees to carry them to their destination in the absence of restrictions limiting the contract for carriage to its own line consented to by the shipper.

2. While a carrier may restrict its liability to its own line by contract with the shipper, it cannot do so by a mere stipulation in a bill of lading not signed by the shipper, without proof that the shipper accepted the same consenting to the restriction.

3. The liability of a carrier by rail as such terminates upon the delivery of the goods at a secure depot or warehouse at the point of destination, though beyond its own line, without notice to the consignee of the arrival or warehousing of the goods.

4. Ordinarily a carrier by water must notify the consignee of the arrival of goods before its liability as carrier terminates, but such notice may be waived by former course of dealing with the consignee, or by usage prevailing among carriers in the same trade at that port

5. The liability of a forwarding carrier

NOTE.—As to the liability of a carrier for misdelivery of property, see Weyand v. Atchison, T. & S. F. R. Co. (Iowa) 1 L. R. A. 650, and *note;* also a few cases in *note* to Richmond & D. R. Co. v. Payne (Va.) 6 L. R. A. 853.

36 L. R. A.

ceases upon the safe delivery and warehousing of the goods at their destination, and it is not liable for a subsequent misdelivery of the same by an agent of the connecting line or warehouseman.

6. **The liability of a forwarding carrier,** after safely delivering goods at the depot or warehouse of the connecting line, at the point of destination, cannot be extended by its agent, in the absence of authority so as to cover future safe delivery.

(January 19, 1897.)

APPEAL by defendant from a judgment of the Appellate Court, First District, affirming a judgment of the Superior Court for Cook County in favor of plaintiff in an action brought to recover the value of certain property which had been delivered to defendant for transportation and was alleged to have been delivered by it to the wrong person. *Reversed.*

The facts are stated in the opinion.

Mr. **James Fentress,** with *Mr.* **C. V. Gwin,** for appellant:

The 1,000 boxes of ink having been carried and delivered at St. Paul on June 27, and in the absence of the consignee having been in the usual course of business stored in the name and for the account of the consignee in a safe and secure warehouse, the owner of which was wholly solvent and pecuniarily responsible to the consignee for any neglect of legal duty, the contract of the Illinois Central Railroad Company as a common carrier, in any view of the case, was fulfilled and performed, and it is not liable in its capacity of a common carrier upon its contract of carriage for the delivery of the ink to Eaton and Jackson, nor can it be held liable as warehouseman: (1) Because the action and declaration are in assumpsit against it in its capacity of a common carrier on its contract, promise, and undertaking as such carrier; (2) because it never sustained the relation of warehouseman to the goods in question.

Gregg v. *Illinois C. R. Co.* 147 Ill. 550; *Illinois C. R. Co.* v. *Alexander,* 20 Ill. 23; *Porter* v. *Chicago & R. I. R. Co.* 20 Ill. 407, 71 Am. Dec. 286; *Richards* v. *Michigan S. & N. I. R. Co.* 20 Ill. 404; *Chicago & A. R. Co.* v. *Scott,* 42 Ill. 132; *Merchants' Dispatch Transp. Co.* v. *Hallock,* 64 Ill. 284; *Illinois C. R. Co.* v. *Mitchell,* 68 Ill. 471, 18 Am. Rep. 534; *Chicago & N. W. R. Co.* v. *Bensley,* 69 Ill. 630; *Cahn* v. *Michigan C. R. Co.* 71 Ill. 96; *Merchants' Dispatch & Transp. Co.* v. *Moore,* 88 Ill. 136, 30 Am. Rep. 541; *East St. Louis Connecting R. Co.* v. *Wabash, St. L. & P. R. Co.* 123 Ill. 594; *Southwestern R. Co.* v. *Felder,* 46 Ga. 433; *Black* v. *Ashley,* 80 Mich. 90; *Kennedy Bros.* v. *Mobile & G. R. Co.* 74 Ala. 430; *Cincinnati & C. Air Line R. Co.* v. *McCool,* 26 Ind. 140; *Pittsburgh, C. & St. L. R. Co.* v. *Nash,* 43 Ind. 423; *Pinney* v. *First Div. of St. Paul & P. R. Co.* 19 Minn. 251; *Mohr* v. *Chicago & N. W. R. Co.* 40 Iowa, 579.

The court erred in admitting in evidence the letters and telegrams between Carter, Dinsmore, & Co. and Brockway and Williams.

Chicago, B. & Q. R. Co. v. *Lee,* 60 Ill. 501; *Chicago, B. & Q. R. Co.* v. *Riddle,* Id. 534; *Chicago & N. W. R. Co.* v. *Fillmore,* 57 Ill. 265; *Michigan C. R. Co.* v. *Carrow,* 73 Ill. 348, 24 Am. Rep. 248; *TenEyck* v. *Harris,* 47 Ill. 268.

Brockway was the agent of the Diamond Jo Line, and although Williams was the general soliciting freight agent of the Illinois Central Railroad Company, yet in so far as his acts related to the delivery of the ink to Eaton and Jackson, he was the agent *pro hac vice* of Carter, Dinsmore, & Co.

Pittsburgh, Ft. W. & C. R. Co. v. *Fawsett,* 56 Ill. 513.

The court erred in excluding the letter written by Carter, Dinsmore, & Co., to Hudson, traffic manager of the defendant, in which plaintiff stated that he relied upon the bill of lading.

Central R. Co. v. *Allmon,* 147 Ill. 471; *Erie R. Co.* v. *Wilcox,* 84 Ill. 239, 25 Am. Rep. 451; *Illinois C. R. Co.* v. *Frankenberg,* 54 Ill. 88, 5 Am. Rep. 92; *Anchor Line* v. *Dater,* 68 Ill. 369; *Merchants' Dispatch Transp. Co.* v. *Theilbar,* 86 Ill. 71; *Merchants' Dispatch Transp. Co.* v. *Jœsting,* 89 Ill. 152; *Black* v. *Wabash, St. L. & P. R. Co.* 111 Ill. 351, 53 Am. Rep. 628.

Messrs. **Baker & Greeley** for appellee.

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

On the 17th of June, 1891, appellee, doing business under the name of Carter, Dinsmore, & Co., by its agent delivered to the Illinois Central Railroad Company, at Chicago, for shipment, 1,000 boxes of goods called "Combination Sets," consisting of bottles of ink, inkstands, etc., valued at about $1.50 each. At the time the goods were so delivered, a receipt for them, filled out by the agent of Carter, Dinsmore, & Co., was presented to and signed by the railroad company, which is as follows:

Chicago, June 17, 1891.

Received from Carter, Dinsmore, & Co., 275 Kenzie street, on Illinois Central Ry., the following articles, in good order, to be delivered in like good order, as addressed, without unnecessary delay:

Marks. (Original.)	Articles.
Carter, Dinsmore, & Co.,	1,000 boxes ink in glass.
St. Paul, Minn.	Freight guaranteed.
[In red]	[In red]
No. 23, Bx. Stain.	*Via* Diamond Joe Route.

Please send bill of lading in duplicate to Carter, Dinsmore, & Co., 275 E. Kenzie street.

On the same day a bill of lading was signed by the company, and received by the shipper through the mail a day or two later. It contained a stipulation limiting the liability of the company to losses occurring upon its own line. Carter, Dinsmore, & Co., were both consignors and consignees of the goods, which were safely carried to East Dubuque, the terminus of the Illinois Central Line, and there delivered to the Diamond Jo Line of steamboats, and by it carried to St. Paul, arriving there on June 27, 1891. Upon their arrival they were stored by the steamboat line in its warehouse, to the account of the shipper. The Illinois Central had no depot, freight house, or other place for the storage of freight in St. Paul. Nine days after the arrival, the bill of lading, indorsed, "Deliver to C. S. Eaton, or to Fred H. Jackson, as per our telegraphic or written instructions, July 6, 1891. Carter, Dinsmore, & Co.,"—was addressed to "R. J. Williams, Esq., Agent Ill.

Cent. R. R.," and received by him in due course of mail. Williams was the only agent of the railroad company at St. Paul, and his authority was limited to soliciting freight for shipment, although the company had furnished him a letter head in which he was described as "Gen'l N. W. Agent." On the 9th of July the shipper, by letter, directed Williams to deliver 330 of the boxes to Eaton & Jackson, which order he gave to one Brockway, agent of the Diamond Jo Line, in charge of the warehouse where they were stored, and Brockway delivered the goods, as directed, to Eaton and Jackson. On July 14 another order was sent to Williams, by telegram, directing 100 of the remaining boxes turned over to Eaton, and 100 to Jackson, and 200 to be forwarded, consigned to themselves, at places to be designated by Eaton & Jackson. This telegram was likewise turned over by Williams to Brockway, but the latter delivered the whole 400 boxes to Eaton & Jackson, which, it is claimed, they failed to account for; and this suit is to recover from the Illinois Central Railroad Company for the 200 boxes delivered to Eaton & Jackson, instead of being forwarded as directed. It also appears that subsequently to the sending of the telegram above mentioned, on August 4, an order was sent to Williams, similar to the first, directing 270 of the boxes to be delivered to Eaton & Jackson, which was turned over to Brockway, and the goods delivered as therein directed. The declaration is in assumpsit, and counts upon a breach of duty on the part of the defendant, as a common carrier, for a failure to deliver the goods according to directions, to which a plea of nonassumpsit was filed; and upon issue joined the cause was tried by a jury, resulting in a verdict and judgment for the plaintiff for $240. That judgment has been affirmed by the appellate court, and the case is now brought here for review, a certificate of importance having been granted by the appellate court.

The theory of the plaintiff's case is that the defendant, by its receipt and bill of lading, became liable, as a common carrier, for the through shipment and safe delivery of the goods at St. Paul, and that such liability still existed when the 200 boxes sued for were delivered to Eaton & Jackson contrary to the order of July 14. That of the defendant is that by the terms of the contract of shipment, contained in the bill of lading, its liability terminated with the safe delivery of the goods to the Diamond Jo Line; and, second, if the undertaking was for a through shipment, it discharged its duty and liability by safely carrying the goods to their destination, and there placing them in a secure warehouse. The boxes being marked for shipment to St. Paul when received by the defendant, it was its duty, prima facie, to carry to and deliver them at that place, though beyond its line; and while it had the legal right to limit that liability, and refuse to take upon itself the duty of a through carrier, by contracting to that effect with the shipper, it could not do so by mere stipulation in its bill of lading, not signed by the shipper, except by assuming the burden of proof that he accepted the bill of lading consenting to such stipulation. *Chicago & N. W. R. Co.* v. *Simon*, 160 Ill. 648, and cases there cited. The importance of defining a common carrier's duty where goods are received for shipment, marked for a destination to which its own line of carriage does not extend, was, as shown by the opinion, fully appreciated by this court in *Illinois C. R. Co.* v. *Frankenberg*, 54 Ill. 88, 5 Am. Rep. 92, and all the authorities bearing upon the question then carefully considered. Since the rule as above stated was there announced, it has been well understood and uniformly adhered to as the law of this state; and although it has been frequently assailed as not in strict harmony with the decisions of other states, adopting what is known as the "English rule," we are not aware that it has been found impracticable or operated unjustly. We are not, therefore, disposed to modify or change it, though earnestly urged to do so by counsel for defendant. Whether or not the plaintiff did consent to the stipulation was a question for the jury. The correctness of the instructions of the court on this issue is not seriously questioned, and so the finding of the jury, and the judgment of affirmance in the appellate court must be accepted as conclusively settling the fact adversely to the defendant.

It being conceded, then, that it became the duty of the defendant to safely carry and deliver the goods at St. Paul, did that duty continue to exist at the time of the alleged loss? It is well settled that the duty of a railroad company as a common carrier terminates when it has carried the goods to their destination, and there placed them in its own safe depot, or other warehouse. The cases in this court so holding are cited in *Gregg* v. *Illinois C. R. Co.* 147 Ill. 550. Nor is notice to the consignee of the arrival or storage necessary to terminate liability as a carrier, but, upon warehousing, the liability is at once changed to that of a warehouseman. The court, however, in this case, at the instance of the plaintiff, instructed the jury as follows: "(2) The jury are instructed that if they shall believe from the evidence that the 200 boxes of ink were delivered to Eaton & Jackson, in violation of the telegraphic instructions of J. W. Carter, the plaintiff, the fact that at the time . . . of such wrongful delivery said boxes were in the warehouse of the Diamond Jo Line (if the jury shall believe from the evidence said boxes were in said warehouse at the time) will not prevent the plaintiff from recovering, unless the jury further believe from the evidence that plaintiff had notice of, and accepted, the conditions contained in the bill of lading introduced in evidence." "(4) The jury are instructed that if they shall believe from the evidence that a mistake was made in delivering the 200 boxes of ink, and that such mistake was made by the agents of the Diamond Jo Line, an independent common carrier, that nevertheless the defendant, the Illinois Central Railroad Company, is liable to the plaintiff for such wrong delivery, unless the jury shall believe from the evidence that, at the time the said ink was delivered to the defendant to be carried, the defendant by express stipulation, assented to by the plaintiff or his agent, limited its liability to loss occurring on its own line." The action being against the defendant as a common carrier, these instructions are clearly erroneous, under the forgoing decisions, unless it can be said that the duty of the

defendant was other than that of a common carrier by rail. In other words, if the connecting line which carried the goods to their destination had been a carrier by rail, their safe carriage and storage at St. Paul would have terminated the liability as a carrier, whether the defendant's liability was limited to its own line or not. It is insisted, however, that, the Diamond Jo Line being a carrier by water, the liability could only be changed to that of a warehouseman by the storage of the goods upon due notice to the shipper of their arrival. Without determining the question as to whether, under the circumstances of this case, the Illinois Central Railroad Company assumed the liability of a carrier by water (the agent of the shipper having filled up the receipt for the goods, thereby prima facie himself selecting the steamboat line as the connecting carrier), we think it clear, from all the facts in the case, that the instruction above set forth was erroneous. While it is a general rule that a carrier by water is required to give notice of the arrival of the goods to the consignee, it is well settled that such notice may be waived, either by the previous course of dealing between the parties, or by the usual course of business of carriers in the same trade in which the carrier is employed at the locality where the goods are landed, and this whether the usage was known to the shipper or not; the rule being that every person who contracts with another for services in his particular trade is understood to contract with reference to the usage of the trade. "The carrier may therefore show, as has been repeatedly held, the usage as to the delivery of the goods by those engaged in the carriage of goods by water in the particular port or at the particular place of delivery, and that he has acted according to it." Hutchinson, Carr. § 366, citing *Dixon* v. *Dunham*, 14 Ill. 324; *Farmers' & M. Bank* v. *Champlain Transp. Co.* 23 Vt. 186, 56 Am. Dec. 68; *McMasters* v. *Pennsylvania R. Co.* 69 Pa. 374, 8 Am. Rep. 264; *Turner* v. *Huff*, 46 Ark. 222, 55 Am. Rep. 580. It was shown upon the trial of the case, and not denied, that the disposition of the goods at St. Paul was in strict accordance with the custom and usage of steamboat carriers at that point. We are also of the opinion that it must be inferred from the conduct of the shipper, in the absence of proof to the contrary, that he had actual notice of the arrival of the goods prior to the alleged wrongful delivery to Eaton & Jackson. On the 6th of July he sent a general order to Williams for the future delivery of the goods, as "per our telegraphic or written instructions." On the 9th of that month he gave an order for the delivery of 320 boxes to the same parties, whereas the mistake did not occur until after the order of July 14. Certainly it cannot be said there was no evidence tending to prove a waiver of notice of the arrival of the goods, or of actual notice of that fact; and therefore, in view of the case, it was erroneous to tell the jury, as was done by the instructions of the court, that the defendant was liable as a common carrier, notwithstanding the storage of the goods, unless it was shown that the shipper expressly assented to the limitation of the defendant's liability for loss or damages occurring on its own line.

As to the suggestion that plaintiff's dealing with the goods through Williams strengthens the case against defendant, we think the opposite effect must be given to those transactions. Those facts were in no proper legal sense dealings with the defendant. Williams was not in fact the agent of the Illinois Central Railroad Company for the delivery of goods at St. Paul, and this is not denied. The fact that he appeared from the letter heads furnished by the company to be its general agent in no way influenced plaintiff's conduct, and therefore he is not in a position to insist that he was in any way misled thereby to his prejudice. By his order of July 6 plaintiff undertook to authorize Williams to deliver the goods from time to time as he might direct, and, by his subsequent orders of July 9 and 14 and August 4, made him his own agent to transfer the goods. On the theory that it was the duty of the defendant to safely carry and deliver the goods at St. Paul, it was equally the duty of the consignor, who was also the consignee, to receive them upon their arrival. Thus, it was said in *Tarbell* v. *Royal Exch. Shipping Co.* 110 N. Y. 170: "The duty of the consignee to receive and take the goods is as imperative as the duty of the carrier to deliver. Both obligations are to be reasonably construed, having reference to the circumstances. The stringent liability of the carrier cannot be continued at the option or to suit the convenience of the consignee. The consignee is bound to act promptly in taking the goods, and if he fails to do so, whatever other duty may rest upon the carrier in respect to the goods, his liability as insurer is by such failure terminated." *Redmond* v. *Liverpool, N. Y. & P. S. B. Co.* 46 N. Y. 578; *Hedges* v. *Hudson River R. Co.* 49 N. Y. 223. It would be unreasonable to hold that the shipper could deal with the goods as he claims to have done, and still hold the defendant to the strict liability of a common carrier during the indefinite period in which he undertook to leave them in the hands of the carrier for distribution. Even if Williams had been the agent of the defendant for the delivery of goods, we do not understand that he could thus extend the liability of the defendant by an arrangment with the shipper for their distribution in the future, without some evidence showing that he had authority to do so. We think the defendant's liability terminated with the safe carriage and warehousing of the property at St. Paul, and that plaintiff must look to the Diamond Jo Line, as warehouseman, for any mistake or wrongful disposition of the same by it.

The judgment of the Circuit and Appellate Courts will accordingly be reversed, and the case will be remanded to the former court, with directions to proceed according to the views herein expressed.

Rehearing denied March 12, 1897.

LOUISIANA SUPREME COURT.

Henry B. HEWES *et al.*, *Appts.*,
v.
John P. BAXTER *et al.*

(48 *La. Ann.* 1303.)

*1. **The executor and tutor of the minor heirs of the testator,** who takes charge of property of a partnership of which the deceased was a member, the other partners giving the property no attention, is not to be deemed an intermeddler; but, however his control of the property may be regarded, he acquits himself of all responsiblity by proper care of the property, and its faithful application in discharging the partnership liabilities. Rev. Civ. Code, arts. 2295, 2299.

2. **While the exercise of the right of suffrage in this state has its influence** in solving the question of domicil of a party, it is not conclusive; and, in the determination of such question, the nature of the domicil the party is supposed to have here, the purpose that brought him to the state, the time he spends here and elsewhere, where his wife and family are, his declarations and conduct, must all be considered in ascertaining his domicil.

(June 22, 1896.)

APPEAL by plaintiffs from a judgment of the District Court for the Parish of Iberia in favor of defendants in a proceeding to hold defendant Baxter liable as an intermeddler for assets which came to his possession belonging to the partnership of Milmo, Stokoe, & Company. *Reversed.*

The facts are stated in the opinion.

Messrs. **Foster & Broussard** and **Beattie & Beattie** for appellants.

Messrs. **Philip H. Mentz** and **Walter J. Bucke,** for appellees:

The testamentary executor and tutor of the children of a deceased father, who assumes charge of the property belonging to the partnership and abandoned by the others in interest, is not an intermeddler.

The only care to be exercised by him is that of the prudent administrator, and he should be reimbursed the expenses incurred by him.

Even if he be deemed an intermeddler, if the task assumed by him encompassed the entire business to be attended to, and he did so, he is to be reimbursed all needed and useful expenses incurred by him. And the utility and necessity of his interprise are determined, not by the final outcome, but by the statutes of affairs at the incipiency of the undertaking.

Marcade on art. 1372 of Code Napoleon *et seq.*

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

The plaintiffs appeal from the judgment dismissing their suit and dissolving their attachment. It seems that the firm of Milmo, Stokoe, & Co., composed of B. Milmo, Mrs. Stokoe, and Henry B. Hewes, was dissolved by the death of Milmo. Another member, Mrs. Stokoe, died. Baxter, the defendant, became executor of Milmo, and tutor of his minor children, and the heirs of Mrs. Stokoe were represented by their uncle J. W. Stokoe. There was a suit for the partition of the partnership property, succeeded by another for the settlement of the partnership, in which a liquidator was appointed. Then came an agreement intended to end litigation, dispensing with the liquidator, and proposing that the partnership debts outstanding should be collected, its other assets realized, and its liabilities discharged, by Baxter, the executor of Milmo, and the tutor, Stokoe, as tutor of his children, and Hewes. Baxter represented the largest interest, $\frac{10}{18}$. Of the remaining interest, the Stokoe heirs owned $\frac{3}{18}$, and Hewes $\frac{5}{18}$. The attempt at liquidation by the representatives of the interest of the heirs and Hewes utterly failed. They disagreed about selling property, employing laborers, paying debts, and other details of the business. Owing to these dissensions between the parties, the liquidation was obstructed, the partnership property exposed to seizure by creditors, and the interest of all concerned menaced. Stokoe and Hewes ceased to exert any control. Of course they had their complaints of Baxter, and the record shows that he imputes to them neglect and *violation of their duties as liquidators. It is* not requisite to pass any judgment as to these differences, but the result was that Stokoe and Hewes seem to have abandoned all participation in the settlement of the partnership; and the care and disposition of its property, the collections from its debtors, and the settlement of its liabilities were assumed by the defendant, aided by his nephew, one of the heirs of the deceased partner *Milmo. This* administration of the defendant lasted some months, and resulted in realizing the partnership property, and paying its debts.

This suit, brought by the heirs of Milmo, Hewes, and Stokoe, representing the heirs of the other partner, Mrs. Stokoe, seeks to hold Baxter, the defendant, as an intermeddler with the partnership property. One of the plaintiffs (Baxter Milmo), suing individually, *as heir of* his father, the member of the firm, and as tutor of the minor heirs, participated with the defendant in the administration charged in the petition to have been intermeddling, or an illegal assumption of control. The defendant, as executor or tutor, rendered the account we find in the record. It is our inference that the account is that filed in the succession of Milmo. Neither brief nor the record, unless our examination has overlooked it, gives us information of the rendition of this count. We gather from the record that the books were kept during the *defendant's gestion,* the entries in large part made by the nephew, one of the plaintiffs; and we presume there was thus furnished the basis for the account, the copy of debit side of which is annexed and made part of the petition. These debits are the amounts derived by the defendant, during his administration, from the sales of the partnership property and collec-

*Headnotes by MILLER, J.

NOTE.—As to what is nonresidence for the purpose of attachment, see also Munroe v. Williams (S. C.) 19 L. R. A. 665, and *note.*

tions of its assets; and judgment for the entire amount of these debits is demanded on the allegation, in substance, of defendant's wrongful intermeddling with the assets and property from which were derived the amount for which he is sued. The answer, in substance, is that, as the executor of Milmo and tutor of his children, the defendant was constrained to give attention to the property of the partnership of Milmo, Stokoe, & Co.; avers the agreement under which he, with Hewes and Stokoe, as tutor, were to take charge, and the dissensions and other circumstances which led to the control exerted by defendant and his nephew, one of the plaintiffs. The answer admits the account attached to the petition, but avers that all that was realized by defendant was faithfully applied to the debts and liabilities of the partnership, and payments to the Milmo heirs, and that the account on the books then under plaintiffs' control will show that application. The lower court, after hearing the testimony, making a huge record, dismissed the plaintiffs' demand, and dissolved the attachment, and this appeal by plaintiff followed.

We do not appreciate that Baxter, under the circumstances, can be deemed an intermeddler. He was the executor and tutor of the minor children of Milmo, representing as such more than one-half interest in the property. By the agreement, he was entitled to participate in the liquidation. The testimony does not impress us that it was his fault that Hewes and Stokoe withdrew from the liquidation. If they had cause of complaint of the defendant, they might have sought the courts to have someone put in charge. Instead, they seem to have abandoned all charge. It is in proof that Stokoe refused to sign checks to pay debts; and Hewes, though not as pronounced in opposition to the joint liquidation agreed upon, concurred, to some extent, at least, in the course of Stokoe. At any rate, Baxter, with the large interest in his hands, found himself under the necessity of abandoning control, or provoking anew the appointment of a liquidator, which useless expense all had agreed to avoid, or continuing his attention to the business. We cannot perceive that this determination, in itself, is to fasten on him a liability. The Code recognizes the liability arising on the part of one who takes on himself the management of another business. It can hardly be said in this case that Baxter, "of his own accord," as the Code puts it, undertook this business. In some sense, at least, it was imposed on him by his responsibility as executor and tutor. The agreement accorded with that responsibility, and, although Hewes and Stokoe declined continuing the liquidation, it did not leave Baxter in the position of an intruder. Rev. Civ. Code, arts. 2295 *et seq.* In this point of view, it remains to inquire into his administration,—whether marked by the care and prudence the Code exacts. Even if he could be deemed an intermeddler, if he has faithfully administered, there can be no liability. Still less can he be made subject to a liability because acting for the interest of all, with an agency that might be deemed implied by full knowledge of his course on the part of Hewes and Stokoe, with no effort on the part of either to take control from him, or any action on their part evincing any concern in the business.

On the threshold of the examination of defendant's receipts and expenditures while in charge of the partnership property, we are met by the objection to the books in which the defendant kept his account, the entries in which were in large part made by his nephew. We gather from the record that the credit side of the account is from the books. In the testimony the direct and cross examination refers to the books. We think the lower court properly overruled the objection, and defendant, as a witness, testified to the items of the account from his own knowledge.

We do not find in the petition any allegations of sacrifice or loss of assets. The plaintiffs' brief alludes to the deposit of the money of the estate in a Milwaukee bank. If this refers to the funds in the defendant's hands as executor, the deposit might be the subject of investigation in the succession proceedings; and we perceive his account was filed as executor, and the controversy appears to have been confined to specific items. But unless this deposit was followed by loss, it is of no pertinence in this discussion. The substantial charge in the petition is that defendant, in the course of his alleged intermeddling, collected certain amounts, and has failed to account. The collections are admitted. We are not, except to a very limited extent, aided by plaintiffs' brief, with any specifications of the collections not accounted for, and in the brief there is a discussion with reference to a charge by defendant for salary; another for sums paid for support of the Milmo children, which appears in his account as executor; and the brief claims, besides, "under any aspect of the case, judgment for the difference between debits and credits. One of the plaintiffs (Hewes), in his testimony, referring to the books and to the credit side of the account, states his ignorance as to many of the charges, admits some few; and to those thus admitted, it is claimed, the defendant's credit should be restricted. It was natural, in our view, that the witness, giving but little attention to the business, should not have the knowledge of every particular item; but it is not easy to appreciate that if defendant's account of over $4,000 of collections and expenditures was not in the main correct, the witness would not have been able to make that statement. But we perceive that in the course of his examination, being asked to point out one charge not necessary for the concern, he answers that he did not see that any were necessary, because, under the agreement, no money was to be touched. This is to be understood, we think, not as a denial of the correctness of the charges, but of defendant's right to use the firm's funds after the disagreement. The answer, therefore, does not meet the issue made by defendant,—that every dollar he applied was for the firm's debts. This witness, pressed further to point out any item to the firm's detriment, indicates two or three small items,—postoffice box rent, and small expenses, not amounting to more than a few dollars. On the other hand, we have the testimony of the defendant, extending to the entire account, given with a precision

and detail that commends it to our acceptance. With plaintiff's brief specially directed only to the charges to which we have alluded, we have endeavored to give attention to all the testimony in this record of 200 pages, and we reach the conclusion that the defendant has accounted for the funds he received; the conclusion, also, of our learned brother of the district court. This conclusion, of course, reserves the charges specifically disputed by plaintiffs. There were charges for defendant's salary previous to what is termed the "agreement." This was recognized by that agreement. The charge for salary since the agreement was at the same rate. In our appreciation, the defendant's services were in the interest of the partnership. They tended to preserve its property. We think, under the circumstances, the charge for salary could not be the subject of reasonable objection. If his commissions as executor are to be considered, they were paid by the succession, not by Hewes and the Stokoe heirs. They represent but $\frac{8}{18}$, and the proportion of the amount charged for salary to be borne by them is small, considering the benefit the partnership property derived from defendant's services. As the sums in the account paid for the support of the Milmo heirs were in excess of the interest of their father in the partnership property, we think, as the suit is against the executor of Milmo, any question as to these sums should be referred to an adjustment of the partnership accounts. The defendant, as executor, is entitled to retain any amount to which the deceased Milmo is entitled. The account exhibits assets realized by defendant amounting to $4,675.75, and expenditures amounting to $4,444 01. This account, sued on by plaintiffs, admitted by defendant, and to which all the testimony has been directed, is the test of his liability. While it is maintained by the lower court, there is no proof of any debt, and the same proposition is urged in defendant's brief. Still there is the excess of collections over expenditures of $234.74, for which, in your opinion, there must be judgment in favor of the plaintiff Hewes, and the representatives of the Stokoe heirs, to the extent of their proportions of interest in the partnership. The defendant, still the executor of Milmo, is entitled to retain the Milmo interest in the fund in his hands, for which he is accountable as executor.

On the right to attach, we find that defendant came here about six years since, and, as we understand the record, the business in which he was engaged has ended. He is not a housekeeper. His wife left the state about two years ago. The climate not agreeing with her, she has since lived in Michigan, defendant's original domicil, and where, we think, under the testimony, he spends his time, with occasional visits to Iberia, in which the partnership was located, and where the judicial proceedings connected with the partnership were conducted. When visiting Iberia on these visits, we presume, defendant lives at an hotel. It is in proof that he was registered at an hotel as of Michigan. This, he claims, was a mistake, but in his testimony he speaks of Manistee, in that state, as his home. The votes he cast here are entitled to weight, as is his vote for school directors in Michigan, but neither votes there nor here are conclusive. *Franklin's Succession*, 7 La. Ann. 395. The facts that he left . . . Louisiana, though temporarily, it is claimed; that his wife has been for two years continuously in Michigan; the time he spends there; the end of the business that brought him to Louisiana; that he had no dwelling here, accompanied by his own declaration that Michigan is his home, all led us to the conclusion that he was a nonresident, and the attachment must be maintained.

It is therefore ordered, adjudged, and decreed that the judgment of the lower court be avoided and reversed; and it is now ordered and decreed that the plaintiffs, H. B. Hewes and John W. Stokoe, tutor of the minors, Neil and Mary Stokoe, do have and recover from the defendant, John P. Baxter, the sum of $104.32, with legal interest, being $\frac{8}{18}$ of the balance in his hands, with privilege on the property attached, with costs.

STATE of Louisiana
v.
John McNALLY, *Appt.*

(48 La. Ann. 1450.)

***The city council of New Orleans has the right to designate the number of hours** in which laborers and mechanics shall work on the public works of the city. But the city council has not got the power to make the violation of an ordinance regulating the number of hours in which laborers and mechanics shall be employed in the public works belonging to the city a misdemeanor, as this is an indictable offense, and one which the general assembly alone can create.

(November 30, 1896.)

APPEAL by defendant from a judgment of the Fourth Recorder's Court of the City of New Orleans convicting him of violating a city ordinance restricting the hours of labor. *Reversed.*

The facts are stated in the opinion.

Mr. **E. C. Kelly,** for appellant:

The city of New Orleans derives all its powers from legislative grants, expressly made, or to be necessarily and fairly implied from such express grants.

An ordinance that contravenes a prohibitory provision of the state Constitution can have no valid legislative authorization.

La. Const. art. 46, ¶¶ 1, 12; Dill. Mun. Corp. 3d ed. § 895 old § 55, and authorities there cited in notes.

This ordinance is obviously *ultra vires*, and *consequently null and void. It is discriminating*, as it imposes restrictions upon one class of persons, engaged in particular lines of business, which are not imposed upon others engaged in the same lines of business and under

*Headnote by McENERY, J.

NOTE.—As to statutory limitation of hours of labor, see *note* to People v. Phyfe (N. Y.) 19 L. R. A. 141; also Low v. Reese Printing Co. (Neb.) 24 L. R. A. 702; Ritchie v. People (Ill.) 29 L. R. A. 79.

See also 47 L. R. A. 52, 380.

like conditions, and impairs the equality of right which all can claim under the law.

Dill. Mun. Corp. 3d ed. § 319, old § 253, 322 (256), 325 (259).

The ordinance in question, with its harsh criminal features, cannot be upheld on the ground that the restrictions on the hours of labor that it imposes may have been written into any contracts for work made with the city. Contractual obligations cannot be enforced by penal sentences.

Municipality No. 1 v. *Pance*, 6 La. Ann. 515; *State* v. *Mannessier*, 32 La. Ann. 1308; *First Municipality* v. *Blineau*, 3 La. Ann. 688; *DeBen* v. *Gerard*, 4 La. Ann. 30; *State* v. *Mahner*, 43 La. Ann. 496; *State* v. *Patamia*, 34 La. Ann. 750; *State* v. *Bright*, 38 La. Ann. 1; Dill. Mun. Corp. 429, §§ 356, 353, 429.

Messrs. **Samuel L. Gilmore** and **James J. McLoughlin**, for appellee:

In *State* v. *Boneil*, 42 La. Ann. 1110, 10 L. R. A. 60, the court decided that "the city of New Orleans, even prior to act 41 of 1890, possessed power to enforce her ordinances by fine or by imprisonment."

An ordinance by the city of New Orleans fixing hours of labor on city works is not violative of art. 46 of the Constitution.

The city of New Orleans has the right to fix the hours of labor of all persons employed by her or by others on city contracts.

Ordinance 11, 954, C. S., is legal.

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

The city council of New Orleans enacted the following ordinance:

An Ordinance Relating to the Limitation of the Hours of Daily Service of Laborers and Mechanics Employed upon the Public Works of the City of New Orleans.

Be it ordained by the council of the city of New Orleans, that the service and employment of all laborers and mechanics who are now or may hereafter be employed by the city of New Orleans, or by any contractor or subcontractor upon any of the public works of this city, is hereby limited and restricted to eight hours in any one calendar day; and it shall be unlawful for any officer of the city government, or any such contractor or subcontractor, whose duty it shall be to employ, direct, or control the services of such laborers or mechanics, to require or permit any such laborer or mechanic to work more than eight hours in any calendar day, except in case of extraordinary emergency.

Be it further ordained, that any officer of the city government, or any contractor, or subcontractor, whose duty it shall be to employ, direct, or control any laborer or mechanic employed on any public works of the city, who shall intentionally violate any provision of this ordinance, shall be deemed guilty of a misdemeanor, and for each and every offense shall, upon conviction, be punished by a fine, not to exceed $25, or by imprisonment for not more than thirty days, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof.

Be it further ordained, that the provisions of this ordinance shall not be so construed as to in any manner apply to or affect contractors or subcontractors, or limit the hours of daily service of laborers or mechanics engaged upon the public works of this city for which contracts have been entered into prior to the passage of this ordinance.

Adopted by the council of the city of New Orleans, February 25, 1896. Approved February 28, 1896.

The defendant was charged with violating this ordinance, and convicted in the recorder's court. He has appealed, and attacks the legality and constitutionality of the ordinance, on the ground that it violates article 46 of the Constitution of the state, and, also, that, independent of said article, the city is without power to enact said ordinance. This defense would, undoubtedly, be good, if the ordinance applied to the regulating of the hours of labor generally within the city limits. But the ordinance only regulates the hours of labor on the city public works. The city has the absolute control of its own property, and can regulate the hours of work to be employed on the same. The ordinance violates no law so far as it designates the number of hours in which laborers may be employed on public works. Having this right over its property, it has also the right to enforce, by appropriate legislation, the violation of the ordinance fixing the hours for work on city buildings. But such an enforcement of the ordinance must be within the powers delegated to the municipality. It cannot trench upon the rights of the state and invade the domain of its legislative department. The ordinance creates the offense of misdemeanor. The word is generally used to denote an offense in contradistinction to felony, comprehending all indictable offenses below felony, but does not include offenses over which magistrates have exclusive summary jurisdiction. The state of Louisiana has never made the offense criminal and indictable, and the city is without authority to make that an offense which the state has failed to do. That part of the ordinance describing the offense and making it a misdemeanor is null and void.

The judgment appealed from is avoided and reversed, and the defendant ordered to be discharged.

INDIANA SUPREME COURT.

James B. COY, *Appt.*,
v.
INDIANAPOLIS GAS COMPANY.

(........Ind........)

1. **Persons or corporations enjoying public franchises** and engaged in public employment owe a duty to the public as well as all individuals of the public who in compliance with established customs or rules make demands for the beneficial use of the privileges and advantages due to the public by reason of the aid so given by public authority.
2. **The duty of a natural gas company, assumed under its franchise, to supply gas** to a consumer, is not released by a contract made with him for gas, but its character and scope are fixed thereby.
3. **The failure of duty to supply gas to a consumer,** on the part of a natural gas company which has a franchise to lay pipes in the streets and to supply the public, is a tort, even if it is also a breach of contract.
4. **The proximate cause** of a given injury is a question of law only when all the facts are found or agreed to.
5. **The sickness and death of children directly due to the failure of a natural gas company** to supply the needed gas for fuel in severe winter weather to a dwelling house which it had assumed to supply, and for which other fuel could not be procured, may constitute an element of the damages to be recovered for such failure.

(January 29, 1897.)

APPEAL by plaintiff from a judgment of the Superior Court for Marion County in favor of defendant in an action brought to recover damages for failure to supply gas for fuel. *Reversed.*

The facts are stated in the opinion.

Mr. **Samuel Ashby** for appellant.

Messrs. **Miller, Winter, & Elam** for appellee.

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

The sole error assigned on this appeal is that the court sustained a demurrer to appellant's complaint, and to each of its two paragraphs. It is alleged in the first paragraph of the complaint: That the appellee is a corporation possessed of certain powers, immunities, and franchises, among which are the right to lay pipes for the supply of natural gas in the streets and alleys of the town of Haughville, and the exclusive right to adjust, supply, and handle all such pipes, together with mixers, repairs, connections, and appliances necessary in supplying natural gas to consumers, and the exclusive right to manage, furnish, control, and measure the supply of natural gas flowing through such pipes and other appliances to its various consumers in said town. That said consumers have no right in any way to interfere with or molest any of said pipes, connections, machinery, or other appliances, or in any way to regulate, manage, on control the flow of natural gas through any of said pipes, mixers, or connections. That, by reason of its said exclusive rights and franchises, the appellee owed and owes a corresponding duty to appellant, with whom it entered into contract relations, to supply him with gas for fuel promptly and without reserve; and, by reason of such contract and exclusive rights of appellee to supply such gas, the appellee was in duty bound to supply the same to appellant, and its failure so to do, as hereinafter stated, was and is wrongful and unlawful, and in violation of express duty due to appellant and to his family. That by reason of such contract relations a duty was and is created, and is imposed by law upon appellee, to supply such gas to appellant upon the performance by him of the conditions of said contract on his part to be performed. That, at the time of entering upon said contract, appellee knew that said gas was a necessity, and essential to the life of appellant and his family, and knew that appellant could not obtain gas or fuel elsewhere, but depended entirely upon appellee to supply the same. That, at the time of entering into the agreement to furnish gas as aforesaid, appellee was the owner of, and operating, a natural gas plant in said town of Haughville, under the laws of the state, and engaged in the business of supplying natural gas for light and fuel to appellant, to divers other persons, and to the public of said town. That in December, 1892, appellee entered into a written contract with appellant to furnish his residence in said town with gas, at an agreed price, and on the terms and conditions stated in said contract, in sufficient quantity for fuel to heat said residence; appellant paying for said gas in advance, and agreeing to notify appellee of any defect in such service and supply of gas. That in December, 1892, appellant's family consisted of himself, his wife, and their two children, all living in his said home, in said town; one of said children, Lou Ethel Coy, being then of the age of five years. That in violation of said contract, and in violation of its duty to appellant, appellee wholly failed, refused, and neglected to supply said gas, and wholly failed, neglected, and refused to perform the conditions of said contract on its part to be performed, and wrongfully and unlawfully failed, neglected, and refused to discharge its said duty of supplying gas to appellant, and, in violation of said duty imposed by law and by said contract, wrongfully and unlawfully left appellant without fuel with which to heat said dwelling, all of which wrongful acts were done while said contract was in full force, and while said duty rested upon appellee towards appellant to supply said natural gas. That appellant, rely-

NOTE.—As to the obligation of a gas company to supply gas to the consumer, see Rushville v. Rushville Natural Gas Co. (Ind.) 15 L. R. A. 321, and *note;* Portland Natural Gas & Oil Co. v. State, Keen (Ind.) 21 L. R. A. 639.

As analogous to the question of the extent of liability for failure of a supply of gas, see the authorities as to the liability of a water company for failure to supply water in Howsmon v. Trenton Water Co. (Mo.) 23 L. R. A. 146, and *note.*

ing upon appellee to comply with its said contract, and believing that appellee would discharge its said duty to appellant, failed to procure wood, coal, gas, or other fuel. That during the severe weather in the latter part of December and the 1st of January, while said contract was in full force, while said duty existed, and while appellant relied upon appellee to perform said contract and discharge said duty, and while appellant was unable to procure any other fuel to heat his dwelling, his said child, Lou Ethel Coy, being sick in said house, and after appellant had given to appellee due notice of its failure to supply gas to appellant, and of his inability to procure fuel elsewhere, and of the sickness of said child, and demanded such supply of gas from appellee, and after appellant had made every effort to procure fuel elsewhere, and while he was unable to obtain the same after diligent search, the dwelling of appellant became so cold and thoroughly chilled, by the want of heat, that said Lou Ethel Coy, without her fault or that of appellant, and by reason of the failure of appellee to furnish gas, and by reason of the wrongful and unlawful refusal and failure of appellee to discharge its said duty to appellant, and by reason of the chilled condition of said house, and the low temperature therein, took a relapse in her sickness, for want of heat and warmth, and became very ill, and lingered in severe sickness in consequence thereof until the 31st day of December, 1892, when she died; the extreme sickness and death of said child being the immediate, direct, and proximate result of the failure of appellee to supply said gas, and of its refusal to discharge its said duty to appellant. The second paragraph of the complaint is similar to the first, except that it counts on damages for the death, in like manner, of the other child of appellant.

Counsel differ as to whether the action disclosed in the complaint is one on contract, or in tort. It is true, as a general rule, that no one is compelled to do business with any but those with whom he chooses. There are, however, well-recognized exceptions to this rule. It has always been held that common carriers cannot, on tender of the usual compensation, refuse to accept for transportation proper articles offered at proper times and places. So, also, innkeepers having accommodations must receive as guests all who in a peaceable and proper manner make application therefor. In like manner it has been held that telegraph, telephone, water, gas, and other like companies that have received from public authorities franchises which also provide for the accommodation of the general public, owe a duty to serve all persons who make proper application for such service, and who comply with such reasonable rules as may be fixed, and make such reasonable compensation as may be required. Persons or corporations enjoying such public franchises and engaged in such public employment are held, in return, to owe a duty to the public, as well as to all individuals of that public who, in compliance with established customs or rules, made demand for the beneficial use of the privileges and advantages due to the public by reason of the aid so given by public authority. *Central U. Teleph. Co.* v. *Fehring* (at last term) 45 N. E. 64; *Portland Natural Gas & Oil Co.* v. *State, Keen*, 135 Ind. 54, 21 L.R. A. 639; *Rushville* v. *Rushville Natural Gas Co.* 132 Ind. 575, and *note* to this case in 15 L. R. A. 321. And, that the public grant to appellee imposed also a public duty in return, see, further, the recent case of *Westfield Gas & Mill. Co.* v. *Mendenhall*, 142 Ind. 538, and cases there cited.

In *Portland Natural Gas & Oil Co.* v. *State, Keen*, 135 Ind. 54, 21 L. R. A. 639, it was said "that a natural gas company, occupying the streets of a town or city with its mains, owes it as a duty to furnish those who own or occupy the houses abutting on such street, where such owners or occupiers make the necessary arrangements to receive it, and comply with the reasonable regulations of such company, such gas as they may require, and that, where it refuses or neglects to perform such duty, it may be compelled to do so by writ of mandamus." So it was said in *Williams* v. *Mutual Gas Co.* 52 Mich. 499, 50 Am. Rep. 266, that, "when the defendant company made the connection of its service pipes and mains with the pipes and fixtures of the Biddle House, it imposed upon itself the duty to suppy the house and premises upon reasonable terms and conditions with such amount of gas as the owner or proprietor might require for its use, and pay for, so long as the company should exist and do business." And the Supreme Court of the United States in *New Orleans Gaslight Co.* v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, said: "It is to be presumed that the legislature of Louisiana, when granting the exclusive privileges in question, deemed it unwise to burden the public with the cost of erecting and maintaining gasworks sufficient to meet the necessities of the municipal government and the people of New Orleans, and that the public would be best protected, as well as best served, through a single corporation invested with the power, and charged with the duty, of supplying gas of the requisite quality, and in such quantity, as the public needs demanded." The same high court in *Gibbs* v. *Consolidated Gas Co.* 130 U.S. 396, 32 L. ed. 979, said: "These gas companies entered the streets of Baltimore, under their charters, in the exercise of the equivalent of the power of eminent domain, and are to be held as having assumed an obligation to fulfil the public purposes to subserve which they were incorporated." In 2 Beach, Priv. Corp. § 835*d*, the author says: "Gas companies, being engaged in a business of a public character, are charged with the performance of public duties. Their use of the streets, whose fee is held by the municipal corporation in trust for the benefit of the public, has been likened to the exercise of the power of eminent domain. Accordingly, a gas company is bound to supply gas to premises with which its pipes are connected. It may, however, impose reasonable conditions."

In the case at bar the arrangements and reasonable conditions referred to in the cases cited were all provided for by the contract between the parties. The agreement so entered into did not in any manner absolve appellee from the duty assumed under its franchise, but rather by its terms fixed the character and scope of the duty so assumed. Even without

and before the contract, it was the duty of the company to attach its mains to appellant's house pipe, on being requested to do so by him, and on his compliance with the reasonable conditions imposed by the company. Nor would it be enough to make such connections without also supplying the gas therefor. Not a partial, but a full, compliance with the company's duty is required, and this without any discrimination as to persons having a right to the gas. *Central U. Teleph. Co.* v. *Fehring* (Ind.) 45 N. E. 64. Whether, particularly after contract entered into to supply the gas, the company might be relieved of the obligation to furnish it, by reason of inability to procure the gas, or for other reason, we need not decide, as no such question appears in the record. That would be matter of defense, and cannot be taken into account in determining the sufficiency of the complaint. *Portland Natural Gas & Oil Co.* v. *State, Keen*, 135 Ind. 54, 21 L. R. A. 639. The failure of duty on the part of the company, as alleged in the complaint, is a tort, even though the complaint also shows a failure to comply with the contract. The contract was but a statement of the reasonable conditions under which the company was required to perform its duty. The authorities show that in such a case the action may be on contract or in tort, the necessary statement of facts being substantially the same in either case. The failure to perform such a contract is in itself a tort. The action in this case is therefore in tort. 2 Addison, Cont. *1119; Cooley, Torts, 90, 91; *Cincinnati, H. & I. R. Co.* v. *Eaton*, 94 Ind. 474, 48 Am. Rep. 179; *Lake Erie & W. R. Co.* v *Acres*, 108 Ind. 548; *Brown* v. *Chicago, M. & St. P. R. Co.* 54 Wis. 342, 41 Am. Rep. 41, and authorities cited in these cases.

The chief objection made to the complaint is that the damages sought to be recovered are too remote. In actions on contract as said by counsel, the damages that may be recovered for a breach of the covenants and conditions are (1) those that result from the usual, natural, and probable consequences of the breach, and which, therefore, the parties may be thought to have had in mind when they entered into the contract; and (2) special damages referred to in the contract, and which actually occur, although not such as might naturally and probably be expected to arise out of a breach of the contract. It is to be observed that such special damages are also in contemplation of the parties in making the contract, as well as the damages of the first class, which naturally flow from a violation of the contract. The difference is that damages naturally arising from a breach of the contract need not be mentioned in the agreement made, but will be presumed to have been in contemplation of the parties, whereas special damages, or those not naturally or usually arising from a breach of the contract, though contemplated by the parties, must be specially referred to in the contract itself. Whether the loss to appellant by the sickness and death of his children might be considered as the natural and probable result of a breach of appellee's contract to furnish gas for fuel during the cold weather in the latter part of December, 1892, we need not consider, inasmuch as the action here, as we have seen, is in tort, the contract being but a statement of the reasonable conditions under which appellee was to furnish the gas in discharge of the duty owed by it to appellant. The rule as to recovery of damages for tort differs in some respects from that which obtains in case of simple breach of contract. All damages directly traceable to the wrong done, and arising without an intervening agency, and without fault of the injured person himself, are recoverable. The wrong in such cases is said to be the proximate cause of the injury. "In an action for a tort," says Mr. Sutherland in his work on Damages, 2d ed. § 16, "if no improper motive is attributed to the defendant the injured party is entitled to recover such damages as will compensate him for the injury received, so far as it might reasonably have been expected to follow from the circumstances; such as, according to common experience and the usual course of events, might have been reasonably anticipated. The damages are not limited or affected, so far as they are compensatory, by what was in fact in contemplation by the party in fault. He who is responsible for a negligent act must answer 'for all the injurious results which flow therefrom, by ordinary natural sequence, without the interpositon of any other negligent act or overpowering force. Whether the injurious consequences may have been reasonably expected to have followed from the commission of the act is not at all determinative of the liability of the person who committed the act to respond to the person suffering therefrom. . . . It is the unexpected, rather than the expected, that happens in the great majority of the cases of negligence." Mr. Wharton says that a man may be negligent in a particular matter a thousand times without mischief, yet, though the chance of mischief is only one to a thousand, we would continue to hold that the mischief, when it occurs, is imputable to the negligence. Hence, it has been properly held that it is no defense that a particular injurious consequence is improbable and not to be reasonably expected, if it really appears that it naturally followed from the negligence under examination. . . . There need not be in the mind of the individual whose act or omission has wrought the injury the least contemplation of the probable consequences of his conduct. He is responsible therefor because the result proximately follows his wrongful act or nonaction. All persons are imperatively required to foresee what will be the natural consequences of their acts and omissions according to the usual course of nature and the general experience. . . . The law is practical, and courts do not indulge refinements and subtleties as to causation, if they tend to defeat the claims of natural justice. They rather adopt the practical rule that the efficient and predominating cause in producing a given effect or result, though subordinate and dependent causes may have operated, must be looked to in determining the rights and liabilites of the parties. Hence if the defendant's negligence greatly multipled the chances of accident, and was of a character naturally leading to its occurrence, the possibility that it might have happened without such negligence is not sufficient to break the chain of cause and effect. An act of negligence will be regarded

as the cause of an injury which results, unless the consequences were so unnatural and unusual that they could not have been foreseen and prevented by the highest practicable care," citing *Stevens* v. *Dudley*, 56 Vt. 158; Whart. Neg. §§ 77, 78; *Baltimore & P. R. Co.* v. *Reaney*, 42 Md. 117; *Reynolds* v. *Texas & P.R. Co.* 37 La. Ann. 694; *Louisville, N. A. & C. R. Co.* v. *Lucas*, 119 Ind. 583, 6 L. R. A. 193. And in the well-considered case of *Brown* v. *Chicago, M. & St. P. R. Co.* 54 Wis. 342, 41 Am. Rep. 41, citing numerous authorities, the court said: "The rules which limit the damages in actions of tort, so far as any general rules can be established, are in many respects different from those in actions on contract. The general rule is that the party who commits a trespass or other wrongful act is liable for all the direct injury resulting from such act, although such resulting injury could not have been contemplated as a probable result of the act done."

Taking the allegations in the complaint before us as true, the relapse in sickness and the death of appellant's children were the direct consequences of the failure of appellant to supply the fuel necessary to warm his home. One of the conditions under which the gas was to be supplied was that, "upon any defect therein or thereto," appellant should give notice to appellee. It is alleged that "during the severe weather," after appellant had given to appellee "due notice of its failure to supply gas to plaintiff [appellee], and of his inability to procure fuel elsewhere, and of the sickness of said child," and after appellant had made every effort, but been unable, to procure fuel, the house became so cold that his children grew worse, and soon after died by reason of the low temperature. Counsel for appellee argue that these and other allegations cannot be true. If they are true, however,—and that they are true is admitted by appellee's demurrer,—then the liability of appellee becomes evident, unless it can be shown that it was impossible to furnish the gas, for reasons showing appellee to be wholly without fault, or because of some fault on the part of appellant, none of which are disclosed in the complaint. It cannot be said, in view of the authorities, or from reason itself, that a natural gas company, occupying the streets and alleys of a city or town by virtue of a franchise granted for that purpose, may, at its pleasure, give or withhold the fuel at its disposal, and which may be the means necessary for the comfort, health, or even life, of the inhabitants. Nor can it be said, from anything appearing in the complaint, that appellee's failure to supply the gas during the cold weather of December may not have been, as alleged, the proximate cause of the relapse in sickness and the death of appellant's children. The allegation is specifically made, and, while it was suggested in argument that independent interving causes might have brought about the severe sickness and death of the children, yet that is a question for the jury. So, also, is the suggestion as to whether appellant might in fact have procured other fuel in time to prevent the fatality complained of. It is by no means an impossibility, or even an improbability, that the sickness and death of the children may have been directly due to the failure of appellee to supply the needed gas for fuel in the severe winter weather; and this failure may have come without warning to appellant, and so as to give him no means or opportunity to obtain other fuel in time to save his children. In *East Tennessee, V. & G. R. Co.* v. *Lockhart*, 79 Ala. 315, it was said: "The plaintiff was sick at the time she was turned off the train. It may be said the conductor was ignorant of her physical condition. Ignorance, in such case, is no excuse, and the defendant is responsible, as if he had full knowledge of the fact. Evidence of her ailment is admissible, not as an element of damage, but as tending, in connection with other circumstances, to show the connection between the subsequent aggravation of the sickness and the wrongful act." And in *Brown* v. *Chicago, M. & St. P. R. Co. supra*, it was insisted that the damages claimed for the sickness of the injured party, and for medical attendance and care, were "too remote to constitute a cause of action, and that it was error on the part of the court below not to take that part of the case from the jury." But the insistence was denied, and it was held that the question as to whether the sickness was or was not the proximate result of the wrong done was one for the jury. It is only when all the facts are found or agreed to that the conclusion as to what was the proximate cause of a given injury is a question of law. Even an aggravation of existing sickness may make the wrongdoer liable. "If the negligence of a carrier," says Mr. Sutherland (Damages, § 36), "results in an injury to a passenger, by which his system is rendered susceptible to disease, and less able to resist it when he is attacked by it, and death results, the injury is the proximate cause thereof, although the disease is to be regarded as an intervening agency, and the malady which attacked him was prevalent in the community;" citing *Terre Haute & I. R. Co.* v. *Buck*, 96 Ind. 346, 49 Am. Rep. 168. We are satified that the complaint is sufficient.

The judgment is reversed, with instructions to overrule the demurrer to the complaint, and to each paragraph thereof.

MASSACHUSETTS SUPREME JUDICIAL COURT.

TRADERS' NATIONAL BANK
v.
Albert D. ROGERS.

(167 Mass. 315.)

1. Failure to repudiate the signature to a promissory note when first shown to him is not of itself an affirmation by an apparent indorser of the signature, but is merely evidence in the nature of an admission bearing upon the question of the assumption of the signature.

2. A statement by the apparent indorser of a note that it will be paid is not a ratification of a forged signature if the remark was not made with intent to induce the holder to assume that the signature was genuine or that the statement was an admission of genuineness.

3. A statement by the apparent indorser of a forged note that it will be paid will not estop him from setting up the forgery if it was not made with intent to mislead the holder and the holder did not rely and act upon the statement.

(January 8, 1897.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Suffolk County made during the trial of an action brought to hold defendant liable as indorser on a promissory

NOTE.—*Liability of person whose signature is forged on commercial paper.*

I. *Generally.*
II. *On forged checks.*
III. *Estoppel and ratification.*
a. *By a promise.*
b. *By silence.*
c. *By benefit to alleged maker.*
d. *By prejudice to holder.*
e. *On account of other transactions.*
f. *By adoption.*

The case of TRADERS' NATIONAL BANK v. ROGERS holds that where a note was shown to a party by a bank, which was forged, and there was nothing to show that such party had received any benefit from the forgery, or that the forger was his agent for any purpose, he was not bound as a matter of legal duty to repudiate at once the genuineness of the signature. His failure to do so was in the nature of an admission, but was not conclusive evidence, and his remark made when the note was shown to him, "The note will be paid," if not made with intent to mislead the bank, and if the bank did not rely and act upon it, created no estoppel.

I. *Generally.*

A party whose name has been forged as obligor, indorser, acceptor, or surety on a note, bill, or check is not liable thereon in the absence of estoppel and ratification or negligence. Ehrler v. Braun, 120 Ill. 503; Hardy v. Chesapeake Bank, 51 Md. 562, 34 Am. Rep. 325; Shisler v. Van Dike, 92 Pa. 449, 37 Am. Rep. 702; Forsyth v. Day, 46 Me. 176; Hall v. Huse, 10 Mass. 40; Beeber v. Papst (Pa.) 6 Cent. Rep. 191; Citizens' State Bank v. Adams, 91 Ind. 280; Tyler v. Todd, 36 Conn. 218.

And where the defense is forgery much latitude is allowed to show the relation of the parties and the consideration. Crane v. Dexter, H. & Co. 5 Wash. 479; Gitchell v. Ryan, 24 Ill. App. 372; Vaughn v. Wilson, 31 Mo. App. 489; Nickerson v. Gould, 82 Me. 512; Haynes v. Christian, 30 Mo. App. 198.

And an instruction that one may authorize a signature by proxy is improper in the absence of any evidence of such authority. Willson v. Law, 112 N. Y. 536.

But a judgment that the signature is genuine will not be set aside on conflicting evidence. Holmes v. Roper, 32 N. Y. S. R. 470.

And a bank taking counterfeit bills must stand the loss as against another bank. Bank of United States v. Bank of Georgia, 23 U. S. 10 Wheat. 333, 6 L. ed. 334.

This does not apply to counterfeit United States notes, passing through an assistant United States treasurer's hands in New York, as he is not an officer who can bind the government, and the United States treasurer must have a reasonable time to inspect the same. Cooke v. United States 91 U. S. 389, 23 L. ed. 237.

Under the practice in Massachusetts, a forger cannot be held liable as maker on paper he utters, but the remedy is by an action of tort. Bartlett v. Tucker, 104 Mass. 336, 6 Am. Rep. 240.

II. *On forged checks.*

It is generally held that a bank is required to know the signature of its depositor, and the depositor will not lose if the bank pays out money where his name has been forged to a check. See *note* to Germania Bank v. Boutell (Minn.) 27 L. R. A. 635.

And his failure to repudiate forged checks returned to him will not render him liable for future forgeries, unless the bank acted in reference to his failure to object to the account stated in his balanced book. Hardy v. Chesapeake Bank, 51 Md. 562, 34 Am. Rep. 325.

Where a depositor's clerk forged a check for $2,500, and notice was given the depositor of its being an overdraft, and he claimed that he had not signed it, but after seeing his clerk reported to the bank that it was all right, and the clerk forged another check for $1,700, the ratification of the first made the depositor lose both amounts. De Ferit v. Bank of America, 23 La. Ann. 310.

As to a depositor's duty when forged checks are charged to his account by a bank, see *note* to First Nat. Bank v. Allen (Ala.) 27 L. R. A. 426.

III. *Estoppel and ratification.*

a. *By a promise.*

A liability will not arise on forged paper because of a promise to pay, made without consideration, where there is no element of estoppel. Workman v. Wright, 33 Ohio St. 405, 31 Am. Rep. 546; Owsley v. Philips, 78 Ky. 517, 39 Am. Rep. 258; Gleason v. Henry, 71 Ill. 109; Murtaugh v. Colligan, 28 Ill. App. 433; Hall v. Huse, 10 Mass. 40; Thorn v. Bell, Hill & Denio Supp. 430; Dean v. Crall, 98 Mich. 591; Smith v. Tramel, 68 Iowa, 488.

Promising to pay without looking at the bill was held not to shut out the defense of the forgery of an acceptance. Barber v. Gingell, 3 Esp. 60.

So, an alleged maker was not bound by a new promise where it was made without full knowledge of all the facts. Gleason v. Henry, 71 Ill. 109; Murtaugh v. Colligan, 28 Ill. App. 433.

And a mere promise to pay a note which is at the same time declared a forgery does not raise an estoppel, although it may be evidence for the jury on the question of an adoption. Dow v. Spenny, 29 Mo. 390.

So, a promise to pay, made after the note was due, is declared binding if a specific note was meant, but not if it was a mere promise to pay some note not seen. Crout v. De Wolf, 1 R. I. 393.

See also 39 L. R. A. 95; 40 L. R. A. 471; 45 L. R. A. 547; 46 L. R. A. 694.

note which resulted in a verdict in defendant's favor. *Overruled.*

The facts sufficiently appear in the opinion.

Messrs. **Strout & Coolidge** and **W. R. Bigelow,** for plaintiff:

The defendant ratified his signature. A man may ratify his forged signature with knowledge of the circumstances, although the facts do not amount to an estoppel *in pais.*

Wellington v. *Jackson,* 121 Mass. 157; *Greenfield Bank* v. *Crafts,* 4 Allen, 447.

Silence, when inquired of, shows ratification.

Thayer v. *White,* 12 Met. 343; *Foster* v. *Rockwell,* 104 Mass. 167; *Metcalf* v. *Williams,* 144 Mass. 452; *Greenfield Bank* v. *Crafts,* 2 Allen, 269; *Casco Bank* v. *Keene,* 53 Me. 103; *Continental Nat. Bank* v. *National Bank,* 50 N. Y. 575.

Upon knowledge of the forgery, the defendant was bound to disavow the signature and give the plaintiff notice thereof within a reasonable time; and, failing to do that, his assent and ratification will be presumed.

Brigham v. *Peters,* 1 Gray, 139; *Harrod* v. *McDaniels,* 126 Mass. 413, and cases last cited above.

In the case of a promissory note already due, immediate denial of the signature was necessary.

Gloucester Bank v. *Salem Bank,* 17 Mass. 33; *Foster* v. *Rockwell,* 104 Mass. 167; *Thayer* v. *White,* 12 Met. 343; *Metcalf* v. *Williams,* 144 Mass. 452.

The defendant must be presumed to have intended the natural consequences of his own acts.

And an alleged maker was not liable where he requested further time under a mistaken belief that the note was his, although pending the delay the forger escaped. Hall v. Huse, 10 Mass. 40.

Or where by mistake one who had made various indorsements without keeping a memorandum thereof consented to further time, and waived protest on a note which he supposed he had indorsed. Thorn v. Bell, Hill & Denio Supp. 430.

So, where under similar circumstances he signed an agreement reciting that he was indorser and still held himself liable, on an extension of time, to the same extent as before. Bell v. Shields, 19 N. J. L. 193.

A party whose name was forged to a note was not liable thereon where he had given the holder to understand that the note was a forgery but would be paid. There was no estoppel as the holder did not change his position for the worse in reliance upon what the alleged maker said. The expression of an opinion that the maker of the note would pay it or an oral promise to pay the debt of another would not constitute an estoppel. Smith v. Tramel, 68 Iowa, 488.

And one whose name was forged to a note was not estopped from denying his liability thereon by any declaration or recitation where it was not relied upon by the one to whom it was made, and he did not lose any opportunity to collect from other parties, and was in no way worse off when told that the notes were forgeries, than he was at the time the promise to pay was made. Dean v. Crall, 98 Mich. 591.

b. *By silence.*

Silence when a forged signature is shown to the person named as maker of a note will not operate as an estoppel, unless the holder has been damaged thereby. Corser v. Paul, 41 N. H. 24, 77 Am. Dec. 753; Boyd v. Union Bank, 17 Ct. Sess. Cas. 2d Series, 159; Warden v. British Linen Co. 1 Ct. Sess. Cas. 3d Series, 402; Ogilvie v. West Australian Mortg. & A. Corp. 65 L. J. P. C. N. S. 46 [1896], A. C. 257, 74 L. T. N. S. 201; Zell's Appeal, 103 Pa. 344; Bucher v. Meixell, 5 Pa. Dist. R. 375; Salem Bank v. Gloucester Bank, 17 Mass. 1, 9 Am. Dec. 111; Second Nat. Bank v. Wentzel, 151 Pa. 142; M'Kenzie v. British Linen Co. L. R. 6 App. Cas. 82, 44 L. T. N. S. 431, 29 Week. Rep. 477.

So, silence for a fortnight after notice by mail of the forgery of one's name as drawer of a bill on account of the forger's representing that he had taken up the forged bill, did not preclude the obligors from repudiating a renewal made by the same forger to same parties, where the situation of the other party had not changed during the delay. M'Kenzie v. British Linen Co. L. R. 6 App. Cas. 82, 44 L. T. N. S. 431, 29 Week. Rep. 477.

And a customer of a bank was not estopped by silence from asserting that a check was forged when he was first informed of the forgery by the accredited agent of the bank who requested his silence and he in complying with the request acted honestly and with a view to what he believed to be to the bank's interest, and his silence did not prejudice the bank, and the bank ratified the action of its agent. Ogilvie v. West Australian Mortg. & A. Corp. 65 L. J. P. C. N. S. 46, [1896] A. C. 257, 74 L. T. N. S. 201.

And the omission by a party to seek the holder of a judgment note on discovery that his name was forged, was not such an acquiescence as estopped him from pleading forgery as a defense to an action on an instrument, where it was not shown that the holder suffered an injury by reason of such admission. Zell's Appeal, 103 Pa. 344.

Silence and acquiescence alone did not estop defendant in a suit upon an alleged forged instrument from proving the forgery, where the plaintiff's rights were not prejudiced thereby, and the plaintiff did not thereby part with any money. The court said that asking for time and promising to pay a judgment note, without proclaiming the forgery of the signature thereto or making defenses to a *scire facias* issued on the judgment entered thereon, was not a ratification which will estop the defendant from asserting the forgery. Bucher v. Meixell, 5 Pa. Dist. R. 375.

In Salem Bank v. Gloucester Bank, 17 Mass. 1, 9 Am. Dec. 111, where forged bank bills were presented to a bank, and the directors hesitated but did not refuse payment and did not declare they were counterfeit but seemed to believe they were genuine, it was not an adoption and did not make them liable. It was said that if they had known them to be forged and had not declared the forgery as the cause of their refusal to pay they might have been liable. It was further held that directors of a corporation could not bind their principals the same as an individual, for they could not pledge their principals for more than they were authorized.

In Second Nat. Bank v. Wentzel, 151 Pa. 142, where a note had been renewed and the indorser was sued upon the renewal, a verdict that it was a forgery was not set aside although the defendant denied that he had indorsed either the original or the renewal, but had admitted that when the original was shown to him by the officers of the bank that they asked him if he had signed it and he believed that he did not then deny that he had, although he then knew that the instrument was a forgery. The original note was not protested for nonpayment and no recovery could be had against the indorser on that note, and on renewal the burden of proof was on the plaintiff to prove that the indorsement was genuine.

In Boyd v. Union Bank, 17 Ct. Sess. Cas. 2d Series, 159, it was held that the charger's allegations of adoption were irrelevant where the charger alleged that although the bill was during its currency

Casco Bank v. *Keene*, 53 Me. 103; *Denny* v. *Dana*, 2 Cush. 160, 48 Am. Dec. 655; *Nash* v. *Minnesota Title Ins. & T. Co.* 163 Mass. 574, 28 L. R. A. 753; *Continental Nat. Bank* v. *National Bank*, 50 N. Y. 575; *Knights* v. *Wiffen*, L. R. 5 Q. B. 660.

If the language and conduct of the defendant did not amount to ratification, it was certainly sufficient to operate as an estoppel, and preclude him from now denying his signature.

Fall River Nat. Bank v. *Buffinton*, 97 Mass. 498; *Leather Manufacturers' Nat. Bank* v. *Morgan*, 117 U. S. 96, 115, 29 L. ed. 811, 818; *Voorhis* v. *Olmstead*, 66 N. Y. 113; *Continental Nat. Bank* v. *National Bank*, 50 N. Y. 575; *Knights* v. *Wiffin*, L. R. 5 Q. B. 660; *Gloucester Bank* v. *Salem Bank*, 17 Mass. 33.

Mr. **C. R. Elder**, for defendant:

What the defendant actually said, what he did, whether the plaintiff bank relied on his statements, whether if it did and acted upon them the officers of the bank exercised reasonable care under the circumstances, and whether the plaintiff disclosed to defendant material facts in its possession, such as another note then its property and not due, are all questions of fact to be determined by the trial court sitting without a jury.

Lawrence v. *Lewis*, 133 Mass. 561; *Reed* v. *Deerfield*, 8 Allen, 522; *Warren* v. *Chapman*, 115 Mass. 584.

The special findings of fact in this case are fatal to plaintiff's case, whether it rests on the ground of ratification or estoppel.

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intimated to the suspender, he kept silence and did not inform the bank that his signature was a forgery.

And in Warden v. British Linen Co. 1 Ct. Sess. Cas. 3d Series, 402, the court refused to grant a counter issue of adoption by two coacceptors, both of whom alleged that their signatures to the bill were forged, upon the bare averment that they had taken no notice of the letter addressed to them by the bank, informing them of the existence of the bill before it was due.

And in M'Kenzie v. British Linen Co. L. R. 6 App. Cas. 82, 44 L. T. N. S. 431, 29 Week. Rep. 477, the court discusses the case of Urquhart v. Bank of Scotland, 9 Scot. Law Rep. 508, where the decision was against the suspender whose signature was forged, and notice of protest was sent to him on the 2d of the month, and he wrote to the bank on the 23d that his signature was a forgery, his friend the forger having in the meanwhile absconded, but the suspender knew that the forger had for some years previous been in the habit of forging his name on bills and in the year previous had given the forger money to retire one of those bills known to be forged. It was said that it must be assumed that the judgment proceeded upon the whole circumstances of the case and not upon silence alone, for if it was upon silence alone the decision would be erroneous.

c. *By benefit to alleged maker.*

A party appropriating any benefit from the use of forged paper cannot thereafter repudiate his alleged signature. Livings v. Wiler, 32 Ill. 387; Fitzpatrick v. Caperton Cove School Tract Comrs. 7 Humph. 224, 46 Am. Dec. 76; Union Bank v. Middlebrook, 33 Conn. 95; Wellington v. Jackson, 121 Mass. 159.

So, a party claiming that a note and mortgage was forged was liable, where after she knew all about the claim of her liability she received the proceeds after she had denied and protested that it was not a mortgage but a forgery. Livings v. Wiler, 32 Ill. 387.

So, where the alleged maker took a deed of trust to secure himself. Fitzpatrick v. Caperton Cove School Tract Comrs. 7 Humph. 224, 46 Am. Dec. 76.

And an alleged indorser whose signature was forged became bound by using the proceeds obtained with the paper. Union Bank v. Middlebrook, 33 Conn. 95.

So, where an alleged maker, knowing his signature to be forged as a bankrupt, scheduled this paper under oath as an existing liability, he was held bound. Wellington v. Jackson, 121 Mass. 159.

d. *By prejudice to holder.*

An alleged maker may become liable by admissions or failure to repudiate, where by such action he has caused the holder of the paper to suffer damages and loss. Fall River Nat. Bank v. Buffinton, 97 Mass. 498; State v. Abramson, 57 Ark. 142; Casco Bank v. Keene, 53 Me. 104; Hefner v. Dawson, 63 Ill. 403, 14 Am. Rep. 123; Rudd v. Matthews, 79 Ky. 479; Woodruff v. Munroe, 33 Md. 158; Crout v. De Wolf, 1 R. I. 393; Leach v. Buchanan, 4 Esp. N. P. 226; Continental Nat. Bank v. National Bank, 50 N. Y. 575; Cooper v. Le Blanc, 2 Strange, 1051; Holgate v. Palmer, 8 Paige, 461; Mather v. Lord Maidstone, 18 C. B. 273, 25 L. J. C. P. N. S. 311, 37 Eng. L. & Eq. 335; Forsyth v. Day, 46 Me. 176.

So, an alleged obligor who admitted his signature to be genuine and delayed to repudiate the forgery thereof, so that the holder was prejudiced, and deprived of his remedy against the forger, was liable thereon. Fall River Nat. Bank v. Buffinton, 97 Mass. 498; State v. Abramson, 57 Ark. 142; Casco Bank v. Keene, 53 Me. 104; Hefner v. Dawson, 63 Ill. 403, 14 Am. Rep. 123; Rudd v. Matthews, 79 Ky. 479; Continental Nat. Bank v. National Bank, 50 N. Y. 575.

So, where an alleged maker induced a purchaser or holder to take paper, by representing or affirming it to be his signature, he could not thereafter defend on the ground of forgery. Woodruff v. Munroe, 33 Md. 158; Crout v. De Wolf, 1 R. I. 393; Leach v. Buchanan, 4 Esp. N. P. 226.

So, where a note was sent to an indorser by a discounter, who pronounced it his signature and said it would be paid, he could not thereafter defend on the ground of forgery. Cooper v. Le Blanc, 2 Strange, 1051.

The case does not show whether it was before or after negotiation. Although the court refused to allow proof of forgery by similitude of hands it seemed inclined to allow direct proof of actual forgery if that could be shown but no such proof could be furnished.

And the alleged maker of a note believing his name had been forged, and paying the same, cannot thereafter recover back the money, where he deprived the holder of his remedy against the forger. Holgate v. Palmer, 8 Paige, 461.

And an acceptor who renewed a bill that was forged as to his acceptance could not after the lapse of a month plead this forgery in bar to an action on the second bill, as the law would infer a loss to the holder by delay. Mather v. Lord Maidstone, 18 C. B. 273, 37 Eng. L. & Eq. 335, 25 L. J. C. P. N. S. 311.

In Forsyth v. Day, 46 Me. 176, it was held that if a forged note is presented to the alleged maker, and he deceived the holder by language and acts calculated to induce reasonable belief that the note was genuine, he will be estopped from denying his signature if the holder acting upon the belief has been damaged.

So, language of a person whose name has been forged to a note, which induces a holder to advance more upon it, estops the party purporting to be the maker from denying his signature only so far as it concerns the money advanced on the faith of his word. Merrill v. Tyler, Selden's Notes, 83.

These findings are final.

Turner v. *Wentworth*, 119 Mass. 459; *Sheffield* v. *Otis*, 107 Mass. 282; *Edmundson* v. *Bric*, 136 Mass. 189.

Any ratification of an unauthorized contract, in order to be effectual and obligatory, must be shown to have been made with a full knowledge of all essential facts connected with the transaction to which it relates.

Manning v. *Leland*, 153 Mass. 510; *Dickinson* v. *Conway*, 12 Allen, 487.

The acts of the principal must show a clear intention to ratify the unauthorized act, and must be inconsistent with any other intention. If the evidence is doubtful, the question is for the jury.

Abbott v. *May*, 50 Ala. 97; *Smith* v. *Tramel*, 68 Iowa, 488.

The plaintiff's case is weaker on the ground of estoppel, for it was bound to show defendant's remark or conduct was accompanied with a design that the bank should rely upon it (*Carroll* v. *Manchester & L. R. Corp.* 111 Mass. 1); that in consequence of defendant's conduct or remark it acted otherwise than it would have done; and that the act or conduct of the defendant was of such a kind that a reasonable man "would rely on it and

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But parties were not liable on a forged acceptance which was of the same amount and payable at the same time as a genuine bill, and the bank was liable to them where it notified the parties that they held such bill for collection and a check was given for the amount with instructions to pay their acceptance "due the 1st and 4th of November," and when the genuine bill was presented, payment was refused for want of funds. The mistake by the officer of the bank supposing the letter had reference to the acceptance then in bank was the bank's mistake. It was the duty of the bank to know whether the acceptance was genuine or not. They took no steps to ascertain these facts, and out of their primary negligence the loss occurred. First Nat. Bank v. Tappan, 6 Kan. 456, 7 Am. Rep. 368.

e. *On account of other transactions.*

There is some difference of opinion as to the effect of an alleged maker's payments, made in regard to similar transactions as fixing his liability upon the paper in suit.

Evidence that the defendant had paid other forged notes or recognized them as valid, was inadmissible to show that he was estopped from setting up the defense of forgery to note in suit. Cohen v. Teller, 93 Pa. 123.

And the payment of a bill by an acceptor whose name had been forged will not prevent him from pleading forgery to a similar bill made thereafter, where he did not know that the plaintiff was the holder of the first one which he paid. Morris v. Bethell, L. R. 5 C. P. 47, 18 Week. Rep. 137.

But in Barber v. Gingell, 3 Esp. N. P. 60, it was held that previous payments to the same party of forged acceptances rendered the alleged acceptor liable on another on the ground that he had adopted it. This is claimed in Morris v. Bethel, L. R. 5 C. P. 47, 18 Week. Rep. 137, to have been rather a conclusion of facts as found by the jury. But the report in 3 Esp. N. P. 60, distinctly states that Lord Kenyon ruled that such payments were an answer to the charge of forgery. The report states that another defense set up was payment by the forger, but as he refused to testify and defendant had no other witness the plaintiff had verdict.

So, in Prescott v. Flinn, 9 Bing. 19, 2 Moore & S. 18, it was held that where the defendant's clerk had been accustomed to draw checks for him, and in one instance was authorized to indorse, and the defendant had received money at other times on similar indorsements, a jury was warranted in finding that the indorsement in controversy was binding.

Evidence that the alleged maker had been in the habit of recognizing similar notes which he himself had not signed, after full knowledge that the signature was not in his proper handwriting, was competent to show authority for such signature which was disputed. Hammond v. Varian, 54 N. Y. 398.

Payment of forged notes may estop against denying the authority of a forger to draw others, but it is not so with the mere payment of a declared forgery made to shield its forger when no one was deceived thereby. Crout v. De Wolf, 1 R. I. 393.

In an action against an alleged indorser upon a forged indorsement, evidence was competent to show authority by proving that the defendant remained silent, although notified by protest, and was sued, and suffered a default in pleading, and took no measure to defend the suit until after the forger absconded, and that the alleged indorser had assumed the payment of other notes similarly executed. Weed v. Carpenter, 4 Wend. 219, 10 Wend. 403; Abeel v. Seymour, 6 Hun, 656.

f. *By adoption.*

The weight of authority seems to hold that an alleged maker of a negotiable instrument may adopt a signature where he is conversant with all the facts and knows it to be forged. There is some conflict on this question, however, and some cases hold that an adoption made solely to prevent the prosecution of the forger or to ratify an act which is known to all parties to be a crime, is not binding. The following cases hold that a party may be bound by adoption: Henry v. Heeb, 114 Ind. 275; Howard v. Duncan, 3 Lans. 175; Forsythe v. Bonta, 5 Bush, 547; Dow v. Spenny, 29 Mo. 390; Melvin v. Hodges, 71 Ill. 422; Meacher v. Fort, 3 Hill, L. 227, 30 Am. Dec. 364; Casco Bank v. Keene, 53 Me. 103; Wellington v. Jackson, 121 Mass. 157; Buck v. Wood, 85 Me. 204; Findlay v. Currie, 13 Ct. Sess. Cass. 2d Series, 278; Maiklem v. Walker, 13 Shaw & D. Sess. Cas. 53; Brown v. British Linen Co. 1 Ct. Sess. Cas. 3d Series, 793; Hefner v. Vandolah, 57 Ill. 520, 11 Am. Rep. 39; Barber v. Gingell, 3 Esp. N. P. 60.

And he may be bound where it is a question as to whether or not the party signing his name had authority if he ratified the same. Henry v. Heeb, 114 Ind. 275; Howard v. Duncan, 3 Lans. 175; Forsythe v. Bonta, 5 Bush, 547; Dow v. Spenny, 29 Mo. 390.

But ratification of a forged indorsement to be binding must be made before maturity and before the transfer of the note to the person who claimed the estoppel. Woodruff v. Munroe, 33 Md. 158.

And a party circulating a note with his signature thereon cannot afterwards claim that it is a forgery. Melvin v. Hodges, 71 Ill. 422; Mecaher v. Fort, 3 Hill, L. 227, 30 Am. Dec. 364.

In Casco Bank v. Keene, 53 Me. 103, an instruction was given that if the defendant, knowing that the signature was not genuine, told the president of the bank that it was his signature, it was such an adoption of it as would render him liable upon the note, but that admissions made under a mistake were not binding. The court held that he would be bound by his adoption of the signature if made with the knowledge that it was a forgery.

In Wellington v. Jackson, 121 Mass. 157, it was held that although the signature to a note was forged, "yet if, knowing all the circumstances as to that signature and intending to be bound by it,

would believe that he meant it as an inducement to be acted upon."

Tracy v. *Lincoln*, 145 Mass. 357; *Lincoln* v. *Gay*, 164 Mass. 537; *Stiff* v. *Ashton*, 155 Mass. 130; *Plymouth* v. *Wareham*, 126 Mass. 475.

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

1. The plaintiff contends that if the defendant, when the note was first shown to him, knew that the indorsement of his name upon it was a forgery, he was bound to inform the plaintiff of this fact, and that his omission to do so amounted, of itself, to an affirmation of the signature. There was nothing to show that the defendant had received any benefit from the forgery, or that the forger was his agent for any purpose. Under these circumstances, the defendant was not bound, as a matter of legal duty, to repudiate or disclaim at once the genuineness of the signature. His failure to do so was evidence in the nature of an admission which might be considered as bearing upon the question whether he assumed the signature as his own, but it was not conclusive. *Greenfield Bank* v. *Crafts*, 2 Allen, 269, 273; *Harrod* v. *McDaniels*, 126 Mass. 413. Nor was the defendant's statement that "the note

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he acknowledged the signature, and thus assumed the note as his own, it would bind him just as if it had been originally signed by his authority, even if it did not amount to an estoppel *in pais*."

Payments thereon by one whose name was forged by a note, made for the purpose or preventing the exposure, arrest, and punishment of the forger estopped the one making them from subsequently setting up the defense of forgery when sued on the note. Buck v. Wood, 85 Me. 204.

In Findlay v. Currie, 13 Ct. Sess. Cas. 2d Series, 278, the substance of the charger's averments was that after notice to him of the bill said to be forged and a demand for payment, the suspender had an interview with the charger's agent when he was shown the bill and did not deny his signature, that in a subsequent interview the suspender did not deny his signature but begged for time to see the bill, which was granted. In the meantime his brother, the alleged forger, absconded and he then denied his signature. It was held that the charger had made averments sufficient to entitle him to a counter issue of adoption in order to meet the issue of forgery taken by the suspender.

Allegations by one of two brothers, *ex facie* coacceptor of a bill, that his signature had been forged by his brother, was held barred where he had received a charge for payment and acquiesced in it for a long time, during which his brother, the true debtor, left the country, and he acted from the laudable motive of desiring to screen his brother from the consequence of the crime of forgery. But he did so by adopting the signature for a time; and having thereby thrown the charger off his guard, the suspender must submit to the liability which he has incurred. Maiklem v. Walker, 12 Shaw & D. Sess. Cas. 53.

So, in Brown v. British Linen Co. 1 Ct. Sess. Cas. 3d Series, 793, the court sustained the relevancy of the charger's averments and allowed a counter issue of adoption. These averments were that the bill was intimated during its currency to the person alleging forgery, and that thereafter his agent under his instructions examined the bill and did not state that his employer's signature was forged, but requested the bank should send him an intimation when the bill fell due, and gave the bank agent to understand that if the bill was not paid at maturity by the alleged forger his client wished it to be renewed.

But an agreement reciting that the party was an indorser on a note not shown to him and giving further time saying he continues liable as before, is not binding on him where the indorsement was forged but was supposed by him to be genuine, as he was in the habit of indorsing for the maker. Bell v. Shields, 19 N. J. L. 93.

An alleged maker was not estopped to deny his signature, although he had admitted it to be his, when the note was not shown to him. Hefner v. Vandolah, 57 Ill. 520, 11 Am. Rep. 39.

But if he had inspected it soon after it was alleged to have been made, and with knowledge that it was not genuine admitted to the holder that it was his signature, he could not afterwards plead forgery, as it would be a ratification of the act of an agent. Hefner v. Vandolah, 62 Ill. 483, 14 Am. Rep. 106.

In Henry v. Heeb, 114 Ind. 275, it was held that where the act ratified is of an ambiguous character, and may as well be attributed to the mistaken assumption of authority as to a purpose to commit a crime, public policy does not forbid the adoption or ratification of the act, nor can it be said to be without consideration, especially where, as in the present case, indemnity has been accepted.

A reply to a defense of forgery pleading that plaintiff asked the defendant about the payment of the note and that the defendant with full knowledge admitted his liability and that he would stand good for it, and that the other signer then owned property sufficient and plaintiff would have secured the payment of the note, and that without knowledge that the defendant's signature was forged the plaintiff extended the time of payment, and that the other party absconded and was insolvent,—was insufficient, as it was not averred that the note was shown to the defendant or that he admitted that he had signed or authorized anyone to sign the note, and it did not appear that the defendant changed his relations or invested any money on the strength of the admissions. All that he claimed was that he did not sue, which he would have done had he known of the forgery. The length of time of the extension was not stated, and it did not appear that the extension was granted in reliance on the statements of the defendant. Lewis v. Hodapp, 14 Ind. App. 111.

It was a question for the jury whether an acceptance had been adopted where the banker wrote to the defendant asking if it was his acceptance, and his clerk answered that it was not. Two days afterwards the defendant wrote in substance that he had purchased goods from the drawer on which he had an accommodation bill until all the goods were delivered, and as he was to take up that bill himself it did not appear in the bill-book. "My clerk was not aware of the circumstances when he replied to your note during my absence; the drawer called here yesterday and states that he has sufficient funds to meet the bill." On a subsequent application by the the banker to the defendant in person, he said that the acceptance was not his handwriting and on dishonor pronounced it a forgery. Wilkinson v. Stoney, 1 Jebb & S. 509.

In Cravens v. Gillilan, 63 Mo. 28, it was held that where the signature was denied the burden of proof was on the plaintiff, and if he put his case on the theory of ratification he should show that the confirmatory act took place with full knowledge of all material facts on the part of him sought to be charged.

But other cases hold that it is contrary to public policy for a party to bind himself by simply ratifying a forged signature. Shisler v. Vandike, 92 Pa. 447, 37 Am. Rep. 702; Workman v. Wright, 33 Ohio

will be paid" conclusive evidence of a ratification of a signature. It was consistent with the idea that the defendant was surprised at finding his name upon the note, and left the bank, saying as little as possible, but meaning only to give the impression that he thought the note would be taken up by someone other than himself. Indeed his words and manner would seem to have left this impression upon Mr. Jaquith himself. It was competent for the court to find, as it did, upon the evidence, that it was not satisfied that the defendant made the remark with the intent to give the plaintiff's officers to understand that the signature was his, and genuine, or with intent to induce the bank to assume that his statement was an admission of the genuineness of the signature; and this finding negatives ratification. *Creamer* v. *Perry*, 17 Pick. 332, 27 Am. Dec. 297; *Wellington* v. *Jackson*, 121 Mass. 157; *Greenfield Bank* v. *Crafts*, 4 Allen, 447, 455; *Smith* v. *Tramel*, 68 Iowa, 488.

2. It was also competent for the court to find, as it did, upon the evidence, that it was not satisfied that the defendant made the remark above mentioned with intent to mislead the plaintiff, or that the plaintiff relied and acted upon his statement as an admission of the genuineness of his signature. According to the rule of law as established in this commonwealth, this negatives an estoppel. *Lincoln* v. *Gay*, 164 Mass. 537; *Stiff* v. *Ashton*, 155 Mass. 130; *Fall River Nat. Bank* v. *Buffinton*, 97 Mass. 498.

Exceptions overruled.

St. 405, 31 Am. Rep. 546; Henry v. Heeb, 114 Ind. 275; Henry Christian Bldg. & L. Asso. v. Walton, 181 Pa. 201; Williams v. Bayley, L. R. 1 H. L. 200; Brook v. Hook, L. R. 6 Exch. 88, 40 L. J. Exch. 50, 24 L. J. N. S. 34, 19 Week. Rep. 506; Greenfield Bank v. Crafts, 4 Allen, 447; M'Kenzie v. British Linen Co. L. R. 6 App. Cas. 82, 44 L. T. N. S. 431, 29 Week. Rep. 477; Ferry v. Taylor, 33 Mo. 333.

So, a ratification of a foreign indorsement involving a crime could not be allowed because contrary to public policy. Shisler v. Vandike, 92 Pa. 447, 37 Am. Rep. 702.

And where the act was void, as in case of forgery, no ratification could be made independent of the principle of estoppel. Workman v. Wright, 33 Ohio St. 405, 31 Am. Rep. 546.

Adopting a known forgery of the signature to a note, where there was no agency, when done to shield the forgery, will not bind the supposed signer. Ferry v. Taylor, 33 Mo. 333.

In Henry v. Heeb, 114 Ind. 275, it was said that where the act of signing constitutes the crime of forgery, while the person whose name has been forged may be estopped by his admissions upon which others may have changed their relations from pleading the truth of the matter to their detriment, the act from which the crime springs cannot, upon considerations of public policy, be ratified without a new consideration to support it.

And in Henry Christian Bldg. & L. Asso. v. Walton, 181 Pa. 201, it was said that the earlier decisions in Pennsylvania which held that all contracts vitiated by fraud are insusceptible of confirmation, were overruled by Pearsoll v. Chapin, 44 Pa. 9; Negley v. Lindsay, 67 Pa. 217, 5 Am. Rep. 427; the distinction being that where the fraud affects individual interests only, ratification is allowed, but where the transaction is a crime the adjustment of which is forbidden by public policy, the ratification of the act from which it springs is not permitted. Forgery cannot be ratified.

And in Williams v. Bayley, L. R. 1 H. L. 200, where a son had forged his father's name to notes, and the bankers insisted on a settlement by the father, who executed an agreement to make an equitable mortgage of his property, and the notes with the forged indorsements were delivered up to him, it was held that such an agreement was void as against public policy, since such pressure was brought to bear as showed that the agreement was made to prevent the prosecution of his son.

So, in Brook v. Hook, L. R. 6 Exch. 88, 40 L. J. Exch. N. S. 50, 24 L. T. N. S. 34, 19 Week. Rep. 506, where the defendant, to prevent the prosecution of the forger, at the same time denying that the signature was his or written by his authority, signed a memorandum while the bill was current saying: "I hold myself responsible for a bill dated November 7, 1869, for 20 £, bearing my signature and Richard Jones, in favor of Mr. Brook,—"it was held that a verdict should have been directed for the defendant, or at least the question had been left to the jury as to the real meaning and effect of the memorandum and the conversation taken together. This was done, "first, upon the ground that this was no ratification at all, but an agreement upon the part of the defendant to treat the note as his own, and become liable upon it, in consideration that the plaintiff would forbear to prosecute his brother-in-law Jones, and that this agreement is against public policy and void, as founded upon an illegal consideration; secondly, the paper in question is no ratification, inasmuch as the act done—that is, the signature to the note—is illegal and void: and that although a voidable act may be ratified by matter subsequent, it is otherwise when an act is originally and in its inception void."

So, in Greenfield Bank v. Crafts, 4 Allen, 447, it was said: "It is, however, urged that public policy forbids sanctioning a ratification of a forged note, as it may have a tendency to stifle a prosecution for the criminal offense. It would seem, however, that this must stand upon the general principles applicable to other contracts, and is only to be defeated where the agreement was upon the understanding that if the signature was adopted the guilty party was not to be prosecuted for the criminal offense."

And in M'Kenzie v. British Linen Co. L. R. 6 App. Cas. 82, 44 L. T. N. S. 431, 29 Week. Rep. 477, it was said: "I wish to guard against being supposed to say that if a document with an unauthorized signature was uttered under such circumstances of intent to defraud that it amounted to the crime of forgery, it is in the power of the person whose name was forged to ratify it so as to make a defense for the forger against a criminal charge. I do not think he could. But if the person whose name was without authority used chooses to ratify the act, even though known to be a crime, he makes himself civilly responsible just as if he had originally authorized it."

In M'Kenzie v. British Linen Co. L. R. 6 App. Cas. 82, 44 L. T. N. S. 431, 29 Week. Rep. 477, it was said that even if a party had gone so far in his endeavors to shield the forger from the consequences of his criminal act as to make himself liable to criminal proceedings for an endeavor to obstruct justice, that would not bar him from averring against the bank that the signature was not his.

For liability of maker or drawer on raised paper, see note to Exchange Nat. Bank v. Bank of Little Rock (C. C. App. 8th C.) 22 L. R. A. 686. L. T.

MISSISSIPPI SUPREME COURT.

HOWELL, Admr., etc., of Solon H. Howell, Jr., Deceased, *Appt.*,

v.

ILLINOIS CENTRAL RAILROAD COMPANY.

(........Miss..........)

1. **A bright boy nearly thirteen years of age** who is expert in jumping on and off moving trains is chargeable with contributory negligence in attempting to get off a train running at the rate of 20 miles an hour.

2. **Running a train at high speed in violation of law** and in breach of the promise of the engineer to a boy who intended to jump off will not render the railroad company liable for injury to the boy in attempting to get off when he knew the danger.

(April 12, 1897.)

APPEAL by plaintiff from a judgment of the Circuit Court for Copiah County in favor of defendant in an action brought to recover damages for the alleged wrongful killing of plaintiff's intestate. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Cassedy & Cassedy** and **W. C. Wells** for appellant.

Messrs. **Mayes & Harris** for appellee.

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

The testimony shows without contradiction that Solon H. Howell, Jr., was an unusually bright boy for his age; that he was killed by appellee on May 2, and would have been thirteen on his next birthday, June 17; that he was an active boy, expert in jumping on and off moving trains; that he did this for two years before his death, constantly in the daytime and on some few occasions at night; that he had been repeatedly warned by various parties of the danger of this practice, and that his father had often chastised him for this, and had positively forbidden it; that he heard the boys discussing the risk of attempting to get off the train which was going through Hazlehurst at a rate of speed, possibly, of at least 20 miles an hour; that the boys—most probably Solon also—had been put off near Crystal Springs, and forbidden to re-embark on the train; that they got back on the train,—a special through freight not scheduled to stop at Hazlehurst; that the conductor, in the hearing of Solon, ordered all the boys again to get off, and, upon their refusing to do so unless he stopped the train, said he would give them a sweet ride through Hazlehurst; that he did increase the speed; that Solon knew it was increased; that the train went through Hazlehurst at at least 20 miles an hour; that some of the boys got off as soon as the conductor made this threat; that the others debated whether it was too dangerous to attempt to get off, some thinking one way and some the other; that finally one made the attempt, and got off, and all followed except Solon; that the last one to get off told Solon to be careful, and that the last seen of Solon was that he was standing upon this flat car waiting for the last boy to get off, who preceded him; that he, attempting to get off, or having accidentally fallen of, was in some way probably dragged some little distance, and found with his head crushed into fine pieces, and his left arm cut near the shoulder to the bone and broken, his under jaw broken, and some other injuries, breathed a few times, and died. There was blood and some hair on the rail. The engineer (so it was testified) had told Solon that if he did not stop at Hazlehurst he would go slow enough for anyone to get off. It was shown without contradiction by some of the boys who got off at Hazlehurst that it was extremely dangerous to make the attempt, and that "anyone with any discretion at all" would know it was dangerous. These are the material facts. On these facts we think the court could not have done otherwise than give the peremptory instruction. The controlling question in the case is whether the boy, Solon Howell, Jr., was, in his situation, and of his age, chargeable with contributory negligence. Ordinarily, of course, this question is one controverted on the facts, and is, hence, ordinarily, to be left to the jury. But where the facts are absolutely without conflict, and all establish capacity sufficient to know and appreciate the peril of his situation, there is nothing on this point to be left to a jury. There is no room for presumption as to capacity when the proof uncontradictedly shows capacity. The rule is thus stated in *Merryman* v. *Chicago, R. I. & P. R. Co.* 85 Iowa, at page 638: "There are numerous cases which hold that the question of negligence on the part of minors is for the jury to determine, and such is the rule where the ability of the minor to comprehend the result of his acts, and the danger to which they will expose him, is controverted. But this case involves no question of that kind,"—there being there, as here, no controversy on that point. And Beach (Contrib. Neg. § 117) announces the rule thus: "Unless the child is exceedingly young, it is usually left to the jury to determine the measure of care required of the particular child in the actual circumstances of the case. Where there is no doubt as to the capacity of the child, at one extreme or the other, to avoid danger, the court will decide it as a matter of law." And see § 136. In the Iowa case, *supra*, the boy was thirteen; in *Newdoll* v. *Young*, 80 Hun, 364, the child was under seven; in *Cleveland, C. C. & St. L. R. Co.* v. *Tartt*, 24 U. S. App. 504, 12 C. C. A. 625, 64 Fed. Rep. at page 831, the boy was over eight years; and in all these cases the court determined, as matter of law, that the minor was chargeable with contributory negligence, and could not recover. It is immaterial in this case what the engineer said, since Solon knew that the train would not stop, but was going at an increased rate of speed. It is undoubtedly true that contributory negligence is not a defense where the injury is caused by an act of the defendant wilfully done. But there must be causal connection between the act causing the injury and the injury. Here, conceding

NOTE.—For injuries in getting on and off railroad trains, see *note* to Carr v. Eel River & E. R. Co. (Cal.) 21 L. R. A. 354.

See also 41 L. R. A. 490.

the increasing of the speed to be wilful, there is no causal connection between that act and the injury. It was not the rate of speed which caused the injury, but getting off, or attempting to get off, or accidentally falling off in attempting to get off, in the face of that rate of speed. Had the boy remained on, there is no room to believe the injury would have occurred. It is said that it is not shown how the boy came to his death. It is true that that is not very clearly shown. But it is shown that he was last seen standing up, waiting for the last boy who preceded him to climb around and down, and jump or drop off, and that he knew it was dangerous—extremely dangerous—to do that, and that he was dragged some little distance, the injuries being of the character stated, either having voluntarily attempted to get off, or accidentally fallen off. In either case the appellee would not be liable. It did not force him off, as in *Phillips' Case*, 64 Miss. 693. It owed him—a trespasser—no duty save not wilfully to injure him. Where it is shown that one is a trespasser, and is injured by the running of the cars at a greater rate of speed than 6 miles an hour, through an incorporated town, neither fact is determinative. The trespasser is not precluded from recovery on the sole ground that he is a trespasser. Nor is the railroad company liable solely because it is violating the law as to speed. Trespassers cannot recover for mere negligent injury. But, while it is true here that the boy was injured by the running of the cars, it is also shown that he was not injured because they were running, but because he attempted to get off voluntarily, or accidentally fell off. It was the getting off or falling off that caused the injury, without which it would not have ocurred. Brantly, in *Phillips' Case*, in 64 Miss. 693, neither got off voluntarily nor fell off as the result of an accident uncaused by the company's officers. They were cursing him, and forced him off, and he fell off while they were thus forcing him off. They directly caused his accidental falling off. The facts here are wholly different. We have examined all the authorities cited by learned counsel for appellant, but find no conflict between them and the views herein announced. Our sympathies have been deeply enlisted for this unfortunate boy and his parents, and our indignation greatly aroused by the atrocious conduct of this conductor in increasing the speed of this train as he manifestly did; but we sit as a court to administer the law, unswayed by sympathy or indignation.

Affirmed.

J. R. ZACHERY, *Appt.*,

v.

MOBILE & OHIO RAILROAD COMPANY.

(..........Miss..........)

A common carrier cannot refuse to accept a person as a passenger merely because he is blind.

(February 1, 1897.)

APPEAL by plaintiff from a judgment of the Circuit Court for Clarke County in favor of defendant in an action brought to recover damages for defendant's refusal to permit plaintiff to ride on its train. *Reversed.*

The facts are stated in the opinion.

Messrs. **J. L. Buckley** and **D. W. Heidelberg** for appellant.

Messrs. **A. J. Russell** and **Chas. M. Wright** for appellee.

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

On the 13th of March, 1896, appellant exhibited his complaint in the circuit court of Clarke county, alleging that for several years he had been traveling on appellee's road, and had business at various stations, and had never given cause of complaint to appellee's servants, and no objection had been made to his riding on appellee's train until January 25, 1896, and February 23, 1896, at which times appellee refused to sell him tickets from Chickora and Vinegar Bend, and from Vinegar Bend to Buckatunna, which was humiliating and annoying, he being away from home; that on 13th of March, 1896, he was again denied tickets to ride on defendant's road, at Stonewall Station, and that on all these occasions he offered the agents of said road the price of the fare, and had engagements that he was deprived of filling on account of the wilful refusal of appellee's agents to sell him tickets; that appellee had no other reason for refusing him passage than that appellant was blind, which is true. To this declaration appellee (defendant below) interposed a demurrer, upon the ground that the declaration shows that the plaintiff was blind, and was not a fit person to travel by himself, and that, as a matter of law, defendant had a right to decline to sell plaintiff a ticket, unless accompanied by an attendant. The court below sustained the demurrer, and the plaintiff appealed.

The demurrer admitting the truth of the allegations of the complaint, one of which is to the effect that the appellant had been riding on appellee's road for several years, pursuing his occupation, and had given no cause of complaint, and none had ever been made until January 25, 1896, and that the sole reason for rejecting him as a passenger was his blindness, it follows that the naked question, detached from any attending circumstances, was whether a person otherwise qualified may be rejected as a passenger for the sole reason that he is blind, and this court is asked to announce that to be the law. There seems to be a scarcity of decisions on the precise point. In 2 Rorer, Railroads, p. 957, it is laid down as the law that, "as common carriers of persons, railroad companies are ordinarily bound to carry, according to their reasonable rules and regulations, and in accordance with their regular time cards, all persons who apply to be carried,

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NOTE.—The above case seems to be entirely novel. The duty of a carrier to sick or infirm passengers has been considered in some cases, but this seems to be the first in which the right of a carrier to refuse to receive a blind passenger has been considered.

As to the duty to passengers taken ill during the journey, see *note* to Lake Shore & M. S. R. Co. v. Salzman (Ohio) 31 L. R. A. 261; also the case of McCann v. Newark & S. O. R. Co. (N. J.) 33 L. R. A. 127.

See also 41 L. R. A. 385.

and are ready to pay, and do pay, the usual fare when required, . . . except" unsuitable persons hereinafter mentioned. These exceptions are those who desire to injure the company, notoriously bad or justly suspicious persons, [gross or immoral persons, drunken persons, and those who refuse to obey the rules. It is laid down in Angell, Carr. § 524, to be the common law that it is "the duty of public or common carriers of persons *to receive all persons who apply for a passage.*" (These words italicized.) In § 525, it is said: "It is in fact beyond all doubt, that the first and most general obligation on the part of public carriers of passengers, whether by land or by water, is to carry persons who apply for a passage." These are the general rules, subject always to the exceptions enumerated; but we have not found any decision holding that, as a matter of law, a person can be rejected because he is blind.

It is urged by counsel for appellee that a rule of a railroad company authorizing the refusal by its agents of an infirm passenger unless provided with an assistant is reasonable, and demanded by the convenience of the traveling public,—a proposition we do not controvert; but in this case there is nothing in the record to show that appellee had made or promulgated such a rule. On the contrary it is alleged in the complaint (admitted by the demurrer) that appellant was not infirm, but robust, able to take care of himself, and to comply with the rules applying to passengers generally; that he had been traveling on appellee's road for several years, and given no cause of complaint to appellee's servants, and none was ever made. All this being admitted by the demurrer, the doctrine laid down in *Seirer* v. *Vicksburg & M. R. Co.* 61 Miss. 10, 48 Am. Rep. 74, relied on by appellee, does not apply to this case. There is nothing to show that appellant was informed that the absence of an attendant was the cause of his rejection, and nothing to show that he needed one. Appellee's counsel contends that infirm passengers require more and extra care, and for that reason railroad companies have the right to reject them. But appellee admits by its demurrer that appellant was not such a passenger, and had never required extra care. We do not desire to intimate any opinion as to what regulations and rules railroad companies may make as to passengers; but we decline to hold that, as a proposition af law, stripped from all attending circumstances, public carriers of passengers can reject a person otherwise qualified upon the sole ground that he is blind.

The judgment of the court below is therefore reversed, the demurrer overruled, and the cause remanded.

RHODE ISLAND SUPREME COURT.

OPINION OF THE JUSTICES in the Matter of the McTammany Voting Machine.

(........R. I.........)

A law authorizing a given city to use a voting machine by which a ballot containing the names of the candidates is punctured and a record of the choice of the voters secured thereby, is authorized by Const. art. 8, § 2, providing that the voting for general officers shall be by "ballot," and that all cases where an election is made by "ballot or paper vote" the manner of balloting shall be the same as now required in voting for general officers until "otherwise prescribed by law."

(*Rogers, J., dissents.*)

(February 2, 1897.)

SUBMISSION by the governor of a question for the opinion of the justices as to the legality of the adoption of a voting machine. *Affirmative answer returned.*

The case sufficiently appears in the opinions.

To His Excellency, Charles Warren Lippitt, Governor, etc.:

We have received from your Excellency the following question: "Can the general assembly of Rhode Island, under our Constitution, enact a valid law providing that the city of Providence may use the 'McTammany Voting Machine,' so called, in elections held in said city?" which we have the honor to answer in the affirmative. In doing so, we are not, of course, to be understood to say that the framers of the Constitution, as individuals, had in mind such a method of voting as that to which you refer, for that would be obviously improbable. The question, however, is not what limitations they may have had in mind by reason of the methods to which they were accustomed, but what the language of the Constitution means, or may reasonably mean, with reference to the matter before us. The opinions of the men who frame a constitution or law cannot be taken as its true construction, unless the language used is capable of such construction; and so, on the other hand, a law is not unconstitutional if it is reasonably within the terms of the Constitution. See *State* v. *District of Narragansett*, 16 R. I. 424, 3 L. R. A. 295. The language used may be broader than individual conceptions at the time, and often is, but it is the language used which must prevail. The *Constitution says, in article 8*, § 2, after providing that the voting for general officers shall be by ballot, "and in all cases where an election is made by ballot or paper

NOTE.—The above case is believed to be the first to decide the question as to the right to use a voting machine under a constitutional provision for voting by ballot.

vote, the manner of balloting shall be the same as is now required in voting for general officers, until otherwise prescribed by law." In this clause the meaning of the word "ballot" is explained by the words "paper vote." The primary meaning of "ballot," which signified a little ball, is not the one intended, but the broader meaning which has been substituted for the word by reason of the change in the mode of voting, from little balls to that of a paper vote. The purpose of the Constitution is evidently to provide a record more permanent than that of counting hands, and the like, by which the declared result may be verified. That the manner of securing this might be changed is evident from the use of the phrase "until otherwise provided by law." We think, therefore, that the present proposal is within the terms and purpose of the Constitution. It is a paper vote, on which the names of the candidates are printed, and from which the result may afterwards be ascertained by counting as well as in the case of individual slips of paper. The vote of a particular person may not be identified, but that cannot be done under the present system. We see no reason why a choice may not be indicated as well by a puncture of the paper as by a pencil mark. The language of the Constitution seems to be broad enough to cover the proposal. The purpose of the Constitution is subserved, and the possibility of a change of method is anticipated and provided for. The essential thing to be secured is a record of the choice of the voters, and this we understand will be secured by the method proposed. In this opinion, we assume that provision will be made for votes for persons other than those whose names are on an official ballot, in case a voter so desires. Owing to the illness of Judge Wilbur, we have been unable to confer with him.

Charles Matteson.
John H. Stiness.
P. E. Tillinghast.
Wm. W. Douglas.

To His Excellency, Charles Warren Lippitt, Governor, etc.:

To your inquiry, "Can the general assembly of Rhode Island, under our Constitution, enact a valid law providing that the city of Providence may use the 'McTammany Voting Machine,' so called, in elections held in said city?" my reply is that in my opinion it cannot. The inquiry is not broad enough to apply to any machine for use in voting, nor to any modification of the McTammany voting machine that I can conceive could, without great difficulty, be made, but to a specific machine which has been exhibited to the judges as a sample of the machine to which the question is limited. The Constitution of Rhode Island (art. 8, § 2) is as follows: "The voting for governor, lieutenant governor, secretary of state, attorney general, general treasurer, and representative to Congress, shall be by ballot; senators and representatives to the general assembly, and town or city officers, shall be chosen by ballot, on demand of any seven persons entitled to vote for the same; and in all cases where an election is made by ballot or paper vote, the manner of balloting shall be the same as is now required in voting for general officers, until otherwise prescribed by law." The constitutional form of voting, then, is "by ballot or paper vote;" and if the McTammany voting machine method of voting is by ballot or paper vote, within the intendment of the provision of the Constitution just quoted, then it would be a constitutional form of voting, for when words are used ambiguously, or not in a perfectly obvious sense, the great object of the maxims of interpretation is to discover the true intention of the law, whether it be statute or constitutional law. Bacon, Abr. title *Statute*, 1, §§ 5, 10; *Re Condemnation of Certain Land*, Index RR. 200, 204; 1 Story, Const. §§ 402, 405. Sutherland, in his work on Statutory Construction (§ 300), says: "It is needful in the construction of all instruments to read them in view of all the surrounding facts. To understand their purport and intended application, one should, as far as possible, be placed in a situation to see the subject from the maker's standpoint and study his language with that outlook." What significance, then, did the framers of the Constitution attach to the words "ballot or paper vote," when used in the constitutional provision above quoted? The generic kind of voting was to be by ballot or paper vote, and the particular manner of using that generic kind was by the framers of the Constitution fixed for the time being, as we have seen by the provision above quoted, in the same way as then in force; but the general assembly was authorized to change the manner from time to time as it saw fit, but not the generic kind, which must continue to be by ballot or paper vote. By referring to R. I. Pub. Laws (Rev. Laws 1822) p. 96, § 15, and Id. p. 95, § 14, one finds both the kind and the manner of voting for certain officers in force at the time of the framing of the Constitution are thus clearly laid down: "Every person who shall vote for general officers shall have his name written at length on the back of his vote at the time of delivering in the same, and the names of all the officers voted for shall be put on one single piece of paper," and "the freemen shall, one by one, in their own proper persons deliver their votes to the moderator," etc. Subsequently the requirement of having the voter's name written on the back of the ballot was abolished by the general assembly, and still later the assembly adopted the present, or Australian, manner of voting, where a large number of names were on the ballot, and the voter designated the persons voted for by a distinguishing cross. These changes were clearly in the manner, merely, of voting by ballot or paper vote. It is claimed that using the McTammany voting machine is also a change in manner of voting by ballot or paper vote only, and not in the generic kind, because it is urged that there is a roll of paper,—invisible to the voter, to be sure, but still there,—and that a pressure of the buttons cuts holes in that paper, which records the voter's vote. It is said that, though the voter does not see the paper on which his vote is recorded, yet that a blind man cannot see the paper ballot now in use, and that he has to have the assistance of someone's else senses to enable him to vote. The blind man certainly has the ballot in his hands, and has sensible knowledge of its presence. But even if a man in the full possession

of all his senses must depend upon someone else for knowledge that there is a paper used, on whose senses does he depend for knowledge that he has made a distinguishing mark by perforation? The voter himself does not see it made, nor does any other living person see it. Even if the voter could stand at the back of the machine, with the doors open, he could not see the hole he was supposed to have made, *until at least one other person, if not two*, had voted so as to uncover his hole by the passage of so much paper as was required for the vote of one or two persons. It seems to me that, for a person to vote by ballot or paper vote, he must have some sensible evidence—some knowledge by means of his senses—that he has performed some effectual act by means of paper to indicate for whom he has voted. After he has pushed the buttons, he cannot affirm, much less swear, that he has made any mark, perforation, or other distinguishing character on, or by means of, paper, to indicate the persons voted for. Nor can anyone else give him that assurance by any sensible knowledge. The most that can be affirmed is that, if the machine has worked as intended, he has made a distinguishing mark or hole. It is common knowledge that human machines and mechanisms get out of order and fail to work, in all sorts of unforeseen ways. Ordinarily the person using a machine can see a result. Thus, a bank clerk, perforating a check with figures, sees the holes; an officer of the law, using a gibbet by pressing a button, sees the result accomplished that he sought; and so on *ad infinitum*. But a voter on this voting machine has no knowledge through his senses that he has accomplished a result. The most that can be said is, if the machine worked as intended, then he has made his holes and voted. *It does not seem to me that that is enough.* For the reasons above set forth, it does not seem to me that voting by the McTammany voting machine, as at present constructed, is voting by ballot or paper vote, within the intendment of the Constitution, and therefore I answer your question in the negative.

Horatio Rogers.

NEW YORK COURT OF APPEALS.

Mary E. WARD, *Respt.*,
v.
George B. BOYCE, *Appt.*

(152 N. Y. 191.)[1]

1. **To entitle a judgment in a proceeding in rem authorized by a state statute,** but in which the defendant was not served with process and did not appear, *to full faith and* credit in another state, the *res* must have been attached or seized, or at least have been within the jurisdiction of the court rendering the judgment.
2. **Service of process will not bind a nonresident defendant** or his property if it is upon a person described *as his trustee*, and there is nothing to show that such person was in fact trustee for him or was in possession of any of his property.
3. **An adjudication of the title to property sought to be reached by trustee process** based upon personal service of process on a third person claiming to own it in an issue raised to determine the right of property in it after a disclosure by the trustee and a judgment in favor of plaintiff will not be binding on him if there was originally no jurisdiction of the principal debtor, the claimant, or the property because of failure to get service of process on them *or to attach the property*.
4. **A claimant of property will not be concluded by an adjudication of its title in a proceeding by trustee process** which sought to reach it as the property of a third person if he was not a party to the original proceeding so as to have an opportunity to contest the questions as to whether or not the principal defendant was a debtor, and the person served with process his trustee, although after those questions were determined in the affirmative he was served with notice to appear and protect his claim.
5. **To render a foreign judgment admissible in a suit upon a promissory note** as conclusive evidence that the title to the note was not in plaintiff, it must, notwithstanding the fact that the judgment involves those facts, be shown either by the record or by extrinsic evidence that the court had jurisdiction of the suit, that the person suing on the note was a party to the other suit in such a way as to be *concluded by the judgment*, and that the fact of his ownership of the note was in issue litigated and determined therein.
6. **A claim that a note belongs to a nonresident debtor will not make it property** subject to trustee process in the hands of the maker which will give the courts of the state of the maker's residence *jurisdiction to make* a decree affecting its title or ownership if it is in fact payable to a third person and held by him at his residence in another state.

(March 2, 1897.)

APPEAL by defendant from a judgment of a General Term of the Supreme Court, Third Department, affirming a judgment of the Washington County Circuit in favor of plaintiff in an action brought to recover the

[1] NOTE.—As to the protection of a nonresident creditor against garnishment, see Illinois C. R. Co. v. Smith (Miss.) 19 L. R. A. 577, and *note;* also Bragg v. Gaynor (Wis.) 21 L. R. A. 161; Neufelder v. German American Ins. Co. (Wash.) 22 L. R. A. 287; Singer Mfg. Co. v. Fleming (Neb.) 23 L. R. A. 210; Wyeth Hardware & Mfg. Co. v. Lang (Mo.) 27 L. R. A. 651; Reimers v. Seatco Mfg. Co. (C. C. App. 6th C.) 30 L. R. A. 364.

amount alleged to be due on a promissory note. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Potter & Lillie**, for appellant:

If the proceedings and judgment in Vermont were had and taken in accordance with the laws of Vermont, they were binding and conclusive upon George B. Boyce, and may be pleaded in abatement to the action here.

Embree v. *Hanna*, 5 Johns. 101; *Williams* v. *Ingersoll*, 89 N. Y. 508; *Mutual L. Ins. Co.* v. *Harris*, 97 U. S. 331, 24 L. ed. 959; *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. ed. 565; 12 Am. & Eng. Enc. Law, p. 148*o*, and cases cited; *Douglass* v. *Phenix Ins. Co.* 138 N. Y. 209, 20 L. R. A. 118; *Gray* v. *Delaware & H. Canal Co.* 5 Abb. N. C. 131, and cases cited.

The proceedings and judgment were had and taken strictly in accordance with the laws of Vermont providing for the maintenance of actions by "trustee process."

N. Y. Rev. Laws, chap. 63, §§ 1067, 1081, now Vt. Stat. §§ 1319 *et seq.*

The construction put upon the statutes of another state by its courts are controlling in the tribunals of this state.

Leonard v. *Columbia Steam Nav. Co.* 84 N. Y. 48, 38 Am. Rep. 491, and cases cited; *Gormley* v. *Clark*, 134 U. S. 338, 33 L. ed. 909; *McElvaine* v. *Brush*, 142 U. S. 155, 35 L. ed. 971; *Morley* v. *Lake Shore & M. S. R. Co.* 146 U. S. 162, 36 L. ed. 925, and cases cited.

The supreme court of Vermont has construed the statutes in question here, and has distinctly held and decided that in cases of this kind service by leaving a copy of the writ in the hands of the trustee for the defendant is sufficient.

Spafford v. *Page*, 15 Vt. 490; *Morse* v. *Nash*, 30 Vt. 76; *Holmes* v. *Clark*, 46 Vt. 26; *Stearns* v. *Wrisley*, 30 Vt. 661; *Marsh* v. *Davis*, 24 Vt. 370; *Nichols* v. *Hooper*, 61 Vt. 295; *Hogle* v. *Mott*, 62 Vt. 255; *Jones* v. *Dillihanty*, 68 Vt. 490.

The supreme court of Massachusetts has held the same doctrine.

Hull v. *Blake*, 13 Mass. 156.

Trustee process binds the debt in the hands of the trustee from the date of the service, and whatever rights the principal defendant may have in relation to the debt thus attached subsist in subordination to the claims of the garnishing creditor.

8 Am. & Eng. Enc. Law, p. 1101; *London* v. *London Joint-Stock Bank*, 50 L. J. Q. B. N. S. 594.

In New England the proceeding is regarded as an equitable action.

Stedman v. *Vickery*, 42 Me. 132.

Service of the summons upon the principal defendant is not a prerequisite of jurisdiction of the *res.*

Winner v. *Hoyt*, 68 Wis. 278.

Notice of the proceeding is not generally necessary unless required by statute.

Phillips v. *Germon*, 43 Iowa, 101; *Dobson* v. *Pearce*, 12 N. Y. 156, 62 Am. Dec. 152; *Kinnier* v. *Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132; *Douglass* v. *Phenix Ins. Co.* 138 N. Y. 209, 20 L. R. A. 118.

The situs of the debt, or note, in question was at the residence of the debtor, George B. Boyce, in the state of Vermont.

The claimant, Mrs. Mary Ward, did not appear, but suffered default.

The judgment, however, is just as effectual an estoppel against her as if she had appeared and offered evidence to sustain her claim. Her failure to appear must be deemed, for the purposes of the action and the judgment, an admission of all the facts alleged in regard to the ownership of the note or debt in question.

5 Am. & Eng. Enc. Law, 461 *et seq.* 467, 469.

The record of judgment offered in evidence is properly authenticated.

Brown v. *Edson*, 23 Vt. 448; 12 Am. & Eng. Enc. Law, p. 148*u*.

Messrs. **O. F. Davis** and **R. R. Davis**, for respondent:

The judgment rendered by the justice on the 9th day of October against M. Eugene Ward was void under the laws of the state of New York, and in violation of the 14th Amendment of the Constitution of the United States, which provides that no state shall deprive any person of life, liberty, or property without due process of law.

Martin v. *Central Vermont R. Co.* 50 Hun, 347; *Douglass* v. *Phenix Ins. Co.* 138 N. Y. 221, 20 L. R. A. 118.

The defendant in this attachment suit, M. Eugene Ward, never owned this note, there fore it could not be attached as his property either as assignor or owner.

Williams v. *Ingersoll*, 89 N. Y. 508.

This note was a written obligation for the payment of money made at Granville, New York, and payable to the order of plaintiff, who resided there.

Osgood v. *Maguire*, 61 N. Y. 524; *Williams* v. *Ingersoll*, 89 N. Y. 523.

The plaintiff was not bound to appear in a foreign state or jurisdiction to assert her right to this note on the notice served on her.

Because, § 1122 of Vt. Stat. is only permissible, and there is nothing in the statute making it imperative upon a claimant to appear and protect his rights.

Williams v. *Ingersoll*, 89 N. Y. 525.

O'Brien, J., delivered the opinion of the court:

This appeal involves a very small sum of money, but legal principles of great importance. The action was on a promissory note of $150, made by the defendant, payable to the order of the plaintiff one day after date, which was September 4, 1893. The defendant, by his answer, put in issue the allegation of the complaint that the plaintiff was the owner of the note, and set forth certain proceedings in a justice's court in the state of Vermont, commenced by what is called "trustee process" in that state, against the plaintiff's husband and the defendant, by one Herrick, claiming to be a creditor of the husband. It is alleged that in that proceeding, to which the plaintiff was made a party, it was adjudged by a court of competent jurisdiction, proceeding under and according to the laws of that state, that the note in suit was not the property of the plaintiff, but of her husband, and that this defendant should pay the amount to Herrick, the husband's creditor, in satisfaction of his claim or judgment *pro tanto*. On the trial of

this action the plaintiff produced the note, the execution of which was admitted, and this established the fact, prima facie, that the plaintiff was the owner and holder thereof. The defendant then gave in evidence the record of proceedings in the justice's court in Vermont and the statute law of that state which it was claimed authorized the proceeding. It appears also, or was admitted, that the plaintiff and her husband resided when the note was given and several years before, and at the time of the trial, in Washington county, in this state, and the defendant in the state of Vermont. The issues in the case were tried by the court without a jury, and it was found, among other things, that the plaintiff was the owner and holder of the note. The proceedings under the trustee process in Vermont, as they appeared by the record, were also found, and certain sections of the statutes of that state under which the proceedings were had appear in the findings. The court gave judgment for the plaintiff, and the general term affirmed the decision but allowed the defendant to appeal to this court.

It is important at the outset to know and bear in mind what the issue between the parties was. It was not that the note had been paid or discharged or merged in the judgment in Vermont, but that the plaintiff was not the owner. The issue was therefore one of fact, or perhaps presented a mixed question of law and fact. The plaintiff met this issue by the production of the note at the trial, and the defendant by the production of the record. If the record adjudged the fact that the plaintiff was not the owner of the note, but that someone else was, and the plaintiff was a party to the suit, and the proceedings were of such a character as to bind the plaintiff in another jurisdiction and in another action, it might be difficult to sustain this judgment. The real question was whether the record was conclusive evidence in favor of the defendant of the disputed fact, *viz.*, that the plaintiff owned the note.

There are some propositions growing out of the general question so familiar and elementary that they may be assumed without argument. The record of a former judgment between the same parties, in which the same question was involved and determined, is a bar or conclusive evidence in a subsequent action upon the question so involved and decided; but it must appear that the court in the first action had jurisdiction. The judgment of a court of a sister state, recovered upon trustee process or attachment proceedings, in which the defendant is not personally served with process, and does not appear, is effectual only to bind such property of the debtor as is found within the jurisdiction. It can form no basis for a personal judgment, and cannot affect the title of property not seized or attached, and not within the jurisdiction of the sovereignty where the proceedings are had. A party cannot be deprived of property without "due process of law," and that term, in its application to judicial proceedings, means a course of legal proceedings according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of our private rights. If the proceedings involve the determination of the personal liability of the defendant, he must be brought within the jurisdiction by service of process within the state or voluntary appearance. If it be a proceeding *in rem* the *res* must have been seized or attached, or at least must be within the jurisdiction. *Reynolds* v. *Stockton*, 140 U. S. 254, 35 L. ed. 464; *Carpenter* v. *Strange*, 141 U. S. 87, 35 L. ed. 640; *Louis* v. *Brown Twp. Trustees*, 109 U. S. 162, 27 L. ed. 892; *Cromwell* v. *Sac County*, 94 U. S. 351, 24 L. ed. 195; *Russell* v. *Place*, 94 U. S. 606, 24 L. ed. 214; *Windsor* v. *McVeigh*, 93 U. S. 274, 23 L. ed. 914; *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. ed. 565; *Perry* v. *Dickerson*, 85 N. Y. 345, 39 Am. Rep. 663; *Remington Paper Co.* v. *O'Dougherty*, 81 N. Y. 474; *Durant* v. *Abendroth*, 97 N. Y. 132. The proceedings in Vermont were substantially in accordance with the statutes of that state. It is not enough, however, to show that the judgment was authorized by statute. In order to entitle it to full faith and credit in another jurisdiction, it must appear that the statute contemplated a judicial proceeding in conformity with the principles above stated.

It will be necessary to examine the proceedings had in the justice's court in Vermont with some detail, in order to see whether the judgment rendered is of such a character, and based upon such proceedings, as to make it conclusive upon the plaintiff in this action upon the question of fact which was in issue. On the 19th of September, 1893, less than three months after the note in question was made and delivered, a justice of the peace at Poultney, in Vermont, issued his summons directed to any constable in the state, commanding him to attach the goods of Eugene Ward, the plaintiff's husband, to the value of $200, and to notify him to appear before the said justice, at that place, on the 2d day of October following, to answer to Alonzo Herrick in a plea of the case, for that the defendant was indebted to the plaintiff in the sum of $200 for money had and received; and the constable was also directed to summon George B. Boyce, the defendant in this action, trustee of said Eugene Ward, to appear at the same time and place, to make disclosure, according to law, of the goods, rights, and credits of the said defendant, in his hands or possession. There does not appear to have been any proof before the justice when this process was issued, or any proof required by statute, of the important fact that Boyce was, in fact, the trustee of the debtor, or had any rights or credits in his hands subject to attachment or trustee process. That was assumed without any proof, so far as appears. The process described the husband, the principal defendant and debtor, as a resident of the state of New York, and the plaintiff and the alleged trustee as residents of Vermont. A constable made return to the justice, in writing, that on the 19th day of September, 1893, he served the writ personally on the trustee, and that he served it on Ward the same day, by delivering a copy to the trustee, said Ward being a nonresident of the state, with a list of the property attached. There is nothing in the return of the constable to show that he had, in fact, attached any property whatever. On the 2d of October, the return day of this process, the plaintiff appeared, and, as it appeared to the

justice that the defendant was out of the state, the cause was continued to October 9 thereafter. On the adjourned day the plaintiff again appeared, and, as the record states, "the defendant, being three times solemnly called, doth not come, but thereof makes default," judgment was entered in favor of the plaintiff, and against the defendant, Ward, for $172.45 damages and $4.24 costs.

This judgment is the foundation of the whole proceeding, and the only evidence that Ward was indebted to Herrick in any sum whatever. It will be seen that there was no service of process of any kind upon the nonresident defendant. The constable, it is true, states that he served Ward by serving on Boyce, his trustee, but there was nothing to show that he was such trustee in fact, and hence the service might just as well have been made upon any other citizen of Vermont, if the constable took care to describe him as a trustee. This is the only way that the justice got jurisdiction of the case. Up to this time there does not appear to have been the slightest proof that the defendant had any property within the state, or any credits in the hands of anyone, or that the alleged trustee played any part in the proceeding. But, the judgment being rendered, the record states that he appeared in court and made the disclosure that he was summoned to make, and this he did by an affidavit taken before another officer, in which he stated that he was the trustee summoned in the case; that on the 4th of September, 1893, he gave the plaintiff the note in this suit; that it was given for cattle sold to him by the plaintiff or in her name; that her husband was present at the sale; that the note was unpaid; that he had not at the time of the service of the writ, nor since, any goods, chattels, or credits of the defendant in his hands or possession, and he asked that, before judgment was rendered against him, the plaintiff in this action, who held the note, be cited to appear as claimant. There was nothing whatever in this disclosure or affidavit to raise any question with respect to the plaintiff's title to the note. All that appeared was that the defendant in this action purchased certain property of the plaintiff, for which he gave her the note in the presence of her husband. But on motion of Herrick, the alleged creditor, it was ordered that the hearing as to whether the trustee "shall be adjudged chargeable, and the sum mentioned in said disclosure adjudged to be held by said plaintiff in part satisfaction of said judgment," be continued to the 27th day of November, 1893, and that the wife, this plaintiff, be notified of the proceedings in the cause and cited to show cause why the sum mentioned in the disclosure should not be adjudged to be held by the creditor and applied upon his judgment; and that, as the wife was a resident of the state of New York, it was ordered that she be cited in and notice given to her, by delivering to her personally a certified copy of the record six days prior to the return of the citation. The record shows that the justice issued the citation, commanding the plaintiff in this action, by name, to appear before him on the 27th day of November, 1893, to show cause why the note in suit should not be adjudged to be held by Herrick as the property of her husband, in the judgment before rendered. This citation, with a copy of the record, was personally served by the sheriff upon the wife, at Montpelier, in Vermont, on November 21, 1893; and, the proof of such service having been returned to the justice, the record states that on the adjourned day the plaintiff, Herrick, appeared, but that "said Mary E. Ward, being thrice solemnly called, did not appear nor make claim in regard to the matters aforesaid." Whereupon, after hearing the plaintiff's proofs, it was adjudged that the note is the property of Eugene Ward, and that the same be held by Herrick against him and as his property, and judgment was rendered that the plaintiff in the proceedings recover of the trustee, this defendant, the sum of $151.57, and that upon payment thereof the maker be released and discharged from all liability on the note. It was not alleged or claimed that the defendant had ever paid this sum to anyone, but, perhaps, that is not very material.

The proposition of the defendant's counsel is that, by means of this proceeding, the plaintiff has been devested of her title to the note in suit, and that it has been transferred to another. It will be seen that the plaintiff, or the moving party in this Vermont action, was Herrick, and, while there are what might be called two judgments in the same action, the last was supplemental to the first, and, properly, the proceeding, from commencement to end, must be regarded as one action. But the plaintiff was not in any way made a party to it until the principal fact had been adjudged, which was that her husband was indebted to Herrick. Neither the husband nor the wife had any opportunity to contest that fundamental element in the litigation, and, unless that can be treated as a valid judgment in this jurisdiction, the subsequent proceedings for its enforcement must fail. It is the same as if a creditor in this state should inaugurate supplemental proceedings upon a void judgment. Any order or judgment made in such proceedings would also be void for want of jurisdiction. It is no answer to say that the plaintiff had personal notice of the final proceedings against the trustee. These proceedings rested upon the prior judgment, and unless that is binding upon her the rest of the proceedings must fall with it. The proceeding must be regarded as a whole from the time that the first process was issued until the adjudication against the trustee. The action was in the nature of a creditor's suit, by a creditor at large against the debtor and such third parties as had in their hands rights, credits, or equities applicable to the payment of the claim. The debt against the principal defendant, and the fact that the other parties held some property in trust for him, were, by the scheme of this suit, to be established in the same action. The initiatory step was to prove the debt and establish it by the judgment of the court, and unless jurisdiction was obtained for that purpose of the necessary parties the subsequent steps for its collection cannot stand. Since there was no jurisdiction of the debtor, and no opportunity for his wife to litigate the question upon which all other questions depended, the judgment ought not to conclude her in a subsequent action in another jurisdiction.

When a party seeks to prove a disputed fact

involved in the action by a former judgment, it must appear that the judgment was recovered in an action between the same parties or their privies. If the litigation was between other parties, though the same fact was in issue and determined, the judgment is neither a bar nor evidence. The Vermont action was not one between the plaintiff and the defendant, but between Herrick as plaintiff and Eugene Ward as defendant, and Boyce, the present defendant, as trustee. This plaintiff was not made a party to it in any form until after the judgment which adjudged that her husband was a debtor, and this defendant his trustee. On these vital questions, as already observed, she had no hearing and no opportunity to be heard. Nor did her husband, although the question whether he owed a debt to Herrick was the foundation of the whole proceeding. The most that can be said is that the plaintiff had notice of a part of the proceedings. But, before she was made a party by such notice, important questions affecting her had been decided. It is manifest that the object of the whole proceeding, from beginning to end, was to reach the note in suit, which she held as her own property. The judgment ought not to conclude her here, when it appears that she was not a party to the whole proceeding, but was brought in at the end under a permissive provision of the statute, and at a stage when she had no opportunity to litigate the fundamental issues in the action. So we think she was not a party to the former suit in that full and complete sense which the law implies, in order to conclude or estop her by the judgment in a subsequent litigation.

But a former judgment is not conclusive evidence of a fact sought to be established by it, unless it is made to appear that the same fact was in issue in the former suit; that it was material; and that it was determined. This may appear by the record itself, and when it does not, may be shown by extrinsic proof. *Bell* v. *Merrifield*, 109 N. Y. 202. *Bradshaw* v. *Agricultural Ins. Co.* 137 N. Y. 137. Now the fact sought to be proved by the record was that when this suit was commenced on the 20th of October, 1893, the plaintiff was not the owner of the note in suit. She certainly owned it then, since it was a month later when she was served with any process in the Vermont suit, and still later when the judgment against her was rendered. The pleadings in an action ordinarily relate to the situation and the facts as they exist at the time of the commencement of the action. If either party seeks to draw in subsequent events into the litigation, it must be done by supplemental pleading. Code Civ. Proc. § 544. It is important to bear in mind that this action was commenced more than a month before the judgment against the trustee in Vermont. That fact, though not found by the trial court, appears upon the brief of plaintiff's counsel, was asserted at the argument without denial, and is confirmed by the date of the summons. The defendant, however, made no attempt to resist the proceedings against him in Vermont upon the ground that he had also been sued for the same cause of action here. If he really felt that there was any danger of being made liable to pay the note twice, it is quite remarkable that he did not at least reveal to the Vermont court the actual situation.

The record of the proceedings in Vermont contains no pleading from which the actual issue between the parties can be determined, nor does it contain any findings of fact to show that the disputed fact involved in the present action was in issue, litigated, or determined in the Vermont court. No extrinsic proof that it was so litigated or determined was given on this trial. It is no answer to this to say that it must have been involved, since the justice rendered judgment for the plaintiff. We do not know and cannot conjecture upon what ground the judgment of the justice was based. There was only one ground that we can perceive upon which it could proceed according to any system of law in force where private rights are protected, and that was that, though the note was held by the wife, yet the debt which it evidenced was for the property of the husband, and that the gift of the note to the wife was fraudulent as to creditors. That proposition involved a variety of facts and circumstances familiar to courts of equity, but did not involve the legal title, possession, or right of possession of the note. There is no indication on the face of the record that such questions were in issue, litigated, or determined. If, however, any such question was in fact litigated and determined before a justice of the peace, that fact should have been shown at the trial by extrinsic proof before the record could conclude or estop the plaintiff. We have already observed that the Vermont record was not pleaded in bar, or by way of payment or satisfaction, but as conclusive evidence of the fact in issue. Since it was not in existence when this suit was commenced, it could not have been pleaded in bar or as payment or satisfaction except in a supplemental answer. It could probably have been given in evidence at the trial to prove the fact under the general denial. The only question with which we are now concerned is, What did it prove? Did it prove jurisdiction of the court? Did it prove that the plaintiff was a party to the former suit in the sense that she was concluded? Did it prove that the disputed fact was in issue, litigated, and determined in the former suit? If it failed at any of these points, it could not conclude the plaintiff. We think it did fail on one or more of these points for the reasons stated, and that the trial judge was not bound to give to it the merit and force of conclusive evidence.

If we were to consider the effect of this judgment outside of the issues in this case and apart from the objections above suggested, either as a bar or as payment or satisfaction, it would still, even in this broader view, be open to very grave objections. According to general principles of jurisprudence, a sister state or a foreign government may authorize its courts to seize or attach or take upon trustee process the property of a citizen of this state, domiciled and residing here, for the payment of debts, provided the property is found within the jurisdiction. In a proceeding *in rem* there must be jurisdiction of the *res*, and where there is, personal service of notice within the jurisdiction is not necessary. But, in order to bind the owner in a subsequent action in

this jurisdiction, the proceeding must at least be shown to have been orderly and conducted according to the rules of the common law for the protection of private rights. The property must be appropriated for the purpose by the judgment of some competent court, that has acquired jurisdiction by regular process, with some reasonable notice to the owner and an opportunity to be heard. We will not stop to inquire whether the laws of Vermont, which authorize the property of nonresidents to be taken upon trustee process issued by a justice of the peace, are a substantial compliance with these rules. It is quite certain, however, that in this case the creditor in that suit found no property of his debtor within the jurisdiction that could be seized or appropriated to the payment of the debt. The note in suit was not only payable to another party, but was held by that party in this state, where its legal situs was. It was in no sense property of the debtor within the state of Vermont, and, according to the settled doctrine of this court, the courts of that state had no power in such a proceeding to make any decree affecting its title or ownership. *Douglass* v. *Phenix Ins. Co.* 138 N. Y. 209, 20 L. R. A. 118; *Williams* v. *Ingersoll*, 89 N. Y. 508; *Osgood* v. *McGuire*, 61 N. Y. 524; *Plimpton* v. *Bigelow*, 93 N. Y. 592; *Straus* v. *Chicago Glycerine Co.* 46 Hun, 216, Affirmed 108 N. Y. 654. There was really no property of any kind belonging to the debtor found in Vermont to attach. A proceeding of this character, which in form is *in rem*, where the *res* was not within the jurisdiction, cannot estop or conclude the plaintiff in this action as to the fact which was put in issue. *Durant* v. *Abendroth, supra;* 1 Greenl. Ev. § 542; Story, Confl. L. § 549; *Robinson* v. *Ward*, 8 Johns. 86, 5 Am. Dec. 327.

Our conclusion is that the judgment record did not estop or conclude the plaintiff, with reference to the fact in issue. The finding of the trial judge, that the plaintiff was the owner and holder of the note, was supported by evidence, and is not against any proof in the case that controlled the question.

The judgment should therefore be affirmed.

Andrews, Ch. J., and **Gray** and **Vann**, JJ., concur. **Bartlett**, **Haight**, and **Martin**, JJ., concur in result.

VIRGINIA SUPREME COURT OF APPEALS.

G. A. WALLACE, *Plff. in Err.*,
v.
City of RICHMOND.

(........Va........)

1. Power of a city council to order the destruction of all the intoxicating liquors in the city and pledge the faith of the city to pay for them in anticipation of riot, lawlessness, and mob, as in case of the evacuation of Richmond in April, 1865, is not implied from charter provisions for by-laws, rules, and regulations necessary for good order and safety of the city and its people or property, and also prohibiting any private property to be taken for public purposes without compensation, even when the charter expressly provides that it shall be construed as a remedial statute in favor of the city.

2. A provision that the police may seize intoxicating liquors and shut up the houses in which they are kept, found in the act of February 12, 1863, in connection with the provision that the city council may enact ordinances and impose penalties for their violation in regulating the sale of intoxicating liquors, does not give power to destroy such liquors and bind the city to pay for them, but is clearly intended as a provision for a penalty imposed for violating such laws and ordinances.

(January 11, 1897.)

ERROR to the Circuit Court of the City of Richmond to review a judgment in favor of defendant in an action brought to recover the value of certain property destroyed by the authorities of the defendant city for the public good. *Affirmed.*

The facts are stated in the opinion.

Mr. **John Howard**, for plaintiff in error:

It was decided by this court in Jones against the city that the city council of Richmond had authority under its charter to contract to pay for the property it ordered to be taken and destroyed. *Jones* v. *Richmond*, 18 Gratt. 517, 98 Am. Dec. 695.

In *Richmond* v. *Smith*, 82 U. S. 15 Wall. 438, 21 L. ed. 202, the decision was accepted by the Supreme Court of the United States as settling the local law upon the subject. The case was recognized as good law, and distinguished as such by this court, in *Dinwiddie County* v. *Stuart*, 28 Gratt. 526.

The validity of the ordinance of 1865, as an exercise of the right of eminent domain, is *res judicata* and the established law of the state.

If the matter were *res integra*, the ordinance was valid and binding upon the city.

From the law of necessity, there are two great fundamental coincident and inherent powers, which, in the governments under written constitutions are sometimes specifically granted, regulated, or modified, but which, without specific grant, would be coexistent with the government, as imperatively essential incidents of sovereignty, and without which government itself would be incapable of executing its granted powers or fulfilling the functions and accomplishing the objects of its

NOTE.—As to right to compensation for property destroyed as a nuisance, see Orlando v. Pragg (Fla.) 19 L. R. A. 196, and *note*; Savannah v. Mulligan (Ga.) 29 L. R. A. 303; and Chicago v. Union Stockyards & T. Co. (Ill.) 35 L. R. A. 281.

See also 41 L. R. A. 566.

creation. These powers are known as the police power and eminent domain.

1 Bl. Com. 139; *Gardner* v. *Newburgh*, 2 Johns. Ch. 162, 7 Am. Dec. 526; Cooley, Const. Lim. 6th ed. 651, 526; 2 Story, Const. §§ 1956, 1790; *Pumpelly* v. *Green Bay & M. Canal Co.* 80 U. S. 13 Wall. 166, 20 L. ed. 557.

Neither power is expressly conferred upon the government of the United States by its Constitution, or upon the government of Virginia by its Constitution, and yet both powers are legitimately exercised by both governments, each in its proper sphere.

United States v. *Gettysburg Electric R. Co.* 160 U. S. 668, 40 L. ed. 576.

An American municipality is an incorporated political community organized upon the model of the Federal and state governments, and exercising as a political autonomy, within prescribed territorial limits, the essential powers of a representative republican government.

1 Dill. Mun. Corp. 4th ed. pp. 8 *et seq.*, and notes; Hannis Taylor on the Origin and Growth of the English Constitution, pp. 1-48.

If the act of its incorporation were silent upon the subject of the two fundamental powers,—the police power and the power of eminent domain, absolutely essential for the fulfilment of the governmental objects of its creation,—such powers would obviously of necessity be implied by the very fact of the creation and existence of such a political community.

Indeed, it is the common, if not the universal, custom to insert in written constitutions, in this country at least, and in municipal charters, limitations upon the exercise of both powers; and limitations would be implied if not expressed.

Tiedeman, Pol. Power, pp. 13-15; Cooley, Const. Lim. 6th ed. pp. 642, 703.

It is in view of these general principles that the amended charter of the city of Richmond of March 18, 1865, should be considered and construed; and it will be found that while the police power and eminent domain were conferred upon the city council in the amplest manner, *it was subject to an implied limitation* that lawful private property should not be taken or sacrificed for public use without just compensation.

There is an absolute necessity that the means in the government for performing its functions and perpetuating its existence should not be liable to be controlled or defeated by the want of consent of private parties, or of any other authority.

Cooley, Const. Lim. 6th ed. p. 645.

It is hard to conceive of larger terms for the grant of sovereign, legislative powers to the specified end than these thus employed in the charter; and they must be taken by necessary and unavoidable intendment to comprise the powers of eminent domain within these limits of prescribed jurisdiction.

Jones v. *Richmond*, 18 Gratt. 523, 98 Am. Dec. 695.

The inhibition not to take or use any private property for streets, or any other purpose, without making just compensation therefor is broad and general, and implies the previous existence of the right to take upon making just compensation.

Kohl v. *United States*, 91 U. S. 372, 23 L. ed. 451; 1 Hare, Am. Const. Law, p. 347; *Mississippi & R. R. Boom Co.* v. *Patterson*, 98 U. S. 406, 25 L. ed. 207; *United States* v. *Jones*, 109 U. S. 518, 27 L. ed. 1017.

But an act of assembly expressly conferring upon the city council of Richmond authority to do exactly what it did was passed on the 2d of April, 1865.

In the 5th Amendment to the Federal Constitution the inhibition not to take private property for public use without just compensation is coupled with the inhibition upon the states to pass any law in violation of the obligation of contracts, and the judicial interpretation and construction established as to the comprehensive and all-embracing sphere of that clause of the 5th Amendment, as including all contracts of whatever character, is equally applicable to its associate, which by the generality of its terms includes any use to which for the public good it might be deemed necessary or proper to be applied.

Dartmouth College v. *Woodward*, 17 U. S. 4 Wheat. 644, 4 L. ed. 661.

When the lawful use and existence of lawful private property, because of its nature or the changed circumstances in which it is placed, become, without any fault of its owner, so dangerous to the community as to require its seizure and destruction for the public benefit and protection, the police power ends, and the right and duty of eminent domain begins to act in its aid, and must be exercised in justice alike to the community and to the individual citizens whose property is sacrificed to the public good; and otherwise confiscation would rule rampant.

Stone v. *Farmers' Loan & T. Co.* (*"Railroad Commission Cases"*), 116 U. S. 331, 29 L. ed. 644; *Hutton* v. *Camden*, 39 N. J. L. 126, 23 Am. Rep. 203; *Janesville* v. *Carpenter*, 77 Wis. 313, 8 L. R. A. 808; *Wynehamer* v. *People*, 13 N. Y. 378; 2 Hare, Am. Const. Law, p. 771.

The property taken was perfectly lawful private property in lawful use, and was securely stored.

The city council of Richmond had no right or power to authorize it to be purchased and sold as a common article of merchandise and to tax it as such for years, when it knew the city was in constant danger of capture by the enemy, to await for the imminency of the actual occurrence, and then, under an apprehension of danger from its abuse, to sweep it out of existence without any process of law and without notice and without compensation to its owners.

Violett v. *Alexandria*, 92 Va. 566, 31 L. R. A. 382.

It was a question for the legislature of the city to decide as to the necessity and propriety of the exercise of a discretionary power, and its decision is the law of the case.

Martin v. *Mott*, 25 U. S. 12 Wheat. 19, 6 L. ed. 537; *United States* v. *Arredondo*, 31 U. S. 6 Pet. 691, 8 L. ed. 547; Cooley, Const. Lim. 6th ed. pp. 648, 663; *Secombe* v. *Milwaukee & St. P. R. Co.* 90 U. S. 23 Wall. 117, 119, 23 L. ed. 69; *Roanoke City* v. *Berkowitz*, 80 Va. 619; *Tait* v. *Central Lunatic Asylum*, 84 Va. 271; 4 Thomp. Corp. §§ 5592, 5612.

Eminent domain was so exercised by the

legislature of Massachusetts in abating a nuisance in Boston and the act was sanctioned by the supreme court of that state in *Dingley* v. *Boston*, 100 Mass. 544; *Sweet* v. *Rechel*, 159 U. S. 396, 40 L. ed. 195.

Under the Code of 1873, conferring powers upon towns to condemn lands, an ordinance of the city council of Roanoke exercising eminent domain in draining an area in the city was upheld and enforced by this court against the opposition of the city.

Roanoke City v. *Berkowitz, supra.*

Wherever by reasonable construction the constitutional limitation can be made to avoid an unrighteous exercise of police power, that construction will be upheld.

Tiedeman, Pol. Power, § 3, p. 10.

Private property is taken for public use when it is sacrificed to that use.

Pumpelly v. *Green Bay & M. Canal Co.* 80 U. S. 13 Wall. 177, 179, 20 L. ed. 560; *Wynehamer* v. *People*, 13 N. Y. 383.

Should it be urged that the ordinance was defective in not making a more specific provision for just compensation, it is sufficient to say that by pledging the faith of the city for that compensation, all of its resources were bound for the fulfilment of the obligation assumed, and that upon judgment against the city and execution returned *nulla bona*, mandamus would lie to compel the council to levy a special tax for the purpose of payment.

Walkley v. *Muscatine*, 73 U. S. 6 Wall. 483, 18 L. ed. 930; *United States, Moses*, v. *Keokuk*, 73 U. S. 6 Wall. 514, 18 L. ed. 934; *United States, Ranger*, v. *New Orleans*, 98 U. S. 387, 25 L. ed. 225; *Louisiana* v. *United States, Wood*, 103 U. S. 289, 26 L. ed. 358; *United States, Wolf*, v. *New Orleans*, 103 U. S. 358, 26 L. ed. 395.

The emergency excused a more formal and specific provision for compensation.

People v. *Hayden*, 6 Hill, 359; *Sweet* v. *Rechel*, 159 U. S. 406, 40 L. ed. 198.

The absence of a receipt is no defense to this action.

Richmond v. *Smith*, 82 U. S. 15 Wall. 430, 21 L. ed. 200.

If the ordinance could be construed as exacting such a requirement as a precedent condition of the liability of the city for just compensation, the condition would of necessity be held so unreasonable and unjust as to be *ultra vires* and void, while the ordinance itself and the obligation of payment would remain in full force and virtue.

Kirkham v. *Russell*, 76 Va. 961.

As the rights of the citizen to compensation for the value of his property arose under the exercise of the right of eminent domain, it could not be defeated by the nonperformance of a duty imposed by the ordinance upon its agents for its execution.

Norfolk & W. R. Co. v. *Dunnaway*, 93 Va. 29; *Campbell* v. *United States*, 107 U. S. 407, 27 L. ed. 593; *Williams* v. *Bank of United States*, 27 U. S. 2 Pet. 96, 7 L. ed. 360; *Manhattan L. Ins. Co.* v. *Warwick*, 20 Gratt. 614, 3 Am. Rep. 218; *Mutual Ben. L. Ins. Co.* v. *Atwood*, 24 Gratt. 497, 18 Am. Rep. 652; *New York L. Ins. Co.* v. *Hendren*, 24 Gratt. 540; *Connecticut Mut. L. Ins. Co.* v. *Duerson*, 28 Gratt. 630; *New York L. Ins. Co.* v. *White*, Insurance Law Journal for December, 1873, p. 917.

Mr. **C. V. Meredith**, for the City:

If the city was authorized by the common law to destroy the liquor without incurring any liability, and had no power given by its charter to pay for such losses, and yet should pay them, it would be making a voluntary gift.

Bowditch v. *Boston*, 101 U. S. 19, 20, 25 L. ed. 980.

If the statute gives it as a bounty, surely if the city gives it without statutory authority, it will not only be a voluntary, but an illegal, gift.

People, Brisbane, v. *Buffalo*, 76 N. Y. 561, 32 Am. Rep. 337; *Dunbar* v. *The Alcalde & Ayuntamiento*, 1 Cal. 355; *McDonald* v. *Red Wing*, 13 Minn. 38.

Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.

1 Dill. Mun. Corp. 3d ed. § 89.

Only such powers and rights can be exercised as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the objects of the grant.

Cooley, Const. Lim. 6th ed. pp. 231, 232. See also *Dunbar* v. *The Alcalde & Ayuntamiento, supra; Eufaula* v. *McNab*, 67 Ala. 590, 42 Am. Rep. 118; *Henke* v. *McCord*, 55 Iowa, 381; *Nashville* v. *Ray*, 86 U. S. 19 Wall. 468, 22 L. ed. 164; *Ravenna* v. *Pennsylvania Co.* 45 Ohio St. 118; *Smith* v. *Newburgh*, 77 N. Y. 136; and *Somerville* v. *Dickerman*, 127 Mass. 272.

The charter confers all the powers usually granted to a city for the purposes of local government, but that has never been supposed of itself to authorize taxes for everything which, in the opinion of the city authorities, would "promote the general prosperity and welfare of the municipality."

Ottawa v. *Carey*, 108 U. S. 110, 27 L. ed. 669.

No case could be found holding the act of destruction of the liquor one of eminent domain.

American Print Works v. *Lawrence*, 23 N. J. L. 615, 57 Am. Dec. 420; *Keller* v. *Corpus Christi*, 50 Tex. 614, 32 Am. Rep. 613; *Russell* v. *New York*, 2 Denio, 461; *Coates* v. *New York*, 7 Cow. 585.

The clause prohibiting the taking of private property without compensation is not intended as a limitation of the exercise of those police powers which are necessary to the tranquillity of every well-ordered community, nor of that general power over private property which is necessary for the orderly existence of all governments.

Sedgw. Stat. & Const. Law, 2d ed. p. 434; 2 Dill. Mun. Corp. 4th ed. § 955.

The act of destruction was, in fact, not the exercise of a local corporate power, but the exercise of a public power, for which the city would not be held responsible.

Keller v. *Corpus Christi, supra; Richmond* v. *Long*, 17 Gratt. 375, 94 Am. Dec. 461; *Burch* v. *Hardwicke*, 30 Gratt. 32, 32 Am. Rep. 640.

In some cases a man may justify the com-

mission of a tort, and that is in cases where it sounds for the public good; as in time of war a man may justify making fortification on another's land without license; also a man may justify pulling down a house on fire for the safety of the neighboring houses; for these are cases of the common weal.

Maleverer v. *Spinke*, 1 Dyer, 35*a; Mouse's Case*, 12 Coke, 63; *Case of the King's Prerogative in Saltpetre*, 12 Coke, 12; *Respublica* v. *Sparhawk*, 1 U. S. 1 Dall. 357, 1 L. ed. 174; *Lovey* v. *Arnold*, Comb. 417; *Bowditch* v. *Boston*, 101 U. S. 16–18, 25 L. ed. 980; *Ruggles* v. *Nantucket*, 11 Cush. 433; *Parham* v. *Decatur County Inferior Ct. Justices*, 9 Ga. 341; *Taylor* v. *Nashville & C. R. Co.* 6 Coldw. 646, 98 Am. Dec. 474; *New York* v. *Lord*, 18 Wend. 126; *Fort Worth* v. *Crawford*, 64 Tex. 202, 53 Am. Rep. 753; *Field* v. *Des Moines*, 39 Iowa, 575, 18 Am. Rep. 46; *Bishop* v. *Macon*, 7 Ga. 200, 50 Am. Dec. 400; *Dunbar* v. *The Alcalde & Ayuntamiento*, 1 Cal. 358; *United States* v. *Pacific R. Co.* 120 U. S. 227–234, 30 L. ed. 634–636; *Taylor* v. *Plymouth*, 8 Met. 465; *Keller* v. *Corpus Christi*, 50 Tex. 614, 32 Am. Rep. 613; *Fisher* v. *Boston*, 104 Mass. 87, 6 Am. Rep. 196.

The common-law doctrine of necessity is one that is now too firmly established to be drawn in question, and yet, perhaps, necessarily from its very character, it seems somewhat undefined as to its application and extent.

American Print Works v. *Lawrence*, 23 N. J. L. 604, 57 Am. Dec. 420; *Ruggles* v. *Nantucket*, 11 Cush. 435.

The right to destroy property to prevent the spread of a conflagration has been traced to the highest law of necessity, and the natural rights of man, independent of society or civil government.

Surocco v. *Geary*, 3 Cal. 73, 58 Am. Dec. 385; *Fields* v. *Stokley*, 99 Pa. 306, 44 Am. Rep. 109; *Meeker* v. *Van Rensselaer*, 15 Wend. 397; *Harrison* v. *Wisdom*, 7 Heisk. 99.

Necessity makes that lawful which would be otherwise unlawful.

Trollop's Case, 8 Coke, 69.

It is the law of a particular time and place.

1 Hale, P. C. 54.

It overcomes the law.

Hob. 144.

And it defends what it compels.

1 Hale, P. C. 54.

The want of the receipt in this case is like a failure to produce an architect's or engineer's certificate or estimate, so frequently required in contract as a condition precedent to the assertion of a claim. In such cases in order to be relieved from the necessity of obtaining such certificate or estimate before bringing suit it is necessary to show that it was withheld by unfairness or fraud.

Condon v. *South Side R. Co.* 14 Gratt. 302; *Baltimore & O. R. Co.* v. *Polly*, Id. 447; *Morgan* v. *Birnie*, 9 Bing. 672; *Milner* v. *Field*, 5 Exch. 829.

In cases like this even a stricter rule is enforced.

Bowditch v. *Boston*, 101 U. S. 16, 25 L. ed. 980; *Ruggles* v. *Nantucket*, 11 Cush. 433; *Taylor* v. *Plymouth*, 8 Met. 465; *Stone* v. *New York*, 25 Wend. 178; *People, Brisbane*, v. *Buffalo*, 76 N. Y. 561, 32 Am. Rep. 337; *Gilman* v. *Milwaukee*, 61 Wis. 594.

Discretionary powers which are granted to one person or body cannot by that person or body, without leave, be delegated to another.

State v. *Fiske*, 9 R. I. 94; *State, Danforth*, v. *Paterson*, 34 N. J. L. 163; *Ruggles* v. *Collier*, 43 Mo. 353; *State, Winants*, v. *Bayonne*, 44 N. J. L. 114; *Birdsall* v. *Clark*, 73 N. Y. 76, 29 Am. Rep. 105; *Ex parte Winsor*, 3 Story, 411; *Minneapolis Gaslight Co.* v. *Minneapolis*, 36 Minn. 160; *Young* v. *Blackhawk County*, 66 Iowa, 460; *Hannon* v. *Agnew*, 96 N. Y. 439; *New York* v. *Pentz*, 24 Wend. 673.

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

This is a writ of error to a judgment of the circuit court of the city of Richmond.

The suit was brought in June, 1871, to recover of the defendant in error, the city of Richmond, the value of liquor claimed to have been the property of the plaintiff in error, of the alleged value of $30.000, destroyed during the night of April 2, 1865, a few hours before the city was evacuated by the Confederate forces, and entered by the Federal army.

The resolutions adopted by the council of the city at a called meeting of that body in the afternoon of April 2, 1865, and by authority of which it is alleged the liquor was destroyed, are as follows:

"(1) Resolved, that it is the imperative duty of this council, in case of the evacuation of the city by the government and army, to provide as far as it can for the immediate destruction of the stock of liquor in the city.

"(2) Resolved, that a committee of twenty-five citizens in each ward be appointed by the president to act in behalf of the city, and proceed at once to accomplish this object; that said committee destroy on the premises all the liquor they can find, giving receipts for the same to the holders.

"(3) Resolved, that the faith of the city be, and is hereby, pledged for the payment of the value of all liquors so destroyed to the holders of said receipts."

After the adoption of the above resolution, the following resolution was offered and adopted, *viz.*:

"Resolved, that the committees under Mr. Burr's resolutions be instructed to proceed to carry them out when General Lee orders an evacuation of the city, but they shall at once, if practicable, remove the same to some warehouse, where it can be guarded, and destroyed when necessary."

The declaration contained a special count setting forth the facts, including the fact that the plaintiff was not given a receipt for his liquor, to which were added the common counts in assumpsit.

A demurrer was filed by the defendant to the declaration as a whole and to each count thereof, which was sustained as to the special count, and overruled as to the common counts.

At the trial upon the plea of nonassumpsit, November 27, 1893, the plaintiff offered in evidence a copy of the resolutions of the city council, and evidence tending to show that his liquor was destroyed in pursuance of the resolutions, and the amount and value thereof, but that the committee superintending the destruction failed to give a receipt for the same. To

the introduction of this evidence, other than the copy of the resolutions, the defendant objected, on the ground that the committee gave no receipt for the liquor so destroyed, which objection the court sustained, and refused to permit this evidence to go to the jury, to which ruling the plaintiff excepted. A verdict was then found for the defendant, and the plaintiff moved the court to set it aside, as contrary to the law and the evidence, and grant him a new trial, which motion the court overruled, and entered judgment for the defendant, to which action of the court the plaintiff again excepted.

We do not deem it at all necessary to consider the questions of pleading and practice made by the record, nor the question whether or not it is essential to a recovery in the case that the plaintiff should have had the receipt contemplated in the resolutions. Suffice it to say upon this question that we construe the expression in the resolutions "giving receipts therefor" as merely directory to the committees appointed to superintend the destruction of the liquor, and as intended to furnish a convenient mode of evidence as to the property that might be destroyed; that such a receipt would not constitute conclusive evidence as to either the citizen or the city, for it could be contradicted or explained by either party, and therefore it could not be considered as a condition precedent to the liability of the city. 1 Greenl. Ev. § 305; Parsons, Cont. 5th ed. 555; Bishop, Cont. (New) § 176.

The main question—indeed, we may say the all-absorbing question—for our determination is: Did the council have the right, under the law, to direct the destruction of the plaintiff's liquor, and bind the city to pay him for it?

There are two adjudged cases that grew out of the destruction of liquor on the 2d of April, 1865, under the resolutions of the council set out above; and they are cited in support of the assignment of error to the judgment of the court below.

The one is *Jones* v. *Richmond*, decided by this court, and reported in 18 Gratt. 517, 98 Am. Dec. 695, and the other *Richmond* v. *Smith*, decided by the Supreme Court of the United States, 82 U. S. 15 Wall. 437, 21 L. ed. 202.

We do not, however, understand that the decision in the last-named case has any controlling influence in the consideration of the question before us. At the trial of that case in the lower court, the defendant demurred to the declaration, which demurrer was overruled: whereupon the defendant offered two special pleas: (1) That the city never contracted or assumed the debt, and (2) that the property would have been destroyed by fire on the morning of April 3, the day of the evacuation, even if the committee had not poured it out on the street during the night of the 2d.

The plaintiff took issue on the first plea, and demurred to the second, which demurrer was sustained, and the case heard upon the first plea by the judge, without a jury. The court gave judgment against the city, and an appeal was taken.

In the opinion of the supreme court, it clearly appears that the court considered that, under its rules, notice could not be taken of the issue under the first plea or of the demurrer to the declaration. Indeed, the opinion says that "nothing is open to examination in this case except the ruling of the court in sustaining the demurrer of the plaintiff to the second plea of the defendant."

In concluding its opinion, the supreme court uses the following language:

"Suppose, however, the exceptions to the judgment are sufficient to raise the questions which the defendants desire to present for decision, still the court would feel constrained to affirm the judgment upon the ground that the supreme court of the state have decided in an analogous case that the corporate authorities of the city had authority under the charter of the city to make the order for the destruction of the liquors and to give the pledge for payment, and that the defendants are responsible for the value of the liquors destroyed under that order. State courts certainly have a right to expound the statutes of the state, and having done so, those statutes, with the interpretation given to them by the highest court of the state, become the rules of decision in the Federal courts."

It is obvious from this extract from the opinion of the supreme court that the opinion and judgment of this court were followed without any independent investigation as a correct interpretation of the statute of the state, and its decision, therefore, adds nothing to the authority of *Jones* v. *Richmond.*

In *Jones* v. *Richmond*, *supra*, it was contended for the city "that the corporation was not liable, on two grounds: First, because the destruction of these stores was the result of that urgent necessity which on common-law principles deprives the sufferer of indemnity; and, secondly, if not to be so regarded, it was an exercise of eminent domain, not pertaining to the corporation, either by express or implied delegation of powers to that end, in its charter or the general laws of the state." The court, in its opinion, by Rives, J., does not discuss the first defense, but recognizing, as it would seem, the principle contended for, proceeds to maintain that, whatever might be the common-law rule as to indemnity and the necessity for the act, yet, in the destruction of the liquor, the act itself was one of eminent domain. It quoted from the charter the provision which authorized the council of the city "to pass all by-laws, rules, and regulations which they shall deem necessary for the peace, comfort, convenience, good order, good morals, health, or safety of said city, or of the people or property therein," also that provision prohibiting the city from "taking or using any private property for public purposes, without making to the owner or owners thereof just compensation for the same," and held that the city was liable under those two provisions.

Referring to the provision of the charter first quoted, and which is commonly known as the "General Welfare Clause," it is said: "It is hard to conceive of larger terms for the grant of sovereign, legislative powers to the specified end than those thus employed in the charter; and they must be taken by necessary and unavoidable intendment to comprise the powers of eminent domain within these limits of prescribed jurisdiction." No authorities are cited

in support of the construction given to the charter, and the opinion recognizes that it is not sustained by the ad judged cases. The view taken by the court was that, the general welfare clause having conferred upon the city the power of eminent domain, there were two modes open to the council: First, to direct the destruction of these stores, leaving the question of the city's liability therefor to be afterwards litigated and determined; or, secondly, assuming their liability, to contract for the values destroyed under their order, and that, the council having adopted the latter mode, it was made a matter of contract. "In this," says the opinion, "they seem to be well justified. They found themselves inhibited by the terms of their charter, § 49, from 'taking or using any private property for public purposes, without making to the owner or owners thereof just compensation for the same.' I *am well aware the exception is taken in adjudged* cases that such destruction is not within this language; but, coupled with the inherent equity of such a course, this language was persuasive to the actual agreement for payment, and should be accepted as a probable and reasonable motive with the council."

While we recognize that one of the primary and fundamental capacities of a corporation is "to contract and to be contracted with," we find ourselves wholly unable to concur in the view taken by this court in *Jones' Case*, that the charter of the city of Richmond in force April 2, 1865, conferred upon the council of the city the power and authority, in the exercise of eminent domain, to direct the destruction of the plaintiff's liquor, and bind the city by contract or otherwise to pay him for it.

Judge Dillon, in his work on Municipal Corporations, in a note to § 443, wherein the extent of the power of municipal corporations to make contracts is discussed, after citing numerous authorities in support of the view taken in the text, reviews the decision of this court in *Jones* v. *Richmond, supra*, and says: "Upon the general principles of construction, the author doubts whether the order for the destruction of the liquors was within the scope of the corporate powers of the city." Referring in this note to the decision of the Supreme Court of the United States in *Smith's Case, supra*, this author says that the Supreme Court of the United States followed, without examination into its correctness, the exposition of the charter given by the state court in *Jones* v. *Richmond, supra*, and refers to §§ 89, 90, and 91 of his work, where the rules of construction of charters of municipal corporations are discussed, and the adjudicated cases are cited.

In § 89 he says: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied."

This rule is recognized in a great number of authorities cited, though stated in some of them in different form, but to the same effect.

The common-law principle upon which the city relies in the case before us, as giving the council or any citizen authority to destroy the liquors for the public good or the public safety, with exemption from liability, is not controverted on behalf of the plaintiff in error. It is the contention of his learned counsel that the liquor was destroyed in the exercise of the right of eminent domain, in aid of the police power of the city, and therefore the city is bound to pay its value. He does not claim that the requisite authority in the council was conferred in express terms in the charter, but by *implication* or intendment, under the rules of construction applicable.

The charter of the city of Richmond in force April 2, 1865, contains the following provision, not usually found in such charters, *viz.:*

"Sec. 97. *This act* shall be construed in relation to the powers conferred upon the city, as a remedial statute in favor of the city."

This provision of the charter seems to be greatly relied upon by plaintiff in error, and, without doubt, changes the rule of construction. The charters of municipal corporations are ordinarily to be strictly construed. By virtue of the provision under consideration, the charter of the city of Richmond is to be construed liberally. It is, however, but a rule of construction. It is designed to ascertain the extent of the powers granted, and is in no sense in itself an independent grant or source of power. Where a doubt exists as to whether or not a municipal corporation may exercise a particular power, that doubt must, under the rule requiring a strict construction of such instrument, be solved by denying the existence of the power (see *Winchester* v. *Redmond*, 93 Va. 711); while, under a rule requiring a liberal construction, such doubt would be solved in favor of the existence of the power; but it still remains that in respect to the charter of Richmond, as of all other municipal charters, *the power claimed must be conferred either in* express terms, or by fair construction of or inference from the express grant of powers contained in the charter, and will not be presumed or assumed to exist. No reference to this provision is made in the case of *Jones* v. *Richmond, supra*, and presumably it was not relied on in that case.

The right to appropriate private property to public use lies dormant in the state, until legislative action is had pointing out the occasions, the modes, conditions, and agencies for its appropriation. It cannot be presumed that any corporation has authority to exercise the right of eminent domain until the grant is shown. Cooley, Const. Lim. 4th ed. p. 657, and authorities cited in note 1.

Section 49 of the charter of Richmond City, from which the opinion in *Jones* v. *Richmond, supra*, quotes the provision relative to taking private property for public uses, etc., is as follows:

"The council shall not take or use private property for streets or other public purposes without making to the owner or owners thereof just compensation for the same. But in all cases where the said city cannot by agreement obtain title to the ground necessary for such

purposes, it shall be lawful for the city to apply to and obtain from the court of the county of Henrico, or the circuit court thereof, if the subject proposed to be condemned lies in said county, or to the court of hustings held by the judge thereof, or the circuit court of the city, if the subject lies within the city, for authority to condemn the same, which shall be applied for and proceeded with as provided by law."

This is the only provision in the charter conferring upon the city the power of eminent domain. The power is here granted for a certain and well-defined purpose, and is to be exercised under prescribed conditions, *viz.*, when the city needs "ground for the purpose of opening or extending its streets," or for other public purposes, and is unable to acquire title to it by agreement with the owner.

In construing statutes, the legislative intent is to be looked to, and it would therefore seem an irresistible conclusion that if it had been the intention of the legislature to confer upon the city of Richmond, by its charter enacted March 18, 1861, and in force April 2, 1865, the power to exercise the right of eminent domain in the taking or destruction of any property for public uses other than land, it would have been conferred in terms as explicit and as well defined as the power to take land for the uses of the city is conferred in § 49 of the charter. Certain it is that that section was never intended to apply to the destruction of liquor.

In *Winchester* v. *Redmond, supra*, it was held that, in the absence of express authority by its charter or by general law, the council of the city of Winchester had no authority to offer a reward for the detection of criminals; that authority to do so cannot be implied from the general welfare clause of its charter. It was said by Riely, J., who delivered the opinion of the court in that case, when referring to the general welfare clause in the charter of Winchester, which is almost in the very words of that clause in the charter of Richmond: "This language, though very broad, is yet not without its proper limitation. It is to be construed with reference to the object contemplated by the state in the grant of the charter, and the extent of the power it confers is to be measured and limited by the purposes for which the corporation was created. A municipal corporation is a local and subordinate government, created by the sovereign authority of the state, primarily to regulate and administer the local and internal affairs of the city or town incorporated, in contradistinction to those matters which are common to and concern the people at large of the state. And it is only in regard to the local and internal affairs of the city or town that its council, unless expressly authorized, has the right to legislate."

It was said by Staples, J., in *Burch* v. *Hardwicke*, 30 Gratt. 34, 32 Am. Rep. 640: "When the mob rages in the streets, when the incendiary and the assassin are at work, they do not offend against the city, but against the state." Again: "The administration of justice, the preservation of the public peace, and the like, although confided to local agencies, are essentially matters of public concern; while the enforcement of municipal by-laws, the establishment of gasworks, of waterworks, the construction of sewers, and the like, are matters which pertain to the municipality, as distinguished from the state at large."

Had the liquor in the city been destroyed by authority of the state to keep it out of the hands of the invading army, no recovery of its value could have been had by its owners; but the resolutions of the council clearly show that the liquor was ordered to be destroyed in anticipation of riot, lawlessness, and the mob, the suppression of which pertains to the sovereign power of the state, though confided to local agencies, the officers of the city. Under these circumstances and surroundings, the council of the city undertake the destruction of all liquors within the limits of the city, and to pledge the faith of the city to pay for them. The power to do this is not, in our opinion, necessarily or fairly implied in any express power granted to the city; and its possession was not indispensable to the performance of its corporate duties, or the accomplishment of the purposes of its incorporation, whether the provisions of its charter be construed liberally or according to the general rules of construction applicable to such statutes.

Counsel for plaintiff in error brings to our attention an act of the legislature passed February 12, 1863 (Acts 1862–63, p. 106), which, it is claimed, escaped the attention of the court and counsel in the *Jones Case*; and it is contended that this act conferred upon the city council of Richmond authority to do exactly what it did do on the 2d of April, 1865. The title of the act is "An Act to Enlarge the Powers of the Council of the City of Richmond."

The act provides that the council of the city be, and the same is hereby, authorized to suppress riots and unlawful assemblies in the said city, to suppress gaming and gambling houses, tippling and tippling houses, and to prevent and regulate the sale of spirituous and fermented liquors within the said city, and around the same, to the boundaries in which the jurisdiction of its corporation courts of officers of police extends in criminal cases; that, for the purpose of executing the powers and authority thereby vested in said council, the council might enact ordinances and impose penalties for the violation thereof, by fine and imprisonment, might authorize and empower the proper officers and police of the city to seize such liquors sold or kept for sale for the use of the city, and shut up the houses in which such liquors are kept, etc.; and that the officers and police of the city should have the same powers and authority in discharging their duties under such ordinances as state officers have in cases of breach of the peace.

Section 2 confers authority upon the council to establish armed police, and appoint officers thereof, etc.

The prime object of this statute, and its legal force and effect, were to enlarge the police power of the city, and to extend this power beyond the limits of the city to the limit of the city's criminal jurisdiction, and for a specific purpose, *viz.*, "to suppress gaming and gambling houses, tippling houses, and such like."

There is neither in express terms, nor by fair and reasonable construction, conferred upon the council of the city by this act the power to destroy the property of its citizens, and bind the city to pay for it. The taking and holding

liquors for the use of the city, authorized by the act, was clearly a part of the penalty authorized to be imposed for the violation of the laws or ordinances regulating the sale of liquors, or prohibiting gambling houses, tippling houses, and the like.

Two adjudicated cases in point are cited in support of the position that the power of eminent domain may be exercised in aid of the police power. The one is *Dingley* v. *Boston*, 100 Mass. 544, and the other, *Sweet* v. *Rechel*, 159 U. S. 396, 40 L. ed. 195, but both of these cases arose in the state of Massachusetts, where there are statutes authorizing and regulating the exercise of eminent domain in aid of the police power. We have no such statutes in Virginia. Moreover, if such were the case, there could be no exercise of the right of eminent domain in aid of the police power, unless the power of eminent domain was conferred upon the city by its charter or the general statutes of the state. Our view is that the right of eminent domain was not conferred upon the city by its charter or general statutes, so as to authorize it to take or destroy the liquors within its limits on April 2, 1865, in aid of the police power or otherwise; and, being without this power, the promise to pay was *ultra vires*, and therefore void.

Against the liability of the city in the case at bar, the authorities are numerous, and, we may say, the line unbroken, except by the decision in the *Jones Case*, a decision founded upon a construction of the charter of the city, unsustained by any authority cited; and, as we cannot concur in the construction of the charter given in that case, *the judgment of the court below in this must be affirmed.*

Rehearing denied.

WISCONSIN SUPREME COURT.

Albert G. MAYO *et al.*, *Appts.*,
v.
MILWAUKEE AMUSEMENT COMPANY
and
Emil J. HANSEN, *Respt.*

(........Wis........)

1. **The treasurer of a private corporation** having, as such, moneys of the corporation in his hands, may be garnished on a judgment against the corporation, under Rev. Stat. § 3719.

2. **An appeal involving the question of a garnishee's liability** on a judgment for more than $100, including costs, involves more than $100, although the original debt, exclusive of costs, may have been less than $100.

(December 15, 1896.)

APPEAL by plaintiffs from a judgment of the Superior Court for Milwaukee County in favor of the defendant garnishee in a proceeding brought to reach funds in his hands

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NOTE.—*Garnishment of an officer or agent of a corporation to secure a demand against the corporation.*

I. *Differentiation.*
II. *Basic principles.*
III. *Application to agents.*
IV. *Application to officers.*
V. *Conclusion.*

I. *Differentiation.*

From consideration of public policy courts will not permit the garnishment of a fund in the possession of a municipal corporation or of its officers or agents. No considerations of public policy arise in connection with cases in which private corporations or their officers or agents are involved. Therefore the principles of law propounded in the former class of cases cannot be invoked in aid of the latter class.

The laws of the different states, with few exceptions, will not permit the garnishment of the officers of public corporations, from consideration of public policy, it is said, and because the usefulness of public servants would thereby be impaired, but no considerations of public policy arise in the case of private corporations.

The officers and agents of private corporations come more nearly within the rules applicable to agents of individuals, and yet those rules are not always applicable, for the reason that agents are in many cases "the very hands of the company" but can never be such to individuals.

II. *Basic principles.*

"Only such demands can be subjected to garnishment as could be recovered in an action of debt or in *indebitatus assumpsit*."

"The liability of the garnishee to garnishment is always measured by what is owing from the garnishee to the principal defendant."

"A debt, to be subject to garnishment, must be one for which an action at law can be maintained by the principal debtor."

"The garnishee is not chargeable unless the defendant could recover in his own name and for his own use that which the plaintiff seeks to secure by garnishment."

"Where a creditor cannot sue, then a garnishee shall not be held liable."

"Garnishment is a subrogation of the plaintiff to the rights of the defendant, and he can only recover what the defendant could at suit at law."

"A garnishment creditor stands in the shoes of his debtor."

"The garnishing creditor can have no greater right to recover from the person garnished than the debtor whose demand against the garnishee is being enforced."

"The garnisheeing creditor cannot be permitted to change the condition of the obligation of the garnishee to the principal debtor."

"Money held by a person under such circumstances that he cannot deal with it as his own is not subject to garnishment."

"In every garnishment case there must be a debtor and a creditor and a third person, who has in his possession money or property belonging to the principal debtor."

These are principles too frequently reiterated to be now disputable, and too well known to need the citation of authority to support them.

III. *Application to agents.*

It is said in Pennsylvania that "the purpose of an attachment execution [process of garnishment] is

alleged to belong to the defendant company. *Reversed.*

Statement by **Pinney, J.**:

This action was a proceeding by garnishment against the respondent, in the action of Albert G. Mayo and others against the Milwaukee Amusement Company, in justice's court. From a judgment there rendered in favor of the plaintiffs, against the garnishee, for $102.17, the amount of the damages and costs in the principal action, and the costs of the garnishee action, taxed at $6.10,—in all, $108.27,—the latter appealed to the superior court of Milwaukee county. The answer of the garnishee disclosed the fact that he, as treasurer of the defendant corporation, had money in his possession belonging to it, to the amount of $500, but that he was not in any manner indebted to the defendant corporation, and had no other money or property belonging to it in his possession or under his control. Upon the facts thus stated, that court found that the garnishee, Hansen, was in no manner indebted to the defendant corporation, and did not, when served with process of garnishment, have, and has not, any personal property, money, credits, or effects in his hands, or in his possession, or under his control, belonging to the defendant, subject to garnishment; and, as a matter of law, that he was in no manner liable as garnishee in the action. Judgment was given in favor of the garnishee, dismissing proceedings against him, with costs, from which the plaintiffs appeal to this court.

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to reach the effects of the defendant in the hands of third persons. Here, the defendant is a corporation, a railroad company. Are its ticket agents to be treated as third persons, so far as regards money received by them in the sale of tickets to passengers? We think not. We suppose that the case speaks of the ordinary ticket agents employed at the offices of the company; and of these we speak. These are the very hands of the company; it cannot do its business without them; and if an attachment execution is to be regarded as arresting money received after its service, then it would always occasion the dismissal of such agents, in order to prevent such a result. We do not undertake to define the class of agents that fall within the principles here decided. We shall be able to do this better by awaiting the instructions of experience." Fowler v. Pittsburgh, Ft. W. & C. R. Co. 35 Pa. 22.

The funds of a corporation cannot be attached in the hands of its officer, agent, or employee as garnishee. Muhlenberg v. Epler, 2 Woodw. Dec. 17.

In Zucker v. Froment, 5 Pa. Dist. R. 579, it is held that an agent of a foreign corporation who may have contracted debts for it cannot be held as garnishee in a suit of foreign attachment against such corporation; but the ground of the decision appears to be that he had nothing in his hands which could be garnished. The court says: "The only question is whether he has in his hands money or property belonging to the corporation."

Garnishment of money in the hands of a ticket agent, which he had received for tickets and freight, was denied in Pettingill v. Androscoggin R. Co. 51 Me. 370, when this was attempted in a suit by a creditor of the railroad company. The court said this could not be garnished because the agent's possession "is the actual possession of the company, like that of its treasurer." In support of this decision the court said:—"The property must be in fact in the hands of a person other than the debtor. Therefore, the mere servant of the debtor, having care of his goods under his direction, would not be liable upon this process, unless he should do something to prevent them from being attached. . . . The process is intended for a case in which, for some purpose, the goods are out of the personal possession of the debtor. It is for this reason that the cashier of a bank, or a treasurer of any other corporation, is not chargeable as the trustee of such corporation, though some of the property in his custody would be attachable. . . . The corporation, as such, has no personalty except in the persons of its agents. It can act only by agents. By them alone can it possess its property and exercise its corporate functions. In doing this, their acts and possessions are its own, not constructively, as in the case of agents of persons, but actually. In this respect corporations differ from persons. In one the act or possession of the agent is constructively that of his principal; in the other it is actually so. There may be a limit to the application of this principle. A corporation may employ an agent who is not invested with its personalty. A railroad company does employ a large number of such agents, in carrying on its business. Such agents having the property of the corporation in their possession may be held as its trustees. But some of the agents of the corporation must, in this respect, be considered as the corporation; and they cannot be charged as its trustees, for the reason they *quoad hoc* are the same. It may not be easy to draw the line between these two classes of agents. But we cannot doubt that those who are appointed to exercise the corporate functions, as its regular agents in doing the business for which the corporation was organized, must be considered as identical with the corporation in such business. . . . The acts of such agents, and their possession of the corporate property, must be considered as the actual acts and possession of the company; and they cannot be held as its trustees."

On the same principles, where an agent in Maine contracted a policy of insurance for his principals in London, and after a loss occurred was garnished as its agent but disputed the liability of his principals, the court held his answer sufficient, and said that even if the plaintiff had maintained an action on the demand, and recovered a judgment against the company (copartnership), it would not follow that the agent was answerable as its trustee; saying further: "Indeed, no state of facts which could arise out of the transaction stated by him could fix him as trustee" to the garnishment plaintiff. Wells v. Greene, 8 Mass. 504.

In all the cases in which the reason is stated why the agent is held liable as a garnishee, it is where the court has considered him, not as an integral part of the corporation, but as a distinct entity, liable to the corporation. This is true on principle, where the cause of action has arisen in favor of the corporation and against the agent, but where such cause of action has not arisen, garnishment cannot, by strict rule of law, be maintained. *Supra*, II., *Basic principles.*

The case of Littleton Nat. Bank v. Portland & O. R. Co. 58 N. H. 104, holds a station agent liable as garnishee. It cites, to authorize its decision, the case of Smith v. Boston, C. & M. R. Co. 33 N. H. 337, in which it was decided that one railway company may be held as garnishee of another railway company for money collected for freights and passengers, and then says: "And no reason appears why an individual, collecting such moneys for a railroad, should not as well be made liable as its trustee" (garnishee). The court expressly declares: "The station agent is not a constituent part of the corporation. He is a servant, and, in a limited sense, an agent of that body, with special duties assigned

Mr. **Edgar L. Wood**, for appellants:

The treasurer or other officer or agent of a private corporation is liable as a garnishee of the corporation defendant.

Everdell v. *Sheboygan & F. du L. R. Co.* 41 Wis. 395; *Ballston Spa Bank* v. *Marine Bank,* 18 Wis. 491; *Curtis* v. *Bradford,* 33 Wis. 190.

An agent holding property of his principal is liable as garnishee of his principal, defendant. The treasurer or other officer of a corporation is the agent thereof, and is likewise liable.

Curtis v. *Bradford,* 33 Wis. 190; *Storm* v. *Cotzhausen,* 38 Wis. 139; *Felch* v. *Eau Pleine Lumber Co.* 58 Wis. 431; *Greene & B. Co.* v. *Remington,* 72 Wis. 648; *La Crosse Nat. Bank* v. *Wilson,* 74 Wis. 391; *First Nat. Bank* v. *Davenport & St. P. R. Co.* 45 Iowa, 120; *Hughes* v. *Oregonian R. Co.* 11 Or. 158; Rood, Garnishment, § 43.

Being remedial in its nature the statute should be liberally construed.

Buffham v. *Racine,* 26 Wis. 465.

Even if it be held that the money is under the control of the corporation, yet the treasurer is liable as garnishee.

Greene & B. Co. v. *Remington,* 72 Wis. 658.

Mr. **D. S. Rose** for respondent.

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

The statute under which it is sought to charge the defendant is that the garnishee, from the time of the service of the summons, "shall stand liable to the plaintiff to the amount of the personal property, money, credits, and

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to him, and having no general authority. He has no discretion in the disbursement of money received by him, except to pay it to the corporation on its order, and in default of such payment may be sued for its recovery."

In Chapin v. Connecticut River R. Co. 16 Gray, 69, it is held that a railway company doing business for another railway company in the collection of freights, etc., as a connecting line cannot be held as a garnishee in a suit against the latter, when the money in the hands of the former is only due to the latter as an agent or trustee of a third company owning a connecting line. This case, however, depends for its decision upon the principle that "when the property of a principal can be ascertained and separated, the creditors of an agent cannot be allowed to appropriate it to the payment of their debt."

The case of Central Pl. Road Co. v. Sammons, 27 Ala. 380, holds that a toll-gate keeper may be held as garnishee in a suit against a plank-road company for the reason that the statute says the attachment may be executed "by summoning any person indebted to, or having in his possession, or under his control, property belonging to the defendant. The garnishee in this case certainly comes under one or the other of the classes described by the statute. If he holds the funds as a mere depositary for the company, he holds its property or effects; if he does not, yet, having collected such funds, he is indebted to the company."

The court said in this case that the toll-gate keeper "does not materially differ from any other agent who collects money for his principal." It was said that he had collected money, and that the company could sue for it, and that "conceding that, in order to maintain such suit there must be a demand and refusal to pay, yet the reason of this rule—which was to prevent agents who acted in good faith from being put to costs by suit before they were put in default—does not apply to cases of garnishment, since the creditor has no right to demand it except by summons, and the garnishee is protected against the cost."

In Curtis v. Bradford, 33 Wis. 190, a resident ticket agent was held liable as a garnishee in an action against a nonresident railway company by which he was employed, but the court did not state on what principle he was liable.

Hughes v. Oregonian R. Co. 11 Or. 158, holding one corporation to be merely a stockholder in another corporation, further held that property in the hands of a stockholder of a corporation may be garnished when such property or fund has not been declared a dividend. If it had been declared a dividend it would be the property of the stockholder, but when not he (or it) has no greater right to maintain it than an entire stranger would have. He (it) has no legal title, and simply had possession of the funds belonging to the creditor.

An attorney for collection was, in Felch v. Eau Pleine Lumber Co. 58 Wis. 431, held as garnishee on an attachment against the company for whom he had collected a fund. No case was cited and no principle laid down, but the attorney in this case had applied the money contrary to the instructions of the company for which he had collected it, and therefore as an action would lie at suit of his principal, garnishment would lie on general principles of the garnishment law.

The fact that no demand has been made upon an agent or officer of a corporation followed by a refusal to comply therewith, which gives an immediate right of action against him to the corporation, is held in MAYO v. MILWAUKEE AMUSEMENT CO., as well as in Central Pl. Road Co. v. Sammons, 27 Ala. 380, to be insufficient to prevent garnishment by a creditor of the company.

IV. *Application to officers.*

In determining whether the treasurer of a railway company could be held as garnishee in an action against the company under a statute making the garnishee liable for "all property, debts," and effects of the defendant in the possession of the garnishee, or under his control," the court in the case of McGraw v. Memphis & O. R. Co. 5 Coldw. 434, said: "It is not every kind of holding that constitutes the possession designated, nor every possibility of power over the property that gives the control necessary to make it garnishable. . . . The servant who feeds and waters and curries the master's horse and keeps the key of the stable, the master having the actual and dominant possession and control; the clerk who opens and shuts the store, and sells the goods, and has charge of the keys of the money drawer and safe, subordinate to the actual possession and control of the merchant; the treasurer of the corporation, who has charge of the safe and the money therein, and receives and pays out under the immediate direction and control of the principal corporate officers,—are not to be deemed in such possession and control of the properties as subjects them, the employees and properties, to garnishment. In such and the like cases, the question is, whether the actual and substantial possession is with the employee, or whether his relation to the properties is merely of employment and service, while the real possession and control are with the owner or some other" (citing Fowler v. Pittsburgh, Ft. W. & C. R. Co. 35 Pa. 22, as to which see *supra,* III., *Application to agents*). "In the case in hand the answer of the garnishee, . . . is to be taken as true. The answer states that he is the mere passive servant and agent of the company, and has no authority or power to control the funds

effects belonging to the defendant, and the amount of his indebtedness to the defendant then due, or to become due, and not by law exempt from sale on execution." Rev. Stat. § 3719. The garnishee, at the time of the service of the summons, was the treasurer of the private corporation defendant in the action, and had in his possession, as such, $500 of the money of such corporation. It does not appear that the corporation had ever demanded that the garnishee should pay or deliver this money to the corporation; and, as between him and the corporation, no cause of action existed, for want of such demand for its delivery to and recovery by such corporation. He held it as its treasurer, and in the discharge of his duties as such. Whether the defendant is liable in such case, as garnishee of the corporation, at the suit of its creditor, by reason of having its property in his possession, is a question upon which the authorities are in irreconcilable conflict. By many of the cases it is held that garnishment is a proceeding against third persons; that is to say, that it cannot be maintained against persons who stand in such relation to the defendant that their garnishment is, in fact and effect, but the garnishment of the defendant. Drake, Attachm. § 465*a*; Waples, Attachm. § 454; Rood, Garnishment, §§ 42, 53. Confessedly, the possession by the garnishee in the present case is, in law, the possession of the corporation; and, as to such possession of the corporate funds in the regular disbursement of them, there is great force in the position that he is *pro hac vice* the corporation itself; but in many of such cases treasurers or agents so holding the money of private corporations have been charged as

of the company except under the immediate mandate and direction of the company; that the funds are in the treasury and possession of the company and not in his possession or control. Upon this answer and the principles hereinbefore stated it follows that the garnishee must be discharged."

"A corporation can act only upon and through its officers. A payment to its treasurer is a payment to the corporation. The funds paid are with the corporation and belong to the same. The treasurer holds them only as an officer of the corporation. He holds no funds in his individual right. If he did he would cease to hold them as an officer of the corporation. To charge the treasurer of a corporation for its funds in his hands officially would imply that when holding such funds he was its debtor and not its official agent. A corporation could hardly be summoned as trustee of itself. But to charge its officer, while holding its funds as such, would be to charge it as trustee of itself. It would be to determine that the trustee held the funds as an individual and not as an officer, which is not the fact. . . . As its treasurer he holds the funds as an officer of the corporation. They are funds held by the corporation through its treasurer. Such funds, so held, are not goods, effects, nor credits of the principal debtor intrusted to or deposited with the supposed trustee, but are the funds of the corporation in its own custody, and in charge of its appropriate officer." Sprague v. Steam Nav. Co. 52 Me. 592.

The court in Mueth v. Schardin, 4 Mo. App. 403, says: "This record presents for our determination the single question whether money in the hands of a treasurer of a private corporation can be attached in his hands at the suit of the creditor of the corporation. The possession of the treasurer is the possession of the corporation debtor itself, and, as the property to be reached by garnishment must be in the hands of a person other than the debtor, and one cannot be summoned as garnishee of himself, it seems quite clear, from reason, that the money of the corporation in the hands of its treasurer cannot be reached by this method. A corporation acts through its officers; and the acts of its officers are its acts. The real possession and control of the money of the corporation are with the corporation, and not with its treasurer. That the treasurer of the corporation is not in such a sense a debtor of the corporation as to be held liable to be summoned as garnishee has been repeatedly decided." The court then cites, in support of this doctrine, the case of McGraw v. Memphis & O. R. Co. 5 Coldw. 440; Fowler v. Pittsburgh, Ft. W. & C. R. Co. 35 Pa. 22; and Pettingill v. Androscoggin R. Co. 51 Me. 370.

In Wilder v. Shea, 13 Bush, 128, the president of a railroad corporation was held not liable as garnishee in a suit by a creditor of the company. But one ground of this decision is expressed as follows: "The president of this corporation is not vested with the power to dispose of the funds of this company as he may see proper, and these funds are not actually in his possession, but are in the treasury and in the possession of the company." The court also says that the proceeding was an attempt to make the president "personally liable for the debts of the company, by reason alone of his supposed control of the moneys received from the earnings of the road." But the court also lays down certain general principles as follows: "When there is a garnishee there must also exist the creditor and debtor—three or more parties in court, in order to reach the money in the hands of the garnishee. . . . The president and directors must be regarded as the corporation, and the funds in the possession of either, or all, as well as of the agents of the company, are in fact in the possession of the corporation. . . . The possession of Wilder as president was the possession of the company, and there is no rule of law or equity or any provisional remedy by which the plaintiff, the creditor, may garnishee the defendant, his debtor. . . . To permit every and any agent of the corporation like this to be garnished before or after judgment would result in the sacrifice of all the private and public interests connected with it."

In First Nat. Bank v. Bristol Iron & S. Co. 12 Pa. Co. Ct. 176, a writ of attachment execution against a corporation making its "secretary and treasurer" sole garnishee was quashed. No opinion in the case is published. But the successful attorney cited Fowler v. Pittsburgh, Ft. W. & C. R. Co. 35 Pa. 22 (see *supra*, II.) and other cases to the same effect.

In Dobbins v. Orange & A. R. Co. 37 Ga. 240, it was held that the superintendent of a railroad was not subject to garnishment, but in that case the road was owned entirely by the state, and the superintendent was a public agent.

Where the president of a corporation received its funds as a banker under an agreement with the treasurer to pay interest thereon it was held that they could be garnished in his hands. Reed v. Penrose, 36 Pa. 215. But in this case it is very clear that he did not hold the funds as an officer of the company but in an independent capacity.

In Nolte v. Von Gassy, 15 Ill. App. 230, the court admitted that in ordinary cases the statute of the state would not warrant a garnishment against the clerk or cashier of a banking or mercantile firm when such firm was engaged in the customary and usual transactions of business; but where the principal had absconded, as in the present case, where there was a total suspension of business relations existing between him and his clerk, the provision of the statute that garnishment will reach any

garnishees, as in the case of the tollgate keeper, paymaster, treasurer, or station agent of a railroad company, and the like (Rood, Garnishment, § 43; *Central Pl. Road Co.* v. *Sammons*, 27 Ala. 380; *Littleton Nat. Bank* v. *Portland & O. R. Co.* 58 N. H. 104; *Jepson* v. *International Fraternal Alliance*, 17 R. I. 471; *First Nat. Bank* v. *Burch*, 80 Mich. 242; *First Nat. Bank* v. *Davenport & St. P. R. Co.* 45 Iowa, 120; *Hughes* v. *Oregonian R. Co.* 11 Or. 158), while in similar cases in other states the liability of the garnishee is denied. *Fowler* v. *Pittsburgh, Ft. W. & C. R. Co.* 35 Pa. 22; *Pettingill* v. *Androscoggin R. Co.* 51 Me. 370; *Sprague* v. *Steam Nav. Co.* 52 Me. 592; *McGraw* v. *Memphis & O. R. Co.* 5 Coldw. 434; *Mueth* v. *Schardin*, 4 Mo. App. 403; *Wilder* v. *Shea*, 13 Bush, 128.

The decisions in this state seem to and perhaps may be fairly said to have established the doctrine in favor of the liability of the garnishee in all such and similar cases. In the case of *Ballston Spa Bank* v. *Marine Bank*, 18 Wis. 493, which was an examination of the president of the Marine Bank on proceedings supplemental to execution, Dixon, Ch. J., disposes of the question that a proceeding to examine the president was a proceeding against the bank itself, and therefore he could not be examined as to the property of the bank in his hands as such president, asserting the more liberal rule in favor of creditors, and said:

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property which may be in the "possession or power" of the garnishee, and another provision that the garnishee must make answer touching all the matters referred to in his "possession, custody, or charge" are certainly broad enough to include the case of a clerk or cashier.

The case of Neuer v. O'Fallon, 18 Mo. 277, 59 Am. Dec. 313, is often cited as authority that a treasurer of a corporation cannot be a garnishee for money in his hand belonging to the corporation, but the question presented is different. In this case the treasurer of a corporation was garnished in a suit against a creditor of the corporation and not against the corporation itself. It was decided that he could not be held, but the decision has more the effect that service upon him individually as garnishee will not be a garnishment of the corporation, that is, will not be the garnishment of the funds of the corporation.

Funds in the hands of the treasurer of local assemblies of benefit societies, not yet forwarded to the treasurer of the general assembly, may be reached by garnishment. It was urged by the defense that the money so paid was yet money of the members who paid it, but the court held that "on receiving these moneys it became the duty of the garnishees to hold them for the benefit of the defendant, not, indeed, as its agents, but as trustees for it, and they [the treasurers] became accountable to it as such for these moneys, and were liable on their bonds for the payment of them to the defendant." Jepson v. International Fraternal Alliance, 17 R. I. 471. In these cases then an action would lie at suit of the defendant against the garnishee.

In First Nat. Bank v. Davenport & St. P. R. Co. 45 Iowa, 120, where the treasurer of a railway construction company admitted he had money in his possession locked up in the safe but that he did not have independent control of it, being under obligation to dispose of it as his superiors might direct, the court held that he must obey the mandate of the law rather than that of his superiors, was liable to garnishment on the principle that a bank is liable to garnishment of a fund deposited, and that as the bank does not commit a breach of faith when answering to the law, *neither will the treasurer of* the company in whose possession the fund is. It is noticeable that this case considers the treasurer, not an integral part of the corporation, but a depositary like a bank.

In a proceeding to reach property of the Marine Bank of Milwaukee, in the hands of its president, Mr. Harris (the office of the bank having been closed nearly two years), the court in Ballston Spa Bank v. Marine Bank, 18 Wis. 490, held that "there can be no doubt *that the property of a private corporation is* liable for its debts, and that whether such property is found in the hands of its president or any other person. The possession is immaterial so far as the liability is concerned; for neither the president nor any other officer of the corporation has any right to withhold its property when required to answer the just debts of the corporation." For the purpose of this proceeding Mr. Harris is regarded as an individual having in his hands property of the bank liable in law for the satisfaction of its debts; and the fact that he happens at the same time to be its president constitutes no excuse whatever for his refusal to surrender such property."

Everdell v. Sheboygan & F. du L. R. Co. 41 Wis. 395, follows Ballston Spa Bank v. Marine Bank, 18 Wis. 491, and holds one who answered that he was "auditor, cashier, or paymaster" liable as garnishee in an action against a railroad company employing him, and states no rule or principle.

MAYO v. MILWAUKEE AMUSEMENT CO. *held the* treasurer of the defendant corporation liable as a garnishee in an action against it, because he admitted that as treasurer of such company he had in his possession money belonging to it, and because the court deemed the doctrine to be *fairly well settled* in that state that such officers or agents are liable as garnishees in all similar cases.

The rule when first laid down in Wisconsin in the case of Ballston Spa Bank v. Marine Bank, 18 Wis. 490, was applied to the *president of an institution* which had been closed for nearly two years, and the court then said: "For the purpose of this proceeding Mr. Harris is regarded as an individual having in his hands property of the bank liable in law for *the satisfaction of its debts.*"

But although the Wisconsin doctrine may have started in the garnishment of an officer of a corporation which had ceased business, it must now be regarded as fully established in respect to corporations *generally in that state.* The above case of MAYO v. MILWAUKEE AMUSEMENT CO. says: "The fair result of the cases in this state, we think, sustains the contention that an officer or agent of a private corporation may be garnished by its creditors *in respect to* money or property in his hands belonging to it."

V. *Conclusion.*

The review of the cases on the subject shows that it is by *no means possible to reconcile them.* In Wisconsin and Iowa the garnishment of a corporate officer by a creditor of the corporation is sustained. The cases in Alabama, New Hampshire, and Rhode Island do not go to the same extent but support the *garnishment of certain corporate agents or officers* in particular cases. The cases from Pennsylvania, Maine, Massachusetts, Tennessee, Missouri, and Kentucky more or less broadly support the doctrine that garnishment of a corporate agent or officer *by a creditor* of the company cannot be sustained unless his default has made him liable to an action by the corporation itself.

R. S.

"There can be no doubt but that the property of a private corporation is liable for its debts; and that, whether such property is found in the hands of its president or any other person. The possession is immaterial so far as the liability is concerned; for neither the president nor any other officer of the corporation has any right to withhold its property when required to answer the just debts of the corporation. It would be easy, indeed, for such corporations to avoid the payment of their debts, if placing their property in the hands of their officers was placing it beyond the reach of creditors;" and that Harris, the president, was to be "regarded as an individual having in his hands property of the bank, liable in law for the satisfaction of its debts, and the fact that he happens at the same time to be its president constitutes no excuse whatever for his refusal to surrender such property," or answer concerning it. In *Curtis* v. *Bradford*, 33 Wis. 190, a garnishee proceeding against the agent of a Michigan railway company, in an action against the company for a personal injury brought in the courts of this state, was regarded as regular and proper. In *Everdell* v. *Sheboygan & F. du L. R. Co.* (and one Ewen, its cashier and paymaster), 41 Wis. 395,—a proceeding under § 103, chap. 134, 2 Taylor, Stat., quite analogous to the proceeding by garnishment, and which was treated by the court as substantially the same,—it was held that the paymaster of the railroad company was subject to such proceeding, in respect to the moneys of the railroad company in his hands as such. And in *Felch* v. *Eau Pleine Lumber Co.* (and another, garnishee), 58 Wis. 431, the agent of the company was held liable to garnishment, at the suit of a creditor of such company, in respect to moneys which he had collected, and held for it, as such agent. In general, an agent holding the property of his principal is subject to garnishment by the creditors of his principal, by reason of the money or property held by him as such agent. Rood, Garnishment, § 43; *Storm* v. *Cotzhausen*, 38 Wis. 139; *Greene & B. Co.* v. *Remington*, 72 Wis. 648, and 658.

The fair result of the cases in this state, we think, sustains the contention that an officer or agent of a private corporation may be garnished by its creditors in respect to money or property in his hands belonging to it. The officers or agents of public corporations or quasi-public officers are not liable to proceeding in respect to money in their hands as such upon grounds of public policy, but it cannot be fairly said that the liability of an officer or agent of a private corporation is affected by any such consideration any more than that of an agent of a natural person in a similar case. While, in the present case, the garnishee is an officer of the corporation, exercising certain official functions in the internal administration of the affairs of the company, he is still, as to the public, but an authorized agent of the corporation, with more or less extensive powers. When the officer has the actual possession and the physical control of the moneys of the corporation, it would seem to be an unsubstantial refinement to deny the remedy because the debtor himself has a right to control the application and use of the funds. The language of the statute is very broad, and it is a remedial one, and should be liberally construed. There can be no sound reason for holding that a private corporation, as a debtor, is entitled to put its moneys or property into the hands of one of its officers or agents, and enjoy an immunity from the proceedings of creditors to reach it by garnishee process, denied to a natural person, who puts his money or property in the hands of his agent. The objection that sustaining the garnishment in question is to sustain a proceeding which is practically a garnishment of the debtor defendant is really quite technical, and without substantial merit.

2. The judgment of the superior court was appealable. The amount involved in that court was the amount of the judgment which the creditor had recovered against the corporation in justice's court, which exceeded $100. The question was whether the plaintiff was entitled to have it satisfied out of the moneys actually in the hands of the treasurer, the garnishee. There was no occasion, therefore, for any certificate of the judge of that court to confer jurisdiction of this appeal. We hold, therefore, that the judgment of the superior court is erroneous.

The judgment of the Superior Court is reversed, and the cause is remanded for further proceedings according to law.

WEST VIRGINIA SUPREME COURT OF APPEALS

Marcus A. BETTMAN *et al.*

v.

Thomas B. HARNESS *et al.*, Impleaded, etc., *Appts.*

(42 W. Va. 433.)

*1. **Equity has jurisdiction by injunction** to prevent acts of irreparable injury to land, even though there is controversy as to title between the parties, and, having jurisdiction on that ground, will go on to give full relief, though in so doing it be necessary to decide between two adverse titles.

2. **The unlawful extraction of petroleum oil** or gas from land, they being part of the land is an act of irreparable injury. Equity will enjoin it.

3. **A preliminary injunction must not do** what can only be done after full hearing by

* Headnotes by BRANNON, J.

NOTE.—As to the nature of property in mineral oil or gas, see Williamson v. Jones (W. Va.) 25 L. R. A. 222, and *note*.

For forfeiture of oil or gas lease, see Evans v. Consumers' Gas Trust Co. (Ind.) 31 L. R. A. 673, and *note*.

final decree, as by changing the possession of realty, or depriving one in possession of its benefits, in any other respect than as to the wrongful act proper to be enjoined; the proper purpose of such injunction being to preserve the present status until a full hearing on the merits shall be had. An injunction as to so much of it as is excessive is void, and ought to be modified on motion.

4. **A lease for oil and gas contains the clause**, "To have and to hold the said premises unto said party of the second part during and until the *full term of two years*, and as much longer as oil or gas is found in paying quantities thereon, or the rental paid thereon," and provides for a rent of one eighth of the oil, and $250 per year for gas, and has a *clause reading*: "Operations shall be commenced and one well completed within one month, and, in case of failure to complete one well within such time, the party of the second part agrees to *pay the parties* of the first part, for such delay, $15 per month in advance after said time for completing such well as above specified, and and the parties of the first part agree to accept such sum as a full consideration and payment for such delay until one well shall be completed; and a failure to complete one well or to make such payments for such delay is to render this lease null and void at the option of the lessor." The lessee, having failed to begin operations within the two years, has no right to continue the lease by payment of $15 per month, but the lease is ended.

5. **The words "or" and "and"** in a contract will be changed and read as "and" and "or" where *it is plain* they were so intended.

6. **To bind one by estoppel in pais** from statement or conduct, he must have stated, or led another to believe in something as a fact, and that other must be *ignorant of the contrary*, and must rely on it, and act to his injury differently from what he would have done but for such statement or conduct.

(*November 25, 1896.*)

APPEAL by defendants, Harness *et al.*, from an order of the Circuit Court for Pleasants County overruling a motion to dissolve an injunction which restrained defendants from boring for oil on certain property. *Reversed.*

The facts are stated in the opinion.

Messrs. **W. P. Hubbard, H. P. Camden, A. Leo Weil,** and **C. M. Thorp,** for appellants:

The contest in this case is purely a legal one, involving no equitable title, right, or remedy.

The whole subject of equity jurisdiction is usually divided into three great heads, that is equitable titles, equitable rights, and equitable remedies—the first embracing trust mortgages and assignments, the second, accident, mistake, fraud, notice, equitable estoppel, election, conversion and reconversion, set-off, contribution, exoneration, subrogation, marshaling and equitable liens, and the third, specific performance, injunction, cancelation, etc.

See Bispham, Eq. 31 *et seq.*

Where the title to the premises is in dispute, both parties claiming title thereto, it is held that an interlocutory injunction should be dissolved upon answer disclosing defendant's claim of title and showing that they are acting in good faith, believing themselves to be the owners of the premises, and that they are not insolvent.

1 High, Inj. § 698; *Hipp* v. *Babin*, 60 U. S. 19 How. 271, 15 L. ed. 633; *Thomas* v. *Hukill*, 131 Pa. 298; *Pittsburgh & A. Drove Yard Co's Appeal*, 123 Pa. 250; *McMillan* v. *Ferrell*, 7 W. Va. 223; *Cox* v. *Douglass*, 20 W. Va. 175; *Schoonover* v. *Bright*, 24 W. Va. 698; *Cresap* v. *Kemble*, 26 W. Va. 603; *Watson* v. *Ferrell*, 34 W. Va. 406; *Christian* v. *Vance*, 41 W. Va. 754; *Moore* v. *McNutt*, Id. 695.

The waste which equity takes cognizance of is waste committed by a lessee, and is restrained only at the suit of the lessor. In other words, it is waste committed by one who is rightfully in possession.

See Bispham, Eq. 429.

The injunction was granted without notice to or knowledge of the defendants. On the motion to dissolve it there was also no hearing, but merely an argument, with nothing before the court except a bill and answer and *ex parte* affidavits of witnesses, no testimony having been taken with the opportunity to cross-examine.

1 Beach, Inj. §§ 110–112; 1 High, Inj. §§ 4, 354, 356, 715; *Northern P. R. Co.* v. *Spokane*, 52 Fed. Rep 428; *Fadely* v. *Tomlinson*, 41 W. Va. 606; *Rollins* v. *Fisher*, 17 W. Va. 578; *Calvert* v. *State*, 34 Neb. 616; *Arnold* v. *Bright*, 41 Mich. 207; *People* v. *Simonson*, 10 Mich. 335; *Salling* v. *Johnson*, 25 Mich. 489; *Tawas & B. C. R. Co.* v. *Iosco County Circuit Judge*, 44 Mich. 479.

Such an injunction is void.

Lessees covenant to commence operations and complete a well within thirty days.

But anticipating possible failure to get a well completed in this time and in order not to leave the question of the lessor's damages open, it is provided that upon such failure $15 a month in one case and $5 a month in the other shall be paid during such delay. These sums are, therefore, provided as liquidated damages for breach of plaintiffs' covenant to operate. They cannot by the utmost strength of the imagination be made rentals, rent being the compensation paid by the lessee for the use and occupation of the premises demised.

Wood, Land. & T. 617.

In these leases the rental is the royalty of one eighth of the oil and $250 per year on each gas well, and the payment to be made on failure to operate is not rent, but is clearly liquidated damages for delay.

Hukill v. *Guffey*, 37 W. Va. 425.

If the language of the lease could fairly be considered of doubtful meaning, it must be interpreted against the claims of the plaintiff.

Union Mut. L. Ins. Co. v. *Wilkinson*, 80 U. S. 13 Wall. 223–236, 20 L. ed. 617–623; *Moulor* v. *American L. Ins. Co.* 111 U. S. 341, 28 L. ed. 449; *Miller* v. *Citizens' Fire Marine & L. Ins. Co.* 12 W. Va. 117, 29 Am. Rep. 452; *Western Pennsylvania Gas Co.* v. *George*, 161 Pa. 47.

Besides the express covenant contained in these leases to operate the premises for oil and gas, there is growing out of such a lease an implied covenant that the property shall be operated and fully developed.

Bradford Oil Co. v. *Blair*, 113 Pa. 83, 57 Am. Rep. 442; *McNight* v. *Manufacturers' Nat. Gas Co.* 146 Pa. 185; *Ohio Oil Co.* v. *Kelley*, 9 Ohio C. C. 511.

And a failure to keep this covenant enables

the lessor to forfeit the lease and make another lease to a third person.

Ohio Oil Co. v. *Kelley, supra.*

The lessee under an oil lease has merely a license until he has entered upon the land and operated thereon; he has no vested estate.

Venture Oil Co. v. *Fretts*, 152 Pa. 451.

There is no estoppel in this case.

1 Herman, Estoppel & Res Adjudicata, pp. 862, 865; Bigelow, Estoppel, 55, 57.

Messrs. **Van Winkle & Ambler,** for appellees:

The rentals having been paid the leases are still in force.

This court has construed "rental" in a lease where that word does not occur, and characterizes as "rental," money agreed to be paid for not operating.

Hukill v. *Myers*, 36 W. Va. 639.

A deed which grants the right to dig for coal in a certain tract of land is a conveyance of the absolute property in the coal to the grantee, and he has the exclusive right to mine and remove the same.

List v. *Cotts*, 4 W. Va. 543; *Watson* v. *Coast*, 35 W. Va. 473.

Petroleum or mineral oil in place is as much a part of the realty as timber, coal, iron, ore, or salt water.

Williamson v. *Jones*, 39 W. Va. 231, 25 L. R. A. 222; *State* v. *South Penn Oil Co.* 42 W. Va. 80; *Tufts* v. *Copen*, 37 W. Va. 623.

This court cannot strike out the rental clause of this contract without violating the express terms of a formal deed.

There is an equitable estoppel in this case.

A party cannot occupy inconsistent positions, and where one has an election between several inconsistent courses of action, he will be confined to that which he first adopts.

Bigelow, Estoppel, 642; *Keate* v. *Phillips*, L. R. 18 Ch. Div. 560; *Williamson* v. *Jones*, and *Tufts* v. *Copen, supra.*

A court of equity is the appropriate jurisdiction in which to enforce an estoppel *in pais* which raises an equity invoking the intervention of the chancellor.

Hanley v. *Watterson*, 39 W. Va. 214.

The silence of the defendants and their acquiescence in the letters, are treated in equity as an affirmative representation.

Bigelow, Estoppel, 568; *Leather Mfrs. Nat. Bank* v. *Morgan*, 117 U. S. 96, 29 L. ed. 811.

"Where in an oil lease there is a clause of forfeiture for nonpayment of rental, but the lessor . . . indulges the lessee and acquiesces in his failure to pay, there is no forfeiture."

Hukill v. *Myers, supra; Fleming Oil & Gas Co.* v. *South Penn Oil Co.* 37 W. Va. 645; *Cranmer* v. *McSwords*, 24 W. Va. 602; *Allen* v. *Bartlett*, 20 W. Va. 46.

An oil lease vests an estate for years, and not a mere license, therefore such lessee is entitled to notice of termination.

Duke v. *Hague*, 107 Pa. 57.

The acceptance of rentals after two years created at least an estate from year to year.

Allen v. *Bartlett, supra.*

The conduct of Harness raises an estoppel which equity will enforce.

Hanley v. *Watterson*, and *Tufts* v. *Copen, supra.*

Our leases gave us exclusive rights, which will be protected by injunction.

West Virginia Transp. Co. v. *Ohio River Pipe Line Co.* 22 W. Va. 621, 46 Am. Rep. 527; *Brown* v. *Spilman*, 155 U. S. 673, 39 L. ed. 306.

The showing made by defendants themselves that they are draining the oil through adjacent wells gives us a distinct equity.

Mines and minerals present a peculiar equity.

1 High, Inj. § 730; *Williamson* v. *Jones*, 39 W. Va. 231, 25 L. R. A. 222; *University* v. *Tucker*, 31 W. Va. 621; *Anderson* v. *Harvey*, 10 Gratt. 386.

As Finegan & Co. took with notice they are bound by all the equities attaching to Harness and wife, and will be held as trustees.

Clark v. *Gordon*, 35 W. Va. 735; *Barrett* v. *McAllister*, 33 W. Va. 738; *Thorn* v. *Phares*, 35 W. Va. 771.

The injunction is appropriate and the orders made are right.

The grounds of equity are inherent in the nature of the case.

1. It concerns oil in place.

Williamson v. *Jones, supra.*

2. It presents an equitable estoppel.

Hanley v. *Watterson*, 39 W. Va. 214.

3. It shows, at least, a license that had been paid for.

Tufts v. *Copen*, 37 W. Va. 623; *Brown* v. *Spilman*, 155 U. S. 665, 673, 39 L. ed. 304, 306.

4. It evinces fraud on our rights.

5. We have no remedy at law, unless leases on their face are binding beyond two years.

6. If so binding on their face, then there is equity to enforce covenants for exclusive privileges, which covenants run with the land.

West Virginia Transp. Co. v. *Ohio River Pipe Line Co. supra.*

7. We are owners of a valuable oil lease, in terms assignable. We own its selling value and the Finnegan lease is a cloud on our rights.

Watson v. *Coast*, 35 W. Va. 480.

Mr. **J. G. McCluer** also for appellees.

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

Harness and wife made two leases giving Watson exclusive privilege to drill and operate for petroleum oil and gas on two tracts of land in Pleasants county, which he assigned to Marcus A. and David Bettman, retaining, however, some interest, the three claiming as partners under the name of Bettman & Watson. No possession was taken under these leases, and later Harness and wife, claiming that these leases had expired, made a lease for oil purposes of both tracts to Finnegan, under which possession was taken, and boring of a well for oil was begun, when Bettman & Watson obtained against Finnegan and others an injunction enjoining operations under this second lease; and, the judge having overruled a motion to dissolve this injunction, the defendants to the injunction appealed. Further facts are stated below in connection with the law points to which they relate.

Will equity entertain this suit? Counsel for appellants ably insist that the acts enjoined are but trespass to realty, reparable in damages

in a court of law; that no injunction lies; and that, under cover of injunction, it is an effort to try title to land in equity, when the law court is open for adequate remedy by ejectment, both to recover possession and damages. Clearly, the general rule is that equity will not restrain a mere trespass to land, and, under the guise of so doing, try title to land, by entertaining what may be called an "ejectment bill;" but that rule has been found in later years not to answer fully the needs of men in their changing multifarious wants in the calls of life, and we find exceptions fastened upon the rule, fixed as the rule itself. The last case decided by the great Chancellor Kent, driven from the bench in the meridian of his greatness by the Constitution of New York because he had attained the age of sixty years, tells us of this change of the old rigor of the rule. *Jerome* v. *Ross*, 7 Johns. Ch. 315, 11 Am. Dec. 484. The rule there stated is that "an injunction is not granted to restrain a mere trespass, where the injury is not irreparable and destructive to the plaintiff's estate, but is susceptible of perfect pecuniary compensation, and for which the party may obtain adequate satisfaction in the ordinary course of law. It must be a strong and peculiar case of trespass, going to the destruction of the inheritance, or where the mischief is remediless, to entitle the party to the interference of this court by injunction." Judge Story, after a review of the cases, says in 2 Eq. Jur. § 928: "If the trespass be fugitive and temporary, and adequate compensation can be obtained in an action at law, there is no ground to justify the interposition of courts of equity. Formerly, indeed, courts of equity were extremely reluctant to interfere at all, even in regard to cases of repeated trespasses. But, now, there is not the slightest hesitation, if the acts done, or threatened to be done, to the property, would be ruinous or irreparable, or would impair the just enjoyment of the property in future. If, indeed, courts of equity did not interfere in cases of this sort, there would . . . be a great failure of justice in the country." In trespass to mines there is greater liberality in allowing injunctions than in ordinary trespass to land, since the injury goes to the destruction of the minerals,—the chief value. 1 High, Inj. § 730. These principles have been followed in America in cases too numerous to cite here. For some of them, see note to *Jerome* v. *Ross*, 11 Am. Dec. 498, 500; *Indian River S. B. Co.* v. *East Coast Transp. Co.* 28 Fla. 387; *Carney* v. *Hadley*, 32 Fla. 344, 22 L. R. A. 233; note to *Smith* v. *Gardner* (Or.) 53 Am. Rep. 346. 2 High, Inj. § 697, emphasizes this exception of irremediable injury. Decisions binding us as authority do not oppose, but recognize, this exception. *Anderson* v. *Harvey*, 10 Gratt. 386, 398, pointedly recognizes it. There an injunction was sustained against one who, under color of adverse title, was taking out iron ore. In the cases of this state cited by counsel against jurisdiction in equity for this case (*McMillan* v. *Ferrell*, 7 W. Va. 223; *Cox* v. *Douglass*, 20 W. Va. 175; *Schoonover* v. *Bright*, 24 W. Va. 698; *Cresap* v. *Kemble*, 26 W. Va. 603; *Watson* v. *Ferrell*, 34 W. Va. 406), this exception of irreparable damage is definitely admitted. They were cases of mere naked trespasses, and the omission of this averment was mentioned as a want of the bills. *Christian* v. *Vance*, 41 W. Va. 754, and *Moore* v. *McNutt*, Id. 695, do not bear on this matter, but on the principles of jurisdiction in equity to remove cloud on land title. The jurisdiction for this case is not claimed to rest on the right to remove cloud on title, but on irreparable injury, and that, jurisdiction being warranted on that ground, the court will go on to adjudicate on the rights of parties, as it has jurisdiction for one purpose.

It makes no difference, if the elements of irreparable injury be present, whether the party doing it be solvent or insolvent. 1 Beach, Inj. § 35. Such being the rule, the question—often of difficulty—is one of its practical application. What is irreparable injury? It is impossible to define it inflexibly. Rights of property and its uses change so; so many new rights of property with new uses arise as time goes on. Here is the right to oil and gas a few years ago unknown; the right sometimes in separate ownership. The word "irreparable" means that which cannot be repaired, restored, or adequately compensated for in money, or where the compensation cannot be safely measured. The courts have generally regarded as irreparable injuries the digging into mines of coal, iron, lead, and precious metals, and, as such injuries subtract from the very substance of the estate, and tend to its ultimate destruction, equity is said to be prompt to restrain them. Rock, if of special value, comes under this rule. See *United States* v. *Gear*, 44 U. S. 3 How. 120, 11 L. ed. 528, and other cases cited in note to *Jerome* v. *Ross*, 11 Am. Dec. 501; note to *Smith* v. *Gardner* (Or.) 53 Am. Rep. 347; 1 Beach, Inj. § 35; 1 High, Inj. § 730. We know but little of petroleum oil and gas hidden far in the bowels of the earth, but from that little we can say they are of great value, and are exhaustible, and, when exhausted in a locality, cannot be restored by the art of man, and perhaps never even by the mysterious alchemy of nature. Surely, they fall under the rule which considers the subtraction of precious things from under the soil as working irreparable injury, as much as iron ore in *Anderson* v. *Harvey*, 10 Gratt. 386, to which I refer as decisive and binding under this branch of this case. We know that these substances are the sole property and value of the plaintiff's estate under their lease,—the only object of the lease. In *Williamson* v. *Jones*, 39 W. Va. 231, 25 L. R. A. 222, we decided that petroleum oil in place is a part of the realty, and its unlawful removal a disherison which equity will enjoin.

The law affords no adequate remedy so as to deprive the party of injunction. An injury to realty may be incapable of compensation in money for several reasons: (1) It may be destructive of the very substance of the estate; (2) it may not be capable of estimation in terms of money; (3) it may be so continuous and permanent that there is no instant of time when it can be said to be complete, so that its extent may be computed; (4) it may be vexatiously persisted in, in spite of repeated verdicts. In this case, when must the party sue? When all the oil is drained out, and the other party is insolvent? Or must he have suit after suit through years? At what time can we estimate the entire damage? How, with justice to either party? To deprive a party of his injunction to keep his

own oil in his own soil, it is not enough to say that he has some remedy at law, but it must be adequate and commensurate with his whole right in the particular case. *Jerome* v. *Ross*, 7 Johns. Ch. 315, 11 Am. Dec. 501; *Osborn* v. *Bank of United States*, 22 U. S. 9 Wheat. 738, 6 L. ed. 204; 1 High, Inj. § 30. To avoid multiplicity of suits, injunction may lie, because that shows inadequacy of legal remedy. *Walling* v. *Miller*, 108 N. Y. 173, 1 High, Inj. § 702; *Lewis* v. *North Kingstown*, 16 R. I. 15. Where repeated acts are done, the entire wrong may be prevented by injunction, though each act itself may not be destructive to the inheritance, and not irreparable, and the legal remedy adequate, if that act stood single and alone. 1 Beach, Inj. § 35. What title is there to maintain such an injunction? Will it lie when it is disputed, to thus try the title in equity? The syllabus in *Cresap* v. *Kemble*, 26 W. Va. 603, says it must be established by legal ajudication, or undisputed. So it is often stated in the books. Does it mean already tried at law? I suppose not. The opinion in the case does not say so, but says it is sufficient if the bill clearly avers good title. Such I think is the law. Here there is a wilderness of decisions, variant and indefinite, arising from the difficulty encountered by the courts in the effort to at once recognize the rule that equity will not try land title and deprive a party in possession of its benefits, and, on the other hand, the rule that irreparable injury will be stayed by injunction. Take the case where irreparable injury is being done to land claimed under two hostile titles. One party files a bill of injunction showing on its face clear title, and the other answers, showing clear title prima facie. Will you at once dissolve the injunction, and send the party to try his title at law, from the fact that there are adverse claims, when in fact the plaintiff ultimately shows, or could show, the better title? Much law can be found to answer "Yes." I think the true answer to that question is "No." Where there is irreparable damage, injunction lies, though there be conflicting title. *Erhardt* v. *Bonro*, 113 U. S. 537, 28 L. ed. 1116; *West Point Iron Co.* v. *Reymart*, 45 N. Y. 703; note to *Jerome* v. *Ross*, 11 Am. Dec. 506; 1 High, Inj. § 69; 2 Beach, Inj. § 1140. *Anderson* v. *Harvey*, 10 Gratt. 386, was a case of adverse title. Equity jurisdiction, from its flexibility and facility in practice in administering justice, has been for centuries ever expanding its scope. So here. Since writing to this point I notice § 367 of the late work of Spelling on Extraordinary Relief, which, from my examination of the subject, fairly states the law of our days on this knotty subject: "Formerly great importance was attached to the fact that a defendant whom it was sought to restrain from committing trespass in good faith set up a claim to the land; . . . and a few courts still attach undue importance to a dispute concerning the title, apparently losing sight of the general departure from the early practice in this respect. It is true now, as it ever has been, that an injunction will not be granted where the title of the plaintiff is in dispute previous to the determination of the legal rights of the parties, unless the threatened act is of such a nature that, should the right to commit it be decided against him, the consequence of its commission would be irreparable. The prevailing view and practice of the present day may be thus stated: (1) Where the bill states facts which show that a threatened trespass, if not prevented, will result in irreparable damage, or is in its character and tendency destructive to the inheritance, or to that which gives it its chief value, an injunction will be granted notwithstanding a dispute, or even pending litigation as to title. (2) Where an action has been already commenced to try the title, the injunction will be only temporary, to be dissolved or made perpetual according to the results of the action. (3) Where no action has been already begun, an injunction will be granted and continued to give the defendant an opportunity to bring an action which, being brought and successfully prosecuted to judgment against the complainant in possession, will entitle him to a dissolution of the injunction; but if the action at law has an opposite result the injunction will be perpetuated. (4) The rule applies and the same course is taken where the ground upon which the relief is sought and granted is the prevention of a multiplicity of suits. Hence . . . the only influence which the existence of a dispute as to title can have . . . in case of irreparable injury sufficiently alleged, is in the character of relief granted, whether absolute or conditional and temporary; and that is of no decisive importance . . . on the question of whether any relief whatever shall be granted." And equity, having once taken jurisdiction, will go on to do complete justice, though in so doing it have to try title, and administer remedies which properly pertain to courts of law. Note in *Lewis* v. *North Kingstown*, 27 Am. St. Rep. 727 [16 R. I. 15]; *Yates* v. *Stuart*, 39 W. Va. 124. Such a bill must not only allege irreparable injury, but state facts making a case of irreparable injury. *Watson* v. *Ferrell*, 34 W. Va. 406. The bill alleges that the defendants are about to bore for and take oil from the premises,—facts which *per se* constitute irreparable injury.

Another subject. Appellants contend that the injunction awarded is erroneous,—in fact void,—because too broad. The sole object of an interlocutory or preliminary injunction is to preserve the subject in controversy in its then condition, and, without determining any question of right, merely to prevent the perpetration of wrong, or the doing of any act whereby the right in controversy may be materially injured or endangered. It cannot be used for the purpose of taking property out of the possession of one party and giving its possession to another; nor does it compel the defendant to undo what he has done, as this might injure him as much as his act would injure his opponent. Injunction prevents the further continuance of injurious acts begun, or prevents doing them, if only threatened. It acts only prospectively to preserve things *in statu quo* until ultimate decision. It does not prejudge without hearing; it does not anticipate ultimate decision, giving decision on the merits, and then hearing. 1 High, Inj. §§ 4, 5, 355, 715. On an application to grant or to dissolve a preliminary injunction, the court will not decide questions of title, but will defer this till a hearing on the merits; nor will it

change possession. "Where the defendant is engaged in removing from the complainant's estate that which constitutes its chief value,—for instance, lumber,—the case is one peculiarly within the province of a court of equity through its preventive writ to interpose and stop the mischief complained of and preserve the property from destruction. And if a preliminary order restrains one of the parties from interference with the property in dispute and leaves the other free so to interfere, the court will modify such order so as to do equal justice to the parties, and keep the property *in statu quo* until the determination of the controversy as to title and their respective rights. . . . If it undertakes, or if its effect is, to dispose of the merits of a controversy without a hearing, or if it devests a party of his possession or rights in property without a trial, it is void." 1 Beach, §§ 110, 112. Possession is prima facie evidence of rightful title, because it is one of the elements of title, is sacred, and no court can in any form of proceeding take it from a man without a hearing, without overthrowing the maxim that no man shall be condemned in person or deprived of property without a day in court and due process. Try the present case under these rules. The order of injunction, a purely preliminary one, did virtually what a final one on final decree would have done, save that a final decree would have delivered possession expressly, while this does so virtually; for it not only enjoins the defendants from boring for oil, but from "in any manner interfering with the rights of the plaintiffs under the leases" under which they claimed, "and from interfering with the plaintiffs' use of said land under said leases, and from setting up any claim against the rights of the plaintiffs under said leases," and enjoined the defendants "from setting up any claim under the pretended leases" under which the defendants claimed. Under this wide injunction, how could defendants even continue in possession when it told them not even to claim under their lease? If the plaintiffs entered on the premises to bore just where the defendants were boring, how could the defendants lift a finger in resistance, or fail to yield the very spot where they were boring, if the plaintiffs put their derrick there? Later, the defendants asked the court to modify the injunction, but it refused to do so. If, on full hearing, this order had been found to be properly anticipatory of the eventual real rights, it would be then a dead issue, and I thought that the later hearing to dissolve might be such a hearing; but though it was on bill, answers, and other papers, and is practically, no doubt, as full a hearing as would ever take place, yet it was on *ex parte* affidavits, not on depositions where cross-examination was allowed, and hence it is not such a hearing. The preliminary injunction was erroneous, and the refusal to modify was error to the prejudice of appellants, and, if we did not decide the question on the merits for the plaintiffs, we would modify the injunction. *Boyd* v. *Woolwine*, 40 W. Va. 282, allowing a mandatory injunction, is cited to justify this. That was to preserve the *status quo* by requiring defendant to unlock gates on a private way. The court did not decide that this was or was not right *ab initio*, but, finding it right in the end, upheld it. It is argued that this injunction may be justified by the fact that the defendants were boring on adjacent lands, and thus draining oil from this land. Is it meant that this injunction could stop boring on adjacent land, or stop draining through a well on adjacent land of oil from this land? How do we know there is oil on this land? Shall we stop boring on the adjacent land without this knowledge? We could not stop it with certain knowledge of the fact, because oil is fugitive, and when it passes from one man's land, and comes to the surface through a well on another's land, it belongs to him on whose land it reaches the surface, even if we know it came from the other land.

Another subject. I come now to the merits, —the rights of the plaintiffs under their leases. No work for development of oil or gas was done under them within the two years fixed by them as the term, but through that term, and for thirteen months after its close, the lessees paid the sums of $15 and $5 per month required by them for delay of work of development, and the lessors received that money up to the close of that thirteen months, when they refused to receive any more, and the lessees deposited it thereafter in bank. Did such payments continue the leases under their letter after the two years? That depends on their construction. The lessees say they had the right to bore or not, as they chose; that, if they did not bore, all they had to do was to pay said monthly sums, and their two leases were kept in full force, not merely within the two years, but thereafter until they should cease to pay. Take the habendum clause, reading, "To have and to hold the said premises for said purposes only . . . during and until the full term of two years next ensuing the date above written, and as much longer as oil or gas is found in paying quantities thereon, or the rental paid thereon." What do the words "or the rental paid thereon" mean? For they are words which, it is thought, prolong the term over two years, the claim being that either the production of oil or payment of the fixed sums, either one or the other, extended the term. Here bring in another part of these leases: "Operations on the above-described premises shall be commenced and one well shall be completed within one month, unavoidable accidents and delays excepted; and, in case of failure to complete one well within such time, the party of the second part agrees to pay to the parties of the first part, for such delay, the sum of $15 per month in advance after the said time for completing such well as above specified, and the parties of the first part hereby agree to accept such sum as a full consideration and payment for such delay until one well shall be completed: and a failure to complete one well, or to make such payments for said delay, is to render this lease null and void at the option of the lessor. A deposit to the credit of the parties of the first part in Parkersburg National Bank, Parkersburg, W. Va., is to be a good payment of any moneys due under this contract."

Again I ask, what do the words "or the rental paid thereon" mean? Does the word "rental" mean the fixed sum of $15? If not, there is no extension from its payment.

Now, the clause providing for payment of the $15 does not call it rental, as might be expected if so considered, but says it is for delay in completing a well. It says a well shall be completed in a month, and, on failing to do so within a month, the lessee is to pay $15 per month after that month, and the lessor to accept it as full pay for such delay until a well should be completed; that is, provided it be within two years; since on this clause alone we would say it contemplates completion within the term of the lease. "For such delay." What delay? The delay just then spoken of. So that we cannot say that the word "rental" in the first clause gets its meaning from the second clause. And the monthly payment is not, in nature, rent or rental, unless plainly given that meaning. We can use words in other than their first or usual sense, but it must clearly appear that such is the purpose. This money has been sometimes called "commutation money." Call it what you may, but you cannot make rent out of it in the first instance. But taking the two clauses together, does it, where used in the first clause, point to this money payable in lieu of boring? It must be given some meaning, and what else can it mean? What else is in the lease for it to mean? you may ask. I see nothing else to refer it to except the one-eighth share of oil and $250 per year for gas as rent provided by the lease, should they be found in paying quantity. But you will say this cannot be, because the lease says the term shall be two years, and "as much longer as oil or gas is found in paying quantities or the rental paid thereon," and this clause presupposes insufficient oil and gas; and how can a fraction of the oil be then paid, or the rent for the gas either? And it certainly provides something to extend the term on failure of oil and gas. It provides an extension of the term in either one or the other of two ways,—either by finding oil in paying quantity, or, if that do not happen, then by payment of rental; for it uses the word "or," notice; and hence, you will say, there is nothing else in the contract to refer the word "rental" to but these monthly payments. I think that the real intention was to say that the lease should continue two years, and as much longer as gas or oil in paying quantity be found, and the rent for that gas and oil be paid. We want to get at what was the most likely meaning of the words used. Courts may look to language, the subject-matter, and surrounding circumstances to get at the meaning, and thus place themselves in the situation the parties were in, to glean their probable purpose. Point 19, *Crislip* v. *Cain*, 19 W. Va. 438; *Caperton* v. *Caperton*, 36 W. Va. 479; *Nash* v. *Towne*, 72 U. S. 5 Wall. 689, 18 L. ed. 527. Here are a landowner and an oil producer negotiating a lease. A term of only two years is fixed; but plainly that is only the period for completing a well. If a good one is obtained, the operator wants longer time, and he inserts a clause extending the term as long as oil or gas is produced in paying quantities; but the lessor wants the lease continued only upon condition that his share of oil and gas rent be paid, and he means to have a clause which provides a continuance of the lease as long as both oil is produced and his rent paid. It is unreasonable to suppose that he would continue the lease, and omit a guaranty of his rent; that he would agree to continue without a guaranty of prompt payment. Here is a clause annexed to the clause continuing the lease which will insure the rent, if we give the word "or" the meaning of "and." Words must serve intention in the construction of contracts. Story, Cont. §§ 773, 774. These words "or" and "and" are so often used inexactly that the one will be read as if the other had been used, to serve the plain intent. It is done in the construction of wills (Schouler, Wills, § 477), and in the construction of statutes (Sutherland, Stat. Constr. § 252); and if the word of a wise legislative assembly must yield to intention, why not the word of two men not so learned and exact? The intention is the question in all these cases. Bishop, Cont. § 383, says it can be done in the construction of contracts. Likewise 2 Parsons, Cont. 497. Just now I notice the case of *Petty* v. *Fogle*, 16 W. Va. 497, holding this to be law in this state in construing contracts. And note that clause providing that a failure to complete a well or make payment for delay shall forfeit the lease. Does not this mean that failure to make payments within that two years shall forfeit? It does not mean that failure to make payments after that shall forfeit the lease, not likely provide a forfeiture for nonpayment after expiration of that term, as none was needed. This goes to show that these payments are not rentals, but compensation only for delay within two years.

This much I have said upon the letter of the lease; but as we are placing ourselves in the situation of the parties, and viewing the subject-matter on which they were treating, and seeking their probable aim, how hard upon the landholder it would be, how improbable, to say that when he has, by express words, shown a fixed purpose to set two years as the limit within which a well must be completed, he would turn right around, and give his caution all away, by agreeing to an indefinite postponement of development on what would be a mere pittance compared with what he would realize if producing wells were bored,—the very object for which he makes a lease; certainly the controlling object. And all the while that same lessee, with wells on an adjoining lease, is draining all the oil away from this landowner and paying the pittance. This would work for the owner a very unfortunate result, which was furthest from his intention. He relied on development because the lessee bound himself to develop by the lease. That was the motive on his part. If he had been warned of this result, he would never have leased. This construction is not harsh on the oil producer. He has had the term he fixed. The other construction would cover the whole country with cloud and encumbrance over titles for many years, preventing the use and transfer of property, the development of the country, and promoting and furthering monopoly; for we know, and may lawfully know, as all men know, that vast areas are held by companies or organizations holding these leases for future use. I shall not say that this construction is one about which men may not fairly differ. But suppose we were in doubt; should we not give that construction which would avoid the

evils above referred to? This court said in *Miller* v. *Citizens' Fire, Marine & L. Ins. Co.* 12 W. Va. 116, 29 Am. Rep. 452, that in construing an instrument prepared by an insurer it ought to be read most strongly against the maker, especially where the terms or language are doubtful or ambiguous, because prepared by the agent of the company or by the company. In *Union Mut. L. Ins. Co.* v. *Wilkinson*, 80 U. S. 13 Wall. 222, 20 L. ed. 617, Justice Miller said on an insurance policy that it could not be denied, logically considered, that the application is the work of the assured, and, if left to himself, or to such assistance as he might select, such person would be his agent, and he alone responsible; but it was so well known that no court would be justified in shutting its eyes to it, that insurance companies send agents all over the land soliciting applications, and parties taking policies look to such agents and rely on them. And in *Moulor* v. *American L. Ins. Co.* 111 U. S. 335, 28 L. ed. 447, Justice Harlan said, in effect, that when a policy contains contradictory provisions, or has been framed so as to leave room for construction rendering certain things doubtful, the courts should lean against the construction imposing a warranty on the assured: that the company's attorneys, officers, and agents prepared the policy, and the language which the court must interpret is its language, and it is both reasonable and just that its own words should be construed most strongly against it. We would be blind to patent facts—that those engaged in the production of oil send agents armed with printed leases to solicit leases, and they take leases for great areas, and they are forms already prepared, and the people in many instances know little of them, are inexperienced in oil operations, and are without legal advice. They rely on the agent. These leases were prepared by such an agent taking leases for a large area. Harness and wife swear that they asked that the words "or the rental paid thereon" be stricken out, but the agent assured them it was unnecessary, because the leases with these words in could not run longer than two years unless in that time oil was gotten, and, relying on this assurance, they signed. True, the law says one signing a writing must know the law of it; but I use the arguments to show that, if there were doubt it ought not to be construed most strongly against the lessors,—a rule having little or no force in case of indentures, or in any case (2 Parsons, Cont. 507),—but against him who solicited and prepared the lease. We are supported in our construction of this lease by a decision of the supreme court of Pennsylvania upon a lease almost exactly like this, containing in the habendum clause, to have and to "hold the leased premises during the term of two years from the date thereof, and as much longer as oil and gas are found in paying quantities or the rental paid thereon." It provided that the lessee should commence a well within thirty days, and complete it within that time, "or in default thereof pay to the party of the first part for further delay an annual rental of $60 payable quarterly in advance on the premises from the time above specified for completing a well, until such well shall be completed." It will be noted that this lease is stronger than the one we have in hand in favor of lessee, because it in terms calls the money payable in default of boring "rental." The court held the term to end at the close of two years, and that the lessee could not, in the absence of boring, prolong it by paying $60 annually. *Western Pennsylvania Gas Co.* v. *George*, 161 Pa. 47. That is point-blank authority against the appellees in the construction of the lease in this case.

It is but fair to notice an argument to the effect that the Harnesses received the commutation money for thirteen months after the two years, and that, where the construction of an instrument is doubtful, the acts of the parties under it afford good ground to give it that interpretation indicated by such acts. It is true, as laid down in *Caperton* v. *Caperton*, 36 W. Va. 479, that such acts of the parties who made an instrument and knew its purpose, are a forceful clue to get at the meaning. But such acts lose force when done under protest, or with express declaration that the contract means another thing, as in this case; for, a few days after the end of the two-years' term of the leases, Mrs. Harness wrote Bettman & Watson asking them to return her lease, as the same had expired by limitation, and she and her husband desired to have the same returned and canceled. Early compliance was asked. Very plain was this of her and her husband's interpretation of the lease. On the same date of Mrs. Harness's letter to them, Bettman & Watson wrote Mr. Harness a letter inclosing one for his wife, containing statement of rentals paid, with receipts to be signed therefor by them, telling them their money was in bank, expressing surprise that they had refused to receive the "letters." It seems from this they had sent letters or receipts before, which had been refused. To this letter she very promptly replied that she was anxious to have an interview at their earliest possible convenience, as she and Mr. Harness wanted a more definite understanding. Bettman & Watson replied that they did not know what she meant by wanting a more definite understanding, that the leases constituted that, insisting that under their provisions they had paid the monthly sums, and that they had the right thus to extend the leases; that they intended to retain their leases until operations in the vicinity, "or possibly on your farms," should prove there was no oil, thus, while insisting on their construction of the leases, inspiring a hope in the breasts of Harness and his wife that they would likely soon bore on these lands. In affidavits, Harness and wife say they told Watson at the end of the two years that the leases were out; that they had importuned Watson often to go on to work; that, in an interview after the two years Watson claimed that the leases were yet in force; and she denying it, and claiming that he ought to surrender the leases, he made excuses for not boring in the two years, and asked that a little more time be given, promising to go ahead with the work, and she and her husband, relying on his promise, agreed to accept monthly payments for a while longer, with the understanding that, if they would proceed during any month for which advance payment was made, their rights under the lease would be continued as long as oil or gas should be found; that this went on for a third year,

and, no work being done, she and her husband declined to receive further payments; that, later, Watson asked them what they would take for new leases, and a sum was named, but he did not agree to it, but said he was going to New York, and would consult the firm and asked what was the least they would take, and she said she would make liberal reduction from that sum, as they had once leased their land; that, Watson not returning by the time fixed, they concluded that he had abandoned all thought of making new leases, and had abandoned all claim under the old, and she and her husband made the lease to Finnegan. Under these facts we are bound to say that Harness and his wife did not construe the leases as calling for an extension by payment of monthly sums, and their acts in receiving them do not show that they so construed the leases.

Another subject. Much as I have said, in deference to the elaborate argument of counsel, and in view of the practical importance of the case, another point is to be settled, which is urged with zeal by counsel for appellees; that is, the doctrine of equitable estoppel. They claim that as the lessors accepted, for thirteen months after the two years, the payment of the sums of $15 and $5 each month, the plaintiffs are barred of relief. What effect can such payments work? We have concluded that those payments did not prolong the leases, and thus they are gone. Such payments cannot create a new estate, unless it be a tenancy from year to year. If they create any other estate, what? Is it a term of years? If so, how long? No term was fixed, but was negatived. A letting for a term must fix the term to be a lease for a specific term. Taylor, Land. & T. § 75. It could not be a term of two years, because that required a writing? But is it a tenancy from year to year? Where there is an intent to create a tenancy, and no term is fixed, it is a tenancy from year to year, generally; but there must be such intent. In this case, if we believe Harness and wife, as opposed to Watson, we have to say, that it was only agreed that the lessees were to have a few months longer, to go on to develop, but conditional upon that, with power in the landowners, certainly after a reasonable time to close this state of things. There was no intent to create a new tenancy of any kind. It was merely a tenancy at sufferance of Harness and wife. Taylor, Land. & T. §§ 54, 59.

Estoppel. Appellee's counsel relies with earnestness, apparently with more confidence than on the terms of the contract, on the doctrine of equitable estoppel arising from the acceptance by the lessors of monthly payments after the expiration of the two years' term. They say equity will not permit the lessors to receive this money, knowing that Bettman & Watson claimed that their lease would extend over two years so long as monthly payments were made; thus acquiescing in such construction of the leases, and inspiring them with the belief that such were the construction and consent of the lessors. That might be true, if the facts just above given did not show that Harness and wife had repudiated that construction, and Bettman & Watson knew they had, and only received that money under protest against that construction, and that, denying that construction, they would only allow a few months payment as a grace, on the condition that drilling be done. We are quoted Bigelow on Estoppel, § 642: "A party cannot occupy inconsistent positions; and where one has an election between several inconsistent courses of action, he will be confined to that which he first adopts." But suppose he adopts one construction, lets the other party know it, and only does what is alleged as an act of estoppel with a specific understanding known to both. It is of the essence of estoppel by conduct, where one alleges that the conduct of another has misled and betrayed him, that the former should be inspiring false belief and confidence in that other; and it cannot apply where that other's eyes are open to the true state of things, and he knows the truth about the thing as to which he alleges he was misled, and knows the other man did not intend to inspire false confidence. Point 5, *Bates* v. *Swiger*, 40 W. Va. 420; *Mason* v. *Harper's Ferry Bridge Co.* 28 W. Va. 639, 649; *Graham* v. *Thompson*, 55 Ark. 296; Bigelow, Estoppel, 626. Harness and wife give affidavits that they told Watson from first to last that the leases were out, and his claim of right to extend not tenable. Two swear so against one. That Harness and wife did so is probable because we know they so claimed, from letters of both sides, which letters cannot swerve from truth, and it is not likely the Harnesses yielded this point afterwards, when they say, and we cannot help but know, that their great object was to have the oil developed on their land. How very improbable that they would dispense with boring for perhaps many years, and thereby lose perhaps great wealth for a merely paltry amount. Harness and wife stated no fact falsely, and to make an estoppel there must be a false statement of facts, not of law. *Mason* v. *Harper's Ferry Bridge Co.* 28 W. Va. 639. One side knew the facts as well as the other, and both sides were bound to know the law of the lease. We cannot say there is any estoppel unless we give it the phase of a promise by Harness and wife that they would abide by Watson's construction; and that is disproved. They told him just the reverse. To constitute an estoppel, the party claiming it must have acted upon the statement or conduct of the other differently from what would have been his course without such statement or conduct. What was the conduct of the Harnesses here? No statement, no false representation; only taking the money. Bigelow, Estoppel, 630. They took that, not of their motion, but at Watson's importuning solicitation, as a favor to him to give a few months longer for drilling. If they had not received it Watson would have paid in bank, as he did when the Harnesses refused to receive further. So, their action did not induce this payment, but Watson risked that. The Harnesses did nothing unjust or unconscionable for which equity should visit them with the penalty of giving anyone leave to defer development for years on payment of a small sum, defeating their object in making the leases, and allowing the lessees, by their wells on adjacent land, to drain off all the oil from their land. What wrong have the Harnesses done? "Equitable

estoppels only arise when the conduct of the party estopped is fraudulent in its purpose or unjust in its results. . . . The fundamental principle upon which this doctrine is based is the equitable one,—the suppression of fraud, and the enforcement of honesty and fair dealing." Herman, Estoppel, §§ 731, 736, pp. 862, 865. Where was any bad intent in the Harnesses in taking this money? Watson paid with eyes open. Id. 833. Where is any injustice, or even hardship, on Bettman & Watson? They say they have paid large sums in these monthly payments. They were only those nominated in the bond, so far as the two years' term is concerned; and beyond that only the same amount per month, and received as a favor and grace to them. They omitted, for reasons known to them, to use the leases by development. Any hardship on them is self-imposed. I must not omit to show a marked distinction between this case and *Hukill* v. *Myers*, 36 W. Va. 639. cited as binding us to recognize an equitable estoppel in this case. That is no authority in this case. In that case was a lease for twenty years, with duty of boring within a year, or paying monthly sums, and, both failing, calling for a forfeiture. We held that receiving money after it was due was evidence of intent not to exact but to waive a forfeiture? It was a question whether there was a forfeiture, the term not being ended. Here it is not at all a question of forfeiture, but a question whether the lease is by its term ended.

So, we hold that there is no ground to raise an equitable estoppel. This renders it needless to discuss the question, if there were such estoppel as between the parties whether its effect would be to continue the leases, which were recorded, and known to Finnegan, or whether it would create a new estate, and as such be void as to Finnegan as a purchaser for value without notice, and whether he was such purchaser.

We reverse the order overruling the motion to dissolve the injunction, and dissolve that injunction, and as the bill is purely an injunction bill, we dismiss it.

William R. GUNN, Admr., etc., of Henry Myers, *Plff in Err.*,

v.

OHIO RIVER RAILROAD COMPANY.

(42 W. Va. 676.)

*1. **The syllabus in Garrett v. Ramsey,** 26 W. Va. 345, upon demurrers to evidence, approved.

2. **A child of very tender years** is not chargeable with contributory negligence.

3. **The engineer and fireman of a railroad train** must keep a careful lookout on the track ahead to discover persons and animals upon it, and use ordinary care to avoid injury to them.

*Headnotes by BRANNON, J.

4. **While it may be assumed by the engineer** that a person walking upon a railroad track will get off it in time to save himself from injury from a train, yet that is not the rule as to children of very tender years, or persons plainly and obviously disabled by deafness, intoxication, sleep, or other cause from taking care of themselves.

5. **Parents' negligence,** when it prevents recovery for injury to children.

6. **Demurrer to evidence,** principles of.

(December 9, 1896.)

ERROR to the Circuit Court for Mason County to review a judgment in favor of defendant in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. *Reversed.*

The facts are stated in the opinion.

Messrs. **John E. Beller, W. R. Gunn,** and **Charles E. Hogg,** for plaintiff in error:

In this class of accidents the railroad company owes a child so young as to be incapable of caring for its own safety the same measure of duty—the same degree of care—that it owes to dumb animals astray upon its tracks.

Gunn v. *Ohio River R. Co.* 36 W. Va. 173, 37 W. Va. 421.

The rule as to domestic animals astray upon a railroad track is, that the employees of the company are bound to adopt the ordinary precautions to discover that the animals are upon the track, as well as to avoid injuring them after they are seen.

Baylor v. *Baltimore & O. R. Co.* 9 W. Va. 271; *Washington* v. *Baltimore & O. R. Co.* 17 W. Va. 190; *Blaine* v. *Chesapeake & O. R. Co.* 9 W. Va. 252; *Hawker* v. *Baltimore & O. R. Co.* 15 W. Va. 628, 36 Am. Rep. 825; *Johnson* v. *Baltimore & O. R. Co.* 25 W. Va. 570; *Heard* v. *Chesapeake & O. R. Co.* 26 W. Va. 455; *Bullington* v. *Newport News & M. V. Co.* 32 W. Va. 436.

The measure of duty on the part of a railroad company toward young children on its tracks is that of ordinary care.

Deering, Neg. § 261; Pierce, Railroads, p. 336; *Isabel* v. *Hannibal & St. J. R. Co.* 60 Mo. 475; *Meeks* v. *Southern P. R. Co.* 56 Cal. 513, 38 Am. Rep. 67; *Chicago, B. & Q. R. Co.* v. *Grablin*, 38 Neb. 91; *Guenther* v. *St. Louis, I. M. & S. R. Co.* 95 Mo. 286; *Reilly* v. *Hannibal & St. J. R. Co.* 94 Mo. 600; *Texas & P. R. Co.* v. *O'Donnell*, 58 Tex. 27; *Smith* v. *Atchison, T. & S. F. R. Co* 25 Kan. 738; *Keyser* v. *Chicago & G. T. R. Co.* 66 Mich. 390; *Frick* v. *St. Louis, K. C. & N. R. Co.* 75 Mo. 595; *San Antonio & A. P. R. Co.* v. *Vaughn*, 5 Tex. Civ. App. 195; *Bottoms* v. *Seaboard & R. R. Co.* 114 N. C. 699, 25 L. R. A. 784.

The only question for the jury to determine in this case was whether the employees in charge of the train, by which plaintiff's decedent was killed, could have seen these little children, by the exercise of ordinary care, in time to have stopped the train and avoided

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NOTE.—As to the duty to maintain a lookout on a railroad train, see Smith v. Norfolk & S. R. Co. (N. C.) 25 L. R. A. 287.

As to care necessary to prevent injuring small children upon a railroad track, see Bottoms v. Seaboard & R. R. Co. (N. C.) 25 L. R. A. 784.

striking them with the engine, as is shown by the evidence to have been the case.

The contention that the defendant owed the plaintiff's decedent no duty was overthrown on the former writ of error awarded in this case, and the law settled to the contrary.

Gunn v. *Ohio River R. Co. supra.*

It was the duty of the defendant through its employees in charge of the train to keep a lookout.

Virginia Midland R. Co. v. *White,* 84 Va. 498; *Bullock* v. *Wilmington & W. R. Co.* 105 N. C. 180, citing Wood, Railway Law, § 418, p. 1548; *South & North Ala. R. Co.* v. *Williams,* 65 Ala. 74; *South & North Ala. R. Co.* v. *Jones,* 56 Ala. 507; *Houston & T. C. R. Co.* v. *Sympkins,* 54 Tex. 615, 38 Am. Rep. 632; *East Tennessee, V. & G. R. Co.* v. *White,* 5 Lea, 540; *Townley* v. *Chicago, M. & St. P. R. Co.* 53 Wis. 626; *Frazer* v. *South & North Ala. R. Co.* 81 Ala. 185, 60 Am. Rep. 145; Hogg, Pleading & Forms, form 115, pp. 350, 351.

The negligence of the parent or him *in loco parentis* cannot be imputed to the child.

Norfolk & W. R. Co. v. *Groseclose,* 88 Va. 267; *Robinson* v. *Cone,* 22 Vt. 214, 54 Am. Dec. 67; *Washington* v. *Baltimore & O. R. Co.* 17 W. Va. 202.

When the suit is by a parent for the loss of service caused by an injury to the child, the contributory negligence of the plaintiff is a good defense; but such negligence is not imputable to the child, and is consequently not to be considered, when the suit is by the child or its personal representative.

Shearm. & Redf. Neg. 48*a; Glassey* v. *Hestonville, M. & F. Pass. R. Co.* 57 Pa. 172; *Huff* v. *Ames,* 16 Neb. 139, 49 Am. Rep. 716.

The doctrine of *Hartfield* v. *Roper,* 21 Wend. 615, 34 Am. Dec. 273, has been repudiated in many states.

Beach, Contrib. Neg. § 42; *Norfolk & P. R. Co.* v. *Ormsby,* 27 Gratt. 455; *Bellefontaine & I. R. Co.* v. *Snyder,* 18 Ohio St. 408, 98 Am. Dec. 175; *Galveston, H. & H. R. Co.* v. *Moore,* 59 Tex. 64, 46 Am. Rep. 265; *Erie City Pass. R. Co.* v. *Schuster,* 113 Pa. 412, 57 Am. Rep. 471; *Robinson* v. *Cone, supra; Daley* v. *Norwich & W. R. Co.* 26 Conn. 591, 68 Am. Dec. 413; *Smith* v. *Hestonville, M. & F. Pass. R. Co.* 92 Pa. 450, 37 Am. Rep. 705; *Pratt Coal & I. Co.* v. *Brawley,* 83 Ala. 371; *Wymore* v. *Mahaska County,* 78 Iowa, 396, 6 L. R. A. 545; *Sioux City & P. R. Co.* v. *Stout,* 84 U. S. 17 Wall. 657, 21 L. ed. 745; 4 Am. & Eng. Enc. Law, p. 88, and cases cited; *Newman* v. *Phillipsburg Horse Car R. Co.* 52 N. J. L. 446, 8 L. R. A. 842; *Chicago City R. Co.* v. *Wilcox,* 21 L. R. A. 76 and *note,* 138 Ill. 370; Bishop, Non-Cont. L. § 352.

All the leading text-writers have concluded that the great weight of authority is adverse to the doctrine that an infant can become in any wise a tortfeasor by imputation.

1 Shearm. & Redf. Neg. § 75; Whart. Neg. § 311; 2 Wood, Railway Law, 1284; Beach, Contrib. Neg. § 130. See *Moore* v. *Metropolitan R. Co.* 2 Mackey, 437; *Westerfield* v. *Levis,* 43 La. Ann. 63; *Battishill* v. *Humphreys,* 64 Mich. 494; *Shippy* v. *Au Sable,* 85 Mich. 280; *Gunn* v. *Ohio River R. Co.* 37 W. Va. 421; *Jansen* v. *Siddal,* 41 Ill. App. 279; *Stafford* v. *Rubens,* 115 Ill. 196; *Chicago* v. *Hesing,* 83 Ill. 204, 25 Am. Rep. 378.

On a motion to exclude the plaintiff's evidence based on the insufficiency of the evidence of the plaintiff to authorize a verdict for him, would not the court ask itself the question, "If the jury should find a verdict for the plaintiff on this evidence would the court set it aside?" If the answer of the court should be in the affirmative, then it would not await the delay of an argument and the deliberations of a jury on the evidence, but would at once exclude the evidence and thus promptly settle the matter at that stage of the proceedings.

Dresser v. *West Virginia Transp. Co.* 8 W. Va. 553; *Schwarzbach* v. *Ohio Valley Protective Union,* 25 W. Va. 622, 52 Am. Rep. 227; *Franklin* v. *Geho,* 30 W. Va. 27; *Humphreys* v. *Newport News & M. V. Co.* 33 W. Va. 135; *James* v. *Adams,* 8 W. Va. 568; *Johnson* v. *Baltimore & O. R. Co.* 25 W. Va. 570.

By the common law and the English practice no evidence was stated in the demurrer but that offered by the demurree.

Patteson v. *Ford,* 2 Gratt. 18; *Miller* v. *Citizens' Fire, Marine & L. Ins. Co.* 12 W. Va. 116, 29 Am. Rep. 452; *Green* v. *Judith,* 5 Rand. 1; *Hansbrough* v. *Thom,* 3 Leigh, 147.

In such case the question, pure and simple, of the sufficiency of the plaintiff's evidence to authorize a recovery was referred to the court.

All the evidence of the demurrant in conflict with that of the demurree is rejected by the court.

Hansbrough v. *Thom, Green* v. *Judith,* and *Patterson* v. *Ford, supra;* 1 Rob. (Old) Pr. 351, 352; *Muhleman* v. *National Ins. Co.* 6 W. Va. 508; *Fowler* v. *Baltimore & O. R. Co.* 18 W. Va. 579; *Allen* v. *Bartlett,* 20 W. Va. 46; *Garrett* v. *Ramsey,* 26 W. Va. 345; *Levy* v. *Peabody Ins. Co.* 10 W. Va. 560, 27 Am. Rep. 598; *Stolle* v. *Ætna F. & M. Ins. Co.* 10 W. Va. 547, 27 Am. Rep. 593; *Horner* v. *Speed,* 2 Patton & H. (Va.) 616; *Trout* v. *Virginia & T. R. Co.* 23 Gratt. 619; *Richmond & D. R. Co.* v. *Anderson,* 31 Gratt. 812, 31 Am. Rep. 750; *Gerity* v. *Haley,* 29 W. Va. 98; *Nuzum* v. *Pittsburgh, C. & St. L. R. Co.* 30 W. Va. 228; *Carrico* v. *West Virginia C. & P. R. Co.* 35 W. Va. 389.

In Illinois, a motion to strike out all the complainant's evidence admits, like a demurrer, all the facts, and all the conclusions fairly deducible therefrom.

Heiderich v. *Heiderich,* 18 Ill. App. 142; *Frazer* v. *Howe,* 106 Ill. 563.

In Indiana, on a demurrer to evidence no attempt to reconcile conflicts in the evidence will be made. All inferences are in favor of the adverse party.

Lake Shore & M. S. R. Co. v. *Foster,* 104 Ind. 293, 54 Am. Rep. 319; *Vigo Agri. Soc.* v. *Brumfiel,* 102 Ind. 146, 52 Am. Rep. 657.

So, in Kansas, on a demurrer to evidence, the court cannot weigh or consider conflicting testimony.

Wolf v. *Washer,* 32 Kan. 533; *Brown* v. *Atchison, T. & S. F. R. Co.* 31 Kan. 1; *Bequillard* v. *Bartlett,* 19 Kan. 382, 27 Am. Rep. 120.

In order to compel the plaintiff to join in demurrer, and thus withdraw his case from the jury—the proper triers of the fact—the truth of the demurree's evidence must be admitted,

and no conflict in the testimony be considered by the court.

Coates v. *Galena & C. Union R. Co.* 18 Iowa, 277; *Jones* v. *Ireland*, 4 Iowa, 63; *Young* v. *Black*, 11 U. S. 7 Cranch, 565, 3 L. ed. 440; *Maus* v. *Montgomery*, 11 Serg. & R. 329; *Brandon* v. *Planters' & M. Bank*, 1 Stew. (Ala.) 320, 18 Am. Dec. 48; *Patty* v. *Edelin*, 1 Cranch, C. C. 60; *Jordan* v. *Sawyer*, 2 Cranch, C. C. 373; *Morrison* v. *McKinnon*, 12 Fla. 552; *Dormady* v. *State Bank*, 3 Ill. 236.

The sworn testimony of witnesses, not otherwise contradicted, may be completely overthrown by the fair and reasonable presumptions from other well-established facts and circumstances in the case.

Greenfield v. *Chicago & N. W. R. Co.* 83 Iowa, 270; *Brown* v. *Missouri P. R. Co.* 13 Mo. App. 462; *Hagan* v. *Chicago, D. & C. G. T. J. R. Co.* 86 Mich. 615; *Dean* v. *Chicago, M. & St. P. R. Co.* 39 Minn. 413; *Schlereth* v. *Missouri P. R. Co.* 96 Mo. 509; *Bon Aqua Improv. Co.* v. *Standard F. Ins. Co.* 34 W. Va. 764.

On rehearing.

The doctrine of *Hartfield* v. *Roper*, 21 Wend. 615, 34 Am. Dec. 273, as originally understood and applied by the courts and the profession, has been either expressly or impliedly rejected in nearly all of the states in the Union, whenever the principle it involves has been invoked or sought to be applied.

Newman v. *Phillipsburg Horse Car R. Co.* 52 N. J. L. 446, 8 L. R. A. 842; *Norfolk & P. R. Co.* v. *Ormsby*, 27 Gratt. 455; *Bellefontaine & I. R. Co.* v. *Snyder*, 18 Ohio St. 408, 98 Am. Dec. 175; *Galveston, H. & H. R. Co.* v. *Moore*, 59 Tex. 64, 46 Am. Rep. 265; *Erie City Pass. R. Co.* v. *Schuster*, 113 Pa. 412, 57 Am. Rep. 471; *Robinson* v. *Cone*, 22 Vt. 214, 54 Am. Dec. 67; *Daley* v. *Norwich & W. R. Co.* 26 Conn. 591, 68 Am. Dec. 413; *Smith* v. *Hestonville, M. & F. Pass. R. Co.* 92 Pa. 450, 37 Am. Rep. 705; *Pratt Coal & I. Co.* v. *Brawley*, 83 Ala. 371; *Sioux City & P. R. Co.* v. *Stout*, 84 U. S. 17 Wall. 657, 21 L. ed. 745.

Our own state has expressly rejected the doctrine in the case of *Dicken* v. *Liverpool Salt & C. Co.* 41 W. Va. 511.

The doctrine has been repudiated as untenable by nearly if not quite all the various text-writers on the law of negligence.

Beach, Contrib. Neg. § 130; 1 Shearm. & Redf. Neg. § 75; 2 Wood, Railway Law, 1284; Bishop, Non-Cont. L. § 352; Ray, Negligence of Imposed Duties, 733.

The negligence of the parent cannot be imputed to the child so as to defeat an action by its personal representative, though such parent may be the sole beneficiary.

Norfolk & W. R. Co. v. *Groseclose*, 88 Va. 267; *Wymore* v. *Mahaska County*, 78 Iowa, 396, 6 L. R. A. 545; *Cleveland, C. & C. R. Co.* v. *Crawford*, 24 Ohio St. 631, 15 Am. Rep. 633; *Davis* v. *Guarnieri*, 45 Ohio St. 470.

The doctrine of imputed negligence does not meet with much favor in the more modern decisions of our courts. The more it is examined the more apparent it becomes that such a doctrine cannot be sustained on principle.

For instance, the holding of the court in *Thorogood* v. *Bryan*, 8 C. B. 115, decided in 1849, was a leading English case, in imputing the negligence of a carrier to the plaintiff, so as to deny him a right of recovery for nearly forty years, until the good sense of modern judges in England repudiated the doctrine it announced and overruled the case. The principle of law announced in *Thorogood* v. *Bryan* has been rejected in Indiana. *Pittsburgh, C. & St. L. R. Co.* v. *Spencer*, 98 Ind. 186; *Knightstown* v. *Musgrove*, 116 Ind. 121; in Ohio, *St. Clair Street R. Co.* v. *Eadie*, 43 Ohio St. 91; *Covington Transfer Co.* v. *Kelly*, 36 Ohio St. 86; in Illinois, *Wabash, St. L. & P. R. Co.* v. *Shacklet*, 105 Ill. 364, 44 Am. Rep. 791; in Pennsylvania, *Carlisle* v. *Brisbane*, 113 Pa. 544, 57 Am. Rep. 483; in Maryland, *Philadelphia, W. & B. R. Co.* v. *Hogeland*, 66 Md. 149, 59 Am. Rep. 159; in Michigan, *Cuddy* v. *Horn*, 46 Mich. 596, 41 Am. Rep. 178; in Iowa, *Nesbit* v. *Garner*, 75 Iowa, 314, 1 L. R. A. 152; in Minnesota, *Follman* v. *Mankato*, 35 Minn. 522, 59 Am. Rep. 340; in New Jersey, *New York, L. E. & W. R. Co.* v. *Steinbrenner*, 47 N. J. L. 161, 54 Am. Rep. 126; in New York, *Robinson* v. *New York C. & H. R. R. Co.* 66 N. Y. 11, 23 Am. Rep. 1; *Dyer* v. *Erie R. Co.* 71 N. Y. 228; *Masterson* v. *New York C. & H. R. R. Co.* 84 N. Y. 247, 38 Am. Rep. 510; in Georgia, *East Tennessee, V. & G. R. Co.* v. *Markens*, 88 Ga. 60, 14 L. R. A. 81.

It is also rejected by the Supreme Court of the United States.

Little v. *Hackett*, 116 U. S. 366, 29 L. ed. 652.

Mr. **V. B. Archer**, for defendant in error:

When the case was here before, the court placed the measure of the defendant's duty in line with that exacted from railroad companies in numerous cases decided by this court upon the law as applicable to injuries to live stock.

In order to charge a railroad company with damages for killing stock straying upon its track, negligence on the part of the company must appear, and the burden of showing it rests upon the plaintiff.

Maynard v. *Norfolk & W. R. Co.* 40 W. Va. 331; *Blaine* v. *Chesapeake & O. R. Co.* 9 W. Va. 252; *Baylor* v. *Baltimore & O. R. Co.* Id. 270; *Washington* v. *Baltimore & O. R. Co.* 17 W. Va. 190; *Johnson* v. *Baltimore & O. R. Co.* 25 W. Va. 570; *Heard* v. *Chesapeake & O. R. Co.* 26 W. Va. 455; *Bullington* v. *Newport News & M. V. Co.* 32 W. Va. 436; *Layne* v. *Ohio River R. Co.* 35 W. Va. 438; *Hoge* v. *Ohio River R. Co.* Id. 562; *Harrow* v. *Ohio River R. Co.* 38 W. Va. 711.

An inference cannot be drawn against the plain, uncontradicted evidence of the engineer and fireman.

Kentucky C. R. Co. v. *Talbot*, 78 Ky. 621.

A motion to exclude or strike out evidence is not in all cases the equivalent of a demurrer to evidence, and should not, without modification, be permitted to supersede and replace such demurrer.

Bon Aqua Improv. Co. v. *Standard F. Ins. Co.* 34 W. Va. 764; *Powell* v. *Love*, 36 W. Va. 96.

The rule upon demurrer to evidence is practically that adopted upon motions for new trial.

If the evidence is such that the court ought not to set aside the verdict of a jury in favor of the demurree, then upon a demurrer to that evidence the court should give judgment against the demurrant

Heard v. *Chesapeake & O. R. Co. supra; Ware* v. *Stephenson,* 10 Leigh, 155.

Can the plaintiff introduce a witness who testified to a fact, and who is not impeached, and who is not contradicted, and then be heard to insist that the jury shall infer a fact in direct contravention to the fact proved by such witness?

Core v. *Ohio River R. Co.* 38 W. Va. 475; *Poling* v. *Ohio River R. Co.* Id. 669, 24 L. R. A. 215.

The judgment of the circuit court in sustaining demurrer to evidence will be given peculiar weight as in awarding a new trial.

Martin v. *Thayer,* 37 W. Va. 38; *Reynolds* v. *Tompkins,* 23 W. Va. 229.

This case is one which particularly calls for the application of the doctrine of imputed or contributory negligence on the part of the parents.

Cauley v. *Pittsburgh, C. & St. L. R. Co.* 95 Pa. 398, 40 Am. Rep. 664; *Chicago City R. Co.* v. *Robinson,* 127 Ill. 9, 4 L. R. A. 126.

Positive testimony of an unimpeached and uncontradicted witness cannot be disregarded by a court or jury arbitrarily or capriciously.

Core v. *Ohio River R. Co. supra; Lomer* v. *Meeker,* 25 N. Y. 361; *Elwood* v. *Western U. Teleg. Co.* 45 N. Y. 549, 6 Am. Rep. 140; *Newton* v. *Pope,* 1 Cow. 110.

The presumptions can only stand when they are compatible with the conduct of those to whom it may be sought to apply them; and still more must give place when in conflict with clear, distinct, and convincing proof.

Whitaker v. *Morrison,* 1 Fla. 29, 44 Am. Dec. 633; *Fresh* v. *Gilson,* 41 U. S. 16 Pet. 331, 10 L. ed. 983.

Messrs. **H. P. Camden** and **James B. Menager** also for defendant in error.

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

Two little boys, Henry C. Mayes, not quite five years old, and Luelza Mayes, about six years old, were killed by a train on the Ohio River Railroad, and this is a suit by the administrator of Henry C. Mayes against the Ohio River Railroad Company to recover damages for his death. The briefs of counsel are elaborate and able, laying down all the propositions arising, and citing all the law necessary for decision, and have been very helpful in the decision of the case.

If Henry C. Mayes had been an adult, no recovery could be had for his death, as he met his sad and early death on the railroad track, and the defense of contributory negligence would defeat recovery; but a child of the tender years of this child is not chargeable with contributory negligence, for want of judgment, discretion, and presence of mind, to know and avoid danger. *Dicken* v. *Liverpool Salt & C. Co.* 41 W. Va. 511; *Westbrook* v. *Mobile & O. R. Co.* 66 Miss. 568; *Bottoms* v. *Seaboard & R. R. Co.* 114 N. C. 699, 25 L. R. A. 784; *Summers* v. *Bergner Brewing Co.* 143 Pa. 114. The law is clear that those in charge of a train, must, by keeping up a reasonable lookout, use fairly ordinary care to discover animals and persons on the track, both to save them and passengers from injury. The public interest and necessity, not merely the company's, demand that the company have sole possession of its track; but, as people live and move along the route, they do go upon the track, children, in their thoughtlessness and indiscretion, will go upon it, stock will wander upon it; and sheer necessity calls for such care as is exacted by this rule. *Gunn* v. *Ohio River R. Co.* 36 W. Va. 165; 2 Wood, Railway Law, § 320; opinions in *Raines* v. *Cheaspeake & O. R. Co.* 39 W. Va. 50, 24 L. R. A. 50. Some courts hold that no duty lies on the company to look ahead for persons on the track, as it has exclusive right to its track except at crossings, and they are trespassers; but we have held that there must be a lookout even for live stock, and ordinary care to prevent injury to it. *Layne* v. *Ohio River R. Co.* 35 W. Va. 438, and cases. And, certainly, the same care would be required so far as infants, deaf and other disabled persons are concerned, if not as to others. But our court has settled this in cases above cited. If a child trespassing on a railroad track is struck by an engine, the company is liable if the engineer, by such careful and vigilant lookout as is consistent with other duties, could have seen the child in time to prevent the accident. *Chicago, B. & Q. R. Co.* v. *Grablin,* 38 Neb. 90; *Bottoms* v. *Seaboard & R. R. Co.* 114 N. C. 699, 25 L. R. A. 784; 2 Wood, Railway Law, § 320. So if the child is going towards the track, or running near it, evidently going on it. An adult seen upon the track, the presumption is that he will get off, but not so with little children. When they are seen on the track, the duty is to stop and save them. *Raines* v. *Chesapeake & O. R. Co.* 39 W. Va. 50, 24 L. R. A. 50; 2 Wood, Railway Law, § 320; *Bottoms* v. *Seaboard & R. R. Co.* 114 N. C. 699, 25 L. R. A. 784. Such is the law of the subject. What are the rights of the parties under it upon the facts? The defendant withdrew the case from the jury by a demurrer to the evidence. This has an important bearing, as certain principles apply in deciding a case on such demurrer.

A demurrer to evidence by the defendant admits all that can reasonably be inferred by a jury from the plaintiff's evidence, and waives all the defendant's contradictory evidence, or evidence the credit of which is impeached, and all inferences from the defendant's evidence that do not necessarily flow from it. The evidence must be interpreted most favorably to the demurree, so that he may have all the benefit which a verdict in his favor by the jury would give him. In determining the facts inferable from the evidence, where there is grave doubt, those inferences or conclusions most favorable to the demurree will be adopted; and, unless there is a decided preponderance of probability or reason against the inference that might be made in favor of the demurree, such inference ought to be made in his favor. If the evidence is such that, if there were a verdict in favor of the demurree, the court ought not to set it aside, then, on the demurrer to the evidence, the court ought to give judgment against the demurrant. *Stolle* v. *Ætna F. & M. Ins. Co.* 10 W. Va. 546, 27 Am. Rep. 593; *Garrett* v. *Ramsey,* 26 W. Va. 345; *Franklin* v. *Geho,* 30 W. Va. 27; *Fowler* v. *Baltimore & O. R. Co.* 18 W. Va. 579. Keeping in mind these principles, let us look at the evidence to see what

inferences ought to be made from it. The children were killed on a little trestle over a small stream, while sitting on the guard rail. The turning question is: Had they been there long enough before the train struck them to have enabled the trainmen to see them in time to save them, as the plaintiff claims they had been, or did they go upon the trestle when the engine was within 50 feet or a very short distance of them, too short to save them, as the defendant claims? The engineer says he could see the track for ½ mile or more, as it was straight, and he was looking out, and could see over the trestle, and could see nothing on it; that there were some willows near the trestle, which cast a shade over part of it. He says he saw nothing till within 40 or 50 feet of the trestle when he caught a glimpse of something between the willows or on the trestle (he could not say which), when he sounded the whistle, and it moved, and he saw it was children. He said they were not before on the track to be seen. They were there when killed. We know this. When did they go there? They were sitting astraddle the guard rail when the engine struck them, indisputably. This leaves the inference that they had been there some time. If interest in the train called them from the willows, would they likely have sat down or stood up, alive with interest? If they had so recently gone upon the trestle, is it not reasonable to say that the engineer, on the lookout, as he says, would have seen them,—two children walking? The train was dashing on at 30 miles an hour, and as it would take some time for them to go upon the trestle and sit down, they must have been on it some time before the engine was within 50 feet; that is, they must have been there when the engine was further distant than that distance. The engineer does not say he saw them going on the trestle, though we would infer from his evidence that they suddenly went upon it. Would he not have seen them that bright June morning at 8 o'clock, with a straight track and unimpeded view for ½ mile? If, as he says, the willows shaded one corner of the trestle, tending to prevent his seeing them sitting still, would he not have seen two children moving, in the act of going upon the trestle. The fireman had been engaged in coaling the engine, and, when he finished, he saw the children sitting on the trestle, 40 or 50 feet ahead. Going no further, taking these facts and the statements of these trainmen, I say that the inference that the children were sitting on the trestle some time before the coming of the train is more reasonable than that they suddenly appeared upon it, just before they were struck. And remember, in doubt, we must make the inference most favorable to the demurree. The engineer does not contradict this inference by telling us that he did see them all at once go upon the trestle. The inference does not necessarily flow from his evidence that they did all at once go upon the trestle. Unless there is a decided preponderance of probability or reason in favor of this sudden coming of the children upon the trestle, we cannot make it, but must make the other, under a demurrer to evidence. But add other evidence: A witness says he passed over this trestle, and saw the children sitting upon it, and the train came in, perhaps, fifteen minutes, he thought, but was not certain as to the time. There they were sitting when he last saw them. There they were sitting when the locomotive struck them. May we not say, that they were yet sitting when it struck them? Had they ever moved? Counsel argues that we cannot make this inference because the uncontradicted evidence of the engineer and fireman is that they were on the lookout, and did not see the children, and we cannot draw inference against positive evidence. But the facts argue against this. The fireman had not looked for ½ of a mile till he got within 45 or 50 feet, when he saw them. The engineer might have looked, but failed to see. The children might have been there nevertheless. He says the morning was foggy. If so, that would likely prevent his seeing; but discard that, as in conflict with several witnesses who say it was sunshiny and bright. The engineer says that willows shaded the trestle. That might have prevented his seeing the children, and yet they be sitting there. But other evidence contradicts him as to the willows shading. Bear in mind that as yet we are confining ourselves to the question whether those children were on the trestle so as to be seen some time before the casualty, not upon the question whether the engineer did see them, or whether he used diligence and failed to see them. We therefore conclude that it is fair upon this evidence to say—at least not unfair or unreasonable to say—the children were on the trestle so as to be seen long enough before the train came to be seen and saved, so far as distance is concerned.

But the defendant would still say that the evidence shows a careful lookout, and, if the children were there, they were not seen by this careful lookout, and that ordinary care is all that can be demanded, and, if it fails, the company is not responsible. They say the evidence showing this ordinary care to avoid calamity is uncontroverted, and we cannot find in its face a want of ordinary care. We do not say they were seen and purposely hurt, but was there due care? Was there that care required by law? This is now our question, seeing that those children were upon that trestle, and the deadly train approaching them. There was a curve in the road, and between the curve and the trestle a straight level track, with clear view for full ½ mile; and the morning a clear bright morning of June, the time 8 o'clock, the children (two of them) sitting on a guard rail on a trestle, clearer to view perhaps, than if elsewhere on the track, and the engine such as was capable of stopping the train in its own length, the fireman said, a witness for plaintiff, though the engineer, a witness for defendant, denied this. Now, it would be pretty lenient under these circumstances, so favorable for seeing and saving these children, and pretty dangerous as a rule, to say there was all due care. But here an important consideration enters into this question of the presence or absence of due care, and this, that it is one of fact, proper for a jury; so, also, what was a fair inference from all the circumstances as to when the children were first on the trestle; so, also, the credibility of witnesses as to seeing the children, and of watchfulness. A jury is

to judge of the weight of evidence, and make inferences and deductions. Now, suppose there had been a verdict for the plaintiff. Could we set it aside? We do not think we could. Then the rule of decision upon a demurrer to evidence would require judgment upon it for the plaintiff. There is stronger reason for holding the company for want of a close lookout, and more opportunity to discover the children, than was the case with the mule in *Heard* v. *Chesapeake & O. R. Co.* 26 W. Va. 455, and that was not on a demurrer to evidence, while this is.

The counsel of defendant seeks to relieve it from liability because of imputed negligence; that is, that as the father and mother of these children allowed them to go about the track, and thus exposed them to danger, and as the father is sole distributee of his child, and will get the money recovered, the suit cannot be maintained, as his negligence is imputed to the child. But we do not think that, if that doctrine be good law, a sufficient basis exists for its application. There was not that omission of ordinary care as persons of ordinary prudence deem adequate care with their children. *O'Flaherty* v. *Union R. Co.* 45 Mo. 70, 100 Am. Dec. 343. The parents of these children seem to be poor, and therefore unable to employ a nurse to attend and guard their children,—a fact bearing on the degree of care demandable of them. Though living near the railroad, yet not so near (300 or 400 yards) as to require such close constant watch. They warned their children against going on the railroad. They did know that they had on one or more occasions been on the track, and warned them against going there, and the father once whipped this little boy for doing so. The mother sent them that morning to turn the cows up the road, and come back by the corn lot and garden,—a different direction from the trestle, I understand. They could not pen or imprison their children from light and air and exercise and play. They could not always keep unfailing watch upon them. That that degree of negligence is not shown which would warrant us in denying recovery on this ground. This renders it out of place to discuss the question of imputed negligence; that is, that, though no negligence could be charged to the child, yet, as the parent was negligent in exposing him to danger, that shall be imputed to the child, and made his negligence, and forbid recovery by merely the representative of the child. This doctrine began in the supreme court of New York in 1839, with *Hartfield* v. *Roper*, 21 Wend. 615, 34 Am. Dec. 273, holding that where a child of tender years is in a highway unattended, and is run over by a traveler, the traveler is not liable to even the child, unless the injury was voluntary or from culpable negligence, because the law attributed the negligence of the parents in allowing the child to be in a place of danger to the child, so as to prevent recovery by the child. Since that case the subject has undergone elaborate and refined discussion in the courts, and the conflict is intense. Some courts repudiate it; some adhere to it. It is said to be now against the weight of authority. Virginia has repudiated it in *Norfolk & P. R. Co.* v. *Ormsby*, 27 Gratt. 455, and *Norfolk & W. R. Co.* v. *Groseclose*, 88 Va. 267. From the reading I have done in an incomplete examination of this point, my individual opinion is that, where the child is living and suing, the negligence of the father cannot be imputed to it to affect its action; but where the child is dead, and the father is, by law, sole distributee of the child, as he gets the recovery, and is guilty of the negligence producing the accident, that will bar recovery, no matter who is administrator, unless the defendant's act be wilful or wanton. Of course, where the father sues for loss of his child's service, his own negligence will bar him. See Beach, Contrib. Neg. § 42; 1 Shearm. & Redf. Neg. § 74; Bishop, Non-Cont. L. § 352; 4 Am. & Eng. Enc. Law, p. 88; *Wymore* v. *Mahaska County*, 78 Iowa, 396, 6 L. R. A. 545, citing the many conflicting cases; *Casey* v. *Smith*, 152 Mass. 294, 9 L. R. A. 259; *Westbrook* v. *Mobile & O. R. Co.* 66 Miss. 560; *Pittsburgh, Ft. W. & C. R. Co.* v. *Vining*, 27 Ind. 513, 92 Am. Dec. 269; *Bellefontaine & I. R. Co.* v. *Snyder*, 18 Ohio St. 399, 98 Am. Dec. 175, and note; note to *Freer* v. *Cameron*, (S. C.) 55 Am. Dec. 677; *Ihl* v. *Forty-Second Street & G. S. F. R. Co.* 47 N. Y. 317, 7 Am. Rep. 450; *Grant* v. *Fitchburg*, 160 Mass. 16; *Wiswell* v. *Doyle*, Id. 42; *Johnson* v. *Reading City Pass. R. Co.* 160 Pa. 647.

Judgment reversed, and judgment for plaintiff on the demurrer to evidence.

On Rehearing.

I have always regarded this case as one which lawyers call "a close case." We therefore granted a rehearing. An able reargument has not changed the result expressed in the above opinion. I repeat what is said in that opinion, that imperious necessity demands that railroad companies, through their employees, keep careful lookout for people and obstructions on the track. Railroads must be accorded a place on the face of the earth to answer the needs of society, but all the people must also use the face of the earth, and we must adopt rules preservative of the rights of all, so far as is practicable. It is a high necessity, looking to the safety of passengers and other people, that those in charge of trains flying with lightning speed through great stretches of country shall keep such lookout to discover obstructions and persons disabled from infancy or other cause, found on the track. Judge Holt emphasized this in *Dicken* v. *Liverpool Salt & C. Co.* 41 W. Va. 511, in saying that railroads of all kinds have found by experience that unrelenting watchfulness is requisite to keep tracks safe and clear and they must act on the assumption that they may be brought in contact with children and adults. Can we find that such watchfulness was exercised in this case? That is the crucial question. It is fairly plain that, under the evidence, we must find that the children were sitting on the trestle long enough before the engine struck them to have been seen and saved, had a due lookout been kept; but, having so found, the next question is, Was there a proper lookout? This is the more difficult question. The children were killed, but that alone is not enough to charge the company, unless it was negligent, and, to show that, it

must appear that they could have been seen by the trainmen a sufficient distance from the place of disaster, so that the train could have been stopped. Wood, Railway Law, 1475. And just here council tell us that, by the uncontradicted evidence of the engineer and fireman, a watch was kept, without discovery of the children until within 50 feet of them, and that we cannot say, therefore, that such watch was not kept.

This brings up the question whether a court upon a demurrer to evidence is bound infallibly to take for true a statement of a witness upon a given fact, only because no witness contradicts him in that statement. The rule is that, upon demurrer to evidence, the court rejects only the oral evidence of the demurrant that is contradicted or impeached. But what do you mean by contradicted or impeached? Do you limit the contradiction to contradiction by witnesses? Suppose facts and surrounding circumstances contradict him as to the particular fact, though no witness in words does. If a man who is required to watch in order to see an object says he did watch, but did not see it, when we know the object was there to be seen, and visible and there was no obstruction to sight, and plenty of light, are we bound to say that he did watch, and failed to see? When two children are on a railroad track in broad daylight, and an engine is approaching them, with nearly ¼ mile of unobstructed level track in which to discover them, and a trainman says he looked out that distance without seeing them, is a court bound to say that he did keep such lookout, and did not discover them, merely because it is upon a demurrer to evidence, when a jury need not have so found? We cannot here reject the witness, nature telling us that the sharp eye of an engineer, more surely than the unpracticed eye, will almost certainly see, in bright daylight, a rock, log, or person ahead on a level, unobstructed track. These considerations answer the question of counsel as to what facts justify the conclusion that the children could have been seen when the train was three or four times as far away as when the engineer and fireman first saw them. Counsel rely with confidence on the statement of the engineer that he watched carefully, and that no evidence contradicts him. No witness does; but how as to other settled facts and circumstances? Shall we forget them? When it is said that, on demurrer to evidence, the party demurring waives his evidence that is contradicted by that of his adversary, we do not mean that if the demurrant has a witness deposing to a given fact, and the demurree has no witness contradicting that particular fact, the court must take that fact as proved by an uncontradicted witness, ignoring other facts and circumstances going to disprove that fact. A jury could find against that fact on the strength of other facts and circumstances by saying that such facts and circumstances contradicted the witness; and must a court be denied the power which a jury could exercise? Surely not, because it has often been held that, if the evidence be such as, if the jury had found against that fact, the court should not set the verdict aside, then a court, upon a demurrer to evidence, ought to find against that fact. In such case the evidence of the witness is not regarded as uncontradicted. So that the contrary of the particular fact stated by him is fairly inferable from all the facts and circumstances proved by the demurree. His evidence is deemed contradicted, under the rule of demurrer to evidence that demurrant waives "all his evidence that at all conflicts with that of the other party, admits the truth of his adversary's evidence, admits all inferences of fact that may fairly be deduced from that evidence, and submits it to the court to deduce such fair inferences." *Clopton* v. *Morris*, 6 Leigh, 278. It is only that evidence of demurrant that does not conflict with the evidence of his adversary, nor with the fair and reasonable inferences from it, that is regarded. In *Green* v. *Judith*, 5 Rand. 1, 19, 20, Judge Carr laid down principles solving more nearly the exact point we have than any case I see, saying: "What part of his evidence is he to be considered as waiving? First. All that contradicts that which is offered by the other party. That is, for instance, where a fact is proved circumstantially on one side to be so, and on the other side, to be otherwise; this latter, being the demurrant's evidence, must be waived. . . . The demurrant cannot say, . . . 'It is true, according to the evidence against me, I ought to admit so and so, as you demand, but my evidence shows I ought not; for, according to it, the fact is otherwise, and my witness is not impeached.' He must waive his evidence, or the court must do it for him, as to this matter." Apply these principles in this case. The nature of the case, its circumstances, show that the children could have been seen by a careful lookout in time to save them, and a jury could say, and we can say, there was no lookout; but because a witness says there was, and he is not specifically contradicted by another witness saying the former did not look ahead, but was talking or looking in another direction, we must say he did look ahead though the natural facts tell us he could have seen the children had he been looking. The rule of demurrer to evidence says the demurrant waives that evidence; that is, the court disregards it. The plaintiff's showing, standing alone, denies that there was such lookout, and a jury could on it have so found, and, if it had, we could not set the finding aside; and shall we deny the plaintiff the benefit of a finding which he might have lawfully secured by a jury, when the defendant has withdrawn the case from a jury? That is the test, and the cases say not. *Fowler* v. *Baltimore & O. R. Co.* 18 W. Va. 579.

And here, upon cases cited in the above opinion, I repeat that upon a demurrer to evidence, in determining facts from evidence, where there is grave doubt, those inferences and conclusions most favorable to the demurree will be adopted; and, unless there is decided preponderance of probability or reason against the inference that might be made in favor of the demurree, such inference ought to be made in his favor; and if the evidence is such that, if there were a verdict in his favor, the court ought not to set it aside, then, on such demurrer, the court ought to give judgment in his favor. Speaking for myself, I do not think

that Acts 1891, chap. 100 (Code 1891, chap. 131, § 9), relates to demurrer to evidence. It was not designed to revolutionize the law of demurrer to evidence by reversing the rule that the demurrant waives his oral evidence contradicted by evidence of his adversary; and my reasons for this opinion are (1) that, before that act, all evidence upon such demurrer was certified, and hence the statute was not needed to bring up evidence in that instance; and (2) because by demurring the demurrant takes the case from the jury, and deprives his adversary of the right to have it pass on the evidence contradicting his evidence, including the credibility of witnesses. To hold that he gives up no evidence enables demurrant, at will, to take the case from the jury, and have the court give him full benefit of evidence that is contradicted, which a jury would have discredited or deemed of little effect. Did this act mean to make a jury out of a court as to conflicting evidence on a demurrer to evidence? I think not. Hence, I think, § 4 of syllabus in *Mapel v. John*, 42 W. Va. 30, 32 L. R. A. 800, saying the demurrant waives no part of his evidence, is not tenable. Some may regard it peculiarly hard on railroads to hold them responsible for killing children on the track, on the theory that they own and should have absolute control of their track; but if any of us traveling an ordinary highway, or a farmer in his own field, were to drive a vehicle over a child when he could have been seen, and the injury avoided, the person doing the injury would be liable.

As to imputed negligence of the father: We do not regard the facts as sufficient to debar his recovery, and I shall add nothing as to that to what is said in the original opinion. The facts, therefore, do not squarely raise that question; and, where neither party can be affected one way or the other by its decision, we need not discuss the question. *Stribling v. Splint Coal Co.* 31 W. Va. 82.

KENTUCKY COURT OF APPEALS.

Lindsey E. STEWART, *Appt.*,
v.
Volney E. THOMSON.

(97 Ky. 575.)

An attempt to evade the exemption laws of the state in which both parties reside, by a creditor who attaches property of his debtor temporarily found in another state and enforces his claim there notwitstanding an injunction from a court of his own state, makes him liable to his debtor in damages in the state where they reside.

(May 24, 1895.)

NOTE.—*A debtor's right of action against his creditor for collecting the debt in another jurisdiction in evasion of the exemption laws of their domicil.*

I. *Right of action denied.*
II. *Right of action maintained.*
III. *Conclusion.*

The right of a debtor to enjoin his creditor from proceeding in a foreign jurisdiction to collect the debt in violation of the exemption laws of their domicil has been considered in *notes* to Illinois C. R. Co. v. Smith (Miss.) 19 L. R. A. 577; and Thorndike v. Thorndike (Ill.) 21 L. R. A. 71.

The purpose of this note is to look farther to determine if the debtor can recover damages from his creditor where the latter has collected the demand in a foreign jurisdiction when the same could not have been collected in the courts of their domicil because of the interposition of the exemption laws thereof.

The right of action contemplated is not that of wrongful or malicious attachment, for the attachment was presumably rightful where prosecuted; nor is it in any sense an action on the attachment bond, but it is simply an action at law for the recovery of the consequential damages resulting to the debtor by enforcing the satisfaction of a just debt from which the exemption laws of his domicil are intended to shield him.

I. *Right of action denied.*

In the case of Uppinghouse v. Mundel, 103 Ind. 238, the debtor and creditor were residents of Indiana. The creditor assigned the claim against the debtor and it was collected by garnishment in Kentucky from the railway company for which the debtor worked in Indiana, out of wages earned and exempt in Indiana. The debtor then brought this action in Indiana for the damages resulting to him. It was held that such an action could not be maintained because there was no "injury" in the full legal meaning of the term, and that although there was a state statute making such assignment of claim a misdemeanor punishable by fine, such statute did not give the debtor a right of action,—the right of action accruing to the public,—and furthermore that the debtor had no right of action for malicious attachment for the reason that to sustain such an action the attachment must have been prosecuted both with malice and without probable cause, while this attachment had been on a just debt, collectible within the state from any property subject to execution.

The case of Harwell v. Sharp Bros. 85 Ga. 124, 8 L. R. A. 514, questions the soundness of the decision in Uppinghouse v. Mundel, *supra*, because there was an express statute violated; but it holds that there is no malicious abuse of process nor malicious prosecution of a civil action where on a just debt lawful resort to a competent forum is had for its collection by a creditor not a resident against his debtor not a resident, because by comity he could proceed the same as though he were a citizen of that state, and that while the debtor may have sustained damage, there is no legal injury for which any court adjudicating on legal principles can afford redress.

For different conclusions in the Nebraska court as to the effect of such statute, see *infra*, II.

See, further, *infra*, III.

II. *Right of action maintained.*

In laying down what seems to be a sound legal doctrine the court in O'Connor v. Walter, 37 Neb.

APPEAL by plaintiff from a judgment of the Circuit Court for Greenup County in favor of defendant in an action brought to recover the value of certain mules, belonging to plaintiff which defendant had attached for debt while temporarily in the state of Ohio in alleged evasion of the Kentucky exemption laws. *Reversed.*

The facts are stated in the opinion.

Messrs. **Bennett & Bennett** for appellant.

Messrs. **A. E. Cole & Sons** for appellee.

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

This action was instituted in the Greenup circuit court by the appellant, Lindsey E. Stewart, against the appellee, Volney E. Thomson. It is alleged, in substance, in the petition and amended petition, that the appellee, on January 31, 1894, brought suit on a note held by him against John Stewart and the appellant, as surety, in the court of Volney Row, a justice of the peace in Scioto county, in the state of Ohio, and sued out an attachment against appellant's property in said state, and caused the same to be levied upon a span of mules, harness, and a two-horse wagon, the property of appellant, and exempt from execution and attachment under the laws of Kentucky; that, at the time of the said levy, he had gone with them to Portsmouth, Ohio, temporarily, to haul a load of goods, going there in the morning, intending to return in the evening; that appellee, knowing all the facts aforesaid, and with a fraudulent intent to cheat and defraud appellant out of his exemption under the laws of Kentucky, and with intent to subvert and annul the laws of Kentucky, procured the attachment, and caused the levy to be made as aforesaid; that said mules were worth $300; that, at the time of the levy, said property was claimed and held by him as exempt, under the laws of Kentucky, all of which was known to appellee, appellant being a citizen and resident within Kentucky, with a family, and being his only team of work-beasts, wagon and harness, exempt by the laws of Kentucky; that appellee was then, and for years before had been, a citizen and resident of the commonwealth of Kentucky; that, immediately after said levy, he returned to Kentucky, and sued out an injunction against appellee, enjoining him from proceeding with a sale of said property, but appellee, in violation of said injunction, proceeded with his action, and caused the sale of said mules in the state of Ohio on the 20th of February, 1894, and applied the proceeds to the payment of said debt, *viz.*, the sum of $212; that appellant and appellee have been continuous residents and citizens of Greenup county, state of Kentucky, for years before the bringing of this action; that appellant has no property in Kentucky subject to execution, and this fact induced appellee to perpetrate this fraud upon his rights; that the levy and sale were a great fraud upon his rights, by which he has been damaged in the sum of $500. It appears that a demurrer was sustained to the petition, after which appellant filed an amended petition, in which it is averred that the said suit against him in Ohio was set for the 3d of February, 1894, and that he was there on that day for the sole and only purpose to demand from the officer and the defendant

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267, 23 L. R. A. 650, argued thus: "Let us suppose the exemption was of a specific article of personal property. It would be unquestioned that if he had appropriated it to his own use in this state, O'Connor [the creditor] would be liable to Walter [the debtor] for its value. Instead of its being appropriated in this state, let us suppose that this property was found and appropriated by O'Connor in Iowa, would his liability for its value in the courts of Nebraska be in any way modified by that fact? Would it at all relieve of liability for him to show that his duly authorized agent in Iowa converted the property to the use of O'Connor? Certainly not, and there is no appreciable difference in principle between the cases supposed and that at bar."

The court then declares: "If the judgment creditor, directly or indirectly, no matter where or by what process, appropriates to the payment of a debt due him the exempt wages of the debtor, without such debtor's consent, such creditor is liable to the debtor entitled to such exemption to the full amount of the misappropriation."

Regarding the estoppel of the debtor from questioning collaterally the matters which were alleged to be *res judicata*, the court held that there was no such estoppel for the reason that there was no mutuality between the parties, the creditor not being a party to the proceeding in the other state where the claim had been collected by an assignee for collection, by garnishment.

The court in Bishop v. Middleton, 43 Neb. 10, 26 L. R. A. 445, brought under the act of March 29, 1889, providing (in addition to a penalty) for the recovery by the debtor from the creditor of the amount of the debt collected by assignment and seizure, attachment or garnishment, in another jurisdiction in evasion of the exemption laws of Nebraska, held that the collection was not only unlawful under the statute but was unlawful before the statute was enacted; and held the creditor liable to the amount of the demand collected by the aid of an assignee, and although the demand collected accrued prior to the creation of the right by the statute. It further held that the jury might infer from the circumstances that the assignment was for the purpose of evading the exemption laws.

Singer Mfg. Co. v. Fleming, 39 Neb. 679, 23 L. R. A. 210, approved by Bishop v. Middleton, *supra*, decides the same question, and holds, further, that a foreign corporation doing business in Nebraska is subject to the Laws of 1889, chap. 25, and is liable to an action by its debtor if it collect its claim against him by garnishment in another state in evasion of the exemption laws of Nebraska. Nor is such a statute in violation of the Federal Constitution by denying full faith and credit to the judgment of the other state. Furthermore a claim that to sustain this action on such statute is to punish a creditor for an act committed elsewhere and which was innocent where committed, is answered by saying: "The wrong was in seizing the debt situated in Nebraska, payable in Nebraska to a citizen of Nebraska."

The collection of a claim in another state by assignment, transfer, or in any other way in evasion of the exemption laws of the domicil of the parties makes the collecting creditor subject to an action by the debtor, under Pa. act of May 23, 1887, and such act is not unconstitutional in that it denies to a citizen of one state the "privileges and immunities to citizens of the several states." Sweeny v. Hunter, 145 Pa. 363, 14 L. R. A. 594.

the restoration of said property, as being his exempt property under the laws of Kentucky, and did, in the presence of appellee and said Row, make such demand from the constable, William H. Williams, who had possession of said property by virtue of the attachment, which demand was refused by the officer and by appellee; that he did not claim the property as exempt under the laws of Ohio, as stated in official return of the officer; that he did not put in any defense to appellee's suit in Ohio, or submit himself to its jurisdiction, and, upon the refusal as aforesaid to restore to him his property, he returned home to Kentucky, and instituted suit in this court and sued out his injunction, which injunction was executed 6th day of February, 1894. Copy of the proceedings of the justice's court of Ohio and of the injunction are filed with petition. A demurrer was sustained to the amended petition, and the petition dismissed by the court. Appellant filed grounds and moved for a new trial, which motion was overruled by the court, and appellant has appealed to this court.

Appellee suggests that appellant failed to show by proper averments that the mules in controversy were by the laws of Kentucky exempt from execution, but we think the allegations are sufficient. The petition does not show that there is any other suit pending between the parties; hence the special demurrer cannot be sustained. But appellee insists that the judgment of the justice of the peace directing the sale of the property, and disallowing the exemption, is conclusive of the appellant's right to recover in this action. Courts of justices of the peace are courts of limited jurisdiction, and there is nothing in this record to show that the justice's court had jurisdiction of the sum claimed and recovered. See *Wood* v. *Wood*, 78 Ky. 627. But appellant does not rely upon the want of jurisdiction in the justice's court; hence we need not notice that question further.

The important question involved in this appeal is whether or not a citizen of this state, who is an insolvent debtor, may go into another state, for the purposes incident to interstate commerce, social intercourse, or special business, without subjecting his property, exempt by the laws of this state from execution and attachment, which he happens to take with him, to the payment of debts due another citizen of this state, who may be watchful enough to follow and attach such property, and the debtor have no redress. It seems to us that the law will not allow a creditor to so evade and annul the laws of his own state. Exemption laws have no force beyond the territorial limits of the state enacting the same; hence a citizen of one state, when his property is levied on in another state, cannot plead with effect the laws of his own state, because the general, if not universal, rule is that exemptions are allowed only to citizens of the state enacting such law; hence, by the laws of Ohio, the appellant could not legally claim the benefit of the law of Kentucky, nor any exemption law of Ohio. If the contention of appellee is to prevail, it follows that any insolvent citizen of this state who takes his property into another state for any purpose or for any length of time makes it subject to the demands of any creditor of this state; and the same may be said of any citizen of another state who might chance to come into this state with his property.

The exact question under consideration has never been passed upon by this court, so far as we are aware, but the supreme courts of some other states have considered the question. We concur in that part of the opinion of the superior court in *Byrne* v. *Sinnett*, 13 Ky. L. Rep. 831, which says: "The weight of author-

In Kansas, that the exempt personal earnings of the debtor, the head of a family, might be recovered in another state, a creditor assigned the claim without consideration, and it was collected by garnishment of the debtor's employers who were doing business in both states. The debtor thereafter brought an action at law against the creditor to recover damages for being deprived of the benefit of the exemption laws of the state of his residence and for the injury to his credit and standing with his employers. The cause was taken up on demurrer, and the supreme court held that "the citizen who proceeds and inflicts the wrong is liable to the debtor to the extent of the injury sustained." The supreme court then affirmed the ruling of the court below that the petition [declaration, in common-law practice] stated a good cause of action. Stark v. Bare, 39 Kan. 100.

Fraudulent inducement in endeavoring to get jurisdiction of the property was, in Wood v. Wood, 78 Ky. 625, held to give a right of action for damages. In that case the debtor was induced to take his team and wagon [exempt property] into another state under pretense of hauling freight. The wagon and team were then attached on the claim assigned for that purpose, after theretofore having been reduced to judgment and execution returned "No property found," in a court within the domicil of the debtor and creditor. The debtor did not appear in the attachment but went home and thereafter brought an action for the damage suffered by the attachment, and recovered judgment of $400, entered upon the special finding affirmatively on the question, "Did defendant by counsel, or advice, or persuasion, induce the plaintiff to take the property to Tennessee with the intent and purpose of subjecting the same in that state to the payment of his debt under legal proceedings?" This judgment was affirmed in the court of appeals. And the court further held that the Tennessee court never having obtained jurisdiction over the property because of fraud, its judgment was a nullity; and that the recital of service of process or appearance presented only a prima facie case of jurisdiction which could be inquired into collaterally. The court found that the assignment of the claim was for the purpose of collection, the ownership remaining in fact in the original creditor, but it does not indicate that that would deprive the court of jurisdiction or of itself give a right of action as being fraudulent.

However, the same court goes further in STEWART v. THOMSON, where one S. went with his team into another state on business for the period of one day and the attachment was levied, etc., as it is alleged in this action for damages, "with a fraudulent intent to cheat and defraud appellant [S.] out of his exemption under the laws of Kentucky, and with intent to subvert and annul the laws of Kentucky, etc." S. went home and sued out an injunction which was disregarded and he then brought this action at law for damages. No fraudulent inducement is alleged, only that "the levy and sale were a great fraud upon his rights, by which he has been

ity is, that an injunction will lie by a citizen to restrain another citizen from instituting or prosecuting a suit in a foreign country or state, where the plaintiff in such suit is fraudulently attempting to evade the laws of this state by subjecting to the payment of his debt property temporarily in the foreign state, when under the laws of this state the property is exempt from seizure for his debt." The supreme judicial court of Massachusetts, in *Dehon* v. *Foster*, 4 Allen, 545, in an elaborate opinion, held that an injunction would lie to prevent a citizen of that state from subjecting by attachment a debt due in Pennsylvania to another citizen of Massachusetts, because the effect would be to give them an advantage over another creditor of the debtor, he having made an assignment. Chief Justice Bigelow says in his opinion: "Inasmuch as the defendants in the present case are citizens of and residents in this commonwealth, there can be no doubt that the jurisdiction of this court over them is plenary. . . . Nor is the validity of a foreign law, or of the lien acquired under it, in any manner called in question. . . . An act which is unlawful and contrary to equity gains no sanction or validity by the mere form or manner in which it is done. It is none the less a violation of our laws, because it is effected through the instrumentality of a process which is lawful in a foreign tribunal." The same case was again appealed to the court after final hearing in the court below, and the injunction was made perpetual. 7 Allen, 57. The supreme court of New York, in *Vail* v. *Knapp*, 49 Barb. 301, enjoined a citizen of New York from prosecuting a suit in the court of Vermont. The supreme court of Georgia, in *Engel* v. *Scheuerman*, 40 Ga. 209, 2 Am. Rep. 573, sustained an injunction against Scheuerman, a citizen of Georgia, restraining him from collecting a judgment obtained against Engel in the state of New York. The jurisdiction of the court of New York to render the judgment was not questioned, but it was claimed by Engel that he had been sued in Georgia for the same debt, and judgment rendered for a part of the claim, which judgment he had paid off, and that Scheuerman had led him to believe by word and act that the suit in New York then pending would be abandoned, but, instead of doing so, was about to collect the judgment in New York off of Engel and his securities. We quote as follows from the opinion delivered by justice Warner: "The states of the American Union, except for all purposes as specified in the Constitution of the United States, are, in legal contemplation, foreign to each other. The courts of one state or county cannot exercise any control or superintending authority over those of another state or county, but they have an undoubted authority to control all persons and things within their own territorial limits. In such cases, the courts do not pretend to direct or control the foreign court, but, without regard to the situation of the subject matter of the dispute, they consider the equities between the parties, and decree *in personam* according to those equities, and enforce obedience to their decrees by process *in personam*. Story, Eq. Jur. § 899 . . . In *Lord Cranstown* v. *Johnston*, 3 Ves. Jr. 183, the master of the rolls said: 'I will lay down the rule as broad as this: This court will not permit him [the defendant] to avail himself of the law of any other country to do what would be gross injustice.' . . . This bill is not filed for the purpose of restraining the proceedings of the court of New York; the courts of this state have no jurisdiction to do that; nor would the courts of this state have jurisdiction to enjoin the enforcement of a judgment obtained in the courts of New York, between citizens of that state, resident there. . . . There is a clear

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damaged, etc." After reviewing the cases permitting a debtor to enjoin a creditor from proceeding in another state to collect the demand, on the principle therein stated that courts will not permit a creditor to avail himself of the law of another county to do what would be gross injustice, the court held that upon principle as well as authority a debtor is entitled to recover.

Courts of equity recognize the right of the debtor to recover what his creditor has obtained in evasion of exemption laws, for in Teager v. Landsley, 69 Iowa, 725, the court of the home state had issued an injunction restraining the creditor from proceeding with a garnishment suit in another state to subject property exempt in the home state. The creditor disregarded the injunction and the court then rendered judgment for damages, which was sustained by the supreme court for the reason that the wrongful appropriation of the fund was in disobedience to the order of the court.

And in Snook v. Snetzer, 25 Ohio St. 516, after the creditor had been enjoined from proceeding with a garnishment suit in another state, and after he had disregarded the order and had recovered his claim, the court issuing the injunction rendered judgment in damages for the amount which had been so recovered. The supreme court on review sustained the judgment without referring in its opinion to this phase of the case, but it is evident that it approved of such judgment in favor of the debtor, who otherwise would have been deprived of the benefit of the exemption laws of his domicil.

III. *Conclusion.*

It is noticeable that the courts which deny this right of action reason from different premises than those which sustain the action.

Both the cases of Uppinghouse v. Mundel, 103 Ind. 238, and Harwell v. Sharp Bros. 85 Ga. 124, 8 L. R. A. 514 (which latter, by the way, questions the soundness of the former) approach the question from the point of view of the legality of the proceedings in the foreign state; but the cases sustaining an action by the debtor against the creditor for the damages suffered by the evasion of the exemption laws of their domicil, view the subject from the point of right and justice between the debtor and creditor residing within this jurisdiction, without questioning the validity of the proceedings in the foreign state. They simply proceed on the theory that the creditor having, though legally there, enforced the payment of the demand from a fund *to which the debtor is legally entitled here*, the latter may recover it here in an action at law.

Equity recognizes the rule, and reason and justice urge its further enforcement.

If law is the perfection of reason it cannot permit the family of the indigent debtor to be deprived by circumvention of that substance of which it could not be deprived directly because of the many statutes enacted to secure it. Just law cannot deny the debtor's right to recover from the creditor that which it would not permit the creditor to obtain.

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distinction as to the power and authority of a court of equity, in this state, to restrain by injunction the proceedings of a court in another state, and the power and authority of such court to restrain, by injunction, the personal action of a citizen of state. . . . In the language of the master of the rolls, in *Lord Cranstown* v. *Johnston*, 'this court will not permit him [the defendant] to avail himself of the law of any other country to do what would be gross injustice.'" The foregoing authorities establish clearly the power and duty of the courts to prevent citizens within their jurisdiction from evading the laws of such state by and through the machinery of the law or courts of a foreign state. In the case of *Snook* v. *Snetzer*, 25 Ohio St. 516, almost the exact question in this case was decided by the supreme court of Ohio. Snook was a creditor of Snetzer. The Baltimore & Ohio Railroad Company owed Snetzer a debt in West Virginia, which was by the laws of Ohio exempt from garnishment or attachment. Snook instituted suit in Western Virginia seeking to subject said indebtedness to the payment of his debt against Snetzer. Snetzer sued out an injunction in Ohio against Snook to enjoin him from proceeding with his suit in West Virginia. Snook disregarded the injunction and prosecuted the West Virginia suit to judgment, and collected the debt. Snetzer then sued Snook in the Ohio court to recover back the sum so subjected in the suit in West Virginia, and recovered judgment. Snook appealed to the supreme court of Ohio, which court, after a careful and thorough consideration of the case and the authorities, affirmed the judgment.

It seems to us, upon principle as well as authority, that if the averments of appellant's petition are true, he is entitled to recover.

The judgment of the court below is therefore reversed, and cause remanded, with directions to overrule the demurrers, and for further proceedings consistent with this opinion.

MINNESOTA SUPREME COURT.

Sarah S. JOHNSON, *Respt.*,
v.
ST. PAUL CITY RAILWAY COMPANY, *Appt.*

(........Minn..........)

*1. **Held that the evidence justified the jury in finding** that plaintiff's injury was caused by the negligence of those in charge of defendant's car.

2. **Also, that there was no evidence** to submit to the jury on the question of plaintiff's contributory negligence.

3. **Also, that the damages awarded were excessive,** and that a new trial should be granted unless plaintiff will consent to a reduction of the verdict.

(*Canty, J., dissents.*)

(January 19, 1897.)

APPEAL by defendant from an order of the District Court for Ramsey County refusing a new trial after a verdict in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed on condition of reduction of verdict.*

The facts are stated in the opinion.

Messrs. **Munn, Boyesen, & Thygeson,** for appellant:

The district court erred in declining to instruct the jury as requested by appellant "that the plaintiff could not recover if she was guilty of contributory negligence." She did not look. She paid no attention to her surroundings. The question of her negligence should have been submitted to the jury.

Johnson v. *Superior Rapid Transit R. Co.* 91 Wis. 233; *Brickell* v. *New York C. & H. R. R. Co.* 120 N. Y. 290; *Donnelly* v. *Brooklyn City R. Co.* 109 N. Y. 16; *Houston City Street R. Co.* v. *Reichart*, 87 Tex. 539; *Allyn* v. *Boston & A. R. Co.* 105 Mass. 77; *Brannen* v. *Kokomo, G. & J. Gravel Road Co.* 115 Ind. 115; *Crescent Twp.* v. *Anderson*, 114 Pa. 643, 60 Am. Rep. 367; *Nesbet* v. *Garner*, 75 Iowa, 314, 1 L. R. A. 152; *Dean* v. *Pennsylvania R. Co.* 129 Pa. 514, 6 L. R. A. 143; *Lapsley* v. *Union P. R. Co.* 50 Fed. Rep. 172; Beach, Contrib. Neg. § 115; *Hoag* v. *New York C. & H. R. R. Co.* 111 N. Y. 199; *Miller* v. *Louisville, N. A. & C. R. Co.* 128 Ind. 97; *Lake Shore & M. S. R. Co.* v. *McIntosh*, 140 Ind. 261; *Wilson* v. *New York, N. H. & H. R. Co.* 18 R. I. 598; *Lake Shore & M. S. R. Co.* v. *Miller*, 25 Mich. 274; *Galveston, H. & S. A. R. Co.* v. *Kutac*, 76 Tex. 473; *Zimmerman* v. *Union R. Co.* 3 App. Div. 219; *Weldon* v. *Third Ave. R. Co.* Id. 370; *Durkee* v. *Delaware & H. Canal Co.* 88 Hun, 471; *Dean* v. *Pennsylvania R. Co.* 129 Pa. 514, 6 L. R. A. 143; *Cincinnati, I. St. L. & C. R. Co.* v. *Howard*, 124 Ind. 280, 8 L. R. A. 593; *Bunyan* v. *Citizens' R. Co.* 127 Mo. 12; *Sonnenfield Millinery Co.* v. *People's R. Co.* 59 Mo. App. 668; *Smith* v. *Citizens' R. Co.* 52 Mo. App. 36; *Hicks* v. *Citizens' R. Co.* (Mo.) 25 L. R. A. 508, *note.*

There is no evidence of appellant's negligence. All the witnesses agree that the horse stepped on the track when the car was not more than 8 or 10 feet from the moving carriage.

*Headnotes by MITCHELL, J.

NOTE.—For injuries by street-car collision with vehicles, see also Hicks v. Citizens' R. Co. (Mo.) 25 L. R. A. 508, and *note.*

As to excessive verdicts for personal injuries, see Standard Oil Co. v. Tierney (Ky.) 14 L. R. A. 677.

See also 38 L. R. A. 708; 45 L. R. A. 671.

All testified that the motorman commenced to stop the car before the horse entered upon the track. Until the horse entered upon the track the motorman had a right to assume that the vehicle would stop and let the car pass.

Daly v. *Detroit Citizens' Street R. Co.* 105 Mich. 193; *Washington & G. R. Co.* v. *Gladmon,* 82 U. S. 15 Wall. 401, 21 L. ed. 114; *McLaughlin* v. *New Orleans & C. R. Co.* 48 La. Ann. 23.

The verdict was excessive. Plaintiff was seventy-six years of age, unable before this accident to take care of himself. Four thousand dollars is so excessive as to indicate that the jury was actuated by passion and prejudice in rendering their verdict.

Slette v. *Great Northern R. Co.* 53 Minn. 341.

Mr. **Daniel W. Doty** for respondent.

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

This was an action to recover damages for personal injuries. The plaintiff was riding in a funeral procession in a carriage driven by, and in the control of, her daughter-in-law. The funeral procession started on Eighth street, west of Broadway, in the city of St. Paul, and proceeded east on Eighth street to the intersection of that street with Broadway, where it crossed the railway tracks of the defendant, and then proceeded up the east side of Broadway. The carriage in which plaintiff was riding was near the rear of the procession, and while it was crossing the railway tracks it was struck by one of defendant's cars going north on Broadway, resulting in the injuries complained of. The allegations of the complaint are to the effect that the accident was caused by the negligence of defendant's servants who were in charge and operating the car. The answer denied any negligence on part of defendant's servants, and alleged that the plaintiff's injuries were caused solely by her own negligence. Such were the issues as made by the pleadings.

Upon the trial the main controversy was as to whether the collision was caused by the negligence of the person operating the car or by that of the person driving the carriage in which plaintiff was riding. The evidence on behalf of plaintiff tended to show that the driver of the carriage was, in the exercise of proper care, following the line of the funeral procession, and crossing the railway tracks at or near the center of the intersection of Eighth and Broadway streets, when the motorman, without giving any warning of the approach of his car, negligently ran into the carriage. On the other hand, the evidence on behalf of the defendant tended to prove that the driver of the carriage, instead of following in the funeral procession and crossing the tracks in the center of Eighth and Broadway, turned up the west side of the latter street as if going to drive up on that side of the tracks, but, after she had driven a short distance, she suddenly turned her horse across the railway tracks within 10 or 12 feet of the approaching car, when it was impossible for the motorman to stop it in time to prevent the collision; and that she did this notwithstanding the giving of constant signals of the approach of the car. All that is necessary to be said as to the weight of the evidence is that in our opinion the preponderance was decidedly in favor of the contention of the plaintiff, especially, as to where the driver attempted to cross the railroad tracks, and was ample to justify a verdict in favor of the plaintiff. Aside from the amount of damages awarded, the only important question in the case is whether the court erred in refusing to give the jury defendant's second request to charge, which was as follows: "That the plaintiff is bound to exercise such care as a reasonable person would exercise under similar circumstances; and, if she failed to exercise reasonable care, and such failure contributed to her injury, she is guilty of contributory negligence, and cannot recover." Of course this was made an issue by the pleadings, and the request, as far as it goes, is doubtless correct as a general abstract proposition of law. The question remains, however, whether, under the circumstances, the defendant was entitled to have it given to the jury. The record presents a rather peculiar state of facts. The plaintiff was riding in a vehicle owned and driven by another. There was no evidence that she had or exercised any control over the driver, or her management of the horse, or that there was any relation of master and servant or principal and agent between them, or that they were engaged in a joint enterprise in any such sense as to make the plaintiff responsible for the negligence of the driver within the doctrine of *Howe* v. *Minneapolis, St. P. & S. S. M. R. Co.* 62 Minn. 71, 30 L. R. A. 684. But, as was said in that case, the fact that plaintiff was not responsible for the driver's negligence will not relieve her from responsibility for her own negligence. She admitted on her cross-examination that she was familiar with the locality, and knew of the existence of the street-car tracks, that she did not look or listen for approaching cars, but sat in a deep study, with her eyes cast down, feeling entirely safe, as she was riding in a funeral procession. There is no evidence that her daughter-in-law was not a safe and competent driver, or that plaintiff knew, or had any reason to believe, that she was not performing her duty in exercising proper care in driving upon or across the street-railway tracks. Assuming that plaintiff's version of the facts is correct that the carriage was following in the funeral procession, and crossing the tracks in the center of the crossing of Eighth and Broadway, where most of the carriages had just crossed, there was certainly nothing in the circumstances to suggest special or extraordinary vigilance, but, on the contrary, everything to make plaintiff feel, as she says, perfectly safe. It must also be kept in mind that crossing a street-railway track is ordinarily accompanied with very much less danger than crossing the tracks of a steam railway, and that the standard of reasonable care is very different, especially at a street crossing. The fact that one is driving in a funeral procession, which is readily seen, and not usually interrupted, by those in charge of street cars, is also calculated to inspire a feeling of safety, just as it did in the plaintiff. The age of the plaintiff is also to be kept in mind. All that the law requires of an infant is a degree of care

commensurate with its age and discretion. We think the same rule should apply to old people, whose senses are blunted, and mental faculties impaired, by age. Like children, they are accustomed to intrust their safety to those who are younger and stronger mentally and physically than themselves; and within reasonable limits they may do so without being guilty of negligence. Suppose, on the other hand, we accept as true the statements of defendant's witnesses that the driver of the carriage turned up Broadway as if intending to go up the west side of that street without crossing the car tracks, and then suddenly turned the horse on the tracks within a few feet of the approaching car. There is no evidence that plaintiff directed this, or knew in advance, or in time to prevent it, that the driver intended to do this. On the contrary, defendant's evidence, if true, tends to show that it was done so suddenly that plaintiff could neither have anticipated nor prevented it. The same fact which would have justified the motorman in assuming that the driver was going to continue her course would certainly have justified the plaintiff in indulging in the same assumption. Of course, no hard and fast rule can ordinarily be laid down, except in the most general terms, as to when the question of negligence is a question for the jury. Every case must depend on its own particular facts. But, whichever version of the facts is accepted as true, bearing in mind that the burden of proof on this issue was on the defendant, we are of opinion that under the peculiar combination of circumstances disclosed in this case there was no evidence to go to the jury on the question of plaintiff's contributory negligence, and for that reason, if no other, defendant's request to charge was properly refused.

This conclusion finds support in the manner in which the case was tried and submitted. While the issue of plaintiff's negligence was tendered by the answer, yet, as already stated, the contest on the trial was over the negligence of the driver of the carriage and the negligence of the motorman. Nothing occurred on the trial, as far as we can discover from the record, to suggest, directly at least, that the question of plaintiff's negligence was being made an issue, except the cross-examination of the plaintiff, which appears to have been directed to that question. When plaintiff's counsel was examining her as a witness in her own behalf, for the purpose of proving affirmatively that she was in the exercise of ordinary care, the court stopped him, saying, "There is no suggestion here yet that there was any contributory negligence on her part;" whereupon counsel dismissed the witness. Defendant's counsel was silent, and made no suggestion that he proposed to make an issue on that question. After the evidence closed, the court opened his charge to the jury by stating that the defense was that the accident did not occur through any fault or negligence of the person in charge of the car, but was the result solely of the negligence of the driver of the carriage in which plaintiff was riding. Thereupon plaintiff's counsel interrupted the court, stating that the answer alleged that it was solely through the negligence of the plaintiff. The court replied, in substance, that it made no difference what the pleadings alleged, that the question was what was claimed on the trial, and that he had stated the matter exactly as claimed by the parties upon the trial. Counsel was again silent, and interposed no objection to the view expressed by the court. The court then proceeded to instruct the jury, limiting the questions which they were to determine to the following: Did the accident occur through the negligence, or any negligence, on the part of the person in charge of the street car? Or was it through the negligence or sole negligence of the person driving the carriage? Or was it inevitable accident for which nobody was responsible? No exception was taken to these instructions. The court then charged the jury at considerable length. Counsel for defendant had submitted to the court numerous requests to charge, among which was the one the refusal to give which is now assigned as error. Most of the others were given. This one contains a mere abstract proposition of law embodied in the most general terms, without any reference to any particular act of omission or commission which defendant claimed to constitute contributory negligence, containing no definitions of negligence or reasonable care, and not alluding to the question of the burden of proof. If given, it could have been of but little assistance to the jury. It was probably not obligatory on counsel for defendant to disabuse the minds of the court or of opposing counsel of an erroneous impression as to what were the issues under the evidence. It is also true, as counsel claims, that, if he saved the point by one exception, he was not bound to repeat it. We do not rest our decision on what thus occurred on the trial. We only refer to it because we think that it shows a state of circumstances that should incline a court towards an affirmance where the case is a border one, and it is a very close question whether the evidence made a case for the jury upon the issue to which the request was directed.

2. The only other question is whether the damages are excessive. Plaintiff was between seventy-five and seventy-six years old, previously in somewhat feeble health, although able to take care of her room, and assist in the household work of her daughter-in-law, with whom she made her home. This injury consisted of a fracture of one of the bones on the outer side of the left ankle, and the tearing of the lateral ligaments of the ankle, and injury to the joint. The nature or extent of the injury to the joint does not appear. She suffered great pain, and was confined to her bed for three months, requiring constant care. She still suffers some pain, and according to the evidence of the physicians, which was not rebutted, she will never be free from pain, and will never be able to walk without a crutch, and hence will constantly require more or less care and attention. This will naturally, if not necessarily, affect her general health, and deprive her, during the remainder of her days, of much of the pleasure in life which only those can enjoy who are possessed of a sound body. The jury awarded her $4,000. Of course, these injuries are very serious, and call for very substantial damages. But it must be remembered that the plaintiff is in the late autumn of life. According to the annuity tables,

her expectation of life was only from six to seven years. Her natural infirmities would necessarily increase with her age, even although she had not received this injury; and for this the defendant, of course, is not liable. Old people naturally and properly command our sympathy. They have a right to pass the remainder of their days in as much comfort and happiness as the natural infirmities of age will permit. But still the fact remains that, estimated from a strictly pecuniary standard,—which is the correct one in these cases,—the damage to an old person, near the close of life, is much less than that which would result from a similar injury to one in youth, or the prime of life, whose days of pleasure and usefulness are still before them. Put at interest, at even 5 per cent, the amount awarded plaintiff would yield her an annual income of $200 for the remainder of her life, and still leave the principal unimpaired for her heirs or legatees. If used in purchasing an immediate life annuity, it would, even on a 4 per cent basis, purchase an annuity of at least $628 for the remainder of her life.

There is another consideration which we think we may take into account, and that is that, however statesmen and financiers may disagree as to the cause, a given sum of money has greater value—that is, greater purchasing power—than it had years ago. Decisions may be found, probably including some of our own, which would, by comparison, justify the size of this verdict. But our conclusion is that it is so clearly excessive that it ought not to stand.

Ordered that a new trial be granted unless within fifteen days after a remittitur is filed in the district court the plaintiff files her consent that the verdict be reduced to $2,500, in which case the order appealed from is affirmed, and judgment may be entered on the verdict as thus reduced. Neither party to be allowed any statutory costs on this appeal.

Canty, J., dissenting:

I cannot concur in the portion of the foregoing opinion which holds that there was no evidence to be submitted to the jury on the question of plaintiff's contributory negligence. I fully concur in the opinion in *Howe* v. *Minneapolis, St. P. & S. S. M. R. Co.* 62 Minn. 71, 30 L. R. A. 684, that the passenger is not responsible for the negligence of the driver, over whom he has no control, but that he is responsible for his own negligence in failing to observe whether or not the driver is doing his duty in looking out for the safety of such passenger, and in failing to take proper steps for his own safety if the driver is not doing so. I am also of the opinion that, whether the vehicle is crossing an ordinary commercial railway or a street railway, the question of the passenger's negligence is ordinarily a question for the jury, and that it was such a question in this case. I agree with the majority that the damages awarded by the jury are excessive.

PENNSYLVANIA SUPREME COURT.

COMMONWEALTH of Pennsylvania, *ex rel.* W. U. HENSEL, Attorney General, *Appt.*,

v.

PROVIDENT BICYCLE ASSOCIATION.

(178 Pa. 636.)

A bicycle association which for membership fees of $6 per year agrees to clean a member's bicycle twice during the year, repair tires when punctured by accident, and the bicycle when damaged by accident, and replace it if stolen unless recovered in eight weeks, and provide a bicycle during that time, does not constitute an insurance company which is required to have a charter as such under the act of 1876.

(*Williams, J., dissents.*)

(January 4, 1897.)

APPEAL by relator from a decree of the Court of Common Pleas for Dauphin County in favor of defendant in a proceeding to oust defendant from the privilege of exercising certain rights. *Affirmed.*

The facts are stated in the opinion delivered in the court below by McPherson, J., which was as follows:

"This is a proceeding by quo warranto, in which it is averred that the defendant claims to have, exercise, use, and enjoy the right to transact the business of insurance, but does not have a charter, as required by the act of May 1, 1876 (Pub. Laws, 52). The facts are agreed upon, and are substantially as follows: The defendant is a corporation chartered in November, 1894, under the general corporation act of 1874, by a judge of the common pleas of Philadelphia county, 'for the purpose of the accumulation of a fund by assessments for the protection of its members from loss by reason of injury to, or the losing of, bicycles.' Every member of the association pays a fixed annual due of $2, and further sum of $1 on the 1st days of January, April, July, and October, making a total annual payment of $6 By virtue of these payments, the member becomes and remains entitled to all the benefits accruing under a card of membership issued to him by the association, which contains the following contract: 'The Provident Bicycle Association agrees to (1) clean your bicycle twice

NOTE.—The above case is the first of its kind. But for cases somewhat analogous respecting the nature of an insurance company, see also Brown v. Balfour (Minn.) 12 L. R. A. 373; State, Covenant Mut. Ben. Asso., v. Root (Wis.) 19 L. R. A. 271.

during the year; (2) repair tire when punctured by accident; (3) repair bicycle when damaged by accident; (4) replace bicycle when destroyed by accident; (5) replace bicycle when stolen, if not recovered in eight weeks, and provide a bicycle during that time.' It is also provided by the card of membership that 'assessments are due January 1, April 1, July 1, and October 1. Membership is forfeited if assessments are not paid on the above dates before 12 o'clock noon.' The association has no lodges, secret ritual, signs, or symbols, and does not pay its members any sick, disability, or death benefits.

"Upon these facts the question first arises: Is the defendant carrying on a kind of business which is provided for and regulated by the act of 1876? If so, its business is being conducted unlawfully, because it is a corporation of the first class, chartered as a protective association, under § 2 of clause 9 of the corporation act of 1874, and not under the insurance act of 1876, under which alone 'insurance companies,' strictly so called, can now be incorporated. *Com. v. Equitable Beneficial Asso.* 137 Pa. 412, and note. The defendant's franchise to be a corporation is not attacked; the dispute simply concerns the character of its business. If it is making contracts of accident insurance, as the commonwealth contends, it needs the authority of a charter under the insurance statutes; and, as it has no such authority, it must cease to exercise this pretended power. But if its contracts do not fall within the scope of these statutes, but are such agreements as may be made under the corporation act of 1874, the present proceeding must fall.

"The contract contained in the card of membership is peculiar. In some respects it is like, and in other respects unlike, a contract of accident insurance. It is not insurance to agree to clean the bicycle of each member twice during the year; nor is it insurance to agree to provide a bicycle for his use during eight weeks if his own is stolen, unless the stolen property is sooner recovered or replaced. Upon the other hand, the agreement to repair in case of accident, and the agreement to replace when a total loss occurs by accident or by theft, may readily fall within the general language of many accepted definitions of insurance. For example, in § 1, May defines the transaction as 'a contract whereby, for a consideration, one undertakes to compensate another if he shall suffer loss;' and Phillips, in § 1, defines it to be 'a contract whereby, for a stipulated consideration, one party undertakes to indemnify the other against certain risks.' 11 Am. & Eng. Enc. Law, p. 280, expressed the same thought in slightly different language: 'A contract whereby one party agrees to indemnify another in case he shall suffer loss in respect of a specified subject by a specified peril.' Our own supreme court, in distinguishing an insurance company from a beneficial association, thus describes the former: 'The general object or purpose of an insurance company is to afford indemnity or security against loss; its engagement is not founded in any philanthropic, benevolent, or charitable principle; it is a purely business adventure, in which one, for a stipulated consideration or premium per cent, engages to make up, wholly or in part, or in a certain agreed amount, any specific loss which another may sustain; and it may apply to loss of property, to personal injury, or to loss of life. To grant indemnity or security against loss, for a consideration, is not only the design and purpose of an insurance company, but is also the dominant and characteristic feature of the contract of insurance.' *Com. v. Equitable Beneficial Asso.* 137 Pa. 419. These quotations, and others which might be added, do not specify the means by which indemnity is to be given; but obviously indemnity may conceivably be made either by a money payment, or in certain cases by repairing or replacing the object injured or destroyed. Accordingly, many insurance policies offer the company an option to repair or replace, although the option is not often exercised.

"There is, however, one prevailing feature of insurance policies, as they exist in practice, which these abstract definitions do not express. It appears in the following quotation from Smith, Com. Law, *299, defining insurance to be 'a contract by which a person, in consideration of a gross sum or of a periodical payment, undertakes to pay a larger sum on the happening of a particular event.' A similar idea is thus stated in Smith, Cont. 248: 'Insurance . . . is a contract by which, in consideration of a premium, one or more person or persons assure another person or persons in a certain amount against the happening of a particular event.' This is the form in which policies are almost universally cast. The amount stated is usually intended as the limit of the insurer's risk, but it also makes prominent the fact that the primary undertaking is to pay money, and not to replace or repair the object injured or destroyed. Indeed, in many cases replacing would be impracticable,—even where the object destroyed was by no means unique, —because there would be no agreement between the parties that the object offered was identical with the object lost or destroyed. As an instance, if a horse was insured against theft, and was afterwards stolen, it may be affirmed with confidence that scarcely ever would the parties be able to agree upon a substitute for the lost animal. In this and in every similar situation the opportunities for friction and dispute concerning the fulfilment of the insurer's obligation are so many that it is easy to understand why the option to replace is so seldom exercised.

"While, therefore, as an abstract proposition, an insurance company might issue a policy agreeing to repair or replace, and specifying no sum whatever, either as a maximum or as a sum definitely agreed upon beforehand, it does not follow that every corporation which agrees to repair or replace, without fixing a limit in money to its obligation, is doing the business of insurance as it is ordinarily regarded and is carried on in practice. The insurance act of 1876 certainly does not regard that kind of agreement as necessarily a contract of insurance, for its provisions do not permit the incorporation of companies for this purpose. The class into which such a company would be expected to fall is the fourth class named in § 1 (now the third class, under the act of 1895,—Pub. Laws, 116), *viz.:* 'To

make insurance . . . against loss, damage, or liability arising from any unknown or contingent event whatever. . . .' Corporations of this class may be organized either upon the stock or mutual principle. If a mutual company is to be chartered (such as the present defendant), § 4 requires that the subscribers to the articles of agreement shall open books to receive applications for insurance at convenient times and places, and keep the *same open until applications for insurance* have been obtained in sufficient number and amount to comply with the requirements of this act. Section 7 further provides that, 'whenever applications for insurance in the case of a mutual company mentioned in the . . . 4th paragraph of the 1st section of this act have been obtained in sufficient number and amount,' the officers of the company shall certify to the governor 'the names and the residences of the persons applying for insurance in said company, and the amount agreed to be taken by each,' whereupon the governor shall incorporate them, by directing letters patent to issue. And, finally, in §§ 11 and 13, it is provided that mutual companies organized for any of the purposes of the act 'may accept risks and issue policies whenever applications be made for insurance to the amount of $2,000.' These provisions indicate clearly the kind of contracts which a company incorporated under this act is expected to make, whether it be organized on the stock or mutual plan, and manifestly an association which does not specify any amount in its policy cannot successfully ask for a charter thereunder. *Accordingly it must be held*, of necessity, that the defendant is not obliged to have a charter which it cannot obtain.

"There is one clause in § 54 of the act of 1876 which is capable of being construed so as to exclude associations like the defendant from the operation of the insurance statutes; and, if that is its true construction, no further reply is needed to the question which we are now considering. The section is as follows: 'That this act and the act to which this is a supplement [insurance act of 1873] shall not apply to the beneficial associations that provide aid for the family of heirs of a deceased member, whether issuing policies containing a guaranteed sum of insurance or not, *nor to associations issuing policies not containing a guaranteed sum of insurance*.' Evidently, the clause italicised, if read by itself, is broad enough to embrace the defendant; but this manner of reading would fail to reach the truth. The history of insurance and insurance legislation in this commonwealth,—considering especially those companies which do business upon the assessment plan,—taken in connection with the fair meaning of the section read as a whole, enables us to say with confidence that the clause in question refers only to the assessment associations which were then coming into prominence, and were practially insuring lives, while they were professing to be mere beneficial associations. A few of these societies were promising to pay a definite sum at death, but much the larger number preferred a contract to pay no more than might be collected from the surviving members. It is well known that these assessment companies were anxious to escape the regulation of the insurance statutes and the supervision of the insurance commissioner, and that the clause in question had no other purpose than this. It does not apply to any other kind of company, or to any other *kind of business*.

"The remaining question is this: Does the corporation act of 1874 authorize the defendant to make such contracts as are contained in the card of membership already quoted? The clause under which the defendant is chartered permits incorporation for 'the maintenance of a society for beneficial or protective purposes to its members from funds collected therein;' and, in our opinion, the defendant's business falls fairly within this description. It is not a beneficial association (*Com.* v. *Equitable Beneficial Asso.* 137 Pa. 419, 420); but it is protective in its purpose, and in the actual character of its business. Its agreement is an undertaking, not to pay money, but to perform certain services for its members. Without doubt, these services benefit the members and protect them from loss or inconvenience; and, while it is freely admitted that in some respects the defendant's undertaking approaches closely the field which belongs properly to insurance,—*at least, to insurance* abstractly considered,—nevertheless, we think that the absence of an agreement to pay money establishes a difference between this undertaking and the contract of insurance as it is known in practice, which of itself, perhaps, would justify us in saying that the transaction as a whole falls fairly within the protective clause already quoted from the act of 1874. Moreover, this agreement differs in other respects from the usual policy of insurance. The defendant makes the same contract with each member. It does not grade its risks. It receives the same sum from each person, although it undertakes to perform services which may vary widely in value among the members served. One bicycle may require no repairs during the year, while another may need to be repaired every month. Total destruction would be comparatively infrequent, and it may safely be assumed that losses by theft will be still more rare. Bicycles differ considerably in value, but for the same sum the defendant will replace a wheel worth $100 and a wheel worth only half that sum. In brief, whatever may be the loss or injury which each member may sustain, he is entitled to have it made good in consideration of the same unvarying sum. The extent of his rights is tested only by the fact of membership.

"We may say, also, that upon the facts before us, which *do not show* in what manner the defendant intends to carry out its contract, it is impossible to declare that its proposed method of operation is unlawful. It is quite clear that an association of bicycle owners with many members can protect themselves against loss or injury at a much cheaper rate than can an individual. It can get repairing done at better rates, and can buy at better rates, for the purpose of replacing wheels that are stolen or destroyed by accident. Indeed, if the association chose to do so, it could establish a repair shop of its own, and in that way carry out a part of its contract, without even being supposed to violate any provision of law. The manner in which the

defendant intends to fulfil its agreement to repair and to replace does not appear from the facts agreed upon by the parties; and we are not at liberty to presume, in the absence of proof, that any unlawful method is proposed. Clearly, if the association intends to maintain its own repair shop, or to purchase bicycles in wholesale quantities, and at wholesale rates, so as to be able to replace from its own stock those which may be destroyed or stolen, its business in these respects cannot be described as insurance, in the ordinary use of that word. And, even if it arranges that other persons shall do the work or furnish the wheels, the benefit which the members thus receive is essentially the same as if it performed these services itself.

"We add, in conclusion, that this view of the defendant's business is not in conflict with the case of *Solebury Mut. Protective Soc.* (Pa.) 4 C. P. Rep. 11. In that case Judge Yerkes was considering whether he would incorporate a company for 'the recovery of property that may be stolen from its members, and in the event of a failure to recover such property, to pay to the loser such part of the value thereof as the company may hereafter determine and set forth in its by-laws.' This apparently contemplates a positive agreement to pay money; and, as no by-laws and no form of contract was submitted the court was naturally unwilling to take the risk which was so plainly visible in the large discretion committed to the company. As the opinion says, in a metaphor of some boldness: 'The paragraph in the second article providing for compensation to the loser of such part of the value of the property as the company may hereafter determine and set forth in its by-laws is the Trojan horse by means of which a full fledged and unrestricted insurance company is to be introduced to fill out the skeleton which we are asked to set up as a society for beneficial and protective purposes to its members, not for profit.' In the case before us, however, the charter has been already granted, and we know the kind of contract which the company is actually making. We regard it as a proper contract for a protective society to make. If an attempt should be made to change it so as to enter the field of insurance, or if an effort should be made to carry it out by an unlawful method, the power of the court is ample to afford redress.

"Without further elaboration, and conceding that the question is not free from difficulty, we hold that this society is not doing the business of insurance, and does not need a charter under the act of 1876. Its business can be carried on lawfully under the charter which it holds for the common pleas, and the commonwealth has not proved that any unlawful method has yet been adopted. Judgment is accordingly directed to be entered for the defendant."

Messrs. **John P. Elkin,** Deputy Attorney General, and **Henry C. McCormick,** Attorney General, for appellant:

The defendant association is not a beneficial society such as can be incorporated under the authority of the act of 1874.

Com. v. *Equitable Beneficial Asso.* 137 Pa. 412; *Berry* v. *Knights Templars' & M. Life Indemnity Co.* 46 Fed. Rep. 439.

The business transacted by the defendant association is accident insurance.

The form of an insurance policy is immaterial as a matter of law.

11 Am. & Eng. Enc. Law, p. 281. See also *Puller* v. *Glover,* 12 East, 124; *Roebuck* v. *Hammerton,* 2 Cowp. 737.

Insurance is a contract between A and B, that upon A's paying a premium equivalent to the hazard run, B will indemnify or insure him against a particular event.

1 Bl. Com. bk. 2, p. 458; 2 Am. & Eng. Enc. Law, p. 280; Biddle, Ins. § 2, p. 2; *Lucena* v. *Craufurd,* 2 Bos. & P. N. R. 301; *Farmer* v. *State,* 69 Tex. 561; *Com.* v. *Wetherbee,* 105 Mass. 149; *State, Atty. Gen.,* v. *Farmers & M. Mut. Ben. Asso.* 18 Neb. 281.

Mr. **E. Spencer Miller** for appellee.

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

The defendant is a corporation chartered under the 2d section of the act of 1874 as a protective association. The question raised by the quo warranto and the answer is whether the association is carrying on the business of insurance, in violation of the act of 1876. The right challenged is that of the defendant to carry on the business in which it is engaged. A part of this business is clearly not insurance, and a part of it may come within the meaning of that term. This would, however, depend on the manner in which the affairs of the association are conducted. All of its business may be so transacted as to be of a kind that a protective association may properly carry on, and it does not appear that it has not been so transacted. The obligation of the association is to repair and replace, not to pay a fixed amount, or an amount covering or proportionate to the loss sustained; and the right of the member is fixed by the fact of membership. The propriety of granting such a charter under the act of 1874 may well be doubted, as there is a probability of its improper use as a cover for a business regulated by the act of 1876; and this case is so near the border line that we have hesitated to affirm it, because it might encourage attempts to establish insurance companies which would not be subject to the wholesome provisions of the insurance laws. These laws are founded on a wise public policy, and any attempt to evade them should be promptly met and defeated. We cannot, however, say that the learned judge of the common pleas erred in entering judgment in this case for the defendant, and we can add nothing to his very able and thorough discussion of the subject.

The judgment is affirmed.

Williams, J., dissents.

OREGON SUPREME COURT.

S. GROSSMAN, *Appt.*,
v.
City of OAKLAND, *Respt.*

(........Or........)

1. An ordinance absolutely prohibiting a railroad company from inclosing its track in the platted portions of the city, and providing that such inclosure shall be a nuisance, is void although the city charter confers on it the power to prevent and restrain nuisances and declare what shall constitute a nuisance.

2. A plea of guilty to a charge of violating a city ordinance is only an admission that defendant committed the acts charged, and is immaterial where the ordinance is invalid.

NOTE.—*Power of municipal corporations to define, prevent, and abate nuisances.*

I. *Derivation of power over nuisances.*
II. *Nature of the power.*
III. *Questions of fact.*
IV. *The question of judicial determination.*
V. *Power to define.*
a. *Extent of power.*
b. *Limit of power.*
VI. *Extent of power to prevent or abate.*
a. *In general.*
b. *Board of health.*
c. *Nonresidents.*
d. *Statutory power.*
e. *Extraterritorial extent of power.*
f. *To take or destroy property.*
VII. *Limit of power to prevent or abate.*
a. *In general.*
b. *In cases of abuse of privilege.*
VIII. *The question of discrimination.*
IX. *The methods of abatement.*
a. *In general.*
b. *Proceedings in equity.*
X. *Effect of authority or license.*
XI. *No infringement of constitutional rights.*
XII. *Notice.*

The subject of this note is the general question of the power of municipal corporations in respect to nuisances. The particular instances of the exercise of such power will be considered in separate notes. One of these will relate to such power over nuisances affecting highways and waters; another, the power over buildings or other structures as nuisances; another, as to nuisances affecting safety, health, and personal comfort; another, as to nuisances affecting public morals, decency, peace, or good order. The effect of prescription in case of a nuisance will also be the subject of a separate note.

The decision in the principal case of GROSSMAN v. OAKLAND is in keeping with the general principles, and strictly follows the trend of the decisions upon the subject of municipal power over nuisances.

I. *Derivation of power over nuisances.*

The right to abate a public nuisance, whether regarded as existing in municipalities, or in the community, or on the land of the individual, is a common-law right, and is derived, in every instance of exercise, from the same source,—namely, that of necessity. Hutton v. Camden, 39 N. J. L. 122, 23 Am. Rep. 203, 208; Lanfear v. New Orleans, 4 La. 97, 23 Am. Dec. 477.

Yet the power of a municipality to abate a nuisance is derived from its charter, and such corporation can exercise no authority beyond that expressly given or necessarily implied from the act of incorporation. Troy v. Winters, 4 Thomp. & C. 256; Pine City v. Munch, 42 Minn. 342, 6 L. R. A. 763; *Ex parte* Robinson, 30 Tex. App. 493; *Ex parte* Garza, 28 Tex. App. 381; Miller v. Burch, 32 Tex. 208, 5 Am. Rep. 242; James v. Harrodsburg, 85 Ky. 191, 196.

One of the chief functions of the police power is to regulate and abate nuisances, and such power is inherent in every state, and belongs, primarily, to the state, although it is delegated to municipal authorities, and its exercise extends to the entire property and business interests within the jurisdiction. Kansas City v. McAleer, 31 Mo. App. 433, 436.

In a case where it was sought to abate a lime kiln as a nuisance it was said, whatever power may properly be exercised by the municipal authorities of the city over the rights and property of the citizens under the denomination of police regulations must be derived from the legislature of the state, and must be by express grant or by fair and reasonable intendment. State v. Mott, 61 Md. 297, 48 Am. Rep. 105; James v. Harrodsburg, 85 Ky. 191, 196

The general assembly has power to vest municipal authorities with power to preserve the public health, and to prevent and abate nuisances. St. Louis v. Stern, 3 Mo. App. 48, 55.

Among the objects for which municipalities are created are those relating to the security, peace, welfare, and convenience of the town, and for procuring peace, order, and good government, and the suppression of nuisances is one of these, and it has therefore been said that the legislature has the right to confer legislative power upon municipal corporations which have been, or may be, established for the purpose of enabling them to carry into effect the objects for which they are created. State, Burton, v. Williams, 11 S. C. 288, 290; Heisembrittle v. Charleston, 2 McMull. L. 233; Charleston v. Ahrens, 4 Strobh. L. 241; State, Heise, v. Columbia, 6 Rich. L. 404.

So, in order to prevent nuisances the legislature, in the exercise of its constitutional authority, may lawfully confer on boards of health the power to enact sanitary ordinances having the force of law, within the district over which their jurisdiction extends. *Polinsky v. People*, 73 N. Y. 65, 69. To the same effect, Metropolitan Board of Health v. Heister, 37 N. Y. 661; New York Health Department v. Knoll, 70 N. Y. 530.

And in Com. v. Parks, 155 Mass. 531, 532, it is said that, within constitutional limits not exactly determined, the *legislature may change the common* laws as to nuisances, and may move the line either way, so as to make things nuisances which were not so, or to make things lawful which were nuisances, although by so doing it affects the use or value of property. To the same effect, Sawyer v. Davis, 136 Mass. 239, 49 Am. Rep. 27; *Rideout v. Knox*, 148 Mass. 368, 2 L. R. A. 81.

So, as the legislature may declare nuisances, it may also, where the nuisance is physical and tangible, direct a summary abatement by executive officers without the intervention of judicial proceedings *in cases analogous to those where the* remedy by summary abatement existed at common law. Lawton v. Steele, 119 N. Y. 226, 7 L. R. A. 134.

In Lawton v. Steele, 119 N. Y. 226, 7 L. R. A. 134, it is said that there is no limitation of legislative power which precludes the legislature from enlarging the category *of public nuisances, or from* declaring places or property used to the detriment of public institutions, or to the injury of the health, morals, or welfare of the community, public nuisances, although not such at common law.

Yet the legislative power on the part of munici-

(August 5, 1895.)

APPEAL by defendant from a judgment of the Circuit Court for Douglas County dismissing his writ of error to review a judgment convicting him of violating a city ordinance against aiding in building a fence in certain portions of the city. *Reversed.*

The facts are stated in the opinion.

Messrs. **Bronaugh, McArthur, Fenton, & Bronaugh,** for appellant:

The ordinance is void because it is not within

pal corporations to declare nuisances has been restricted by judicial interpretation to the power to declare those things to be nuisances which are nuisances *per se.* State, Russell, v. Beattie, 16 Mo. App. 131.

II. *Nature of the power.*

One of the great objects of the incorporation of a town or village is the most summary inquiry into nuisances, and the removal of them. Shaw v. Kennedy, 1 N. C. Term Rep. 158.

The right to abate public nuisances, whether regarded as existing in municipalities, or in the community, or in the land of the individual, is a common-law right, and is akin to the right of destroying property for the public safety, in case of the prevalence of a devastating fire or other controlling exigency. Hutton v. Camden, 39 N. J. L. 122, 23 Am. Rep. 203, 208.

And the authority to decide when a nuisance exists is an authority to find facts, to estimate their force, and to apply rules of law to the case thus made; and it is a judicial function and one applicable to a class of important interests. Hutton v. Camden, 39 N. J. L. 122, 23 Am. Rep. 203, 208.

The tribunal established by law to determine the question of nuisance or no nuisance is the legislative body of the government. State, Marshall, v. Cadwalader, 36 N. J. L. 283, 284.

And the authority to abate nuisances is a part of the police power vested in all large and populous cities. State v. Heidenhain, 42 La. Ann. 483, 486; Kennedy v. Phelps, 10 La. Ann. 227; Monroe v. Gerspach, 33 La. Ann. 1011, 1012.

Such authority is an exercise of the police power, and not of the right of eminent domain. Dunbar v. Augusta, 90 Ga. 390, 395; Manhattan Mfg. & Fertilizing Co. v. Van Keuren, 23 N. J. Eq. 251; State, Weller, v. Snover, 42 N. J. L. 341; St. Louis v. Stern, 3 Mo. App. 48; Theilan v. Porter, 14 Lea, 622; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205.

So, the summary proceedings taken by such corporations are taken as valid under the police power of the government. McKibbin v. Fort Smith, 35 Ark. 352, 355; Blair v. Forehand, 100 Mass. 136, 1 Am. Rep. 94; Salem v. Eastern R. Co. 98 Mass. 431, 96 Am. Dec. 650; American Print Works v. Lawrence, 21 N. J. L. 248; Underwood v. Green, 3 Robt. 86; Harvey v. Dewoody, 18 Ark. 252, 255.

So, the prevention of a nuisance is an important part of the internal police of towns and cities. Com. v. Patch, 97 Mass. 221.

And it is not only the right, but the imperative duty, of the town government to watch over the health of the citizens, and to remove every nuisance, so far as they may be able, which may endanger it. Harvey v. Dewoody, 18 Ark. 252, 259.

In this respect, such corporations, when acting within the general scope, plan, and purpose of their charters or the general laws under which they are incorporated, are aiding the state, within the local jurisdiction, in protecting the public peace and order, the public health, public morals, public safety, public convenience, and the trade and commerce of the inhabitants. *Re* Gribben (Okla.) 47 Pac. 1074, 1075.

So, in abating public nuisances solely injurious to the general public, such corporations, acting as city governments under the authority of the state, have the authority of the state delegated to them. Llano v. Llano County, 5 Tex. Civ. App. 132, 134.

And in this respect the town is the representative of the state. Hutchinson Twp. v. Filk, 44 Minn. 536.

The action of a board of health in respect to particular nuisances is intended to be prompt and summary, and such a body is clothed with extraordinary powers for the protection of the community from noxious influences affecting life and health. Salem v. Eastern R. Co. 98 Mass. 431, 453, 96 Am. Dec. 650.

Ordinances relating to nuisances may be classed with ordinances relating to the comfort, health, good order, convenience, and general welfare of the inhabitants, which are regarded as the exercise of police regulations. St. Louis v. Schoenbusch, 95 Mo. 618.

The protection of the citizen from public nuisances, whether endangering health or public travel, is considered in law and in state legislation as a public and governmental duty. Hewison v. New Haven, 37 Conn. 475, 9 Am. Rep. 342, 346.

And the duties of the board of health in respect to inquiring into and determining whether or not a nuisance exists under the provisions of the New York laws of 1885 and 1888 are quasi judicial in their nature. People, New York C. & H. R. R. Co., v. Seneca Falls Board of Health, 58 Hun, 595.

Where the subject is a prima facie nuisance, or a nuisance *per se*, an adjudication by the municipal agents to whom the legislature has delegated a general power to provide for the public health by the removal of nuisances is conclusive. St. Louis v. Stern, 3 Mo. App. 48; St. Louis v. Schnuckelberg, 7 Mo. App. 536, 541.

But it has been held that when the thing condemned as a nuisance is not such by any law or ordinance, the decision of a board of health when brought before the court is not conclusive, and evidence may be given by the appellant of the fact of a nuisance. St. Louis v. Schnuckelberg, 7 Mo. App. 536, 541.

And while the judgment of a board of health upon the question of a nuisance is entitled to great weight and will not be disturbed if it is within the bounds of reason, its reasonableness is still open to inquiry in any judicial proceedings, either civil or criminal, in which it may be called in question; but where a sufficient ground exists for action the latter may be summary, and without due process of law as that phrase is commonly understood. Eagan v. New York Health Department, 20 Misc. 38.

III. *Question of fact.*

The question of nuisance or no nuisance is one of fact in relation to which the opinions of individuals differ. Hart v. Albany, 3 Paige, 213; Kennedy v. Phelps, 10 La. Ann. 227; Washington Comrs. v. Frank, 1 Jones, L. 436, 440; Bybee v. State, 94 Ind. 443, 447, 48 Am. Rep. 175; Grove v. Fort Wayne, 45 Ind. 429, 15 Am. Rep. 262; Centerville v. Woods, 57 Ind. 192; Logansport v. Dick, 70 Ind. 65, 36 Am. Dec. 166; Ayer v. Norwich, 39 Conn. 376, 379, 12 Am. Rep. 396; Bond v. Smith, 44 Hun, 219, 222.

And such question must be settled as one of fact and not of law. Des Plaines v. Poyer, 123 Ill. 348, Affirming 22 Ill. App. 574; Monroe v. Gerspach, 33 La. Ann. 1011, 1012; State v. Merrit, 35 Conn. 314, 318; Burnham v. Hotchkiss, 14 Conn. 311.

An indictment by a municipality for maintaining a particular business as a nuisance must charge facts necessary to bring it within the definition of a nuisance, or at least within the power conferred

the police power of any city to declare that to be a nuisance which was not so at common law, or which is not so in fact.

Everett v. *Council Bluffs*, 46 Iowa, 67; 15 Am. & Eng. Enc. Law, p. 1166; *Butchers' Union S. H. & L. S. L. Co.* v. *Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585; *Wynehamer* v. *People*, 13 N. Y. 378; *Des Plaines* v. *Poyer*, 123 Ill. 348; *Chicago, R. I. & P. R. Co.* v. *Joliet*, 79 Ill. 44; *Yates* v. *Milwaukee*, 77 U. S. 10 Wall. 503, 19 L. ed. 986; Cooley, Const. Lim. 6th ed. 741, note.

by the statute suppressing it; and the power given to municipalities to regulate does not embrace a power to prohibit or destroy a trade or occupation. State v. Mott, 61 Md. 297, 48 Am. Dec. 105, 107.

Again, it is a question of fact to be determined by a jury whether an obstruction in a street is or is not a public nuisance and abatable as such by the municipal authorities. People v. Carpenter, 1 Mich. 273, 289.

So, also, is the determination of the question whether a particular business is or is not a nuisance. Meeker v. Van Rensselaer, 15 Wend. 397.

And so the question whether buildings declared a nuisance by a city ordinance establishing fire limits are such is one of fact for the jury. Frank v. Atlanta, 72 Ga. 428.

A nuisance by way of encroachment upon a highway is a question for the jury. King v. Wright, 3 Barn. & Ad. 683.

The question whether or not a particular use of the highway which does not of itself amount to a nuisance is reasonable or not, is a question of fact for the jury. State v. Edens, 85 N. C. 522, 526.

And the question as to whether or not the use of steam upon a public street or highway is or is not a nuisance is for the jury, a steam engine not necessarily being a nuisance. Macomber v. Nichols, 34 Mich. 212, 22 Am. Dec. 522, 526.

In deciding the question whether or not the defendant's taking of land dedicated as a public highway was a nuisance to be ascertained as a question of fact by a jury, the court stated that in cases of that kind the question to be put to the jury must depend upon the character of the nuisance charged, and if the act complained of does not devest the property or any part of it from the use of the public, or in any manner impair the public use and enjoyment of it, but the act was done for the purpose of making the use more beneficial to the public, there would be a manifest propriety of submitting the question to the jury. But where the act complained of was the taking of property dedicated to the use of the public and appropriating it to private use, thereby wholly excluding the public from the enjoyment of it, there was no rule of law that required such an act to be submitted to the jury, such act being *ipso facto*, in law, a nuisance, for the commission of which there was no justification. State v. Woodward, 23 Vt. 92, 99.

IV. *The question of judicial determination.*

Upon the question of the power of such authorities to abate or prevent nuisances, it has been stated that nothing is a nuisance unless it is made such by the law, and to determine what is by law a nuisance is an exercise of judicial power. State v. Noyes, 30 N. H. 279.

And therefore what is or what is not a nuisance is a judicial question to be determined by the courts. State v. Noyes, 30 N. H. 279.

If the property destroyed by a municipal corporation is itself a nuisance, endangering the public health or safety, the city is not liable for its value to the owner, provided the city charter confers upon the city the power to abate such nuisances, but the property must first be condemned as a nuisance by appropriate proceedings. Savannah v. Mulligan, 95 Ga. 323, 29 L. R. A. 303.

With respect to things which are not nuisances *per se*, they must be lawfully ascertained to be such, and the municipal authorities cannot arbitrarily declare a thing a nuisance, or destroy valuable property which is lawfully erected or created, without such lawful ascertainment, and in such case, if the legislature has conferred the power, it is inoperative and void if the thing is not a nuisance in itself or is not created or erected subsequent to the date of the ordinance and in defiance of it, and therefore, except in exceptional cases, or where the thing is clearly a nuisance in itself it should be judicially determined in the first instance. Denver v. Mullen, 7 Colo. 345, 353.

The necessity of abating a public nuisance must be present in order to justify the exercise of the right, and whether present or not must be submitted to a jury under the guidance of the court. Hutton v. Camden, 39 N. J. L. 122, 23 Am. Rep. 203, 208.

The finding of a sanitary committee, or of a lawful council, or of any other body of a similar kind, can have no effect whatever for any purpose upon the ultimate disposition of a matter of that kind. Hutton v. Camden, 39 N. J. L. 122, 23 Am. Rep. 203, 208; State, Avis, v. Vineland, 56 N. J. L. 474, 23 L. R. A. 685.

And such a finding cannot be used as evidence in any legal proceeding for the end of establishing the effect of a nuisance. If it can be used for any purpose it can be such only as shows that the persons acting in pursuance of it were devoid of that malicious spirit which aggravates trespass. Hutton v. Camden, 39 N. J. L. 122, 23 Am. Rep. 203, 208.

The question whether certain extraneous facts and circumstances do or do not constitute a nuisance should be concluded by a jury, and cannot be so determined by a board of health, especially where the nuisance complained of is not one *per se*. Rogers v. Barker, 31 Barb. 447.

Whether or not an establishment, trade, or occupation which is lawful in itself is to be abated as a nuisance is a judicial question to be decided in an action at law by the verdict of a jury, or, under certain special circumstances, in a proceeding in equity by the decision of a judge, the principle in both cases being, that the party whose establishment or trade is sought to be abated as a nuisance is to be heard before he is condemned, and that evidence must be produced against him, and he must have an opportunity of rebutting the same before his natural rights to use his property in such manner as he may deem conducive to his own welfare can be restrained in order to subserve the rights of others. State, Russell, v. Beattie, 16 Mo. App. 131.

Bees may become a nuisance in a city, but whether they are so or not is a question to be judicially determined in each case. Arkadelphia v. Clark, 52 Ark. 23.

So, intoxicating liquors cannot be taken away or removed under an ordinance declaring such liquors kept within the town limits to be a nuisance, before it has been judicially declared that the ordinance has been violated. Darst v. People, 51 Ill. 286, 2 Am. Rep. 301.

Yet it has been stated that in cases of emergency municipal authorities, if authorized by their charter to abate nuisances, are not bound before ordering the destruction of the property as a nuisance to wait until the fact that the property is a nuisance is judicially determined, and in such cases the destruction may be ordered without a preliminary condemnation. Savannah v. Mulligan, 95 Ga. 323, 29 L. R. A. 303.

This ordinance, in effect, is a taking of the property of the railway company without due process of law, and without compensation.

18 Am. & Eng. Enc. Law, pp. 746, 747, note 3; *Chicago* v. *O'Brien*, 111 Ill. 536, 53 Am. Rep. 640.

So, for the purpose of suppressing nuisances the question whether an ordinance is unreasonable and therefore invalid is one for the court and not for the jury, and in determining whether it is reasonable the court should not substitute its discretion for that of the municipal legislation, and the court's power should not be hastily or incautiously exercised. Kansas v. McAleer, 31 Mo. App. 433, 436. To the same effect, Fisher v. Harrisburg, 2 Grant, Cas. 291; Com. v. Robertson, 5 Cush. 438; St. Louis v. Weber, 44 Mo. 547.

Where the act gives the board full and complete power to remove, abate, suspend, or improve and purify anything dangerous to life or health, as a public nuisance, the question whether the thing which has been or is to be removed or abated, etc., is dangerous to health or life, or is a public nuisance, is a jurisdictional question, but independent of the special provisions in the act to this effect: considering that the act not only gives power, but imposes a great public duty, on such a question, all presumptions are and should be in favor of the board. Coe v. Schultz, 47 Barb. 64, 69, 2 Abb. Pr. N. S. 193.

Under Mass. Gen. Stat. chap. 26, § 52, the selectmen of the town, acting under the provisions of such act, may prohibit the exercise of offensive trade within the limits of the town, without giving notice to the person carrying on such trade; and the prohibition contained in such section operates only as a temporary suspension of the use of the property, if the owner sees fit to appeal and submit the question whether the trade or employment which he exercises is a nuisance, or hurtful or injurious to the inhabitants or their estates. Belcher v. Farrar, 8 Allen, 325, 327.

A skin-dressing establishment is not *per se* a nuisance, and it therefore requires acts of a judicial nature to determine whether such an occupation, lawful in itself, is so conducted as to become liable to abatement, which power is vested solely in the common council under the city charter. State, Marshall, v. Cadwalader, 36 N. J. L. 283, 284.

Where a ditch constructed for a necessary, useful, and lawful purpose, was used for such purpose, and was not in its nature a nuisance as a matter of law, or as a matter of fact, there being no hurt, detriment, or offense to the public or to any private citizen, and the only ground upon which it might have become a nuisance was a change of circumstances brought about by the growth of the town, which had extended beyond such ditch and along its line for a great distance without bridges across the same, the court stated that to such extent, and from such causes outside the ditch and its use, *per se*, the ditch became a public nuisance, if as a matter of fact it was such, but whether it was or not was a fact which must be first ascertained by judicial determination before it could be lawfully abated, either by the public or by a private person, the question as to what constitutes a nuisance being for the court and not for the jury, the question whether the results of any stated business amount to a common nuisance being also for the jury. Denver v. Mullen, 7 Colo. 345, 353.

V. *Power to define.*

a. *Extent of power.*

That which is an actual nuisance can be suppressed just so far as it is noxious, and its noxious character is the test of its wrongfulness. Anderson v. Wellington, 40 Kan. 173, 178, 179, 2 L. R. A. 110; *Re* Frazee, 63 Mich. 396, 404.

A city council, within the exercise of its legislative discretion, has authority to determine what is a nuisance, and to enact the necessary ordinance to suppress it. State v. Heidenhain, 42 La. Ann. 483, 486.

The mayor and municipal assembly have power to declare by acts of legislation what shall be nuisances, and beyond this the mayor has power, whenever in his opinion a nuisance exists on public or private property, or whenever a nuisance has been so declared by ordinance by resolution of the board of health, to abate and remove the same in a summary way; yet the legislative power on the part of a municipal corporation to declare nuisances has been restricted by judicial interpretation to the power to declare those things to be nuisances which are nuisances *per se*. State, Russell, v. Beattie, 16 Mo. App. 131.

The right exists in the council of a municipal corporation to determine what, in its nature and use, it deems a nuisance, and to direct its removal or discontinuance under the penalties which it is, by legislative authority, authorized to impose or inflict. Monroe v. Gerspach, 33 La. Ann. 1011, 1012.

The police of cities require many regulations which grow out of their situation, their climate, and their population, and many things which would not amount to a nuisance at common law might be hurtful there. Milne v. Davidson, 5 Mart. N. S. 409, 16 Am. Dec. 189, 191.

Much discretion is allowed to a municipality in its definition of a nuisance, and such discretion will not be judicially interfered with, unless the corporation is manifestly unreasonable and oppressive, and has invaded private rights and transcended the power granted to it. State v. Heidenhain, 42 La. Ann. 483, 486.

Whether a thing may or may not be a nuisance depends upon a variety of circumstances requiring judgment and discretion on the part of the town authorities in exercising their legislative functions, and under a general delegation of power their action would be conclusive of the question. Baumgartner v. Hasty, 100 Ind. 575, 576, 50 Am. Rep. 830; North Chicago City R. Co. v. Lake View, 105 Ill. 207, 44 Am. Rep. 788.

In doubtful cases, where a thing may or may not be a nuisance, depending upon a variety of circumstances requiring judgment and discretion on the part of the town authorities in exercising their legislative functions, under a general delegation of power to declare and define what shall be a nuisance, their action, under such circumstances, would be conclusive of the question. Kansas v. McAleer, 31 Mo. App. 433, 436; North Chicago City R. Co. v. Lake View, 105 Ill. 207, 44 Am. Rep. 788; Harmison v. Lewiston, 46 Ill. App. 164, 165.

The question of nuisance or no nuisance depends upon the presence or absence of extraneous facts and circumstances, such as the question whether they affected the public health or safety. Rogers v. Barker, 31 Barb. 447.

So, whether an act amounts to a nuisance must depend upon the place in which it is done, and its tendency to produce those inconveniences which are specified in the definition of the offense. Shaw v. Kennedy, 1 N. C. Term Rep. 158.

There are many things which courts, without proof, will declare nuisances, and in such cases it is sufficient to show the existence of the fact constituting the nuisance in order to empower a city council to abate such nuisances. North Chicago City R. Co. v. Lake View, 105 Ill. 207, 44 Am. Rep. 788, 790.

The language of a city charter giving the city power "to make regulations to secure the general health of the inhabitants, to declare what shall be

This ordinance is void in that it attempts to conclusively declare that a nuisance which is not in itself injurious to the public health, the public morals, or the public safety, and which is not a nuisance at common law or one in fact, and which is an act entirely legal under the laws of the state.

15 Am. & Eng. Enc. Law, pp. 1178, 1179

a nuisance, and to prevent and remove the same" is to be construed as giving the city authority to declare by general ordinance what shall constitute a nuisance, the city by such ordinance defining, classifying, and enacting what things, or classes of things, and under what conditions and circumstances such specified things, are to constitute and be deemed nuisances. Denver v. Mullen, 7 Colo. 345, 353.

So, under a charter and ordinance of a city giving the mayor and council, upon the recommendation of the board of health, full power in a summary manner to abate nuisances, the mayor and council may determine, upon the report of the board of health, whether the particular matter is a nuisance or not, and if they conclude that it is a nuisance which affects the health of the community, they have a right to abate it in a summary manner. Americus v. Mitchell, 79 Ga. 807, 809. In this case the question was whether a mill pond was a nuisance or not, but the question was not determined, as before trial the mill dam had been swept away by a flood, the court stating that the Almighty had already abated the nuisance.

It is competent for the legislature to declare any practice deemed injurious to the public a nuisance, and to punish it accordingly, and whether the law is politic, or expedient, or necessary, is not a question with which the courts have anything to do, such question being between the people and those to whom they delegate the temporary power of making laws. Bepley v. State, 4 Ind. 265, 58 Am. Dec. 628.

Whatever deprives the citizens of pure, uncontaminated, inoffensive air is a nuisance. State v. Luce, 9 Houst. (Del.) 396.

A city ordinance declaring dense smoke from the smoke stack of any boat or locomotive, or from any chimney within the city, to be a nuisance to the public, but excepting chimneys of buildings used exclusively for private residences, defines what the common council of the city regarded as a nuisance. Harmon v. Chicago, 110 Ill. 400, 51 Am. Rep. 698.

Although a municipal corporation has no power to treat a thing as a nuisance which cannot be one, yet it has power to treat as a nuisance a thing that, from its character, location, and surroundings, may and does become such. Baumgartner v. Hasty, 100 Ind. 575, 576, 50 Am. Rep. 830.

That which is a nuisance in one situation may not be so in another. Rex v. Neville, Peake, N. P. Cas. 91.

In places where offensive trades have been long carried on they are not nuisances, though they would be so in any of the squares or other places where such trades have not been exercised. Rex v. Neville, Peake, N. P. Cas. 91.

Many things which are not nuisances *per se* may become so when placed in locations forbidden by law, and where they essentially interfere with the enjoyment of life and property. Baumgartner v. Hasty, 100 Ind. 575, 576, 50 Am. Rep. 830.

City authorities, when they do act, must be certain that they are right, and that the thing abated is a nuisance, or they will subject the municipality to damages. Americus v. Mitchell, 79 Ga. 807, 809.

Nuisance means, literally, annoyance, anything that works hurt, injury, or damage. Ward v. Little Rock, 41 Ark. 526, 48 Am. Rep. 46, 47; Meeker v. Van Rensselaer, 15 Wend. 397.

A public nuisance at common law signifies anything that works hurt, inconvenience, or damage to the King's subjects. Ferguson v. Selma, 43 Ala. 398, 400.

At common law a nuisance is anything that works hurt or inconvenience or damage, and a public or common nuisance is that which affected the public, or is an annoyance to the King's subjects at large. Harmon v. Chicago, 110 Ill. 400, 51 Am. Rep. 698.

So, anything is a nuisance at common law which renders the enjoyment of life and property uncomfortable, and when a considerable number of persons are so damaged it becomes a nuisance which may be suppressed by a proper proceeding. St. Paul v. Gilfillan, 36 Minn. 298.

A nuisance which affects a place where the public have a legal right to go, and where the members thereof congregate, or where they are likely to come within its influence, is a public nuisance. Burlington v. Stockwell (Kan. App.) 47 Pac. 988.

A nuisance *per se* may be a nuisance which the judge can declare to be such without inquiry into the extrinsic facts; that is, a nuisance by enumeration rather than by definition. *Ex parte* Shrader, 33 Cal. 279, 284.

A public nuisance does not necessarily mean one affecting the government or the whole community of the state; it is public if it affects the surrounding community generally, or the people of some local neighborhood, and such a nuisance is one which the common council, as a sort of local board of health, is authorized as a government agency to abate, in order to protect the health of the inhabitants of an incorporated district. Pine City v. Munch, 42 Minn. 342, 6 L. R. A. 763.

The purpose of an ordinance is to declare what are nuisances aside from nuisances *per se*, and to empower certain officers to act concerning nuisances, or to provide a summary method for the ascertainment of nuisances and for their abatement. Coast Co. v. Spring Lake (N. J. Eq.) 36 Atl. 21.

By section 8 of the English statute, 18 & 19 Vict. chap. 121, the word "nuisance" includes any pool, ditch, gutter, watercourse, privy, cess-pool, drain, or ash pit, so foul as to be a nuisance or injurious to health. St. Helen's Chemical Co. v. St. Helens, L. R. 1 Exch. Div. 195, 45 L. J. M. C. N. S. 150, 34 L. T. N. S. 397.

So, § 3312, subdiv. 45, of Colo. Gen. Stat. gives authority to municipal corporations to declare what shall be nuisances. May v. People, 1 Colo. App. 157, 159.

And the Revised Statutes of Illinois empowered municipalities to declare anything a nuisance which is in fact and in its nature a nuisance. Nazworthy v. Sullivan, 55 Ill. App. 48, 51.

The city of Kansas has not only power to abate nuisances, but under its charter has the extraordinary power to define and declare what is a nuisance, which is broader than the general authority to abate. Kansas v. McAleer, 31 Mo. App. 433, 436.

Where a city charter does not give the city authority to define a nuisance, but only the power "to prescribe the mode and manner of trying all charges of nuisances in the city, and the abatement of the same," the petition of a citizen to the mayor to grant a rule to show cause why an encroachment on a certain street should not be abated as a nuisance will be dismissed, no special damage being shown, the state law declaring what a nuisance is; a city ordinance merely prescribing how they shall be tried legislatively and judicially, and therefore when a case is tried upon the law and evidence under § 235 of such city ordinance, they must determine the law of nuisance by the state law and

(note 1), 1180; note to *Milne* v. *Davidson* (La.) 16 Am. Dec. 195; note to *Robinson* v. *Franklin* (Tenn.) 34 Am. Dec. 627; *River Rendering Co.* v. *Behr*, 77 Mo. 98, 46 Am. Rep. 6; *Hennessy* v. *St. Paul*, 37 Fed. Rep. 565; Wood, Nuisances, 2d ed. § 744; 1 Dill. Mun. Corp. 3d ed. § 325; *Richmond* v. *Dudley*, 129 Ind. 112, 13 L. R. A. 587.

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not by the city ordinance. Ison v. Manley, 76 Ga. 804, 806.

Under a power "to abate or prevent nuisances" or to pass "such ordinances, by-laws, rules, and regulations for the better government of the city as they deem necessary," city authorities have no power to define that to be a house of ill-fame which is not so. State v. Webber, 107 N. C. 962, 964.

Public picnics within the city limits, not being nuisances *per se*, cannot be declared so by a city ordinance. Des Plaines v. Poyer, 123 Ill. 348, Affirming 22 Ill. App. 574; May v. People, 1 Colo. App. 157, 159; Nazworthy v. Sullivan, 55 Ill. App. 48, 51.

b. *Limit of power.*

Although the legislature may authorize boards of health to pass ordinances necessary for the objects of their creation, yet they cannot delegate to them the power to define what shall be a nuisance. Hoffman v. Schultz, 31 How. Pr. 385, 396.

In Hoffman v. Schultz, 31 How. Pr. 385, 396, it is stated to be doubtful whether the legislature can delegate to any body of men the power to declare what is or what is not a nuisance, as such a power is equal to one to declare what is to be a criminal act, because it is a crime to maintain a public nuisance, and if the legislature can delegate to individuals the power to define a nuisance, they can delegate to them the power to make acts criminal which are not so by law, and such power cannot be delegated to them by the legislature.

The legislature cannot create a public nuisance or a new definition of a public nuisance unknown to the common-law decisions, and therefore an act creating a metropolitan sanitary district does not empower the board of health to define a public nuisance, or to declare an act or thing to be a common nuisance which is not so and cannot under any circumstances be such. Coe v. Schultz, 47 Barb. 64, 2 Abb. Pr. N. S. 193.

It cannot so use its power as to arbitrarily declare property a nuisance for the purpose of devoting it to destruction. Lawton v. Steele, 119 N. Y. 226, 7 L. R. A. 134.

So, the legislature in the exercise of its power to prevent nuisances cannot, under the guise of police regulation, arbitrarily invade personal rights and private property, but the removal of noxious and unwholesome matters, extending directly to promote the public health, comfort, and welfare, is a proper exercise of the police power. Smiley v. MacDonald, 42 Neb. 5, 27 L. R. A. 540, 545.

It will not be assumed that the legislature may authorize and declare that to be a nuisance which from the nature of the case is not and cannot be such. St. Paul v. Gilfillan, 36 Minn. 298.

The power conferred in general terms on municipal corporations to prevent and abate nuisances cannot be taken to authorize the condemnation and destruction of that as a nuisance which in its situation or use is not such in fact; and therefore if a city, acting under the general power, abate that as a nuisance which is not such in fact, it does so at its peril, and is liable for the damage done. Orlando v. Pragg, 31 Fla. 111, 19 L. R. A. 196, 201.

So, in the exercise of the power to declare nuisances they may not declare anything such which cannot be detrimental to the health of the city or dangerous to its citizens, or a public inconvenience, and even then not when the thing complained of is expresely authorized by the supreme legislative power of the state. State v. Jersey City, 29 N. J. L. 170.

And a city council cannot, by mere resolution or motion, declare any particular thing a nuisance which has not previously been pronounced to be such by law, or been so adjudged by judicial determination. Denver v. Mullen, 7 Colo. 345, 353; Hennessy v. St. Paul, 37 Fed. Rep. 565.

So, before it is so declared it must be in some manner injurious to public health. Hennessy v. St. Paul, 37 Fed. Rep. 565.

Again, it cannot by its simple fiat declare that a nuisance which is not so in fact. *Re* Sam Kee, 31 Fed. Rep. 680; United States Illuminating Co. v. Grant, 55 Hun, 222.

The following cases are to the same effect: Orlando v. Pragg, 31 Fla. 111, 19 L. R. A. 196, 201; Evansville v. Miller (Ind.) 45 N. E. 1054, 1056; First Nat. Bank v. Sarlls, 129 Ind. 201, 13 L. R. A. 481.

And the mere declaration of a city council that it is such, and the proceedings taken under the ordinance to abate the same, do not make it a nuisance. Cole v. Kegler, 64 Iowa, 59, 62; *Re* Lowe, 54 Kan. 757, 27 L. R. A. 545; Wreford v. People, 14 Mich. 41, 46; *Ex parte* O'Leary, 65 Miss. 80; Howard v. Robbins, 1 Lans. 63; *Ex parte* Robinson, 30 Tex. App. 493, 495.

The thing abated must be a nuisance in fact. People, Copcutt, v. Yonkers Board of Health, 140 N. Y. 1, 23 L. R. A. 481.

So, neither the power to abate nuisances, nor the power to define and declare what are nuisances, will justify a wanton declaration that an act or a vocation is a nuisance which unquestionably is not. Kansas v. McAleer, 31 Mo. App. 433, 436.

And this is so even though power to declare a nuisance may be conferred by the legislature, unless the thing declared to be a nuisance is one in fact, or is created or erected after the adoption of the ordinance, and in defiance thereof. Evansville v. Miller (Ind.) 45 N. E. 1054, 1056.

The thing must be a nuisance and be so declared in the ordinance, and shown to be such by its location, or by the sanitary condition of the city or town. Pieri v. Shieldsboro, 42 Miss. 493, 495.

The power granted by a city charter to prevent and remove all nuisances does not authorize the town to declare that to be a nuisance which is not and to destroy property or interfere with individual rights improperly, under the pretense of preventing or removing nuisances. Green v. Lake, 60 Miss. 451.

A municipal corporation, without any general laws either of the city or the state within which a given structure can be shown to be a nuisance, cannot, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. Chicago, R. I. & P. R. Co. v. Joliet, 79 Ill. 25, 44.

Where the special charter gives the city council power to declare what shall constitute a nuisance, and to prevent, remove, or abate the same, such general grant of power does not authorize the city council to declare anything a nuisance which is not such at common law, or has not been declared such by statute. Everett v. Council Bluffs, 46 Iowa, 66.

So, the power vested in a city council to prevent injury or annoyance within the limits of the corporation, from anything dangerous, offensive, or unhealthy, and to abate nuisances, does not authorize a city council to condemn any act or thing as a nuisance which in its nature, situation, or use does not come within the legal notion of a nuisance. Ward v. Little Rock, 41 Ark. 526, 48 Am. Rep. 46, 47.

Boards of health, in summary proceedings without a hearing of the owner, cannot make that a

This ordinance is a denial to the railway company of the equal protection of the laws. It is also special and discriminating legislation.

14th Amend. Fed. Const.; State Const. art. 1, § 18, art. 2, § 4.

Such legislation is confiscation.

Burns v. *Multnomah R. Co.* 8 Sawy. 551;

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nuisance which is not so in fact, and have no jurisdiction to make any order or ordinance to abate an alleged nuisance unless it is in fact a nuisance. People, Copcutt, v. Yonkers Board of Health, 140 N. Y. 1, 23 L. R. A. 481, Affirming 71 Hun, 84.

A board of health clearly exceeds any authority conferred upon it by the laws when it attempts to declare a thing to be a nuisance which is not such at common law, and its action in seeking to prevent or abate such alleged nuisance will be restrained by injunction. Schuster v. Metropolitan Board of Health, 49 Barb. 450, 452.

The provisions of the English statute 16 Vict. chap. 35, did not authorize the passing of by-laws by a municipality to prevent a nuisance not in itself unlawful. Davis v. Clifton, 8 U. C. C. P. 236.

And although a municipal corporation may possess powers *similar to those conferred* by charter, yet such fact does not carry with it the authority, where there are no general laws of the state or city within which laws the business or other subject can be shown to be a nuisance, to finally decide the question of fact as to the existence of a nuisance in the given case. St. Louis v. Schnuckelberg, 7 Mo. App. 536, 541. To the same effect, Everett v. Council Bluffs, 46 Iowa, 66; Yates v. Milwaukee, 77 U. S. 10 Wall. 497, 19 L. ed. 984; *Wreford* v. *People*, 14 Mich. 41; Clark v. Syracuse, 13 Barb. 32; Coe v. Schultz, 47 Barb. 64; Underwood v. Green, 42 N. Y. 140; Hutton v. Camden, 39 N. J. L. 122, 23 Am. Rep. 203; Quintini v. Bay St. Louis, 64 Miss. 483, 60 Am. Rep. 62.

The mere fact that the resolution of a board of health in general terms denounces the business of skin dressing as a nuisance and directs it to be abated, does not bring the alleged offenders within the reach of a municipal ordinance enjoining them to remove any offensive matter noxious to public health and *per se* a nuisance. State, Marshall, v. Cadwalader, 36 N. J. L. 284, 286.

Power to abate or suppress a nuisance is confined to abating or suppressing that which is imminently dangerous to life and property and a nuisance, and where the facts do not create the danger a resolution or ordinance of a common council to the contrary cannot avail. Hennessy v. St. Paul, 37 Fed. Rep. 565. To the same effect, Everett v. Council Bluffs, 46 Iowa, 66; Yates v. Milwaukee, 77 U. S. 10 Wall. 497, 19 L. ed. 984; *Clark* v. *Syracuse*, 13 Barb. 32; Underwood v. Green, 42 N. Y. 140.

The fact that a village incorporated under the general law in relation to the incorporation of villages, is by that law empowered to declare what shall be a nuisance does not authorize it to declare that a nuisance which is not so in fact. Des Plaines v. Poyer, 123 Ill. 348, Affirming 22 Ill. App. 574; Chicago v. Laflin, 47 Ill. 172.

A clause in a city charter *giving the municipality* power to ordain and establish such acts, laws, regulations, and ordinances, not inconsistent with the Constitution or laws of the state, as shall be needful for the government, interest, welfare, and good order of such body politic, does not convey an unlimited authority to declare that to be a nuisance which is not such by reason of its nature, situation, or use. Pye v. Peterson, 45 Tex. 312, 23 Am. Rep. 608.

No power to define or declare what shall be a nuisance is conferred upon cities of the fourth class by § 1589 of Mo. Rev. Stat. 1889, and therefore such a city has no power to declare that a nuisance which is not so at common law, or declared to be so by statute. Allison v. Richmond, 51 Mo. App. 133, 136.

That which is authorized by law cannot be a nuisance. Hinchman v. Paterson Horse R. Co. 17 N. J. Eq. 75, 77, 86 Am. Dec. 252; Rex v. Pease, 4 Barn. & Ad. 30, 1 Nev. & M. 690; Bordentown & S. A. *Turnp. Road* v. *Camden & A. R. & Transp. Co.* 17 N. J. L. 314; Davis v. New York, 14 N. Y. 506, 67 Am. Dec. 186; Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336.

So that which is authorized by the legislature if executed in the manner and at the place pointed out by them cannot become a public nuisance. Atty. Gen., Easton, v. New York & L. B. R. Co. 24 N. J. Eq. 49.

VI. *Extent of power to prevent or abate.*
a. *In general.*

The power of a municipal corporation over nuisances within its corporate limits must be conferred upon it by its charter or general laws. Pine City v. Munch, 42 Minn. 342, 6 L. R. A. 763.

And the police power of the state is adequate to give an effectual remedy against nuisances. Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036.

But where a right or privilege such as the right to abate nuisances is claimed under a charter of a *corporation*, nothing is to be taken as conceded to it but what is given in unmistakable terms or by an equally fair implication. Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036.

Where the charter gives the corporation a power to make by-laws, it can only make them in such cases as it is enabled to do by its charter, for such power given by the charter implies a negative that they shall not make by-laws in any other case. *Child* v. *Hudson's Bay Co.* 2 P. Wms. 237.

In the abatement of nuisances a municipal corporation must show a grant, either in express terms or by necessary implication, for all the power and authority it undertakes to exercise. Rochester v. Collins, 12 Barb. 559, 562.

Where the city authorities act under the powers contained in their charter, or under the powers conferred upon them by statute, and do not proceed either *negligently*, *maliciously* or wantonly, but in good faith and in the careful exercise of their discretion, the damage occasioned to the owner of the property by its removal by such authorities pursuant to their ordinance is *damnum absque injuria*. Tate v. Greensboro, 114 N. C. 392, 24 L. R. A. 671; Smith v. Washington, 61 U. S. 20 How. 135, 15 L. ed. 858; Brush v. Carbondale, 78 Ill. 74; Pontiac v. Carter, 32 Mich. 164.

So, the legislature has power *to grant municipal* corporations authority to make by-laws and ordinances upon subjects appertaining to them locally, such as the abatement and prevention of nuisances. *Tanner* v. Albion, 5 Hill, 121, 40 Am. Dec. 337.

Yet the legislation of a common council, even in the abatement of nuisances, must be subordinate to that of the state, the power to which it owes existence. State v. Jersey City, 29 N. J. L. 170, 175.

And in this respect every ordinance is *valid under* a charter, unless it is contrary to the Constitution or to some law or laws of the state. Paxson v. Sweet, 13 N. J. L. 196, 199.

The power to pass a by-law or an ordinance which establishes a rule interfering with the rights of individuals or the public, as an ordinance suppressing a billard table let for hire, must emanate from the creating body, and clear authority must be found for it in the legislative enactment under which the corporation exercises its functions of government. State, Breninger, v. Belvidere, 44 N. J. L. 350, 355;

Santa Clara R. Tax Case, 9 Sawy. 186; *Railroad Tax Case*, 8 Sawy. 251; *Oregon & C. R. Co.* v. *Lane County*, 23 Or. 393.

The courts will always set aside an ordinance which contravenes a common right, or which for any cause is so unreasonable as to be void.

State v. *Tenant*, 110 N.C. 609, 15 L.R. A. 423.

Carron v. Den, Martin, 26 N. J. L. 594, 69 Am. Dec. 584; Taylor v. Griswold, 14 N. J. L. 222, 27 Am. Dec. 33.

In abating nuisances the public exercises its police power and not power of eminent domain. Dunbar v. Augusta, 90 Ga. 390, 395. To the same effect, Manhattan Mfg. & Fertilizing Co. v. Van Keuren, 23 N. J. Eq. 251; State, Weller, v. Snover, 42 N. J. L. 341; St. Louis v. Stern, 3 Mo. App. 48; Theilan v. Porter, 14 Lea, 622, 52 Am. Rep. 173; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205.

It is for the public authorities, acting in the common interests, to interfere for the suppression of a common nuisance, such as a house of ill-fame, except in cases of special damage. Cranford v. Tyrrell, 128 N. Y. 341, 343; Francis v. Schoellkopf, 53 N. Y. 152.

The right to abate public nuisances, whether regarded as existing in municipalities, or in the community, or in the land of the individual, is a common-law right arising from necessity and akin to the right of destroying property for the public safety, in case of the prevalence of a devastating fire or other controlling exigency. Hutton v. Camden, 39 N. J. L. 122, 23 Am. Rep. 203, 208.

A city has power to make laws for better government without any express grant. Milhau v. Sharp, 15 Barb. 193, 207.

In the case of London v. Vanacre, 5 Mod. 438, it is stated that the privilege of making by-laws and ordinances is vested in the city, by common right, if not by custom, for that it concerns the good and better government of the city, and every town and city may by an essential power inherent in their constitution make by-laws for the advantage of the government of the body politic, and that is the true touchstone of all by-laws, which ought to be for the administration of the government with which they are intrusted.

And a municipality may with a strong hand abate a public or common nuisance which endangers either the health or safety of its citizens. Easton, S. E. & W. E. Pass. R. Co. v. Easton, 133 Pa. 505.

The right to reserve property for public use includes the power to protect the public in its use, as well by the abatement of a public nuisance in the neighborhood, as upon the road or street itself. Ashbrook v. Com. 1 Bush, 139, 89 Am. Dec. 616, 619.

If the nuisance is a public one it may be summarily abated by the proper authorities without notice, but no unnecessary damage must be done. Baumgartner v. Hasty, 100 Ind. 575, 576, 50 Am. Rep. 830.

It must, however, be shown that there is a substantial injury to the public at large. Ferris Wheel Co. v. Chicago, 27 Chicago Leg. News, 399.

In Manhattan Mfg. & Fertilizing Co. v. Van Keuren, 23 N. J. Eq. 251, 255, it is stated that any citizen acting either as an individual or as a public official, under the orders of local or municipal authorities, whether such orders be or be not in pursuance of special legislation or charter provisions, may abate what the common law deems a public nuisance.

The summary abatement of a nuisance is a right that existed at common law in favor of the individual sustaining special injury from such nuisance, and the Indiana statute (§ 3333, subd. 4, Rev. Stat. 1881, § 4357, subd. 4, Rev. Stat. 1894) confers that right upon a municipal corporation, and such proceeding is *ad rem*, and not *in personam*, the power extended to towns being exercised by and through ordinances general in character, and affecting alike all the property or all the business of all the citizens, under like conditions, occupying like situations, and conducted in like manner. American Furniture Co. v. Batesville, 139 Ind. 77, and 35 N. E. 682.

With respect to the summary abatement of nuisances it has been stated that it is right that such power should exist somewhere to be exercised upon proper emergency, for the reason that if the civil authorities are obliged to await the slow progress of a public prosecution the evil arising from nuisances will seldom be avoided. Van Wormer v. Albany, 15 Wend. 264; Weil v. Schultz, 33 How. Pr. 7, 8.

In order to clear the public streets of a palpable obstruction or nuisance, no hearing is necessary. Laing v. Americus, 86 Ga. 756, 757.

Summary proceedings by corporations for the suppression of nuisances under ordinances passed pursuant to the powers of their charter without the usual forms of a regular judicial trial have been held valid as falling within the police powers of the government. McKibbin v. Fort Smith, 35 Ark. 352, 355. To the same effect, Blair v. Forehand, 100 Mass. 136, 1 Am. Rep. 94, and 97 Am. Dec. 82; Salem v. Eastern R. Co. 98 Mass. 431, 96 Am. Dec. 650; American Print Works v. Lawrence, 21 N. J. L. 248; Underwood v. Green, 3 Robt. 86; Harvey v. Dewoody, 18 Ark. 252, 255.

Yet it is only certain kinds of nuisances that may be removed or abated summarily by the acts of individuals or by the public, such as those which affect the health, or interfere with the safety of property or person, or are tangible obstructions to streets and highways under circumstances presenting an emergency, such cases being nuisances *per se*. Denver v. Mullen, 7 Colo. 345, 353.

The state and its municipalities intrusted with the execution of the power, such as the suppression, removal, and abatement of nuisances, may provide means of protecting the public health, and it is their duty to do so, and any means may be adopted that will effect the end. Louisville v. Wible, 84 Ky. 290, 295.

A city, as a representative of the state, has the right to pursue all the ordinary civil remedies for enjoining or abating a public nuisance upon its streets or squares. San Francisco v. Buckman, 111 Cal. 25, 31.

So, a city council has a right as a police regulation to pass ordinances in order to prevent nuisances. State v. Bergman, 6 Or. 341, 343.

And cities and incorporated towns have power to provide by ordinance for the abatement of nuisances. Knoxville v. Chicago, B. & Q. R. Co. 83 Iowa, 636.

And this is so for the reason that a municipal corporation has power to pass all laws necessary or proper to carry into effect any given power. *Ex parte* Burnett, 30 Ala. 461, 465.

And for the further reason that it is necessary in all populous towns to regulate the matter of nuisance by police ordinances. Hart v. Albany, 3 Paige, 213; Kennedy v. Phelps, 10 La. Ann. 227.

In Savannah v. Hussey, 21 Ga. 80, 68 Am. Dec. 452, it is stated that all ordinances regulating nuisances are legitimate and proper.

Where a city has power under its charter and also by the Code of the state, it may abate a nuisance. Pruden v. Love, 67 Ga. 190, 192.

The mayor and aldermen of a city are clothed with legislative powers and prerogatives to a certain extent, and are fully empowered to adopt measures of police for the purpose of preserving the health and promoting the comfort, conven-

A judgment of conviction upon a plea of guilty may be reviewed.

Code, §§ 536, 585, 1331, 1429, 2159; Sess. Laws 1889, pp. 135, 454, 455, § 5; *Hill* v. *State*, 23 Or. 446; *Fletcher* v. *State*, 12 Ark. 169; *Walsh* v. *Union*, 13 Or. 589.

A municipal corporation cannot by mere declaration constitute a nuisance of any struc-

ience, and general welfare of the inhabitants of the city, and it is not only the right, but the imperative duty, of a city government to watch over the health of the citizen, and to remove every nuisance, so far as they are able, which may endanger it. Baker v. Boston, 12 Pick. 184, 22 Am. Dec. 421, 423; Kennedy v. Phelps, 10 La. Ann. 227.

Inasmuch as the question of nuisance or no nuisance is one of fact, it becomes necessary in all populous towns to regulate such matters by public ordinance, and the public policy requires that the corporation should not be disturbed in the exercise of its powers unless it clearly transcends its authority. Monroe v. Gerspach, 33 La. Ann. 1011, 1012.

Subject to constitutional limitations, legislative authority extends to the suppression or regulation of those things, such as nuisances, which are hurtful to the general good, and, as a general rule, the lawmaking power will be deemed the exclusive judge of what is or is not hurtful. *Re* Linehan, 72 Cal. 114, 116; *Ex parte* Andrews, 18 Cal. 679.

So far as a municipality acts in the exercise of its public political powers and within the limits of its charter, it is vested with the largest discretion, and whether its laws are wise or unwise, whether they are passed for good or bad motives, it is not the province of the court to inquire. Milhau v. Sharp, 15 Barb. 193, 212. Frewin v. Lewis, 3 Myl. & C. 249, 2 Jur. 175, to the same effect.

The discretion vested in municipal authorities, as to the degree of municipal legislation on subjects committed to their charge, such as the suppression and abatement of nuisances, although broad, is not, however, absolutely and in all cases beyond judicial control. Baltimore v. Radecke, 49 Md. 217, 33 Am. Rep. 239.

In Gregory v. New York, 40 N. Y. 173, 282, it is said that under the city charter, the mayor, aldermen, and commonalty of the city of New York have power to pass by-laws and ordinances in advance to prevent nuisances, as well as to secure their abatement.

And, under the power to preserve the health of a city, and to prevent and remove nuisances, municipal corporations have the undoubted right to pass ordinances creating boards of health and appointing health commissioners, with other subordinate officials, regulating the removal of house dirt, night soil, refuse, offal, and filth, by persons licensed to perform such work, and providing for the prohibition, abatement, and suppression of whatever is intrinsically and inevitably a nuisance. Boehm v. Baltimore, 61 Md. 259, 263.

If the nuisance exists in the city, the city, as a municipal corporation, has the right to abate it. Belton v. Central Hotel Co. (Tex. Civ. App.) 33 S. W. 297; Belton v. Baylor Female College (Tex. Civ. App.) 33 S. W. 680.

So, a city has power to prohibit nuisances, and may declare an act to be a nuisance and impose a penalty. Chambers v. Ohio Life & T. Ins. Co. 1 Disney (Ohio) 327, 335.

And when the act complained of is so extended as to become a public menace and nuisance, the public officers, especially when specifically authorized to do so, can lawfully abate it. Electric Improvement Co. v. San Francisco, 45 Fed. Rep. 593, 595, 13 L. R. A. 131.

Where the people of the city accept the privileges and advantages conferred upon them by their charter, they take the same subject to the obligations imposed, and, if such charter gives them power to prevent and remove nuisances, their obligation is to keep the city free therefrom. Baltimore v. Marriott, 9 Md. 161, 174.

A village incorporated by a charter authorizing it to abate a nuisance may, by an ordinance, abate such nuisance. Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036.

The power to abate a nuisance implies that there is, or may be, in existence something to be abated. A nuisance must exist before it can be abated. Cole v. Kegler, 64 Iowa, 59, 62.

And such power, being derived from the municipal charter, can only be exercised when it is expressly given or necessarily implied from the act of the incorporation. Troy v. Winters, 4 Thomp. & C. 256; Pine City v. Munch, 42 Minn. 342, 6 L. R. A. 763.

The power of municipalities over nuisances falls within the well-established rule that municipal corporations can exercise no powers except those which are conferred upon them by the act by which they are constituted, or such as are necessary to the exercise of the corporate powers, the performance of their corporate duties, and the accomplishment of the purposes of their association, and they can exercise no powers which the charter does not grant in express words, or which are not necessarily or fairly implied in, or essential to, the powers expressly granted, or which are an essential to the declared objects and purposes of the corporation. *Ex parte* Robinson, 30 Tex. App. 493, 495. To the same effect, *Ex parte* Garza, 28 Tex. App. 381; Miller v. Burch, 32 Tex. 208, 5 Am. Rep. 242.

So, in addition to the above, it has been stated that the power of municipal corporations to abate nuisances, like other powers, in order to be exercised by them must be not simply convenient, but it must be indispensable. Christie v. Malden, 23 W. Va. 667; Charleston v. Reed, 27 W. Va. 681, 55 Am. Rep. 336, 340.

And beyond the powers defined the courts will not allow them to go. Collins v. Hatch, 18 Ohio, 523, 51 Am. Dec. 465.

The general scope, plan, and purpose in the creation of such corporations, as deducible from their charters or the general laws under which they are organized, is the aiding of the state within the local jurisdiction for which they are created, in protecting the public peace and order, the public health, public morals, public safety, public convenience, and the trade and commerce of the inhabitants. *Re* Gribben (Okla.) 47 Pac. 1074, 1075.

In Sigler v. Cleveland, 3 Ohio N. P. 119, in dealing with the question of an ordinance making smoke a nuisance, it is laid down as an established doctrine and rule of law that municipalities have incidental powers, and a general right, even in the absence of special grants from the legislature, to enact reasonable ordinances for the government of the municipality; but where a special grant of power is made to the municipality by the legislature, then that grant must be strictly construed, and followed by the city council in enacting any ordinance predicated on such ground.

And a necessary implication must be so fair and strong as to render it highly improbable that the legislature could have entertained an intention contrary to the implication claimed as resulting from the power granted. Frank v. Atlanta, 72 Ga. 428, 432.

Under a city charter authorizing the common council to pass and enact ordinances for the good government of a city, and for the benefit of the trade, commerce, and health thereof,

ture or of any acts which do not in fact or in law constitute a nuisance.

Denver v. *Mullen*, 7 Colo. 345; *Ward* v. *Little Rock*, 41 Ark. 526, 48 Am. Rep. 46; *State* v. *Mott*, 61 Md. 297, 48 Am. Rep. 105; *Wreford* v. *People*, 14 Mich. 41; *Lake View* v. *Letz*, 44 Ill. 81; *Chicago* v. *Laflin*, 49 Ill. 172; *Allison* v. *Richmond*, 51 Mo. App. 133; *Teass* v. *St.*

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and to make orders, regulations, and provisions "to abate and remove nuisances," an ordinance which merely gives them power to prevent nuisances will be invalid, as, under such a grant, they have no power to make regulations to prevent nuisances, or to impose penalties for their creation, although, under a power "to do all acts, make all regulations, and pass all ordinances which they should deem necessary for the preservation of health and the suppression of disease in the city, and to carry into effect and execute the powers thereby granted," the power to pass such an ordinance is clearly given by necessary implication although not in express terms. Rochester v. Collins, 12 Barb. 559, 562.

Of the degree of necessity for municipal legislation relating to such matters, the city council are the exclusive judges, where, under their charter, they have power to pass laws and ordinances necessary to preserve the health of the city and to prevent and remove nuisances. Harrison v. Baltimore, 1 Gill, 264, 267.

A town council has power to pass all such ordinances under its charter as appear necessary and requisite for the health, welfare, etc., of the town, and therefore has the exclusive right to judge what is necessary and requisite to preserve the health of the town, and, under such an ordinance no question can arise as to whether the cultivation of the soil beyond a certain area is necessary to the health, or whether the nonrestriction of such cultivation would be a nuisance. Summerville v. Pressley, 33 S. C. 56, 8 L. R. A. 854.

The power of a municipal officer to abate a public nuisance without a statutory or judicial process stands upon the same footing as the power of a citizen. Coast Co. v. Spring Lake (N. J. Eq.) 36 Atl. 21.

Such power is shared by a city in common with individuals, and arises from necessity, and ceases with that necessity. Lanfear v. New Orleans, 4 La. 97, 23 Am. Dec. 477.

Public policy requires that the body, or the individual, clothed with the power of preventing nuisances in populous towns and crowded harbors, should not be disturbed in the exercise of that power, unless they clearly transcend their authority. Hart v. Albany, 3 Paige, 213; Kennedy v. Phelps, 10 La. Ann. 227.

As all the authority of a municipal corporation is derived from its charter, its powers cannot be enlarged, diminished, or varied by the ordinance or by-laws of a corporation. State, Breninger, v. Belvidere, 44 N. J. L. 350, 355.

In Llano v. Llano County, 5 Tex. Civ. App. 132, 134, the court stated that whatever might have been or was now the construction placed upon the common law by some courts, to the effect that public nuisances solely injurious to the general public could only be abated at the instance of the sovereign, either by indictment or equitable remedy invoked by its law officers to that end, such construction must yield to a policy that had grown into a principle of law in most of the states of the Union, to the effect that the state in its sovereign capacity had delegated its authority in that respect to those municipal corporations that were acting as city governments by authority from the state, the control of such internal matters which affect directly the public interest of the city, or of its inhabitants as a part of the general public being left to the governing bodies of the state.

And it has been looked upon as the prerogative of the legislative body of the city government to adopt such sanitary measures as will preserve the public health, and remove every nuisance which may endanger it; their determination in this respect being conclusive so long as they do not violate the Constitution or transcend the power conferred upon them. State, Marshall, v. Cadwalader, 36 N. J. L. 283, 284.

So, where the city council have authority under the charter to establish such laws, rules, and ordinances as shall appear to them requisite and necessary for the security, welfare, and convenience of the city, for preserving peace, order, and good government within the same, they may enact ordinances for such purposes so long as they do not conflict with the provisions of the Constitution. Vason v. Augusta, 38 Ga. 542, 546.

When the legislature delegates to certain municipal agents a general power to provide for the preservation of the public health by the removal of nuisances, an adjudication by such agents upon the fact of a nuisance existing within their local jurisdiction is conclusive in every case where the subject-matter comes within the classifications of prima facie nuisances *per se*. St. Louis v. Stern, 3 Mo. App. 48, 55.

And under a grant of power to prevent and remove all nuisances, a town has the power to prevent and remove what comes within the legal notion of a nuisance. Green v. Lake, 60 Miss. 451.

In Weil v. Ricord, 24 N. J. Eq. 169, 173, it is stated that among the objects sought to be secured by municipal government there is none more important than the preservation of the public health, and therefore the imperative obligation rests upon the government of every city promptly to abate or remove all nuisances by which the public health may be affected, and that it is no less its duty to provide in like manner for the comfort and convenience of its inhabitants within its limits, for which ends such governments are clothed with police powers.

Incidental to the ordinary powers of a municipal corporation, and necessary to the proper exercise of its functions, is the power of enacting sanitary regulations for the preservation of the lives and health of those residing within its corporation limits, thus preventing nuisances affecting health. St. Paul v. Laidler, 2 Minn. 190, 72 Am. Dec. 89, 92.

And in Ferguson v. Selma, 43 Ala. 398, 400, the court stated that, even without such special powers as are conferred by the charter, powers to remove all nuisances within the city, such as decayed and dilapidated houses or structures calculated to produce disease, or unfit for use or habitation, and things producing noxious smells in frequented parts of the city, and things producing unhealthy exhalations and prejudicial to health, and things calculated to impair the comfort and convenience of the inhabitants, are incident to all incorporated towns and cities as a means of discharging the duty to abate nuisances.

Without a special grant of authority public corporations may, as a common-law power, cause the abatement of nuisances, and, if the nuisance cannot be otherwise abated, may destroy the thing which constitues it; and it is further the duty of such corporations to abate public nuisances. Baumgartner v. Hasty, 100 Ind. 575, 578, 50 Am. Rep. 830.

All rights for the use and enjoyment of property, secured by the Constitution of the United States, are subject to regulation under that power known as the police power of the state, which is necessary to its existence, and which is implied in the idea of

Albans, 38 W. Va. 1, 19 L. R. A. 802; *Cole* v. *Kegler*, 64 Iowa, 59; *Pieri* v. *Shieldsboro*, 42 Miss. 493; *Frank* v. *Atlanta*, 72 Ga. 428.

A municipal ordinance which assumes to declare and punish a nuisance, or to create an offense in too broad and sweeping terms, so as to prevent the exercise of a lawful right, or to impose unreasonable restrictions upon the lawful use of property, is void.

Ex parte O'Leary, 65 Miss. 80; *St. Paul* v.

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free civil government, the suppression of nuisances being within such power. Watertown v. Mayo, 109 Mass. 315, 319, 12 Am. Rep. 694, 696.

Such rights are held subject to such reasonable control and regulation of the mode of keeping and use as the legislature, under the police power vested in them by the state statute, may think necessary for the prevention of injuries to the rights of others and the security of public health and welfare. Blair v. Forehand, 100 Mass. 136, 139, 1 Am. Rep. 94.

Police regulations may forbid such a use and such modification of private property as would prove injurious to the citizen generally. Wadleigh v. Gilman, 12 Me. 403, 405, 28 Am. Dec. 188.

Where the thing sought to be abated is intrinsically and unavoidably a nuisance, the authority to preserve the health and safety of the inhabitants and their property is a sufficient foundation for municipal ordinances suppressing and prohibiting it. United States Illuminating Co. v. Grant, 55 Hun, 222.

So, a city ordinance providing punishment for the maintenance of a nuisance is not invalid or unconstitutional, for the reason that the general statutes of the state provide for the punishment of a like offense. People v. Detroit White Lead Works, 82 Mich. 471, 9 L. R. A. 722.

And the mere fact that a person may be liable to prosecution under a state law does not relieve him from liability under a city ordinance passed for the prevention and abatement of nuisances. McLaughlin v. Stephens, 2 Cranch, C. C. 148; United States v. Holly, 3 Cranch, C. C. 656.

But the powers conferred upon municipal corporations to abate nuisances must be reasonably exercised, and the reasonable use of such powers requires the abatement of a nuisance in such a way as to do the least injury to private rights. State, Bodwell, v. Newark, 34 N. J. L. 264, 267.

A city ordinance providing that any person placing any obstruction or excavation on a street shall be fined, and such obstruction be removed at his or her expense, is not within the power of the city authorities to enact, § 4089 of the Iowa Code declaring such act to be a nuisance, and § 456 of the Code conferring power upon cities and towns to abate nuisances, but not to define them. Nevada v. Hutchins, 59 Iowa, 506.

b. *Boards of health.*

The power of the board of health to abate nuisances or the causes of them, and to enforce sanitary regulations, is great, and the courts will never interfere with the legitimate use of their power, but, on the contrary, excuse an excessive exercise of the power in cases where there is great peril to the public health. Eddy v. Board of Health, 10 Phila. 94.

A board of health of a city has power to declare and abate nuisances. Philadelphia v. Provident Life & T. Co. 132 Pa. 224; Kennedy v. Philadelphia Board of Health, 2 Pa. 366.

So, the board of health in the township in which a nuisance exists, or is carried on, has the authority, and it is its duty, to abate such nuisance, either on its own motion, or by the aid of the court, although it is only hazardous to the health of individuals residing in another township. State, North Brunswick Twp. Board of Health, v. Lederer, 52 N. J. Eq. 675.

It is the duty of the board of health of a town to examine into all nuisances, sources of filth, and causes of sickness within its town, and it has authority to order the owner or occupant of any premises on which the same may exist to remove it after notice served upon such owner or occupant. Com. v. Alden, 143 Mass. 113, 117.

The jurisdiction of a board of health, however, depends upon the existence of a nuisance, and that is always open to judicial inquiry, even though the property owner may have had a hearing before the board on the subject. Eagan v. New York Health Department, 20 Misc. 38.

Under the New York statutes of 1850, as amended by those of 1854, 1867, and 1868, the board of health of a city has power to abate nuisances, and to charge the expenses incurred in so doing upon the owner of the premises in which such nuisance exists. Prendergast v. Schaghticoke, 42 Hun, 317.

The functions of a board of health are of an executive and advisory, and not of a legislative or judicial, character. State, Marshall, v. Cadwalader, 36 N. J. L. 284, 286.

Under the provisions of N. J. Stat. March 31, 1887 (Pub. Laws, p. 93, §§ 28, 29), it must be shown that the thing complained of amounts in itself to a nuisance, and such nuisance must be a public as distinguished from a mere private one, and must affect a considerable number of persons, and must be such as will be indictable at common law, a mere tendency to injure not being sufficient; and in such cases there must be something appreciable which of itself arrests the intention, and rests, not merely in theory, but strikes the common sense of the ordinary citizen. State, Hackensack Board of Health, v. Bergen County Chosen Freeholders, 46 N. J. Eq. 173, 179.

In Philadelphia v. Goudey, 36 W. N. C. 246, the court discharged a rule to strike off a municipal claim filed by the city for the costs of removing a nuisance by the board of health, which nuisance consisted of a foul privy wall.

And the similar rule to strike off a lien upon defendant's premises, occasioned by reason of the suppression of a similar nuisance, was discharged in Philadelphia v. Glading, 36 W. N. C. 247.

c. *Nonresidents.*

The procedure under an ordinance prohibiting the running at large of hogs in towns and cities in order to abate a nuisance created thereby is a proceeding *in rem*, and therefore does not depend upon the residence or domicil of the owner, the offense consisting in allowing such animals to run at large, and it is equally a violation of the ordinance whether the owner resides out of, or in, the town. McKee v. McKee, 8 B. Mon. 433.

So, cattle of a stranger straying into a town and so becoming nuisances may be removed by way of abating the nuisance. Whitfield v. Longest, 6 Ired. L. 268; Plymouth Comrs. v. Pettijohn, 4 Dev. L. 591; Friday v. Floyd, 63 Ill. 50; Spitler v. Young, 63 Mo. 42, 45; Crosby v. Warren, 1 Rich. L. 385; Knoxville v. King, 7 Lea, 441.

A stranger is an inhabitant *pro hac vice* within the meaning of a town ordinance or a by-law, passed pursuant to a charter or act prohibiting or regulating offensive and noxious trades creating a nuisance. Pierce v. Bartrum, 1 Cowp. 269.

So, a city ordinance passed pursuant to the charter may bind, not only residents, but nonresidents, of the town, when, such nonresidents come within the jurisdiction. Kennedy v. Sowden, 1 McMull. L. 323, 326.

And an ordinance providing for the abatement

Gilfillan, 36 Minn. 298; *Ex parte Sing Lee*, 96 Cal. 354, 24 L. R. A. 195; *Ex parte Whitwell*, 98 Cal. 73, 19 L. R. A. 727; *Re Sam Kee*. 31 Fed. Rep. 680; *Re Tie Loy*, 26 Fed. Rep. 611; *Laundry Ordinance Case*, 7 Sawy. 528; *Greensboro* v. *Ehrenreich*, 80 Ala. 579, 60 Am. Rep. 130; *Sioux Falls* v. *Kirby*, 6 S. D. 62, 25 L. R. A. 621.

Any ordinance which, in effect, prevents the right of building on private property, under

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of a nuisance within a town operates as well upon nonresidents, who suffer the nuisance to remain within the limits of the town, as upon the actual residents. Whitfield v. Longest, 6 Ired. L. 268.

In Reed v. People, 1 Park. Crim. Rep. 481, 493, it is stated that persons residing out of the corporate bounds may render themselves obnoxious to the by-laws and regulations of a corporation by coming within them and while there, but that such a corporation has no right to make by-laws or regulations binding personally upon an individual not residing within its geographical bounds, who had done no act within them after the making of the by-law.

d. *Statutory power.*

Under an act amending the city charter, providing that the city council shall have power to prevent and cause the removal of all nuisances within the city, such as all decayed and dilapidated houses or structures calculated to produce disease of any kind, or unfit for use or habitation, and things producing noxious smells in frequented parts of the city, and things producing unhealthy exhalations and prejudicial to the health of the city, and things calculated to impair the comfort and convenience of the inhabitants of the city, the city authorities are clothed with the amplest powers to protect the health, peace, and comfort of its citizens, and even without such special authority as is given by the charter such powers are incident to all incorporated towns and cities as a means of discharging the duty to abate nuisances. Ferguson v. Selma, 43 Ala. 398, 400.

Section 3312 of Colo. Gen. Stat. subd. 45, confers authority upon municipal corporations to declare what shall be a nuisance and to abate the same, and to impose fines upon parties who may create, continue, or suffer nuisances to exist, and subdivision 53 of the same gives them power to prohibit any offensive or unwholesome business to be established within, or within 1 mile of, the limits of the corporation. May v. People, 1 Colo. App. 157, 159.

Under an act giving the board of health power to preserve the public health and prevent the spread of malignant diseases, and to examine into all nuisances and sources of filth injurious to the public health, and to cause the removal of such filth, which in their judgment endangered the health of the inhabitants, such board has power to cause such nuisance to be abated, where they act in good faith and with reasonable caution, and in order to prevent the spread of a malignant disease, even though the property removed as a nuisance does not partake of the character of filth. Raymond v. Fish, 51 Conn. 80, 50 Am. Rep. 3.

Municipal corporations are by the Revised Statutes of Illinois authorized to declare anything a nuisance which is in fact in its nature so, and to abate it, and it is not indispensable under such statutes that the power be exercised only in pursuance of an ordinance. Nazworthy v. Sullivan, 55 Ill. App. 48, 51.

Power is conferred upon cities of the second class to enact ordinances for the preservation of the health and inhabitants of the city, and to prevent and remove nuisances, by Kan. Comp. Laws 1885, § 61, chap. 19. State, Humphrey, v. Franklin, 40 Kan. 410.

When a statute confers a power on a municipal corporation to be exercised for the public good, the exercise of the power is not merely discretionary but imperative, and the words, "power and authority," in such case, may be construed duty and obligation. Baltimore v. Marriott, 9 Md. 161, 174, 66 Am. Dec. 326, wherein the Maryland act of 1796, chap. 68, gave the corporation full power and authority to prevent and remove nuisances.

The mayor and city council of the city of Baltimore, by the act of general assembly incorporating such city, have full power and authority to enact and pass all laws and ordinances necessary to preserve the health of the city, prevent and remove nuisances, and to prevent the introduction of contagious diseases within the city and within 3 miles of the same. Harrison v. Baltimore, 1 Gill, 264, 276.

The powers, as conferred upon boards of health by Mass. Gen. Stat. chap. 26, were intended to provide a summary and speedy remedy for the ordinary case of a local nuisance occasioned by the neglect or mismanagement of an individual upon his own land, which can be removed or abated by him personally. Cambridge v. Munroe, 126 Mass. 496.

The terms "nuisance, source of filth, or cause of sickness, as used in the Massachusetts statute," may be naturally construed as applying to those obvious and palpable objects from which danger to public health directly arises. Salem v. Eastern R. Co. 98 Mass. 431, 433, 96 Am. Dec. 650.

In Farnsworth v. Boston, 126 Mass. 1: Read v. Cambridge, 126 Mass. 427; Bancroft v. Cambridge, 126 Mass. 438, and Welch v. Boston, 126 Mass. 442, note,—the city authorities had power conferred upon them by statute to abate nuisances, but the real question involved in those cases was that of compensation to the owner of the land so taken, and rather involved the question of the power to take by eminent domain than the real question of the power to abate nuisances.

Sections 1640 to 1642 of Howell's Michigan Statutes authorize township boards of health in proper proceedings to destroy, remove, or prevent nuisances in certain cases. Ronayne v. Loranger, 66 Mich. 373.

Cities of the fourth class have authority, under § 1589, Mo. Rev. Stat. 1889, to prevent and remove nuisances, but have no power to declare what shall be a nuisance as is provided in some charters, and therefore such a city has no power to declare that to be a nuisance which is not so at common law, or declared to be so by some statute. Allison v. Richmond, 51 Mo. App. 133, 136.

The New York statutes, which give the board of health large powers for cleansing and purifying the city, and made it their duty to exercise certain specified powers, and also such other powers, whenever a contagious disease appears in the city, as in their judgment the circumstances of the case and the public good require, and to establish regulations in their discretion concerning the suppression and removal of nuisances, and the common council of the city having power to appoint a board of health from their body to assist the mayor and recorder in carrying out the provisions of the statutes made to preserve the health of the city, confer upon the board of health discretionary powers of a large nature, among which are the suppression and removal of nuisances, and also give them a summary remedy to remove or abate the same. Van Wormer v. Albany, 15 Wend. 262.

Section 3 of 1 N. Y. Rev. Stat. 600, provides that no corporations, in addition to the general powers enumerated in the 1st section of the act, and to those generally given by the city charter, shall possess or exercise any corporate powers, except such as are necessary to the exercise of the powers so enumerated and given. Rochester v. Collins, 12 Barb. 559, 562.

peril of punishment, is void, as taking property without due process of law and without compensation.

St. Louis v. *Hill*, 116 Mo. 527, 21 L. R. A. 226; *Newton* v. *Belger*. 143 Mass. 598; *Quintini* v. *Bay St. Louis*, 64 Miss. 485, 60 Am. Rep. 62; *Evansville* v. *Martin*, 41 Ind. 145.

The police power does not extend to depriv-

Under the provisions of N. Y. Stat. 1857, § 5, a board of health has power to act in a particular matter or thing dangerous to the public health, and cause it to be removed as a nuisance, but it has no right to assume in advance that all things of a certain character in a city are or will become nuisances or dangerous to public health, and contract for their removal indefinitely until it or the common council order otherwise, and to bind the defendants to pay therefor. Gregory v. New York, 40 N. Y. 273, 282.

Under the Pennsylvania act of 1818, the board of health has jurisdiction in determining the fact that a nuisance exists, and it makes no difference from what cause it arises, it being necessary and proper that it shall be removed. Kennedy v. Philadelphia Board of Health, 2 Pa. 366, 370.

The provisions contained in § 4915 of the Tennessee Code have been construed as meaning that when the party is indicted and convicted for permitting the nuisance it may be so abated, and that there is no power in the town government to indict or try for criminal offenses, although they may sue for, and recover, the penalties imposed for violating the town ordinances. McCrowell v. Bristol, 5 Lea, 685, 689.

Under the provisions of the Texas statutes (Sayles's Civ. Stat. arts. 342, 375, 379, 382, 403, 404, 408, 468, 472, 514, 521), which regulate the powers and duties of a city government, the city can sue and be sued, and has control of its streets and public grounds, and may remove obstructions therefrom, and abate nuisances affecting the public health. Llano v. Llano County, 5 Tex. Civ. App. 132, 134.

The discretion as to what works are necessary, under the English public health act of 1848, to be done on water closets, etc., within the district, so as not to allow the same to become a nuisance, is vested in the board of health and not in the justices, and the latter cannot review the decision of the former. Hargreaves v. Taylor, 3 Best & S. 613, 32 L. J. M. C. N. S. 111, 9 Jur. N. S. 1053, 8 L. T. N. S. 149, 11 Week. Rep. 562.

By § 12 of the English statute 18 & 19 Vict. chap. 121, known as the nuisance removal act, when a nuisance has been ascertained to exist the local authority can summon before the justices "the person by whose act, default, permission, or sufferance a nuisance arises or continues," and if it is proved to the satisfaction of the justices that the nuisance exists they shall make an order in writing for the abatement or discontinuance of such nuisance. St. Helens Chemical Co. v. St. Helens, L. R. 1 Exch. Div. 196, 45 L. J. M. C. N. S. 150, 34 L. T. N. S. 397.

In Scarborough v. Rural Sanitary Authority, L. R. 1 Exch. Div. 344, 34 L. T. N. S. 768, the sanitary authorities had deposited ashes and refuse in a field in order that the same might be removed by certain farmers with whom they had contracted for its purchase, but neither of the parties was the owner of such field, and it was shown that the deposit created a nuisance, and an order was made by the justices under the English public health act of 1875, § 96, asking for the abatement of the nuisance and for the prohibition of its reoccurrence. It was held that so much of the order as directed the abatement was bad inasmuch as it prescribed an act, the execution of which might involve the committal of a trespass, although the order, in so far as it is prohibited the reoccurrence of the offense was good, the act of the authorities in so depositing the rubbish creating the nuisance.

Under § 90 of the municipal corporation act (5 & 6 Wm. IV. chap. 76), it is lawful for the council of a borough to make by-laws, *inter alia*, for the prevention and suppression of all such nuisances as are not already punishable in a summary manner by virtue of any act in force in such borough. Shillito v. Thompson, L. R. 1 Q. B. Div. 12, 45 L. J. M. C. N. S. 18, 33 L. T. N. S. 506, 24 Week. Rep. 57.

e. *Extraterritorial extent of power.*

The power of a town council to declare the sale of intoxicating liquors to be a nuisance in so far as it extends 3 miles beyond the corporate limits is void. Strauss v. Pontiac, 40 Ill. 301.

Under §§ 28 and 29, N. J. Laws 1887, p. 180, which give local boards power to bring suits to prevent nuisances, a board of health has no jurisdiction to restrain the defendants from creating a nuisance upon their own land upon the ground that it injuriously affects the residents of the plaintiff borough, their powers being confined to matters arising within their own territorial limits, and in the matter of a nuisance arising outside of such limits they must proceed by action under the statute of 1894. State, Vailsburgh Board of Health, v. East Orange Twp. 53 N. J. Eq. 498.

But in Gould v. Rochester, 105 N. Y. 46, Reversing 39 Hun, 79, the court allowed an action in the name of the board of health to restrain the defendant city from creating a nuisance by discharging sewage upon and over the lands of the town of such board of health, although such board could not enter upon the city's lands to summarily abate such nuisance, the board having the power to seek redress in the courts for the prevention of the violation of its rules, and to prevent and abate nuisances affecting it arising outside of its jurisdiction.

Subdivision 53, § 3312, Colo. Gen. Stat. gives municipalities power to prohibit any offensive, unlawful, or unwholesome business established within 1 mile of the corporate limits. May v. People, 1 Colo. App. 157, 159.

And the act of the general assembly of Maryland gives power to the city of Baltimore to prevent and remove nuisances within 3 miles of the city. Harrison v. Baltimore, 1 Gill, 266, 276.

So, under a charter giving power to the town to declare the sale of spirits or beer within its limits to be a nuisance, a town has no power to declare such sale 3 miles beyond such limits to be a nuisance, the charter giving no extraterritorial power. Strauss v. Pontiac, 40 Ill. 301, 303.

An ordinance providing that any person visiting a house of ill-fame within the city, or within 1 mile thereof, shall be guilty of a violation of its provisions, exceeds the powers conferred by its charter with respect to the visiting of such houses outside of the city limits, the charter providing for the removal and abatement of nuisances carrying out and enforcing sanitary regulations, for the apprehension of disorderly persons, vagrants, or prostitutes and their associates, and for the regulation of the liquor traffic, and giving the city council jurisdiction 2 miles beyond the city limits. Robb v. Indianapolis, 38 Ind. 49, 52.

f. *To take or destroy property.*

As to the power of municipal authorities to destroy buildings in order to abate a nuisance, see *note* to Evansville v. Miller (Ind.) *post*, —.

The destruction of private property in order to abate a nuisance is simply the prevention of its noxious and unlawful use, and depends upon the principles that every man must so use his property

ing any person of the lawful use of property without due process of law, and without compensation.

Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; *Re Cheesebrough*, 78 N. Y. 232; *Rockwell* v. *Nearing*, 35 N. Y. 302.

Messrs. **J. W. Hamilton** and **John McGowan** for respondent.

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as not to injure his neighbor, and that the safety of the public is the paramount law. Manhattan Mfg. & Fertilizing Co. v. Van Keuren, 23 N. J. Eq. 251, 255.

The power of a municipal authority to abate a nuisance does not include the destruction of private property used in the creation of such nuisance,—especially where such property may be used for lawful purposes. Chicago v. Union Stockyards & T. Co. 164 Ill. 224, 35 L. R. A. 281.

Where, by a town ordinance, intoxicating liquors kept within the town limits for sale or to be given away to be drunk within such limits, are declared a nuisance, and the police are directed to abate the same by removing them beyond such limits, such liquors cannot be taken away until it has been judicially determined that the ordinance has been violated. Darst v. People, 51 Ill. 286, 2 Am. Rep. 301.

The power of such bodies to prevent and remove all nuisances does not authorize them to declare that a nuisance which is not, nor to destroy property or interfere with the individual rights in property, under the pretense of preventing or removing nuisances. Green v. Lake, 60 Miss. 451.

In Easton, S. E. & W. E. Pass. R. Co. v. Easton, 133 Pa. 505, the action of the city authorities in removing in a summary way the tracks used by the company, upon the ground that the rails used in the construction thereof were not the best for the interests of the public, was condemned, as such rails had not been declared to be a common nuisance, there being nothing in the case to justify the conclusion that the tract as laid was a public or common nuisance which the highway department of the city could forcibly and of its own will abate.

So, a statute giving power to seize and destroy gaming tables without notice to the owner or a judicial investigation or determination of the case is unconstitutional, even though it may be contended that such table constitutes a nuisance at common law, and may therefore be destroyed without notice. Lowry v. Rainwater, 70 Mo. 152, 35 Am. Rep. 420.

But if the nuisance cannot otherwise be abated such authorities may destroy the thing which constitutes it. Baumgartner v. Hasty, 100 Ind. 575, 576, 50 Am. Rep. 830.

In Farrell v. New York, 22 N. Y. S. R. 469, the court refused to restrain the action of the city authorities in removing and tearing down an awning erected by the plaintiff in front of his premises.

And for the purposes of destroying, removing, or preventing sickness, city authorities may destroy, injure, or appropriate private property other than that which constitutes or causes the nuisances. Salem v. Eastern R. Co. 98 Mass. 431, 433, 96 Am. Dec. 650.

Where a public nuisance consists in the location or use of tangible personal property so as to interfere with or obstruct a public right or regulation, the legislature may authorize its summary abatement by executive agencies without resort to judicial proceedings, and any injury or destruction of the property necessarily incident to the exercise of the summary jurisdiction interferes with no legal right of the owner, but the legislature can go no further, and it cannot decree the destruction or forfeiture of property used so as to constitute a nuisance as a punishment for the wrong, nor to prevent a future illegal use of the property, it not being a nuisance *per se*. Lawton v. Steele, 119 N. Y. 226, 7 L. R. A. 134.

Power is conferred upon the board of health by Mass. Stat. 1816, chap. 44, Pub. Stat. chap. 80, to examine into all cases of sickness, nuisances, and sources of filth in any vessel within Boston harbor or within the limits thereof, and to destroy, remove, or prevent the same. Train v. Boston Disinfecting Co. 144 Mass. 523, 59 Am. Rep. 113, wherein rags were seized and destroyed under the order of the public authorities.

Such authorities have also the right to remove or destroy hog pens when they become nuisances, and their action in so doing is a valid exercise of police power. St. Louis v. Stern, 3 Mo. App. 48, 55.

So, the summary killing of horses afflicted with the glanders is legal under Mass. Stat. 1887, § 13, the same being nuisances, although such act does not authorize the killing of all horses, nor does it declare all horses to be nuisances. Miller v. Horton, 152 Mass. 540, 543, 10 L. R. A. 116.

And an ordinance giving power to prohibit the cultivation of rice, and to destroy or remove the same, has been upheld, the same being a nuisance injurious to health. Green v. Savannah, 6 Ga. 1.

In Savannah v. Mulligan, 95 Ga. 323, 29 L. R. A. 303, city authorities destroyed the defendant's bed and bedding in order to prevent a nuisance in the spreading of a contagious disease.

And in Lawton v. Steele, 119 N. Y. 226, 7 L. R. A. 134, the destruction of fish nets was held a reasonable incident of the power to abate a nuisance.

In Dunbar v. Augusta, 90 Ga. 390, 395, the city council had, after notice given to plaintiff, removed a large quanity of grain which had been damaged by a flood, and destroyed the same pursuant to the terms of the city ordinance declaring the same a nuisance, being detrimental to the public health and public welfare, and the plaintiff sought damages for the destruction of the same, but inasmuch as his declaration was defective, by reason of it not stating that such grain was not a nuisance, the court set aside his action without passing upon the constitutionality of the ordinance.

As to the right to compensation for property destroyed in abating a public nuisance, see *note* to Orlando v. Pragg (Fla.) 19 L. R. A. 196.

As to the right of a municipal corporation to destroy or take the carcasses of dead animals, see *note* to *Ex parte* Lacey (Cal.) *post*, —.

VII. *Limit of power to prevent or abate.*

a. *In general.*

The court will not interfere to see whether any alteration or regulation which a muncipality may direct is good or bad, but, if such authorities are departing from that power which the law has vested in them,—if they are assuming to themselves a power over property which the law does not give them,—the court no longer considers them as acting under the authority of their commission, but treats them, whether they are a corporation or individuals, merely as persons dealing with property without legal authority, in Frewin v. Lewis, 4 Myl. & C. 255, 2 Jur. 175.

With respect to the limit of the power of such corporations over nuisances it is a general rule that a city possesses only such legislative powers as are prescribed by the charter from which it derives its existence. Waters v. Leech, 3 Ark. 110, 115.

A muncipal corporation cannot make a thing a nuisance by declaring it to be so, nor can it in the exercise of the power of regulation materially impair or affect the franchise actually granted by the legislature. Brooklyn City R. Co. v. Furey, 4 Abb.

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

On June 12, 1894, the petitioner was arrested on a warrant of the municipal court of the city of Oakland, issued upon a complaint charging him with having "committed a public nuisance within the platted portion of said city by driving stakes as a part of the fence which he was

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Pr. N. S. 364, 367; Davis v. New York, 14 N. Y. 524, 67 Am. Dec. 186; State v. Jersey City, 29 N. J. L. 170.

And for this reason a muncipal corporation has no control over nuisances within its corporate limits, except such as is conferred upon it by its charter or general laws. Pine City v. Munch, 42 Minn. 342, 6 L. R. A. 763.

It can, therefore, only pass such ordinances as are warranted by its charter. St. Charles v. Nolle, 51 Mo. 122, 11 Am. Rep. 440, 441.

And it can only exercise such powers as are expressly given to it or necessarily implied from the act of incorporation. Troy v. Winters, 4 Thomp. & C. 256; Pratt v. Litchfield, 62 Conn. 112, 118.

And such implied ones must be necessary to make valuable the powers expressly conferred and essential to effect the purpose of the corporation, and these powers must be strictly construed. Clark v. Des Moines, 19 Iowa. 202, 87 Am. Dec. 423; Keokuk v. Scroggs, 39 Iowa, 449.

So, with respect to nuisances it must act within the limits of its delegated authority, and cannot go beyond it. *Ex parte* Burnett, 30 Ala. 461, 465.

And the *power to abate or suppress* a nuisance is confined to abating or suppressing that which is imminently dangerous to life and property and a nuisance, and where the facts do not create the danger a resolution or ordinance of a common council to the contrary cannot avail. Hennessy v. St. Paul, 37 Fed. Rep. 565; Everett v. Council Bluffs, 46 Iowa, 66; *Yates v. Milwaukee, 77 U. S. 10* Wall. 497, 19 L. ed. 984; Clark v. Syracuse, 13 Barb. 32; Underwood v. Green, 42 N. Y. 140.

And a city cannot creat a nuisance upon the property of a citizen, and compel him to abate it. Hannibal v. Richards, 35 Mo. App. 15, 21; St. Louis & S. F. R. Co. v. Evans & H. F. Brick Co. 85 Mo. 330, 336; Weeks v. Milwaukee, 10 Wis. 269.

So, a city cannot assist, by its affirmative action, in creating a nuisance upon the ground of a private person, and then require him to abate it at his own charge. Hannibal v. Richards, 35 Mo. App. 15, 21.

And it cannot arbitrarily, where no public right or property is involved, declare property a nuisance for the purpose of devoting it to destruction. Lawton v. Steele, 119 N. Y. 226, 7 L. R. A. 134.

The law will not allow rights of property to be invaded under the guise of police regulation for the preservation of health or protection against a threatened nuisance; and when it appears that such are not the real object and purpose of the regulation, the courts will interfere to protect the rights of the citizen. Watertown v. Mayo, 109 Mass. 315, 12 Am. Rep. 694.

Before the public authorities, who have elevated a street above the adjoining property so that such property has *no outlets for* the escape of water, and the holder of the adjoining property has filled up his lot to the level of the street, can hold such owner responsible for the presence of a putrid, filthy, noxious, and stagnant pond of water existing there and which they deem a common nuisance, they must show that he has some agency in its creation, *or that he has performed the act which* causes its continuance, or that he is guilty of omitting some duty which he lawfully owes to the public. Barring v. Com. 2 Duv. 95.

An ordinance not warranted by the charter of a city is void, and can furnish no justification to persons acting under its authority, and therefore, if the public authorities move to abate a nuisance, or proceed in a manner not authorized by their charter, their act will be illegal. Miller v. Burch, 32 Tex. 208, 5 Am. Rep. 242.

Neither a municipal authority nor a board of health has, in the absence of statute, in order to abate a nuisance *existing upon adjoining land*, power to erect a dam on the land of another person except with his consent. Cavanagh v. Boston, 139 Mass. 426, 433, 434, 52 Am. Rep. 716.

A city has no power to prohibit, within 1,500 feet of a park, that which is not a public or a private nuisance, nor a nuisance *per se*, irrespective of the manner of its operation. *Ferris Wheel Co. v. Chicago*, 27 Chicago Leg. News, 399.

So, the legislature cannot use its power as a cover for withdrawing property from the protection of the law. Lawton v. Steele, 119 N. Y. 226, 7 L. R. A. 134.

Under the provisions of N. Y. Stat. 1857, § 5, the board of health have no right to assume in advance that all things of a certain character in a city are or will become nuisances or dangerous to the public health, and to contract for their removal indefinitely until they or the common council order otherwise and to bind the defendants to pay therefor. Gregory v. New York, 40 N. Y. 273, 282.

Although a charter of a municipal corporation may empower the common council to abate all nuisances in any manner that they may deem expedient, and to do all acts and to pass all ordinances which they shall deem necessary or expedient for the preservation of health, yet such ordinance will not authorize it to abate a nuisance in any manner unknown to the law, or in violation of the constitutional restrictions prohibiting disfranchisement, and the depriving a person of rights and privileges secured to him as a citizen in any manner, except by the law of the land or the judgment of his peers, and also prohibiting the *depriving a person of life, liberty, or property* without due process of law, and the taking of private property for public use without just compensation. Babcock v. Buffalo, 1 Sheldon, 317, 328, Affirmed 56 N. Y. 268.

Where the nuisance is sought to be abated either by the judgment of the court, or by the private act of one *aggrieved, or by the public authorities*, whoever undertakes to exercise the right to abate must not exceed the right to do what he is justified in doing by the law of the land, by the authority by which each acts, and no greater power can be conferred upon one than upon another. Babcock v. Buffalo, 1 Sheldon, 317, 328, Affirmed 56 N. Y. 268.

The abatement of a nuisance must be *limited by* its necessity, and no wanton or unnecessary injury must be committed, and so much only of the thing which causes the nuisance must be removed. Babcock v. Buffalo, 1 Sheldon, 317, 328, Affirmed 56 N. Y. 268.

And anything which amounts to more than an abatement of the nuisance is unauthorized and void. Bush v. Dubuque, 69 Iowa, 233, 237.

So, the remedy by summary abatement cannot be extended beyond the purpose implied in the words, and must be confined to doing what is necessary to accomplish it. Lawton v. Steele, 119 N. Y. 226, 7 L. R. A. 134.

If a city, under the general power to prevent and abate nuisances, proceeds against that as a nuisance which is in fact such because of its nature, situation, or use, it is then under the obligation of exercising the power of abatement in a reasonable manner so as to do the least injury to *private rights*, and if, where the fact of nuisance is clear, it exercises the power of abatement in an un-

then and there building along the side of the O. & C. Railroad, otherwise known as the Southern Pacific Railroad, contrary to ordinance No. 58 of the city," and on a plea of guilty was fined $25. He thereupon sued out a writ of review to have the judgment of the recorder's court annulled and set aside on the ground that the ordinance was void. The writ

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reasonable, careless, or negligent manner, so as to produce unnecessary damage to private rights, it will be liable for the damage caused by its negligence. Orlando v. Pragg, 31 Fla. 111, 19 L. R. A. 196, 201; State, Rodwell, v. Newark, 34 N. J. L. 264; Larson v. Furlong, 50 Wis. 681.

And although cities and incorporated towns have power to provide by ordinance for the abatement of nuisances, yet they cannot provide for the punishment by fine of those guilty of maintaining the nuisances; such punishment must be by indictment, under the Iowa Code. Knoxville v. Chicago, B. & Q. R. Co. 83 Iowa, 636.

The exercise of the power to abate a nuisance which is clearly unlawful and which has no great public necessity to excuse it will be restrained by the court, no matter how praiseworthy the motive may be which prompts it. Eddy v. Board of Health, 10 Phila. 94.

While the courts will not disturb the board of health of a city from proceeding under the provisions of its ordinance in the exercise of its powers for the abatement of public nuisances within its legitimate limits, yet it will prohibit such authorities from inflicting, by means of their prohibition, irreparable injury upon the owner or party claimed to be injured by their action. Weil v. Ricord, 24 N. J. Eq. 169, 173.

In Pennsylvania, before a board of health can enter upon occupied or inclosed property to search for a nuisance, for the purpose of removing the same, it must obtain a warrant pursuant to the 27th section of the Pennsylvania act of 1818. Eddy v. Board of Health, 10 Phila. 94; Kennedy v. Philadelphia Board of Health, 2 Pa. 366; Baugh v. Sheriff, 7 Phila. 82.

Municipal authorities abating a nuisance under the powers conferred upon them by a city ordinance will be liable to the same penalties as others, if the thing abated is not in fact a nuisance. Cole v. Kegler, 64 Iowa, 59, 62. To the same effect, Clark v. Syracuse, 13 Barb. 32; Welch v. Stowell, 2 Dougl. (Mich.) 332; Underwood v. Green, 42 N. Y. 140; Yates v. Milwaukee, 77 U. S. 10 Wall. 497, 19 L. ed. 984; Haskell v. New Bedford, 108 Mass. 208; Wreford v. People, 14 Mich. 41; Everett v. Council Bluffs, 46 Iowa, 66; Salem v. Eastern R. Co. 98 Mass. 431, 96 Am. Dec. 650.

b. *In cases of abuse of privilege.*

The mere fact that a privilege, such as the right to hold a public picnic and open-air dances, may be abused, is no reason why it should be absolutely denied by a village ordinance as being a public nuisance. Des Plaines v. Poyer, 123 Ill. 348, Affirming 22 Ill. App. 574.

VIII. *The question of discrimination.*

An ordinance or by-law, passed under the power given to the city authorities with respect to the abatement or prevention of nuisances, giving such authorities a discretionary power either to allow or disallow a certain trade, business, or calling to be carried on, thus leaving it optional with them, so that they may or may not show partiality, is invalid as not within the proper exercise of the authority vested in them.

A city ordinance prohibiting the keeping and storing of green or dried hides or pelts within the city without the permission of the city council does not declare such business to be a nuisance, but assumes the right to prohibit it or not as their inclination prompts them, and is therefore discriminatory and not within the powers conferred by § 3312, subdivs. 45, 53, Colo. Gen. Stat. May v. People, 1 Colo. App. 157, 159.

So, a city ordinance prohibiting the carrying on of a certain business without the consent of certain persons cannot be upheld, even though the authorities may have power to regulate business and abate nuisances on public or private property, and the causes thereof. St. Louis v. Howard, 119 Mo. 41.

For delegation of power as to licenses, see note to St. Louis v. Russell (Mo.) 20 L. R. A. 721.

And although they may enforce fines for the violation of their ordinances respecting nuisances in offensive trades, yet they cannot designate one individual or establishment and subject its owners to punishment, the same being contrary to common right. First Municipality v. Blineau, 3 La. Ann. 688.

So, in the case of an engine erected by the permission of the public authorities upon condition that it shall be removed after six months' notice from the mayor according to the provision of the city ordinance, such ordinance is void, the matter being amply covered by state legislation independently of the power vested by the ordinance in the public authorities, and for the reason that it vests in a single person a power which he must exercise in his discretion either prejudicially or otherwise to the defendant, according to whether he is given to favoritism or otherwise. Baltimore v. Redecke, 49 Md. 217, 33 Am. Rep. 239.

So an ordinance requiring the recommendation of citizens and taxpayers in the vicinity. Laundry Ordinance Case, 7 Sawy. 526, 13 Fed. Rep. 229, 231.

Again, a by-law that no person shall keep a slaughterhouse within the city without special resolution of the council is invalid as not within the provisions of Can. Stat. 1866, § 296, subs. 23, which prevents or regulates the erection or continuance of slaughterhouses which may prove nuisances, as it shows there may be favoritism and restraint of trade, or it may be used to create a monopoly, and persons may not therefore all be placed upon an equal footing. *Re* Nash, 33 U. C. Q. B. 181.

The business of conducting a laundry is a lawful occupation, and is not of itself, and irrespective of the manner in which it is conducted, offensive or dangerous to the health of those living within its vicinity, and no municipal corporation has the power to make the right of a person to follow such business at any place he may select for that purpose dependent upon the will of any number of citizens or property owners within its limits. *Ex parte* Sing Lee, 96 Cal. 354, 357, 24 L. R. A. 195.

An ordinance conferring upon the municipal authorities arbitrary power to give or refuse to any person a permit to carry on laundry business is unconstitutional. Yick Wo v. Hopkins, 118 U. S. 373, 30 L. ed. 227.

In a laundry business carried on by the petitioner and his predecessors, at the location occupied by him for twenty years, and by the petitioner himself for eight years, there is nothing tending to show that it is in fact a nuisance, and therefore the provisions of the city ordinance which declare the carrying on of such business to be a nuisance are unconstitutional. *Re* Sam Kee, 31 Fed. Rep. 680.

But a city ordinance prohibiting the sale of intoxicating liquors as a nuisance in any refreshment saloon or restaurant within a city, but not prohibiting the use or keeping thereof elsewhere, merely selecting the places of a certain class and prohibiting its use in such places, is not unreasonable, and

being dismissed by the circuit court, he brings this appeal.

The ordinance in question was passed by the *Oakland council June 11, 1894, for the declared* purpose, as shown by the minutes of the meeting, of "prohibiting the Southern Pacific Railroad Company from building a fence along *their railroad within the corporate limits of the*

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is a valid exercise of the police power over nuisances. State v. Clark, 28 N. H. 176, 61 Am. Dec. 611.

For monopoly in removal of garbage see Smiley v. McDonald (Neb.) 27 L. R. A. 540, and note also Walker v. Jameson (Ind.) 28 L. R. A. 679.

IX. *The methods of abatement.*

a. *In general.*

The ordinary method of abating a public nuisance and punishing its author is by criminal proceedings. Ottumwa v. Chinn, 75 Iowa, 405.

The general proposition of the law is, that where a municipal corporation is empowered to enforce its ordinances in any prescribed manner, it is by implication precluded from adopting any other mode for its enforcement. Hettenbach v. New York C. & H. R. R. Co. 18 Hun, 129, 131.

Under N. J. Rev. Laws, chap. 125, the power of ordaining laws for the good government of the city is under no other restriction than that they shall not contravene the Constitution or laws of the state, and its terms import all ordinances which they may deem necessary, and their opinion of its necessity is evinced by their having ordained it. Paxson v. Sweet, 13 N. J. L. 196, 199.

A city, as representing the state, has the right to pursue all the ordinary civil remedies for enjoining or abating a public nuisance upon *its streets or* squares. San Francisco v. Buckman, 111 Cal. 25, 31.

City authorities have the power of deciding in what manner they will remove a nuisance which endangers the health and comfort of the inhabitants, *and such decision is conclusive unless they* transcend the powers conferred by the town charter or violate the Constitution. Harvey v. Dewoody, 18 Ark. 252, 259; Baker v. Boston, 12 Pick. 184, 22 Am. Dec. 421, 423.

Under the exercise of police power municipal authorities can declare and abate nuisances, in cases of necessity, without citation, and without adjudication as to whether there is in fact a nuisance. Joyce v. Woods, 78 Ky. 386, 389.

Municipal *corporations* may be invested with authority to abate public nuisances by the legislature without resorting to judicial proceedings. Baumgartner v. Hasty, 100 Ind. 575, 576, 50 Am. Rep. 830.

A municipality as the representative of the people may sue to abate or prevent a nuisance upon public property within its limits. Coast Co. v. Spring Lake (N. J. Eq.) 36 Atl. 21.

It so far represents the equitable rights of its inhabitants that it is authorized to maintain an action to abate a public nuisance upon a public square. People, Bryant, v. Holladay, 93 Cal. 248; Watertown v. Cowen, 4 Paige, 510, 27 Am. Dec. 80; Dempolis v. Webb, 87 Ala. 659.

And a board of health has a legal right to proceed in a summary manner in all proper cases to abate nuisances. St. Louis v. Schnuckelberg, 7 Mo. App. 536, 541.

So, a borough can bring a suit for abatement of a nuisance *per se* without the passage of an ordinance. Coast Co. v. Spring Lake (N. J. Eq.) 36 Atl. 21.

So, a city council, being the governmental agency to whom the inhabitants of a municipality have the right to look in a proper case for protection from the evil effects of a public nuisance, may, when authorized so to do, resort to an indictment, a civil action, or abatement, according to the exigencies of the particular case. Huron v. Bank of Volga (S. D.) 66 N. W. 815.

And the council of a city of the second class has the power to prevent and remove nuisances by an ordinance which provides a punishment by fine or imprisonment, or both. Burlington v. Stockwell (Kan. App.) 47 Pac. 988.

The importance of the duty of abating nuisances imposes upon a board of health the necessity of prompt and decisive measures to protect the public *health, and requires a wide discretion in the use* of means by which to destroy, remove, or prevent causes of sickness, and, if it be necessary for the proper performance of their duty, they may in the exercise of such discretion resort to means and *measures which affect injuriously other lands than* those upon which the manifestation or cause of sickness is found. Salem v. Eastern R. Co. 98 Mass. 431, 433, 96 Am. Dec. 650; Baker v. Boston, 12 Pick. 184, 22 Am. Dec. 421.

Where a thing, which is in its nature in fact a public nuisance, is to be abated, the city, if authorized by statute to do the act, may proceed by resolution of the city council, and in such cases such resolution is as effective as an ordinance. Nazworthy v. Sullivan, 55 Ill. App. 48, 51.

And proceedings under a city ordinance providing a penalty for committing or continuing a nuisance may be by summons in the name of the commonwealth to the use of the city, and a warrant of arrest issued at the instance of the city commission is irregular. Scranton v. Frothingham, 5 Pa. Dist. R. 639.

So, an action by the board of health of a village to abate a nuisance by reason of waste water and fæcal matter running into the streets, under the provisions of the New York statute (chap. 270, Laws 1885), which provides that the penalty "may be sued for and recovered with costs by said board in the name of such board in any court having competent jurisdiction," is well brought in the name of the board without naming the individual members thereof. To the same effect, New Brighton Board of Health v. Casey, 18 N. Y. S. R. 251; New Rochelle Board of Health v. Valentine, 32 N. Y. S. R. 919.

b. *Proceedings in equity.*

The power of municipalities to proceed in equity by way of injunction to restrain a public nuisance will be treated of in a separate *note* confined exclusively to the consideration of such subject.

X. *Effect of authority or license.*

Public policy forbids that a city government should be allowed to part with any of its powers the exercise of which may be necessary to secure and conserve the public welfare, and any violation of this policy necessarily tends to an impairment of the usefulness and efficiency of the city government, and consequently to defeat in a greater or less degree the very purposes for which it was created. Augusta v. Burum, 93 Ga. 68, 26 L. R. A. 340, 343, wherein it was sought to enjoin the action of the authorities in pulling down an awning as an encroachment.

Neither the mayor, aldermen, nor commonalty of the city of New York collectively can authorize use of the sidewalks in such a way as would cause an obstruction thereof, or a nuisance—especially where the ordinance limits the hanging or placing of goods to 12 inches from the front of the street or building, and the consolidation enactment act of 1882, § 4, prohibits the placing or continuing of any encroachment or obstruction upon any street

city," and provides "that it shall be unlawful for any person, association, or corporation owning, operating, or controlling any railroad within the corporate limits of the city of Oakland, Oregon, or any person or persons in the employment of any such person, association, or corporation, or any other person whatever, to build, construct, or maintain any fence or

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or sidewalk except the temporary occupation thereof during the erection or repairing of buildings. Lavery v. Hannigan, 10 Jones & S. 463, 466.

In the absence of a clear grant of power from the legislature the municipal authorities can do nothing amounting in effect to the alienation of a substantial right of the public. Augusta v. Burum, 93 Ga. 68, 26 L. R. A. 340, 343.

Evidence tending to show the mere fact that the public authorities have allowed illegal structures to be placed upon piers, would not control a similar case in which it was sought to abate such structures as nuisances, as the existence of a nuisance cannot be justified, nor its continuance demanded, by establishing that similar nuisances had been committed. People v. Mallory, 4 Thomp. & C. 567, 569.

With reference to the effect of a prior authority or license from the public authorities as a defense to proceedings by them to abate a nuisance committed by reason of the subject-matter of such nuisance, it has been stated that the legislature of a state cannot, by any contract, limit the exercise of the police powers of the state to the prejudice of the general welfare in regard to the public health and public morals. Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585.

The legislature has no power to violate the laws of public safety, and cannot authorize an enterprise to be conducted by the use of a death-dealing factor, unless the conditions imposed are such as to secure the public safety for all time during its use, and whenever this safety ceases to exist the enterprise becomes a nuisance which may be abated by the public authorities. United States Illuminating Co. v. Grant, 55 Hun, 222.

Although the legislature of a state may give an exclusive right for the time being to particular persons, or to a corporation, to provide a stock landing and to establish a slaughterhouse in a city, it has no power to continue such right so that no future legislature, nor even the same body, can repeal or modify it, or grant similar privileges to others. Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 28 L. ed. 585.

The city authorities cannot legalize a public nuisance, and therefore a plea that the defendant acted pursuant to the license or authority of such authorities is of no avail in proceedings by the municipality to abate such a nuisance. Cohen v. New York, 113 N. Y. 533, 537, 4 L. R. A. 406; Ely v. Campbell, 59 How. Pr. 333; People, O'Reilly, v. New York, 59 How. Pr. 277; Lavery v. Hannigan, 20 Jones & S. 465; Mutual Union Teleg. Co. v. Chicago, 16 Fed. Rep. 309; Des Moines Gas Co. v. Des Moines, 44 Iowa. 508, 24 Am. Rep. 756; Flemingsburg Trustees v. Wilson, 1 Bush. 203; Pettis v. Johnson, 56 Ind. 139; Pfau v. Reynolds, 53 Ill. 212; Stanley v. Davenport, 54 Iowa, 463, 467, 37 Am. Rep. 216; Day v. Green, 4 Cush. 433; People v. Vanderbilt, 28 N. Y. 396, 84 Am. Dec. 351.

And in case of an authority or a consent given by the public authorities to erect a nuisance they are not estopped thereby from proceeding by way of injunction to restrain their abatement of the same, the doctrine of estoppel not applying in cases where the act of such officers is *ultra vires*. Norfolk City v. Chamberlaine, 29 Gratt. 534, 539.

The general principle of law is settled beyond controversy that the agents, officers, or even the city council, of a municipal corporation cannot bind the corporation by any contract or act which is beyond the scope of its powers or entirely foreign to the purposes of the corporation, or which, "not being in terms authorized," is against public policy. Norfolk City v. Chamberlaine, 29 Gratt. 534, 539.

Such authorities cannot, in the absence of a statutory power, grant to any citizen the right to maintain a permanent structure for private use upon a public street. Laing v. Americus, 86 Ga. 756, 757.

Any license which the authorities may grant to occupy the streets for private purposes is temporary and revocable, even though intended to be permanent. Laing v. Americus, 86 Ga. 756, 757.

And though premises be granted for a certain purpose and be long used for that purpose, this will not prevent the use afterwards being treated as a public nuisance. Coates v. New York, 7 Cow. 585.

Again, a certificate to carry on a trade is of no avail after the trade has become a public nuisance. Rex v. Cross, 2 Car. & P. 483.

If the matters complained of create a nuisance the party creating the same cannot justify his acts under a pretended authority from the officers of the city, for the reason that a city cannot of itself create a nuisance which affects the health of its inhabitants, and therefore cannot authorize another to do what it is itself prohibited from doing. Belfon v. Baylor Female College (Tex. Civ. App.) 33 S. W. 680.

So, the mere fact that the city has by ordinance empowered a person to construct a sewer or drain, and has by such ordinance provided that the same shall be removed upon its proving a nuisance, does not authorize such individual to use the same in such a manner as to discharge filth into an open watercourse, no power existing in such public authorities to authorize such act. Hutchinson v. State, Trenton Board of Health, 39 N. J. Eq. 569, 572.

And a license given by a county board of health to manufacture fertilizers and materials will not give the licensee power to create noisome odors and corrupt the air to the inconvenience of the public, neither will such license be of any value in proceedings to abate such nuisance as a public one. Garrett v. State, 49 N. J. L. 94, 60 Am. Rep. 592.

Again, where the city council have no authority given to extend the steps of a building in a particular street, and the ordinance specially forbids it, any extension thereof by the owner is an unauthorized obstruction of a public highway, and a nuisance which the public authorities have a right to abate. Norfolk City v. Chamberlaine, 29 Gratt. 534, 539.

But where the nuisance becomes such by the act of the city itself, the city cannot institute a bill to have the same declared a nuisance, inasmuch as it is a consequence of the city's acts; and in any such case, or even if they can be declared nuisances, they cannot be removed without compensation to the owners. Chicago v. Laflin, 49 Ill. 172.

XI. *No infringement of constitutional rights.*

In this respect it has been said that all the rights for the use and enjoyment of property, secured by the Constitution of the United States, are subject to regulation under that power known as the police power of the state, which is necessary to its existence, and which is implied in the idea of free civil government, the suppression of nuisances being within such power. Watertown v. Mayo, 109 Mass. 315, 319, 12 Am. Rep. 694, 696.

And the mere fact that the nuisance complained of and punished under the city ordinance is also punishable under the general statutes of the state

other obstruction whatever along the side of any such railroad within the portion of the corporate limits of said city of Oakland that is laid out in lots and blocks, and every such fence and obstruction is hereby declared a nuisance within and against the ordinance of said city of Oakland." In our opinion, this ordinance cannot be sustained as

does not render such ordinance unconstitutional. People v. Detroit White Lead Works, 82 Mich. 471, 9 L. R. A. 722.

So, the summary abatement of nuisances by municipal corporations is a remedy which has ever existed in the law, and its exercise is not regarded as in conflict with constitutional provisions for the protection of the rights of personal property, and formal legal proceedings and trial by jury are often inappropriate and wholly inadequate in cases where public safety demands an immediate remedy. Nazworthy v. Sullivan, 55 Ill. App. 48, 51.

In abating nuisances the public does not exercise the power of eminent domain, but the police power. Dunbar v. Augusta, 90 Ga. 390, 395; Manhattan Mfg. & Fertilizing Co. v. Van Keuren, 23 N. J. Eq. 251, 255; State, Weller, v. Snover, 42 N. J. L. 341; St. Louis v. Stern, 3 Mo. App. 48; Theilan v. Porter, 14 Lea, 622, 52 Am. Rep. 173; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205.

If the abatement of a nuisance by such authorities involves the destruction of property, the owner is deprived of its property by due process of law, nor is it a taking of private property for public use without compensation if the thing abated is a public nuisance, for then the summary process of abatement is authorized by common law, and any process authorized by law must be due process. Manhattan Mfg. & Fertilizing Co. v. Van Keuren, 23 N. J. Eq. 251, 255.

And in such cases local authorities may destroy property, and the owner can be deprived of it without trial, without notice, and without compensation, such destruction being for the public safety or health. Manhattan Mfg. & Fertilizing Co. v. Van Keuren, 23 N. J. Eq. 251, 255.

Again, such a taking is simply the prevention of its noxious and unlawful use, and depends upon the principles that every man must so use his property as not to injure his neighbor, and that the safety of the public is the paramount law. Manhattan Mfg. & Fertilizing Co. v. Van Keuren, 23 N. J. Eq. 251, 255.

The destruction of property because it is a dangerous nuisance is not to appropriate it to the public use, but to prevent any uses of it by the owner, and put an end to its existence because it could not be used consistently with the maxim *sic utere tuo ut alienum non lædas*, and therefore the owner of grain destroyed upon the ground that it is a nuisance dangerous to health is not deprived of his property without compensation. Dunbar v. Augusta, 90 Ga. 390, 395.

And this is so for the reason that a regulation which compels a man so to use his own as not to interfere with the rights of others does not deprive him of his property, nor does it devote such property to any public use. St. Louis v. Stern, 3 Mo. App. 48, 55.

And for the further reason that the law presumes that the individual is compensated by sharing in the advantages accruing from the general enforcement of such beneficial measures. State, Marshall, v. Cadwalader, 36 N. J. L. 283, 284.

The abatement of a public nuisance is not the appropriation of property to public use without the judgment of one's peers, but it is the suppression of a thing declared to be illegal by the law of the land, which may be destroyed by any citizen if done in such a manner as to invade no law of property, or for the preservation of the peace. Weil v. Schultz, 33 How. Pr. 7, 8.

So, laws passed in the legitimate exercise of the police power for the suppression of nuisances are not obnoxious to constitutional provisions, although in some measure they may interfere with private rights, merely because they do not provide compensation to the individual whose liberty is estranged. Watertown v. Mayo, 109 Mass. 315, 12 Am. Rep. 694, 696.

As at common law a public nuisance might be removed, taken away, or abated by any person aggrieved thereby, if in so doing he does not disturb the public peace, without resorting to legal proceedings for the purposes of its removal, it is therefore no violation of the Constitution for the legislature to declare that the board of health of a town or city may make use of such proceedings; and therefore an enactment declaring that they may so remove a nuisance is no new exercise of legislative authority. Cooper v. Schultz, 32 How. Pr. 107, 121.

And an ordinance declaring all slaughterhouses or other buildings whence offensive smells are emitted to be nuisances, enacted pursuant to a city charter giving the board of aldermen power to declare what shall be nuisances in lots, streets, docks, wharves, or piers, and to provide for the removal, sale, or other disposition of all such nuisances, does not authorize unreasonable searches and seizures, the taking of property without due process of law, the conviction of an offense without being heard, the deprivation of trial by jury, and the taking of private property for public use without compensation,—such constitutional limitation having no application to the power of a municipal government to pass ordinances for the control or abatement of nuisances, nor to the provisions of the ordinance in question. Manhattan Mfg. & Fertilizing Co. v. Van Keuren, 23 N. J. Eq. 251, 255.

The Tennessee act of January 29, 1879, which gives a city government power to condemn as nuisances all buildings, cisterns, wells, privies, and other erections in the taxing district, which on inspection shall be found to be unhealthy, and cause the same to be abated, in case the owner at his own expense and after notice refuses or neglects to reconstruct the same, does not violate the clause of the state Constitution which declares that no man's property shall be taken or applied to public uses without the consent of his representatives, or without just compensation, such invasion having no application as a limitation to the exercise of those police powers which are necessary to the safety and tranquillity of a community, nor to the general power over private property necessary for the orderly existence of all governments. Theilan v. Porter, 14 Lea, 622, 52 Am. Rep. 173.

Where, upon the certificate of the sanitary superintendent of the health department of the city of New York certifying to the board that a certain building is "unfit and not reasonably capable of being made fit for human habitation by reason of want of proper ventilation, and by reason of want of repair and defects in the drainage and plumbing, and because of the existence of a nuisance on the premises which is likely to cause sickness among its occupants, and that the occupancy of said building is dangerous to life and detrimental to health," the board of health determines such condition to exist, and an order is issued for the removal of the same and for a vacation of the premises forbidding its further use as a human habitation without a written permit,—it is the function of the board, exclusively confided to it by the legislature, to determine whether a cause exists for the exercise of the power, and having so determined the court will not assume to reverse its action, unless it appears

a legitimate exercise of municipal power. The charter of the city confers upon it the power to prevent and restrain nuisances and to "declare what shall constitute a nuisance;" but this does not authorize it to declare a particular use of property a nuisance, unless such use comes within the common-law or statutory idea of a nuisance. 2 Wood, Nuisances, 3d ed. 977;

hat such action has been arbitrary, oppressive, or repugnant to justice; and in such a case the owner is not entitled to notice of the proceedings, and is not deprived of her property without due process of law. Eagan v. New York Health Department, 20 Misc. 38.

And an ordinance impounding animals running at large as a nuisance, and providing for the sale thereof without any judicial inquiry or determination, is not unconstitutional as authorizing a forfeiture of property without due process of law. Wilcox v. Hemming, 58 Wis. 144, 46 Am. Rep. 625.

A city ordinance prohibiting the suspension of electric wires over and upon the roofs of buildings does not violate any provision of the National Constitution. Electric Improvement Co. v. San Francisco, 45 Fed. Rep. 593, 596, 13 L. R. A. 131.

So, the provisions of a board of health, under its ordinance, for the abatement of nuisances dangerous to the public health, especially where the defendant has had notice to abate and has been offered an opportunity to be heard, do not violate the provisions of the New York Constitution relating to trial by jury, inasmuch as in any questions relating to the public health, where the public interests require action to be taken, the jury is not the ordinary tribunal to determine such questions prior to the adoption of the New York Constitution of 1846, neither do they deprive him of his property or liberty. Metropolitan Board of Health v. Heister, 37 N. Y. 661, 669.

And in this relation it has been said that although a municipal charter may empower the common council to abate all nuisances in any manner they may deem expedient, and to do all acts and pass all ordinances which they deem necessary or expedient for the preservation of health, yet such ordinance does not authorize it to abate a nuisance in any manner unknown to the law, or in violation of the constitutional restrictions prohibiting disfranchisement and the depriving a person of rights and privileges secured to him as a citizen in any manner except by the law of the land or a judgment of his peers, and also prohibiting the depriving a person of life, liberty, or property without due process of law, and the taking of private property without just compensation. Babcock v. Buffalo 1, Sheldon, 317, 323, Affirmed, 56 N. Y. 268.

But the opportunity to be heard before condemnation is the right which every person has under the common law and under the New York Constitution. People, New York C. & H. R. R. Co., v. Seneca Falls Board of Health, 58 Hun, 595.

And there is no authority in the New York statutes vesting in the board of health authority to declare any particular business a nuisance without notice to the offending party, and an opportunity of being heard. People, Savage, v. New York Board of Health, 33 Barb. 344.

Yet N. Y. Stat. 1885, chap. 270, as amended by the Laws of 1888, chap. 309, empowering boards of health to prevent and remove nuisances, is not unconstitutional as depriving a person of life, liberty, or property without due process of law. People, New York C. & H. R. R. Co., v. Seneca Falls Board of Health, 58 Hun, 595.

So, the constitutional guaranty of due process of law does not take away the common-law right of abatement of nuisances by summary proceedings by municipalities without judicial trial or process. Eagan v. New York Health Department, 20 Misc. 38; Lawton v. Steele, 119 N. Y. 226, 227, 7 L. R. A. 134.

But a city ordinance which absolutely and unconditionally forbids the keeping of a laundry for washing clothes for hire, at any point within the inhabited, and even within the habitable, part of a city, the remainder of the city being in an uninhabitable condition, violates the constitutional provisions, and will not be enforced upon the ground that such business constitutes a nuisance, such ordinance not regulating but extinguishing the business. Stockton Laundry Case, 26 Fed. Rep. 611-613.

And a city ordinance which makes the carrying on of a laundry business a nuisance by the arbitrary declaration of the ordinance itself is unconstitutional. *Re* Sam Kee, 31 Fed. Rep. 680.

Where a laundry business has been carried on by the petitioner and his predecessors at the location occupied by him for twenty years, and by the petitioner himself for eight years, and there is nothing tending to show that it is in fact a nuisance, the provisions of a city ordinance which declare the carrying on of such business to be a nuisance will be decreed to be unconstitutional. *Re* Sam Kee, 31 Fed. Rep. 680.

A mayor and municipal assembly under a grant of power to declare nuisances have no authority by ordinance to declare an existing livery stable a nuisance, such an act being the deprivation of property without due process of law and an invasion by the legislature of the powers of the judicial department of the government. State, Russell, v. Beattie, 16 Mo. App. 131.

So, an ordinance authorizing a constable to seize as nuisances all hogs running at large in the city has been looked upon as unconstitutional as authorizing the taking of property without a hearing, although not without dissent. Shaw v. Kennedy, 1 N. C. Term Rep. 158.

And in a case of the street commissioner, under the instructions of the board of health, proceeding to abate an alleged nuisance, in the carrying on of a business lawful of itself which has not been declared a nuisance, the common council must proceed specially against the parties to be affected, as before their rights are impaired by an adverse adjudication such parties are entitled to be heard in their defense. State, Marshall, v. Cadwalader, 36 N. J. L. 284, 286; State v. Jersey City, 34 N. J. L. 39; State, Bodine, v. Trenton, 36 N. J. L. 198.

So, the constitutional provisions are infringed by a law giving power to seize and destroy gaming tables without notice or judicial investigation or determination, even though it may be contended that such tables constitute a nuisance at common law, and are therefore destroyable without notice. Lowry v. Rainwater, 70 Mo. 152, 35 Am. Rep. 420.

And a resolution of the common council directing a soap factory to be removed within a certain time unless it should be put in such a condition as not to be a nuisance, and ordering that after complaint of three inhabitants under oath the owner should be fined, is unconstitutional, not being general but imposing upon one person or establishment. First Municipality v. Blineau, 3 La. Ann. 689.

But a resolution ordering notice to be given to the owner to remove his premises as a nuisance, and empowering the street commissioners to proceed to remove the same in case of neglect, passed pursuant to the provisions of a city ordinance, is valid, and the proceedings taken thereunder will be upheld. Kennedy v. Phelps, 10 La. Ann. 227, 229.

The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the state to protect the public health, the public morals, or the public safety, as

Yates v. *Milwaukee*, 77 U. S. 10 Wall. 497, 19 L. ed. 984; *Des Plaines* v. *Poyer*, 123 Ill. 348; *Quintini* v. *Bay St. Louis*, 64 Miss. 483, 60 Am. Rep. 62; *Chicago, R. I. & P. R. Co.* v. *Joliet*, 79 Ill. 44; *Hutton* v. *Camden*, 39 N. J. L. 122, 23 Am. Rep. 203. By this provision of the charter the city is clothed with authority to declare by general ordinance under what cir-

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the one or the other may be involved in the execution of such contract. New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516.

So, no notice is necessary in the case of a summary abatement of a public nuisance. Baumgartner v. Hasty, 100 Ind. 575, 576, 50 Am. Rep. 830.

XII. *Notice.*

In Earl Lonsdale v. Nelson, 2 Barn. & C. 311, 3 Dowl. & R. 556, it is said, the security of lives and property may sometimes require so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen to remedy it, and in such cases one would be justified in abating a nuisance from omission without notice.

Although notice and opportunity to be heard upon matters affecting private interests ought always to be given, yet, where the nature and object of the proceedings are such that it is deemed best for the general good that such notice should not be essential to the right to act for the public safety, such notices are not absolutely necessary, as they may defeat all beneficial result from an attempt to exercise the powers conferred upon boards of health. Salem v. Eastern R. Co. 98 Mass. 431, 433, 96 Am. Dec. 650.

Therefore the board of health of a city may proceed without notice, in case of public emergency, to abate a nuisance, but if their adjudication goes beyond this and deprives a party of the use of his premises for the future in the exercise of his lawful business, their action is invalid, especially if no opportunity has been afforded him to be heard. Weil v. Ricord, 24 N. J. Eq. 169, 173.

In cases, however, where the security of lives and property and public safety does not require so speedy a remedy, and the matter can be dealt with as well after as before notice, the general rule calls for notice to be given requiring the owner or party creating such nuisance to abate the same or show cause why it should not be abated by the public authorities, and in many cases such notice is made necessary by statute.

Where a nuisance affects private rights reasonable notice must be given of the time and place of trial under § 4096 of the Georgia Code, before a city can proceed to abate such nuisance. Pruden v. Love, 67 Ga. 190, 192.

And a provision empowering the authorities to seize and destroy gaming tables without notice has been looked upon as unconstitutional, even though it was contended that the same constituted a nuisance at common law and was therefore destroyable without notice. Lowry v. Rainwater, 70 Mo. 152, 35 Am. Rep. 420.

So, whenever the action of municipal authorities in declaring and abating nuisances goes so far as to fix a burden upon the owner of the property he is entitled to be heard upon the question as to the existence of a nuisance, and such right of being heard may come either before or after the nuisance is abated, as circumstances may require. Joyce v. Woods, 78 Ky. 386, 389.

In New York Health Department v. Trinity Church, 145 N. Y. 32, 27 L. R. A. 710, although the question involved was not that of a nuisance but was for the recovery of a penalty for refusing to comply with an order of the board of health to place water facilities in certain tenement houses, it is stated that where property of an individual is to be condemned and abated as a nuisance it must be that, somewhere between the institution of the proceedings and the final result, the owner shall be heard in the courts upon that question, or else he shall have an opportunity, when calling upon those persons who destroyed his property to account for the sale, to show that the alleged nuisance was not one in fact, no decision of a board of health, even if made on a hearing, concluding the matter upon the question of nuisance. The following cases are the same in effect: People, Copcutt, v. Yonkers Board of Health, 140 N. Y. 1, 23 L. R. A. 481; Yonkers Board of Health v. Copcutt, 140 N. Y. 12, 23 L. R. A. 485; Miller v. Horton, 152 Mass. 540, 10 L. R. A. 116; Hutton v. Camden, 39 N. J. L. 122, 23 Am. Rep. 203.

The advertising of the sale of an animal taken under the ordinance has been held to be sufficient notice to the owner, personal notice not being necessary. Hellen v. Noe, 3 Ired. L. 493, 499.

If the fact of a nuisance is clear, and the owner thereof is notified that he must remove the same, and is given a reasonable time to do so and fails, the city, acting on its general power or as agent of the county board of health, may remove or abate the same in such a manner as not to bring about any unnecessary damage to the owner. Orlando v. Pragg, 31 Fla. 111, 19 L. R. A. 196, 201.

Notice is, under § 4096 of the Georgia Code, however, of the very essence of the trial of a nuisance, and if the mayor and city council proceed *ex parte* and without notice to the owner of a house, and condemn it as a nuisance, and order it torn down without a hearing, they do so at their peril. Pruden v. Love, 67 Ga. 190, 192.

So, if a city seeks to abate a nuisance by the filling in of the plaintiff's lots much below the level of the main street, the owners, so long as they created no nuisance, have a right to say what grade of surface they require, and the city has no right to cause such grade to be raised higher than what is absolutely necessary, even though the surface is so low as to become a nuisance by retaining stagnant water; and therefore before the city can proceed in such cases it must give the owner notice and require him to abate it. Bush v. Dubuque, 69 Iowa, 233, 237.

Under Mass. Pub. Stat. chap. 80, §§ 18, 22, an order to abate a nuisance must be in writing, and may be served by any person competent to serve a notice in a civil suit, and it is not necessary that it be served by an officer; and therefore it is sufficient if such notice is served by a constable, even though he may be one of the board of health signing the notice. Com. v. Alden, 143 Mass. 113, 117.

A notice directing the owner of hogs to remove the same outside the limits of the village, and to abate the said nuisance on his estate within forty-eight hours from the service thereof, is good, and is not rendered void by the addition of the direction to remove the hogs. Com. v. Alden, 143 Mass. 113, 117.

But, an order given by the board of health under Mass. Gen. Stat. chap. 26, § 8, which directs the landowner to abate or remove a nuisance in a particular manner pointed out by such notice, is void. Watuppa Reservoir Co. v. Mackenzie, 132 Mass. 71.

Yet a city ordinance, passed under the provisions of the city charter, providing for the abatement of nuisances, or the removal of accumulated filth, and giving the health commissioners power, whenever in his opinion such nuisances or filth exist, and after officially so declared of record by the board of health, to give notice to the owner or agents thereof to abate and remove the same, and if such owner fails to do so within the time indicated, which time is discretionary with the health com-

cumstances and conditions certain specified acts or things injurious to the health or dangerous to the public are to constitute and be deemed nuisances, leaving the question of fact open for judicial determination as to whether the particular act or thing complained of comes within

missioners, such owner is to be held guilty of a misdemeanor and liable to a fine,—will be upheld. This case turned upon the question of the sufficiency of the notice and of the service thereof. St. Louis v. Flynn, 128 Mo. 413.

Even though the power to adjudge the question of the existence of a nuisance may be lodged in a board of health, such board acquires no jurisdiction of the matter, unless the party proceeded against has been offered an opportunity to make defense, and it makes no difference that the power given to such a body is unqualified and without any requirement as to notice of the proceeding, for the reason that the power to adjudge necessarily by implication carries with it the obligation to give a hearing to the person affected by the condition. Hutton v. Camden, 39 N. J. L. 122, 23 Am. Rep. 203, 208, in which case the proceedings of the board of health under the authority given to them by the city council with respect to the abatement of a nuisance were held void even when called in question collaterally. To the same effect Youngs v. Hardiston Overseers of Poor, 14 N. J. L. 518; New Jersey Turnp. Co. v. Hall, 17 N. J. L. 337; Salem v. Eastern R. Co. 98 Mass. 431, 96 Am. Dec. 650.

Under an ordinance establishing fire limits, and prohibiting the erection or repair of any wooden building within the prescribed limits without permission, and declaring any building standing, fronting, or cornering on a public square becoming damaged by fire, decay, or otherwise, to the extent of 50 per cent of its value, to be a nuisance, before the authorities can proceed in a summary manner to tear down or abate such nuisance, they must notify the owner to remove the same in the manner provided by the ordinance. Louisville v. Webster, 108 Ill. 414.

The mere fact that the resolution of a board of health in general terms denounces the prosecutor's business of skin dressing as a nuisance and directs it to be abated, does not bring the alleged offenders within the reach of the municipal ordinance, by enjoining them to remove any offensive matter noxious to public health and *per se* a nuisance. State, Marshall, v. Cadwalader, 36 N. J. L. 284, 287.

Under N. Y. Laws 1885, chap. 270, § 3, creating boards of health and authorizing them to make special orders for the suppression and removal of nuisances, and to serve copies of the order upon "any occupant or occupants, and the owner or owners, of any premises whereon any such nuisance" shall exist, or to post them "in some conspicuous place on such premises," and in case of noncompliance to enter upon the premises and suppress or remove the nuisance, and charge the expense thereof upon the occupant, or any or all of the occupants, of the premises, or upon the person or persons who have caused or maintained the nuisance,—the board are to decree a nuisance or other matter detrimental to health, and to serve a copy of the order on occupants and owners, or to post the order on the premises, the disobedience of such order giving the right of action, and therefore an order directed to a person, served upon his agent, no occupant of the premises being named, either as an individual or as a class, is insufficient. Lydecker v. Ells, 20 N. Y. S. R. 886.

So, under the act (2 N. Y. Rev. Stat. 5th ed. p. 13), the city inspector of the city of New York, under directions from the board of health, is authorized to cause any matter which may be dangerous to the public health to be removed or destroyed at the expense of the owner, and the board is expressly authorized to perform certain duties for promoting or preserving the public health, and authority is given to such inspector on notice to the offending party, in conjunction with the board of health, to take measures for the removal of such nuisances. There is no authority in any of such statutes vesting in the board of health authority to declare any particular business a nuisance without notice to the offending party and an opportunity of being heard. People, Savage, v. New York Board of Health, 33 Barb. 344.

And under N. Y. Laws 1885, chap. 270, and 1889, chap. 309, giving the board of health power to receive and examine into the nature of complaints made by any of the inhabitants concerning nuisances or causes of danger or injury to life and health, within the limits of its jurisdiction, and to enter upon or within any place or premises where nuisances or conditions dangerous to life and health are known or believed to exist, and by appointed members or persons to inspect and examine the same, the owners, agents, or occupants to permit such examination, such board of health to furnish such owners with written statements of such examination, whereupon such board has power to suppress and remove such nuisances, the proceedings of the board of health whereby it proceeds to the abatement of a nuisance without notice, are invalid, the parties being entitled to reasonable notice of the existence of the nuisance in order that an opportunity may be afforded them of being heard in their defense. People, New York C. & H. R. R. Co., v. Seneca Falls Board of Health, 58 Hun, 595.

And the board of health is bound to give such notice, even before proceeding by way of equitable action to enjoin such nuisance under the provisions of the New York statutes. Schoepflin v. Calkins, 5 Misc. 159.

Again, while a board of health may in certain cases in the discharge of its public duties make an *ex parte* examination, yet before a final determination is made which will put the accused person to expense, or which will deprive him of his right to carry on his business, he should be apprised of the substance of the charge, and be thus enabled to defend himself by final judgment. People, New York C. & H. R. R. Co., v. Seneca Falls Board of Health, 58 Hun, 595.

Yet a hearing of a property owner, before the condemnation of his land as a nuisance by a board of health, is not necessary to constitute due process of law, where the question of nuisance remains open to trial in the courts notwithstanding the decisions of the board of health. People, Copcutt, v. Yonkers Board of Health, 140 N. Y. 1, 23 L. R. A. 481.

In Van Wormer v. Albany, 18 Wend. 169, it was questioned whether an order of the board of health directing the removal of a nuisance should be in writing, and whether, after the adjudication of the existence of a nuisance by such board, the party affected thereby was at liberty to prove that the adjudication was wrong.

So, under the Pennsylvania statute notice to remove a nuisance must be given to the registered owner, and not to the reputed owner. Philadelphia v. Laughlin, 28 W. N. C. 306.

And if, after due notice to remove or abate a nuisance, the owner or occupier of the premises refuses or neglects to remove the same, the board of health under the provisions of the Pennsylvania act of 1818, may remove the same and charge the expense to the owner of the property. Eddy v. Board of Health, 10 Phila. 94. E. W.

the prohibited class; but it cannot, by ordinance, arbitrarily declare any particular thing a nuisance which has not heretofore been so declared by law, or judicially determined to be such. *Denver* v. *Mullen*, 7 Colo. 345.

An ordinance of the city cannot transform into a nuisance an act or thing not treated as such by statutory or common law, nor can it prohibit the free use of property by the owner so long as such use does not interfere with the rights of others. Every proprietor has a constitutional right to erect upon his property such buildings or other structures as he may deem necessary for its enjoyment, having due regard for the rights of others, and this is a vested right, guaranteed by the Constitution, and cannot be arbitrarily interfered with. It is true one cannot lawfully use his property in such a manner as to injure another, but a particular use, which may or may not result in creating a nuisance, according to circumstances, cannot be declared such in advance. The question when it may or may not become a nuisance within some provision of law must be settled as one of fact, and not of law. Now the fencing of a railway track in the platted portion of a city can ordinarily work no more harm or injury to others than the fencing of private property, and it would not for a moment be contended that an ordinance prohibiting a private citizen from fencing his property regardless of the character of the fence would be valid. The fencing or inclosing of property is a lawful and harmless use in itself, and does not become a nuisance because the municipal authorities have so declared, unless it is so in fact by reason of the character of the structure or the place of its erection; and in such case the ordinance should be directed against the unlawful, and not the lawful, act, leaving it to be judicially determined whether the particular structure is in fact a nuisance, either by reason of its character or the place of its erection. But the ordinance in question is not directed to the prohibition of such fences or structures as may by reason of their character or location be a nuisance, but it absolutely prohibits a railroad company from in any manner fencing or inclosing its track in the platted portions of the city, although the fence may be upon its own property, acquired by purchase or condemnation, and although it may be necessary to do so as a protection to its servants or the traveling public: and, in our opinion, is manifestly void. Tiedeman, Pol. Power, § 122*a*. It is contended, however, that by his plea of guilty the petitioner has waived the right to insist in this proceeding that the ordinance is void. But the plea of guilty is only an admission that the defendant committed the acts charged in the complaint, and unless such acts constitute an offense, or are in violation of some valid ordinance of the city, his admission was not material, and he waived nothing thereby. *Fletcher* v. *State*, 12 Ark. 169.

It follows that *the judgment of the court below must be reversed.*

ALABAMA SUPREME COURT.

Franklin P. DAVIS, *Appt.*,
v.
Frank PETRINOVICH, Tax Collector of Mobile.

(112 Ala. 654.)

1. The pendency of an action by one person to enjoin the collection of a license tax is not ground for the abatement of a similar action by another person, although the latter contributed towards paying the expenses of the suit by the former.

2. It is a matter of common knowledge that the bicycle is used for the purpose of pleasure and exercise, and also, especially in cities and towns, for transportation of goods.

3. The imposition of a license tax on a bicycle used for pleasure is not authorized by a provision in a city charter for the regulation of "hackney coaches, wagons, hacks, and drays," and authorizing a "vehicle license" to be imposed on vehicles used in the "transportation of goods and merchandise."

4. An action to enjoin the collection of an illegal tax, however small, may be maintained under a provision in a city charter that any license charges other than those authorized by such charter shall be null and void, and any taxpayer may enjoin without bond the tax collector from collecting any tax attempted to be imposed beyond the tax and license charges authorized.

(November 24, 1896.)

APPEAL by plaintiff from a decree of the Mobile Chancery Court refusing an injunction to prevent the collection of a tax upon complainant's bicycle. *Reversed.*

The facts are stated in the opinion.

Messrs. **McIntosh & Rich,** for appellant:

The undisputed facts are that the bicycle owned by appellant was not used in the transportation of goods and merchandise or kept for hire. The ordinance levying a license tax thereon was unauthorized, null, and void.

Ala. Acts 1894–95, p. 387, § 7; *Baldwin* v. *Montgomery*, 53 Ala. 437; *Selma* v. *Selma Press & W. Co.* 67 Ala. 430.

Power to license, tax, and regulate horse railroads, hackney carriages, etc., does not extend to taxation of private vehicles used by a merchant or manufacturer.

St. Louis v. *Grone*, 46 Mo. 574; 1 Dill. Mun. Corp. 4th ed. 478; *Hannibal* v. *Price*, 29 Mo.

NOTE.—For tolls on bicycles as "carriages," see Geiger v. Perkiomen & R. Turnp. Road (Pa.) 28 L. R. A. 458.

As to the regulation of bicycle riding, see *note* to Twilley v. Perkins (Md.) 19 L. R. A. 632; also Com. v. Forrest (Pa.) 29 L. R. A. 365.

App. 280; 13 Am. & Eng. Enc. Law, pp. 530, 531; *Eufaula* v. *McNab*, 67 Ala. 588, 42 Am. Rep. 118; *Mobile* v. *Richards*, 98 Ala. 594; 15 Am. & Eng. Enc. Law, p. 1041.

The bicycle owned by appellant does not belong to the class of vehicles upon which the city of Mobile had authority to levy a license tax.

Ala. Acts 1894-95, p. 384, §§ 4, 7; *Baldwin* v. *Montgomery*, *Selma* v. *Selma Press & W. Co.* and *St. Louis* v. *Grone*, *supra;* 2 Am. & Eng. Enc. Law, p. 736.

The license tax of $1 on bicycles was levied for purposes of revenue, and not as a municipal regulation. The city of Mobile had previously exercised the authority to regulate bicycles.

The remedy by injunction is specially authorized by the act creating the corporation of the city of Mobile, and the bill was properly filed.

Ala. Acts 1886-87, p. 249, § 45.

Mr. **Peter J. Hamilton,** for appellee:

The proved plea of pending suit by Rolston estops this complainant, Rolston having sued for all in interest and this complainant admitting in his deposition that he was party to the Rolston litigation.

Barker v. *Walters*, 8 Beav. 97; 3 Brickell, Dig. p. 2, § 23; 1 Dan. Ch. Pr. *659.

Complainant on his bill has an adequate remedy at law, as the charter says that unauthorized licenses are absolutely void and not collectible.

Charter, § 45.

The amount involved is $1, which is below the chancery jurisdiction; for this complainant has voluntarily amended so as to sue only for himself, and his injury is at most $1.

3 Brickell, Dig. 331, § 20; *Campbell* v. *Conner*, 78 Ala. 211; *Ulbricht* v. *Eufaula Water Co.* 86 Ala. 587, 4 L. R. A. 572.

An injunction would not apply to this case, because the injunction, if authorized by § 45, applies to the tax levied under § 26 and the business revenue license levied under § 40 of the charter, while this bicycle license is not collected under either of these. The bicycle license comes under § 21, authorizing licensing and regulation of carriages, etc., as a police regulation.

Acts 1886-87, pp. 223, *et seq.* §§ 21, 26, 40, 45.

A bicycle is a "carriage."

Geiger v. *Perkiomen & R. Turnp. Road*, 167 Pa. 582, 28 L. R. A. 458; Webster and Worcester, Dicts. *Carriage;* Clementson, Road Rights and Liabilities of Wheelmen, §§ 99-102.

Regulation may be by license, and in fact is a higher power embracing license.

Beach, Pub. Corp. § 1252, note 4; Horr & B. Mun. Pol. Ord. § 256.

License may be exacted of vehicles dangerous from any cause.

Horr & B. Mun. Pol. Ord. §§ 229, 246.

It is not necessary to prove this small sum reasonable. The amount of a license is presumed reasonable.

Beach, Pub. Corp. § 1255.

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

1. The fact of the pendency of another suit by one Rolston against the defendant in this case, in the same court with this suit, and in reference to the same subject-matter, is not well taken. It was admitted on the trial of this case, that the case of Rolston was instituted in the Mobile chancery court, on the 24th March, 1896; that it "was substantially the same in object and almost identical in language with that of *Davis* v. *Petrinovich, Tax Collector* [this case], and that it was brought in behalf of all parties in interest by Hugh Rolston, but was amended on the hearing, so as to be only on his own account;" and that the "said Rolston bill was answered, evidence taken and case submitted and argued on the pleadings and testimony, at the same time with this, the *Davis Case.*" What disposition, if any, has been made of the *Rolston Case,*—whether or not it has been decided,—is not shown, nor is it shown that said cause was submitted on the same evidence even as that on which this cause was submitted and tried. That cause, then, confessedly, is not between the same parties as those to this case, though relating to the same subject-matter; is between different parties; is not shown to be on the same evidence on which this cause was tried; and is still pending undetermined in said court. All that is shown is, that in said suit, the plaintiff in this cause contributed $1 towards paying the expenses of conducting it. These facts furnished no ground for abating the present suit. *Foster* v. *Napier*, 73 Ala. 595.

2. That a bicycle comes properly within the definition of a carriage or vehicle we apprehend can no longer admit of dispute. A vehicle is defined to be, "any carriage moving on land, either on wheels or on runners; a conveyance; that which is used as an instrument of conveyance, transmission, or communication." Century Dict. And a carriage in the same lexicon is defined as, "that which is used for carrying or transporting, especially on or over a solid surface. A wheeled vehicle for the conveyance of persons." In *Taylor* v. *Goodwin*, L. R. 4 Q. B. Div. 228, it was held that a person riding a bicycle on a highway at such a pace as to be dangerous to passers-by may be convicted under an act to prevent any person riding any horse or beast, or driving any sort of carriage furiously, so as to endanger the life or limb of any passenger. The court said: "It may be that bicycles were unknown at the time when the act passed, but the legislature clearly desired to prohibit the use of any sort of carriage in any manner dangerous to the life or limb of any passenger. The question is, whether a bicycle is a carriage within the meaning of the act. I think the word 'carriage' is large enough to include a machine such as a bicycle which carries the person who gets upon it, and I think that such person may be said to 'drive' it." In *Williams* v. *Ellis*, L. R. 5 Q. B. Div. 175, it was held, in construction of the act allowing tolls to be collected at a gate on a turnpike road, that a bicycle was not embraced within the purview of the act imposing a toll of 6 pence, "for every . . . sociable, chariot, berlin, landau, . . . or other such carriage," for the reason that the act imposed a toll on particular carriages which were described as, "or other such carriages," which latter must be *ejusdem generis* with the carriages previously specified.

The case of *Taylor* v. *Goodwin* was referred to in this later decision with approval. It is a matter of common knowledge that the bicycle is now used for the purpose of the conveyance of parties owning or hiring the wheels, largely for the purpose of pleasure and exercise, and that in cities and towns, especially, they are coming to be used for the transportation, from point to point, of packages of goods and merchandise such as they are fitted to carry. What further possibilities await the bicycle as a means of the transportation of persons, goods, and merchandise it is not important now to consider or predict. They remain to be developed. On principle and authority, however, it may be said that it has taken its place safely with the vehicles and carriages of the time, entitled to the rights of the road and street equally with them, and is subject in its use to the same liabilities. Its use upon the highways of the country and upon the streets and sidewalks of towns and cities may be regulated under legislative and delegated municipal authority. Potter, Road & Roadside, 157; Elliott, Roads & Streets, pp. 331, 635; Horr & B. Mun. Pol. Ord. § 247; Clementson, Road Rights and Liabilities of Wheelmen, §§ 99, 106–109; *Mercer* v. *Corbin*, 117 Ind. 450, 3 L. R. A. 221; *Holland* v. *Bartch*, 120 Ind. 46, and authorities *supra; Thompson* v. *Dodge*, 58 Minn. 555, 28 L. R. A. 608.

3. Section 26 of the charter of Mobile (Acts 1886–87, p. 240) provides that "the general council is authorized and empowered to levy and collect for each year of its existence, upon all real and personal property, and all subjects of state taxation within said city of Mobile, except the tax levied on polls, a tax of not exceeding six tenths of 1 per cent of the value of such property, or subjects of taxation during the year preceding that for which the general council may assess and levy the tax above provided for." By § 21 of the amended charter (Acts 1894–95, p. 387), the regulation of "hackney-coaches, carriages, wagons, carts, and drays" was conferred upon the general council, and § 40 of said amended charter provides "that the said general council shall, besides the tax heretofore authorized (§ 26), have the authority to assess and collect from all persons and corporations, trading and carrying on any business, trade, or profession, by an agent or otherwise, *within the limits of said corporation*, a tax license which shall be fixed and declared each year by an ordinance of said corporation, and the license so said shall be issued and the amount imposed shall be collected as may be provided by ordinance of said corporation. . . . A vehicle license may be imposed in addition to business license, provided that said license shall only apply to vehicles used in the transportation of goods and merchandise, and vehicles used for hire at the public stands; . . . that in addition to the license tax imposed on livery stables, there shall be an additional license tax not exceeding $1 for every carriage, and 50 cents for every buggy owned and used for hire by such livery stable."

4. On the 16th of March, 1896, the general council of Mobile adopted a general license ordinance, providing "that a license tax for the fiscal year, beginning on the 16th of March, 1896, and ending on the 14th of March, 1897, is hereby imposed and assessed on each person, firm, association, or corporation trading or carrying on any business, trade, or profession, by agent or otherwise, within the limits of the city of Mobile," followed by a schedule of *special licenses required in each instance*, among others, specifying bicycles,—"including tags furnished for same,—$1." The imposition of such a license tax, it has been well said, is such as may be referred to the taxing power, or to the police power,—to the latter, when its object is merely to regulate, and the amount levied is merely to pay the expenses of enforcing the regulation; including reasonable compensation for the additional expense of municipal supervision over the particular business or vocation; and to the taxing power, if its main object is revenue. If, however, it appears that the legislature has not bestowed the right to tax under either of these delegated powers, but has omitted it, the imposition of the tax is without legislative sanction and void. *St. Louis* v. *Green*, 7 Mo. App. 468; Id. 70 Mo. 562; 1 Dill. Mun. Corp. § 357; Burroughs, Taxn. § 77; *Van Hook* v. *Selma*, 70 Ala. 361, 45 Am. Rep. 85.

5. The only authority, then, appearing in the charter of said city, for levying a distinctive license tax on vehicles of any description, apart from the general police power to regulate them, is confined by the terms of the act (§ 21) to "hackney coaches, carriages, wagons, hacks, and drays," and to such only of these as are used in the transportation of goods and merchandise; to vehicles used for hire at the public stands, and on carriages and buggies owned and used for hire by livery stables. If a business man in Mobile pays a business license tax, as he may be required under the charter to do, he may be also required, under the charter, to pay an additional license tax on any vehicle he uses in his business, in the transportation of goods and merchandise, and he is relieved from such tax on other vehicles he may own. It was not within the contemplation of the legislature, as is evident from the text, that an inhabitant of that city should be required to pay such a tax on his pleasure carriage or vehicle, of whatever description, if not used in the business of transportation of goods and merchandise. The policy of the legislature seems to have been to confine the *license tax on vehicles*, whether imposed under the police or taxing power, to such of them as are used in the transportation of goods and merchandise, and those kept for hire, and to relieve all other carriages from such a tax. *St. Louis* v. *Grone*, 46 Mo. 574; *Hannibal* v. *Price*, 29 Mo. App. 280.

6. In the charter (Acts 1886–87, p. 223), in § 45, after limiting the rate of taxation, it is provided: "Nor shall said general council levy any tax for any other purpose than those specially stated in this act, and any tax or license charges other than those authorized by said §§ 26 and 40 (of the charter) which said general council may levy or attempt to levy, shall be null and void and not collectible, and any taxpayer may enjoin by bill in chancery, and restraining without bond, the tax-collector of the city of Mobile from collecting any tax which said general council may levy or attempt to impose beyond the aforesaid tax and

license charges. The provisions of this act shall not be enlarged, or extended so as to be made applicable to or for any other purposes than those stated in this act." It is manifest, therefore, that the levy of said bicycle tax was outside of the powers of the general council to levy, and was illegally levied. It is provided again, that the taxes levied shall have the force and effect of a judgment against the person assessed therewith, to which a preference is given over all other securities and encumbrances, and for the collection of which a lien is given on all the real and personal property of the taxpayer; that the mayor shall certify on the tax book that said taxes have been fixed and levied, and append his warrant, directed to the tax collector, authorizing and commanding him to collect the taxes so levied, and shall deliver said tax book and warrant to the tax collector, whose duty it is made forthwith to notify the public by advertisement for thirty days in some newspaper published in the city, that he is ready to receive payment of the taxes so levied; that the tax collector shall be charged with the whole amount of the assessed taxes for the year; that he shall issue garnishment process for the collection of taxes and licenses as on judgment returnable to any court having jurisdiction of the amount; that after the expiration of ninety days from the first publication of the tax collector's notice, as aforesaid, he may levy upon and seize any personal property, if any there be, or if there be none, or not sufficient personal property, then upon the real estate of the delinquent taxpayer; and that he shall be charged with and accountable for the whole amount of the assessed taxes for the year, and shall only discharge himself from such accountability by showing that the amounts unpaid could not have been collected by the exercise of the means given him. Sections 31, 32, 36, 39, of original charter (Acts 1886-87, pp. 242, 243; Amendatory Acts 1894-95, p. 387, § 6). Without these provisions, it may be that, the tax being illegal, there would be an adequate remedy at law against its collection, and chancery would not enjoin (High, Inj. §§ 543, 545); and that, $20 being the fixed minimum of chancery jurisdiction, the court would not entertain a bill to enjoin the collection of a tax of $1. *Hall* v. *Cannte*, 22 Ala. 650; *Campbell* v. *Conner*, 78 Ala. 211. But the statute takes the case from the influence of any such rules as are applicable to the general exercise of the jurisdiction of equity courts; and any taxpayer is authorized by the charter, as we have seen, to enjoin the levy and collection of any illegal tax levied and assessed by the general council. The act in terms bestows the right of injunction without bond, in favor of the taxpayer, whenever the general council "may levy or attempt to impose (any tax or license) beyond the aforesaid tax and license charges," which may not be rightfully levied and collected. It is idle to say that the general council have not levied and attempted to impose this illegal tax, or that the collector has no intention of collecting the same, because it is illegal. It has been levied, and the collector is charged with it, and by the terms of the charter must account for and pay it himself unless he has been unable to do so after he has used all means conferred on him for its collection, and the collector in this suit is seeking to maintain the legality of said levy. The wrong done the appellant was in the imposition of said illegal tax, and it was not incumbent on him to delay filing his bill until the further wrong of a levy on his property had occurred or his creditors were garnished. If so, the very purpose of the legislature in granting relief against such unlawful menaces of the taxpayer's rights would thereby be defeated. 1 High, Inj. § 18.

7. The proofs showed that appellant was a taxpayer of the city; that this illegal tax had been levied, and there was an attempt to impose it on his property; that the collector had made the publication as required by the statute; that the bicycle was his private carriage, used alone for the purposes of pleasure, and not for the transportation of goods and merchandise. The bill should not have been dismissed for want of equity, but the motion to dismiss it on that account should have been overruled, and the injunction perpetuated.

Reversed, and a decree will be here rendered, restoring the injunction that had been granted, and making it perpetual.

Rehearing denied February 4, 1897.

CALIFORNIA SUPREME COURT.

In the Matter of GEORGE T. BOHEN.

(115 Cal. 372.)

1. Power to prohibit the burial of the dead within the limits of a city upon a lot which had not been procured for burial purposes before the passage of the ordinance is not conferred by legislative authority to make all regulations necessary for the preservation of public health.

2. An ordinance prohibiting future burials on lots within the city limits which had not been purchased for burial purposes before the passage of the ordinance cannot be upheld as an exercise of the police power where the number of burials which it would sanction would be greater than the number it would prohibit.

3. The owner of lots cannot be restrained by ordinance from selling them for burial purposes on the ground that

NOTE.—The above case is somewhat noticeable because of the grounds on which the invalidity of the ordinance is based, among which is the discrimination between citizens.

As to the discrimination between residents of the municipality and other residents of the same state, see *note* to Sayre v. Phillips (Pa.) 16 L. R. A. 49.

See also 46 L. R. A. 237.

such use may become deleterious in the future, if the use of lots in the vicinity for such purposes is not forbidden at the time.

(*McFarland, J., dissents.*)

(December 17, 1896.)

APPEAL by petitioner from an order of the Superior Court for the City and County of San Francisco remanding the petitioner to custody to which he had been committed for violation of a municipal ordinance from which he sought his discharge by a writ of habeas corpus. *Reversed.*

The facts are stated in the opinion.

Mr. **E. S. Pillsbury,** for appellant:

A cemetery is not *per se* a nuisance.

Kingsbury v. *Flowers*, 65 Ala. 479; *Ellison* v. *Washington Comrs.* 5 Jones, Eq. 57, 75 Am. Dec. 430; *Musgrove* v. *St. Louis Catholic Church*, 10 La. Ann. 431.

The act gives no power to the board to declare what shall constitute a nuisance. It simply empowers it to authorize and direct the summary abatement of nuisances.

State v. *Mott*, 61 Md. 297, 48 Am. Rep. 105; *Austin* v. *Austin City Cemetery Asso.* 87 Tex. 330.

Neither would the power "to make all regulations which may be necessary or expedient for the preservation of the public health" authorize the board of supervisors to prohibit the further burial of the dead in this city by all except those owning lots at the time of such prohibition.

Pennsylvania R. Co. v. *Canal Comrs.* 21 Pa. 9; *Minturn* v. *La Rue*, 64 U. S. 23 How. 435, 16 L. ed. 574; *Lewisville Natural Gas Co.* v. *State*, 135 Ind. 49, 21 L. R. A. 734; *St. Louis* v. *Bell Teleph. Co.* 96 Mo. 623, 2 L. R. A. 278.

Ever since the act of 1870 the board of supervisors has had no power to legislate upon questions pertaining to sanitary affairs within the jurisdiction of the board of health.

People v. *Perry*, 79 Cal. 112; *Ex parte Keeney*, 84 Cal. 306; *People, Wilshire,* v. *Newman*, 96 Cal. 607.

The exercise of police power must be reasonable.

Ex parte Whitwell, 98 Cal. 78, 19 L. R. A. 727; *New York Health Department* v. *Trinity Church*, 145 N. Y. 39, 27 L. R. A. 710; *Greensboro* v. *Ehrenreich*, 80 Ala. 579, 60 Am. Rep. 130; *Kosciusko* v. *Slomberg*, 68 Miss. 469, 12 L. R. A. 528; *Erison* v. *Chicago, St. P. M. & O. R. Co.* 45 Minn. 370, 11 L. R. A. 434; *Barling* v. *West*, 29 Wis. 315; *Austin* v. *Austin City Cemetery Asso.* 87 Tex. 330; *Clason* v. *Milwaukee*, 30 Wis. 321.

This order is invalid because it is special or class legislation, and therefore unjust and unreasonable.

Ex parte Westerfield, 55 Cal. 550, 36 Am. Rep. 47; *Bruch* v. *Colombet*, 104 Cal. 351; *Darcy* v. *San José*, 104 Cal. 645; *People* v. *Central P. R. Co.* 105 Cal. 576.

The order denies to citizens of this city that protection of equal laws which is guaranteed by § 1 of the 14th Amendment of the Constitution of the United States.

Yick Wo v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220; *People's Home Sav. Bank* v. *San Francisco City & County Super. Ct.* 104 Cal. 652, 29 L. R. A. 844; *Re Sic*, 73 Cal. 148; *Ex parte Keeney*, 84 Cal. 307.

Messrs. **Harry T. Creswell** and **William Irwin Brobeck,** for respondent:

There is no doubt of the power of the association, under the act of 1859, to acquire and dispose of real estate for burial purposes, without restraint, upon a compliance with the terms of the statute under which it is incorporated, unless this power has been limited or abridged by subsequent laws.

Cooley, Const. Lim. 335-337.

The articles of association and the statute of 1859, as amended in 1864, constitute a contract between the association and the state which cannot be impaired, under *Dartmouth College* v. *Woodward*, 17 U. S. 4 Wheat. 518, 4 L. ed. 629, unless the power to amend or repeal was reserved to the state.

Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time, or repealed.

Const. 1849, art. 4, § 31.

This reserved to the state the right to alter or repeal the charter of this association.

If, then, order 2950 was passed in the lawful exercise of the police or sanitary powers of the board, duly conferred by statute or Constitution, it does not violate the contract which exists between the association and the state.

By an act of the legislature, approved April 25, 1863 (Stat. 1863, p. 540), among other powers conferred upon the board of supervisors of the city and county of San Francisco was the power "to make all regulations which may be necessary or expedient for the preservation of the public health and the prevention of contagious diseases."

The board of health cannot be a legislative body, since § 13 of article 11 of that instrument prohibits the legislature from delegating to any special commission any power to "perform any municipal functions whatever."

Ex parte Cox, 63 Cal. 21; *Ex parte McNulty*, 77 Cal. 164; *Port of Eureka Harbor Comrs.* v. *Excelsior Redwood Co.* 88 Cal. 491.

Whether a thing is a nuisance or not is purely a question of fact.

Requena v. *Los Angeles*, 45 Cal. 55.

The order is passed in the exercise of the police power of the board.

3 Am. & Eng. Enc. Law, p. 747, and cases cited; Black, Constitutional Prohibition, §§ 62, 64, 69; Cooley, Const. Lim. 577; *New Orleans Gaslight Co.* v. *Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516; *Coates* v. *New York*, 7 Cow. 585; *Lake View* v. *Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71; *Concordia Cemetery Asso.* v. *Minnesota & N. W. R. Co.* 121 Ill. 211.

The United States Supreme Court has held that a municipal ordinance, passed in the exercise of the police power, is valid and constitutional, though it violates the provisions of the legislative charter previously granted.

Northwestern Fertilizing Co. v. *Hyde Park*, 97 U. S. 659, 24 L. ed. 1036.

All rights in tombs are subject to police regulation for the removal and preservation of the

dead. And when they prove to be detrimental to public health, or are in danger of becoming so, they may be closed against further use for burying purposes.

16 Cent. L. J. 164; *Fisher* v. *McGirr*, 1 Gray, 1, 61 Am. Dec. 381; *Ashmun* v. *Williams*, 8 Pick. 402; *Prince* v. *Case*, 10 Conn. 375, 27 Am. Dec. 675; Cooley, Const. Lim. 6th ed. 740; *Brick Presby. Church* v. *New York*, 5 Cow. 538; *Stuyvesant* v. *New York*, 7 Cow. 604; *Kincaid's Appeal*, 66 Pa. 411; *Woodlawn Cemetery* v. *Everett*, 118 Mass. 354; *Lake View* v. *Rose Hill Cemetery Co.* 70 Ill. 191, 22 Am. Rep. 71.

The public health, comfort, and convenience are concerned in the proper regulation of burials; and the evils resulting from neglect are especially to be apprehended in the crowded population of cities. Power to regulate this matter may properly be conferred upon municipal corporations. And such power will be held to be given by authority to make police regulations or to pass by-laws respecting the health, good government, and welfare of the place.

1 Dill. Mun. Corp. § 372; *Bogert* v. *Indianapolis*, 13 Ind. 134; *New York* v. *Slack*, 3 Wheel. Crim. Cas. 237; *Brick Presby. Church* v. *New York*, 5 Cow. 538; *Stuyvesant* v. *New York*, 7 Cow. 604; *Austin* v. *Murray*, 16 Pick. 121; *Com.* v. *Fahey*, 5 Cush. 408; *New Orleans* v. *Church of St. Louis*, 11 La. Ann. 244; *Com.* v. *Goodrich*, 13 Allen, 546.

Where a city had conveyed land to individuals for the purpose of erecting powder magazines thereon, and afterwards passed an ordinance declaring the magazines so erected dangerous to life and property, and directing them to be removed at the expense of the owners, it was held that the ordinance was a valid exercise of the police power, and did not impair the obligations of the contract under the deed, nor was it a taking of private property without compensation.

Davenport v. *Richmond City*, 81 Va. 636, 59 Am. Rep. 694; *Com.* v. *Certain Intoxicating Liquors*, 115 Mass. 153; *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Concordia Cemetery Asso.* v. *Minnesota & N. W. R. Co.* 121 Ill. 211; Tiedeman, Mun. Corp. § 118; Beach Pub. Corp. § 996; *Brady* v. *Weeks*, 3 Barb. 157; *Bogert* v. *Indianapolis*, 13 Ind. 136; *Com.* v. *Fahey*, 5 Cush. 411; *Com.* v. *Goodrich*, 13 Allen, 548.

Rights of burial under churches or in public burial grounds are peculiar, and are not very dissimilar to rights in pews. They are so far public that private interests in them are subject to the control of the public authorities having charge of police regulations.

Sohier v. *Trinity Church*, 109 Mass. 22.

The principle that no person shall be deprived of life, liberty, or property without due process of law has never been regarded as incompatible with the principle, equally vital, because essential to the peace and safety of society, that all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.

Mugler v. *Kansas*, 123 U. S. 665, 31 L. ed. 211; *Boston Beer Co.* v. *Massachusetts*, 97 U. S. 25-32, 24 L. ed. 989-991; *Barbier* v. *Connolly*, 113 U. S. 31, 28 L. ed. 924; *Re Hoover*, 30 Fed. Rep. 51; *Powell* v. *Pennsylvania*, 127 U. S. 678, 32 L. ed. 253; *Brooks* v. *Hyde*, 37 Cal. 366; *Ex parte Smith*, 38 Cal. 702; *Abeel* v. *Clark*, 84 Cal. 226; *Ex parte Newman*, 9 Cal. 502; *Ex parte Andrews*, 18 Cal. 678.

A general law is a law which operates uniformly upon all persons standing in the same relation to the law, in respect to the privileges and immunities conferred by it, or the acts which it prohibits.

Brooks v. *Hyde*, 37 Cal. 366; *Pasadena* v. *Stimson*, 91 Cal. 251.

Even if the order were not general it would still be valid, since these provisions refer only to the legislature and have no limitations upon municipalities.

Ex parte Chin Yan, 60 Cal. 81.

The right of the legislature to authorize the removal of the remains of the dead from the cemeteries is well settled. So it may delegate such power to municipalities. It is a police power necessary to the public health and comfort.

Craig v. *First Presby. Church*, 88 Pa. 42, 32 Am. Rep. 423.

Order 2950 assumes to regulate the burial of human remains within the limits of the city and county of San Francisco.

In matters within the legislative powers of legislative bodies the legislative body is supreme, and it is a usurpation of power for a court to call for evidence in support of a legislative enactment.

Ex parte Shrader, 33 Cal. 279; *Ex parte Haskell*, 112 Cal. 412, 32 L. R. A. 527; *Ex parte Chin Yan*, 60 Cal. 82; *Bennett* v. *Boggs*, Baldw. 74; *Ex parte Newman*, 9 Cal. 502; *Ex parte Andrews*, 18 Cal. 682; *Ex parte Casinello*, 62 Cal. 540; *Powell* v. *Pennsylvania*, 127 U. S. 684, 32 L. ed. 256; *Mugler* v. *Kansas*, 123 U. S. 664, 31 L. ed. 211; *People* v. *Gillson*, 109 N. Y. 389.

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

The petitioner was convicted of violating an ordinance of the city and county of San Francisco, and has sued out a writ of habeas corpus for the purpose of testing the validity of the ordinance. The ordinance is as follows:

Order No. 2950. Prohibiting the Further Purchase of Lots for Burial Purposes within the City and County of San Francisco; also Providing for Further Burials being Made only in Lots heretofore Acquired by Persons or Associations for Burial Purposes.

Whereas, the unlimited burial of the dead within the city and county of San Francisco is dangerous to life and detrimental to the public health; and, whereas, the right of those persons or associations who have already purchased lots or plots for their own use or for the use of their families or members in the cemeteries in the city and county of San Francisco should be recognized: Now, therefore, the people of the city and county of San Francisco do ordain as follows:

Sec. 1. It shall be unlawful, after the passage of this order, for any person, association, or corporation to hereafter, within the limits of the city and county of San Francisco, pur-

chase, acquire, sell, lease, or in any other manner dispose of, or make available, any land situated therein for the purpose of interring any human body, or any portion of any human body. Nor shall any interment of any human body be made except in such lots or plots as may have been already purchased by persons, associations, or corporations for their own use, or for the use of their families or members; *provided*, the said lots shall not be used for general interment purposes.

Section 2 makes a violation of the ordinance a misdemeanor, and prescribes the penalty therefor.

The Odd Fellows' Cemetery Association was incorporated in 1865, under the act of the legislature entitled "An act to Authorize the Incorporation of Rural Cemetery Associations" (Stat. 1859, p. 281); and the petitioner is the president of the corporation, and the offense with which he is charged is that as such president he executed a deed of conveyance of a lot of land within the tract of the cemetery, that had been sold by the association, and thereby aided and abetted in the violation of the ordinance. The validity of the ordinance is maintained on behalf of the people, upon the right of the municipality, when authorized thereto by the legislature, to restrict or prohibit burials within its limits, or within certain districts therein, and is resisted upon the ground that in the present case such authority has not been conferred upon the municipality, and also that the ordinance under consideration is unreasonable, by reason of not being operative upon all citizens alike.

By the act of April 25, 1863 (Stat. 1863, p. 540), the board of supervisors of San Francisco have power by ordinance "to make all regulations which may be necessary or expedient for the preservation of the public health and the prevention of contagious diseases." It may be conceded that, under the authority thus given, the city of San Francisco could pass an ordinance prohibiting burials of the dead within certain portions of the city; but the power of the legislature to prohibit burials in the entire city, as well as the power of the city to pass ordinances therefor, are questions not presented for consideration in determining the validity or effect of the ordinance under which the petitioner was convicted. This ordinance does not prohibit burials within the city, or within any designated district of the city, nor does it prohibit burials within the cemetery of which the petitioner is president. On the contrary, there is, by the terms of the ordinance itself, an express sanction of the right of those who have purchased lots for the purposes of burial in any portion of the city, to continue to bury human bodies therein until the capacity of the lots is exhausted; and it appears in this case that in the Odd Fellows' Cemetery alone these lots will allow the interment of upward of 18,000 bodies, in addition to those already buried there, while the capacity of the unsold lots within the same cemetery is sufficient for only 3,600 bodies. There is no restriction in the ordinance upon the persons whose bodies may be buried within these lots that have been sold, except that the lots shall not be used for "general" interment purposes; and under § 613 of the Civil Code the owner of a lot may consent to the burial therein of one who had no interest in the lot. By the terms of the ordinance, also, burials are permitted of any member of a corporation or association that has purchased a lot within either of the cemeteries of the city, irrespective of the size of the lot or the number of such members, so long as there shall be space within the lots for such burials. The effect of the ordinance is, therefore, in no respect to prohibit burials, but simply to limit the right to those who have been fortunate enough to secure a lot therefor before the passage of the ordinance. The fact that the "unlimited" burial of the dead within the city is "dangerous to life and detrimental to the public health" may be a sufficient reason for the enactment of an ordinance fixing a term after which such burials shall cease within certain portions of the city; but, while burials are permitted within a district, the privilege cannot be limited to one class of citizens, and denied to another class within the same district. The police power is to be exercised for the good of the entire public, and any restriction of the rights of the individual by virtue of this power must extend to all the individuals who might otherwise exercise the right. The owner of a lot within a cemetery, who has purchased it for the purpose of burial, holds the same subject to the right of the city to prohibit further burials within the cemetery (*Coates* v. *New York*, 7 Cow. 585), and has no greater right to use it for burials after such prohibition than has the cemetery association itself to subject its unsold lots to such use. The right to prohibit burials within a certain district rests upon the proposition that any burial within that district is injurious to the public health; but an ordinance permitting burials within that district to an extent greater in number than it prevents cannot be upheld as an exercise of the police power. An ordinance forbidding the burial of human bodies within the city, or upon any designated portion thereof, cannot be sustained, if such burial be permitted upon other lots similarly situated, any more than can an ordinance forbidding the conducting of a soap-boiling factory, or any other occupation which may, under certain circumstances, be deleterious to health; and the owner of lands cannot be restrained from selling them for the purpose of being used as a place of burial, or conducting a soap-boiling factory, or any other use which in the future may become deleterious to health, and for that reason be forbidden, but which is not forbidden at the time of the sale. In *Hudson* v. *Thorne*, 7 Paige, 261, the city of Hudson, under the power in its charter authorizing it to adopt regulations for the prevention of fires, had passed an ordinance forbidding the erection of any wooden or frame barn, stable, or hay press within certain limits in the city, except of certain dimensions, without permission of the common council, and a resolution by it that such building was not dangerous in causing fires. The defendants, without such permission, commenced the erection of a building within the prohibited limits, which was to be occupied for storing and pressing hay, and a bill to restrain them from erecting the building was dismissed, the chancellor saying: "If the manufacture of pressed hay

within the compact parts of the city is dangerous in causing or promoting fires, the common council have the power, expressly given by their charter, to prevent the carrying on of such manufacture, but, as all by-laws must be reasonable, the common council cannot make a by-law which shall permit one person to carry on the dangerous business, and prohibit another, who has an equal right, from pursuing the same business. Neither have they the right to permit the dangerous manufacture to be carried on in buildings already erected, and to prohibit these defendants, whose building was destroyed by an incendiary, from rebuilding the same for the purpose of carrying on a manufacture which is permitted to others." In *Tugman* v. *Chicago*, 78 Ill. 405, the city of Chicago had passed an ordinance prohibiting the erection or operation, after January 1, 1872, of slaughterhouses within a designated portion of the city, "in any building not now used for such purpose." It was held by the court that the ordinance was invalid by reason of its discrimination between those owning and operating slaughterhouses prior to 1872, and those erecting and operating them after that date, upon the ground that an ordinance which would make an act done by one penal, and impose no penalty for the same act done under like circumstances by another, could not be sanctioned or sustained, because it would be unjust and unreasonable; saying: "If the health or comfort of the city require the prohibition of new slaughterhouses within a designated part of the city, the same reason would surely demand that old ones should be discontinued. If one of the citizens of Chicago is permitted to engage in the business of slaughtering animals in a certain locality, an ordinance which would prevent, under a penalty, another from engaging in the same business, would not only be unreasonable, and for that reason void, but its direct tendency would be to create a monopoly, which the law will not tolerate. The fact that certain persons were engaged in the business within the district designated in the ordinance, at the time of its adoption, gave them no right to monopolize the business; nor would such fact authorize the board of health to provide that such persons might continue the avocation, while others should be deprived of a like privilege who should engage in the business at a later period. If the board of health had any power to adopt an ordinance on the subject, the ordinance, to be valid, should not discriminate in favor of any citizen. If it prohibited one from carrying on the business, that prohibition should extend to all, regardless of the time the business may have been commenced. A regulation of this character, to be binding upon the citizen, must not only be general, but it should be uniform in its operation. In *Lake View* v. *Tate*, 130 Ill. 247, 6 L. R. A. 268, the municipality had passed an ordinance for the purpose of regulating the speed of railroad trains, and dividing the city into two districts therefor,—the east district and the west district,—and providing that no train should be run within the limits of the east district at a greater speed than 10 miles per hour, making no restriction, however, upon the speed within the other district. It was shown that the route of the Chicago & Evanston Railroad was within the east district, and that of the Chicago & Northwestern Railroad in the west district, and it was held that the ordinance was unreasonable and invalid, for the reason that it constituted a special and unwarranted discrimination between two lawful and competing lines of railway; that as the line of each of the roads ran through a thickly settled portion of the city, with no appreciable difference of danger to those crossing the tracks of the two railways, there was no justification for the discrimation. See also *Chicago* v. *Rumpff*, 45 Ill. 90; *State* v. *Hinman*, 65 N. H. 103; *State* v. *Pennoyer*, 65 N. H. 113, 5 L. R. A. 709; *State* v. *Mahner*, 43 La. Ann. 496; Dill. Mun. Corp. § 322.

The ordinance in question forbids the purchase or sale of any parcel of land, if made for the purpose of doing an act thereon which is in itself not only not illegal or forbidden, but is by the same ordinance recognized as a legal act, and is permitted to others. Irrespective of the rule that the motive with which an act is done is not the subject of punishment unless the act itself is wrong, the act with which the petitioner is charged—the sale of a lot of land—was done in the exercise of one of the rights of an owner, and can be made an offense only in case such act contributed to the violation of law. The burial of a human body is the act sought to be prohibited; and, while it may be conceded that, if such prohibition had been made by a valid ordinance, the burial of a human body within the lot purchased therefor would have been an offense for which the petitioner might have been charged as an aider and abettor, yet, until the offense of such burial has been committed, the sale and purchase of the lot cannot be made the basis of a crime or misdemeanor.

As the ordinance, by its terms as well as by its operation, discriminates, in its operation, between individuals similarly situated, it is upon that ground unreasonable and invalid, and *the petitioner should be discharged.*

We concur: **Beatty, Ch. J.; Van Fleet, J.; Temple, J.; Henshaw, J.**

McFarland, J., dissenting:

I dissent. If the future sale and purchase of lots for burial purposes cannot be prohibited unless all burials in lots already purchased are also prohibited, then it is evident that there can be no gradual progress towards the extinguishment of the cemetery evil. But an ordinance which would absolutely and immediately prohibit any further burial within the city would be a sudden and abrupt measure that would result in great confusion and distress. No such ordinance is likely to be passed; and yet, without such an ordinance, it seems to me that, under the opinion of the majority of the court, the cemetery evil must be perpetual. The ordinance in question operates uniformly upon all of the class who come within its provisions. The petitioner would be in no better situation if the ordinance had absolutely prohibited all future burials. As long as sales and purchases of lots for burial purposes are allowed, the cemetery evil will be greatly magnified, and its suppression made correspondingly more difficult.

CONNECTICUT SUPREME COURT OF ERRORS.

STATE of Connecticut
v.
Amasa M. MAIN, *Appt.*

(69 Conn. 123.)

1. **The provision against any direction how to find a verdict** in a criminal case, made by Gen. Stat. § 1630, cannot limit the right of the court, in the constitutional exercise of judicial power, to instruct the jury as to the constitutionality of a statute.

2. **The constitutionality of a statute** under which a person is prosecuted is a matter for the court to determine, and it is the duty of the jury to accept the court's determination thereof.

3. **The existence of a disease of peach trees,** called "yellows," ordinarily resulting in the premature death of the tree, is a matter of common knowledge of which the court may take judicial notice.

4. **A statute requiring the destruction of peach trees attacked by the yellows** is within the discretion of the legislature as an exercise of the police power, unless the courts can see that there could be no possibility of any apprehension of substantial danger from allowing them to live.

5. **The sufficiency of the term "yellows"** in a statute as defining a well-known disease of peach trees is a question for the court, and not for the jury.

6. **The excessiveness of a fine** prescribed by statute is a question of law for the court.

7. **A fine prescibed by statute** cannot be held by the courts to be excessive unless it is so clearly disproportioned to the offense as to come necessarily within the constitutional prohibition.

8. **Oral testimony from the secretary of a public board** that a statement in a certified copy of its regulations had been interlined pending the case, but was no part of the original record, is not admissible to impeach a certified copy of the record of the board.

9. **Testimony of a witness that he was acting as a specified officer** is not admissible to show that he acted as such in the matter in controversy, but is admissible to show that he was acting as such in other matters generally at that time.

10. **Testimony of a deputy commissioner of peach yellows,** who had been acting as such for more than a month, that after an examination he condemned certain trees which were diseased with the peach yellows is admissible without his stating any facts to show the condition of the trees or the symptoms of the disease.

11. **Every man acting officially** is presumed to have done his duty until the contrary appears.

12. **The decision of a trial judge in admitting a witness** to testify as an expert will not be reviewed unless it is clearly shown to have been based on incompetent or insufficient evidence.

(April 6, 1897.)

APPEAL by defendant from a judgment of the Superior Court for New London County convicting him of violating the statute providing for the destruction of peach trees affected with yellows. *Affirmed.*

The facts sufficiently appear in the opinion.

Messrs. **Brown & Perkins,** for appellant:

This law which hangs on such a slight benefit to the public, if any, is in strange contrast to the law in relation to tuberculosis in cattle whose flesh and milk are used for food and the public health thus endangered, for that law does not suffer the destruction of diseased cattle constituting a serious danger to public health, except on payment of damage to the owner.

Gen. Stat. § 1703; Pub. Acts 1895, p. 635.

Even glandered horses, which endanger the public health, cannot be condemned and destroyed.

Gen. Stat. § 3672.

It cannot be said that diseased trees may be summarily destroyed because they are of no value, because that assumes the existence of the disease, the very fact upon which the owner is entitled to a hearing and determination under due process of law, and, even though diseased, the trees have a value, for they live and produce fruit for three to five years after the appearance of the disease.

The law renders the people insecure in their possessions and subjects them to unreasonable searches and seizures (Const. art. 1, § 8), for there is no limitation of the right to enter upon and search a man's premises, and destroy his trees if he refuses to do it; it deprives him of his property without notice, without compensation, and without due process of law.

Const. art. 1, §§ 9, 11, 12, 21; *State* v. *Brennan's Liquors,* 25 Conn. 286; *Averill* v. *Hull,* 37 Conn. 323; *Ieck* v. *Anderson,* 57 Cal. 251, 40 Am. Rep. 115; *Dunn* v. *Burleigh,* 62 Me. 24; *King* v. *Hayes,* 80 Me. 206; *State* v. *Snow,* 3 R. I. 74; *East Kingston* v. *Towle,* 48 N. H. 59, 97 Am. Dec. 575; *Varden* v. *Mount,* 78 Ky. 86, 39 Am. Rep. 208; *River Rendering Co.* v. *Behr,* 77 Mo. 91, 46 Am. Rep. 6; *Lowry* v. *Rainwater,* 70 Mo. 152, 35 Am. Rep. 420; *Wadsworth* v. *Union P. R. Co.* 18 Colo. 600, 23 L. R. A. 812.

The appeal provided in this act is not due process of law, and a man cannot be compelled to take such action himself to save his property.

Baker v. *Kelley,* 11 Minn. 495.

Due process of law has been defined to be "the right of trial according to the process and proceedings of the common law or law in its regular course of administration through courts of justice."

Ex parte Grace, 12 Iowa, 208, 79 Am. Dec. 529; *Davidson* v. *New Orleans,* 96 U. S. 104, 24 L. ed. 619; *Marchant* v. *Pennsylvania R. Co.* 153 U. S. 380, 38 L. ed. 751; *People, Copcutt,* v. *Yonkers Board of Health,* 140 N. Y. 1, 23 L. R. A. 481; *New York Health Department* v. *Trinity Church,* 145 N. Y. 48, 27 L. R. A. 710;

NOTE.—On the question of the constitutional powers of the jury as judges of law, see also Beard v. State (Md.) 4 L. R. A. 675; State v. Armstrong (Mo.) 13 L. R. A. 419; Com. v. McManus (Pa.) 14 L. R. A. 89; and State v. Burbee (Vt.) 19 L. R. A. 145.

Saco v. *Wentworth*, 37 Me. 165, 58 Am. Dec. 786; *Allen* v. *Jay*, 60 Me. 138, 11 Am. Rep. 185; *Hutton* v. *Camden*, 39 N. J. L. 129, 23 Am. Rep. 203; *Newark & S. O. Horse Car R. Co.* v. *Hunt*, 50 N. J. L. 314.

Such an act as the legislature may, in the uncontrolled exercise of its power, think fit to pass is in no sense the process of law designated by the Constitution.

Westervelt v. *Gregg*, 12 N. Y. 209, 62 Am. Dec. 160; *Wynehamer* v. *People*, 13 N. Y. 295; 2 Hare, Am. Const. Law, pp. 772-774.

The law is not a valid exercise of the police power of the legislature.

People v. *Jackson & M. Pl. Road Co.* 9 Mich. 285.

It is coextensive with self-protection and is not inaptly termed, "the law of overruling necessity."

Tiedeman, Pol. Power, § 1: *Lake View* v. *Rose Hill Cemetery Co.* 70 Ill. 192, 22 Am. Rep. 71; *State* v. *Noyes*, 47 Me. 189; *Bertholf* v. *O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323; *Re Jacobs*, 98 N. Y. 108, 50 Am. Rep. 636.

The unwritten law of this country is in the main against the exercise of police power, and the restrictions and burdens imposed upon persons and private property by police regulations are jealously watched and scrutinized.

Tiedeman, Pol. Power, § 3, p. 10.

Some damage a man must put up with, however plainly his neighbor foresees it before bringing it to pass.

Middlesex Co. v. *McCue*, 149 Mass. 104.

The statute imposes a minimum penalty of $100 for a violation of the law, a refusal to destroy one tree, unaccompanied with an obstruction or resistance, but simply a passive neglect to do an act which the deputy is directed to do and which would cost a trifling sum.

It is out of all proportion to the offense, and is excessive in fact and law.

Blydenburgh v. *Miles*, 39 Conn. 495; Tiedeman, Pol. Power, § 122, p. 423; 2 Hare, Am. Const. Law, pp. 772-774.

Nor will a legislative declaration render that a nuisance which is not such within the legal definition of the term and according to the common experience of life and trade.

2 Hare, Am. Const. Law, 772, 774; *State, Aris*, v. *Vineland*, 56 N. J. L. 476, 23 L. R. A. 685; *Re Jacobs, supra; People* v. *Marx*, 99 N. Y. 386, 52 Am. Rep. 34; *People* v. *Gillson*, 109 N. Y. 401; *Austin* v. *Murray*, 16 Pick. 126; *Rideout* v. *Knox*, 148 Mass. 368, 2 L. R. A. 81; *Coster* v. *Tidewater Co.* 18 N. J. Eq. 54; *Allen* v. *Jay*, 60 Me. 124, 11 Am. Rep. 185; *Farist Steel Co.* v. *Bridgeport*, 60 Conn. 292, 13 L. R. A. 590.

An unconstitutional act is not a law; it is in legal contemplation as though it had never been passed.

Norton v. *Shelby County*, 118 U. S. 425, 30 L. ed. 178.

The jury are the judges of the law and must necessarily determine constitutional objections which render that not a law in fact, though such in form.

State v. *Buckley*, 40 Conn. 247; *State* v. *Thomas*, 47 Conn. 546, 36 Am. Rep. 98.

Mr. **Solomon Lucas**, for appellee:

The opinion of the witness Brown was properly admitted. His qualification was a matter of discretion with the trial judge, and in this case it was wisely exercised.

Phillips v. *Marblehead*, 148 Mass. 328.

His position presumes, because it requires, sufficient knowledge to render him a competent witness.

Taylor, Ev. § 1425.

The witness being an expert and having made a personal examination of the diseased trees, it was competent for him to testify that in his opinion the trees had the yellows.

Taylor v. *Monroe*, 43 Conn. 43.

The board being a public board created by a public statute, and the officer who made the records a public officer, those records could not be impeached in the way the defendant sought. If he desired the correction of the record he had his remedy.

Gilbert v. *New Haven*, 40 Conn. 105.

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

Upon the trial of this cause, the defendant claimed that the statute (Pub. Acts 1893, chap. 216) upon which the prosecution was based, was unconstitutional for various reasons, and asked the court to instruct the jury as follows: "The jury are the judges of the law bearing upon the case, as well as the facts; and they are entitled; and it is their duty, to consider the legal questions regarding the constitutionality of the statute in question; and, if they conscientiously believe that the statute is unconstitutional upon any of the grounds claimed, then they should acquit the defendant." The court refused to charge as thus requested, and instructed the jury that the statute (Gen. Stat. § 1630) made them the judges of the law, but not in such a sense that they were at liberty to disregard it; that, when their judgment was satisfied as to what the law was, that law, as thus ascertained, was binding upon them; that, in the opinion of the court, the statute upon which the prosecution was brought was a constitutional and valid law; but that, under the limitations already stated, they were the judges of the law, as well as of the facts; and it was for them to say, on all the evidence, and under the law as they should find it to be, and as they conscientiously believed it to be, whether the accused was guilty or not guilty. There is nothing in this part of the charge of which the defendant can complain. Constitutional law, in the form which it has taken in the United States, is an American graft on English jurisprudence. Its principles and rules are mainly the work of the present century. They rest upon the fundamental conception of a supreme law, expressed in written form, in accordance with which all private rights must be determined and all public authority administered. The Constitution of Connecticut (art. 2) has divided the powers of government into three distinct departments, each confided to a separate magistracy. To one of these departments is intrusted (art. 5) the judicial power of the state. In all cases where the meaning of a written document is to be collected from the words in which it is expressed, its construction, if called in question in the course of a judicial proceeding, is to be determined by the court. This is a proper and necessary ex-

ercise of judicial power. It belongs, therefore, to the magistracy to which the exercise of this power has been confided by the Constitution to determine the meaning and effect of the words in which that instrument is expressed.

The defendant contends that as, by Gen. Stat. § 1630, it is enacted that "the court shall state its opinion to the jury upon all questions of law arising in the trial of a criminal cause, and submit to their consideration both the law and the facts, without any direction how to find their verdict," the superior court, in the case at bar, was bound to submit to the determination of the jury the meaning and effect of the Constitution, in its bearing upon the validity of the statute under which he was prosecuted. If this contention could be supported, it would follow that the general assembly has power indirectly to transgress the constitutional limitations which the people have imposed upon the exercise of legislative power. It is undisputed that that body cannot enact a law which is in conflict with the Constitution. But if it can enact a law that juries, in certain cases, shall decide between the Constitution and a statute, where it is claimed by a party to the proceeding that they are in conflict, the legislative magistracy can thus invest the jury with a prerogative which it does not itself possess, and can take that prerogative away from the judicial magistracy which does possess it, under the tripartite division of the powers of government upon which our Constitution rests.

These questions first claimed the serious attention of the court and bar of the United States in connection with the prosecutions growing out of the sedition law of 1798. By that act of Congress it was provided that in any prosecution for libel the truth might be given in evidence, and the jury should have "a right to determine the law and the fact under the direction of the court, as in other cases." Notwithstanding this, the circuit court uniformly held that the jury could not pass upon the constitutionality of the statute. *Lyon's Case*, Whart. St. Tr. 333, 336; *United States* v. *Callender*, Id. 688, 713, 718. In the latter of these cases, Mr. Justice Chase observed in his charge that, by the provision above quoted, "a right is given to the jury to determine what the law is in the case before them, and not to decide whether a statute of the United States produced to them is a law or not, or whether it is void, under an opinion that it is unconstitutional, that is, contrary to the Constitution of the United States. I admit that the jury are to compare the statute with the facts proved, and then to decide whether the acts done are prohibited by the law, and whether they amount to the offense described in the indictment. This power the jury necessarily possesses in order to enable them to decide on the guilt or innocence of the person accused. It is one thing to decide what the law is, on the facts proved, and another and a very different thing to determine that the statute produced is no law. To decide what the law is on the facts is an admission that the law exists. If there be no law in the case, there can be no comparison between it and the facts; and it is unnecessary to establish facts before it is ascertained that there is a law to punish the commission of them. The existence of the law is a previous inquiry, and the inquiry into facts is altogether unnecessary, if there is no law to which the facts can apply. By this right to decide what the law is in any case arising under the statute, I cannot conceive that a right is given to the petit jury to determine whether the statute (under which they claim this right) is constitutional or not. To determine the validity of the statute, the Constitution of the United States must necessarily be resorted to and considered, and its provisions inquired into. It must be determined whether the statute alleged to be void, because contrary to the Constitution, is prohibited by it, expressly, or by necessary implication. Was it ever intended by the framers of the Constitution, or by the people of America, that it should ever be submitted to the examination of a jury, to decide what restrictions are expressly or impliedly imposed by it on the national legislature? I cannot possibly believe that Congress intended, by the statute, to grant a right to a petit jury to declare a statute void. . . . I have uniformly delivered the opinion 'that the petit jury have a right to decide the law as well as the fact, in criminal cases,' but it never entered into my mind that they therefore had a right to determine the constitutionality of any statute of the United States." *Callender's Case* was tried in 1800, and the grounds upon which the charge was based, so far as concerns the point now under consideration, have since been repeatedly approved by American courts of last resort. *Com.* v. *Anthes*, 5 Gray, 185, 191, 192; *Pierce* v. *State*, 13 N. H. 536, 553, 561; *Franklin* v. *State*, 12 Md. 236, 245, 246; *Sparf* v. *United States*, 156 U. S. 51, 71, 39 L. ed. 343, 350.

Gen. Stat. § 1630, which first appears in the Revision of 1821, was not intended to narrow the functions of the court, but rather to enlarge them. *State* v. *Fetterer*, 65 Conn. 287, 291. Trial by jury in criminal cases had, for more then a century before the adoption of our Constitution, become something very different in Connecticut from what it was under the common law. The judges, after the first generation of colonists (among whom were some who had been trained for the English bar) had passed away, had seldom received any special legal education. They did not assume to express any opinion of their own to the jury on points of law, contenting themselves with simply recapitulating in the charge the points made by counsel. 2 Swift's System, 258, 401. If a verdict of guilty were returned in the county court, the prisoner had, by a statute passed in 1705, an absolute right of "review;" that is, a new trial. Comp. Stat. 1715, p. 131. As soon as the judicial establishment of the state was reorganized, in 1806, by placing only trained lawyers upon the bench, the judges began the restoration of trial by jury to something like its form at common law. *Rules of Practice*, 3 Day, 28. The general assembly took action in the same direction in 1812 (Sess. Laws 1812, chap. 15, p. 106); and in 1818 the framers of the Constitution completed the work (art. 1, § 21).

Trial by jury had lost, under our colonial government, its native strength and dignity. Legislation and judicial practice had done something towards their restoration. The Constitution, in providing that the right of

trial by jury should remain inviolate, was designed to perpetuate its essential characteristics, as they existed at common law; preserving its substance, while leaving its form to be regulated from time to time as the legislative power might deem the public interest to require. *Guile* v. *Brown*, 38 Conn. 237, 243; *State* v. *Worden*, 46 Conn. 349, 365, 33 Am. Rep. 27. The effect of the statutory provisions in the Revision of 1821, by which it was sought to give proper effect to the Declaration of Rights in this particular, was probably not fully apprehended by those who penned them. Chief Justice Swift, who was one of the revisers, states in his Digest, with reference to Gen. Stat. § 1630, that it precludes the court from expressing any opinion on the facts, or giving any direction to the jury with regard to them, and so that the judge is made a mere cipher, as it respects the facts in criminal cases, and the jury deprived of that benefit from his ability and experience which in other states, where the common law is recognized, is secured by his explanation and illustration of the testimony and the statement of his opinion as to its weight and sufficiency. 2 Swift's Digest, 412. The judicial construction of the statute, however, has always been otherwise; and it is settled by a long course of decisions that the judge can, and, wherever it seems necessary, should, in the charge, give his own opinion of the nature, bearing, and force of the evidence adduced. *State* v. *Rome*, 64 Conn. 329, 336. The meaning of a statute must always depend on the words used and the intention as thus expressed. *Lee Bros. Furniture Co.* v. *Cram*, 63 Conn. 433, 438; *Dartmouth College* v. *Woodward*, 17 U. S. 4 Wheat. 518, 4 L. ed. 629. Courts cannot with safety proceed under any other rule, even if satisfied that this expressed intention was not that which the legislature designed to express or that understood by contemporary expositors. It has been assumed in some of the decisions of this court that the statute now under consideration (Gen. Stat. § 1630) may subject to the determination of the jury in criminal cases questions of statutory or common law to a greater extent than would otherwise have been allowed. *State* v. *Buckley*, 40 Conn. 248; *State* v. *Thomas*, 47 Conn. 546, 551, 36 Am. Rep. 98. If this be so, it would not follow that it has subjected to their determination any question of constitutional law. It is true that the requests for instructions which came under review in the cases above cited related to questions of that nature; but the distinction between constitutional law and other law was not alluded to in argument or considered by the court. We have not found it necessary to consider it fully, and are satisfied that to hold the statute to mean that it is in the rightful province of the jury to determine the true construction of the Constitution in criminal cases would be to attribute to the general assembly an intent to trench upon the judicial power, and give to verdicts a superior force to that of the words of the Constitution itself.

At common law no jury ever exercised such a function, for there was no written constitution under which the government was created, and by which its limitations were established. The constitutional guaranty that the right of trial by jury shall remain inviolate lends, therefore, no aid to the defendant's position. On the other hand, the section of the Declaration of Rights (Const. art. 1, § 7) which declares that "in all prosecutions or indictments for libels the truth may be given in evidence, and the jury shall have the right to determine the law and the facts, under the direction of the court," implies that, but for such a declaration, it would be, to say the least, doubtful whether, in prosecutions for that offense, the jury could, under the principles of the common law, determine the law of the case by their verdict. On that subject there had been a sharp contest between the English bar and the English bench. In 1792, only twenty-six years before the adoption of our Constitution, it had been affirmed by the twelve judges of England, in response to questions put to them by the House of Lords, that the general criminal law was also the law of libel, and that in prosecutions for that offense it was the duty of the judge to declare to the jury what the law was, and their duty, should they find a general verdict, to compound it of the fact as it appeared in evidence before them, and of the law as it was declared to them by him. Annual Register for 1792, Chron. 62, 68, 69, 75. The same rule was laid down in 1803 by Chief Justice Lewis, in an important prosecution of this nature in New York. *People* v. *Croswell*, 3 Johns. Cas. 337, 341. The earliest state Constitution in which indictments for libel are specifically mentioned is that of Pennsylvania, adopted in 1790, two years before the passage of Fox's libel bill in Parliament, in which it was declared that in such proceedings "the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases." 2 Poore, Charters & Const. p. 1554. Constitutional provisions similarly phrased were adopted by Delaware in 1792, by Kentucky in 1792 and 1799, by Tennessee in 1796, and by Illinois in August, 1818. 1 Poore, Charters & Const. pp. 278, 447, 655, 666; 2 Poore, Charters & Const. p. 1674. The same terms were also introduced, as has been stated, in the sedition act of 1798. In 1817 Mississippi put into her declaration of rights, from which that in our Constitution, adopted in September of the following year, was largely copied, a section precisely identical with that now under consideration. 2 Poore, Charters & Const. p. 1055. It will be remembered that the words "as in other cases" were thus dropped by Mississippi, and, following her lead, by the framers of our Constitution. This would seem to indicate that they intended to secure to juries larger power over questions of law in prosecutions of libel than in other criminal trials; and our statute (§ 1630) is in entire harmony with this view, since, in lieu of declaring that the jury shall have the right to "determine" the law under the direction of the court in ordinary prosecutions, it only provides that the court shall state its opinion to them on all questions of law, and then submit the law to their "consideration," without any direction how to find their verdict. The distinguishing feature of trial by jury in criminal cases, as compared with trial by jury in civil cases, has always been the right of the jury to return a general verdict, and such a verdict as they might deem proper, on the law

and the evidence, without dictation from the court. The English judges, from the earliest times, were accustomed to instruct the jury as to the law, with the same freedom in criminal as in civil proceedings; but after the decision in *Bushell's Case*, Vaughan, 135, in 1670, they never assumed the right to direct a verdict of guilty.

It was the duty of the superior court to instruct the jury as to the constitutionality or unconstitutionality of the statute under which the defendant was prosecuted; but it would have had no right to direct a verdict either of conviction or acquittal. Their duty to accept the construction of the Constitution which the court might adopt was absolute. They were bound to this, as well by their official oath as jurors well and truly to try and true deliverance make between the state of Connecticut and the prisoner at the bar, according to law and the evidence before them, as by the oath which each had taken as a freeman to be true and faithful to the state of Connecticut and the Constitution and government thereof. Gen. Stat. § 3264. But their right to return such a verdict as they thought proper was absolute also. Law and fact are inseparably blended in every general verdict. By a verdict of not guilty, they might, in effect, have disregarded the instruction of the court, but only by disregarding the Constitution and disobeying the government which they had sworn to support. The request for instructions which has been under consideration was therefore properly refused. It is unnecessary to decide whether the instructions which were given in response to it, and substantially followed the charge sustained in *State* v. *Buckley*, 40 Conn. 246, were in all points correct. They gave the defendant no cause of complaint.

The superior court was also right in refusing to instruct the jury, as requested, that if they should "find that the 'yellows' is not a contagious disease, and that the existence of the disease in one tree does not cause it to spread from that tree to other trees, and thus endanger other trees, the property of others, and that a tree so diseased is not a public nuisance, then this statute is an improper and unwarrantable invasion of the rights and property of citizens, the right to care for his property, and plant and cultivate his trees as he desires, without interference, and is unconstitutional and void." Whether the "yellows" was such a disease as to justify the general assembly in enacting the statute under which the prosecution was brought, depended on the existence and nature of the disease, and also on the apprehension of danger from it commonly entertained by the public at large. That such a disease existed, and was one of a serious character, ordinarily resulting in the premature death of the tree affected, is a matter of common knowledge, of which the court had a right to take judicial notice. Century Dict. *Peach Yellows*, and *Yellows;* Webster International Dict. *Yellows*. Such a disease it was proper for the general assembly, in the exercise of its police power, to endeavor to suppress, even by the destruction of the trees attacked by it, if there was a reasonable apprehension of substantial danger from allowing them to live, to those who might eat their fruit, or to other peach orchards. Unless the courts can see that there could by no possibility be such danger, the propriety of such legislation as that now in question is to be determined solely by the discretion of the legislative department. The description of this disease given in standard works and government publications, and the legislation in regard to it to be found in the statute books of Delaware, Maryland, Michigan, New York, Pennsylvania, Virginia, and the province of Ontario, are amply sufficient to establish, as a matter of judicial notice, the possibility, if not the probability, that it is a contagious disease. *Grimes* v. *Eddy*, 126 Mo. 168, 26 L. R. A. 638. The destruction of a tree affected by a disease of that character, without compensation to the owner, and against his will, is as fully within the police power of the state as the destruction of a house threatened by a spreading conflagration or the clothes of a person who has fallen a victim to smallpox. Such property is not taken for public use. It is destroyed because, in the judgment of those to whom the law has confided the power of decision, it is of no use, and is a source of public danger.

Judicial notice takes the place of proof, and is of equal force. As a means of establishing facts, it is therefore superior to evidence. In its appropriate field it displaces evidence, since, as it stands for proof, it fulfils the object which evidence is designed to fulfil, and makes evidence unnecessary. *Brown* v. *Piper*, 91 U. S. 37, 43, 23 L. ed. 200, 202; *Com.* v. *Marzynski*, 149 Mass. 68. "The true conception of what is judicially known is that of something which is not, or rather need not, unless the tribunal wishes it, be the subject of either evidence or argument,—something which is already in the court's possession, or, at any rate, is so accessible that there is no occasion to use any means to make the court aware of it." Thayer, Cas. Ev. 20. If, in regard to any subject of judicial notice, the court should permit documents to be referred to or testimony introduced, it would not be, in any proper sense, the admission of evidence, but simply a resort to a convenient means of refreshing the memory, or making the trior aware of that of which everybody ought to be aware. *State* v. *Morris*, 47 Conn. 179, 180. The defendant therefore had no right to have the jury pass upon the danger of contagion from trees affected by the yellows, as a means of determining the constitutionality of the statute, by such verdict as they might render under the instructions of the court. It was for the court to take notice that it was a disease which might be contagious. *Norwalk Gaslight Co* v. *Norwalk*, 63 Conn. 495, 525, 527. This being established, the validity of the statute became a matter of pure law. Police legislation for the extirpation of a disease of such a nature, which the legislative department deems dangerous to the public welfare, cannot be pronounced invalid by the judicial department by reason of any difference of opinion, should one exist, between these two agencies of government, as to the probability of such danger. If the law may be an appropriate means of protecting the public health and the agricul-

tural interests of the state, it is for the legislature alone to determine as to its adoption. It may have been the opinion of the general assembly that peach growers in general would abandon their business from dread of contagion from orchards infected by the yellows. In such a case, whether their apprehensions were well founded or ill founded would be immaterial, unless it also appeared that there could be no reasonable grounds for them. A wide-spread apprehension throughout the community justifies itself, and is a sufficient basis for legislative action towards the removal of the cause, real or supposed, of the danger apprehended, when this cause is a deadly disease of a food-producing tree. *Bissell* v. *Davison*, 65 Conn. 183, 191, 29 L. R. A. 251. The destruction of the infected trees by order of a public official, after due inspection, is a remedy which, however severe, is one appropriate to the end in view, and may properly be enforced without any preliminary judicial inquiry, as well as without any compensation to the owner for resulting loss. *State* v. *Wordin*, 56 Conn. 216, 226; *Powell* v. *Pennsylvania*, 127 U. S. 678, 685, 32 L. ed. 253, 256.

The superior court also properly refused to instruct the jury, as requested by the defendant, that "if the term 'yellows', in the statute, does not define with clearness and certainty a well and commonly known disease of peach trees, capable of being clearly and readily recognized, identified, and shown to exist, but the term is so vague and uncertain that it furnishes no clear and fixed standard so as to determine what said disease is, and when it exists, then the statute is void for doubt and uncertainty in defining the disease and the crime of failing to destroy such diseased trees." As has already been stated, the court had a right to take judicial notice that the term "yellows" was one the meaning of which was clearly defined by common usage. This being so, whether the statute was void for uncertainty or not depended simply on the construction of a written document, and was properly and only a question for the court. *Jordan* v. *Patterson*, 67 Conn. 473, 479; *People* v. *Smith* (Mich.) 2 Det. L. N. 914, 32 L. R. A. 853.

The requests for instruction that "the statute is unconstitutional and void, because it deprives a person of his rights and property without notice and hearing, and without due course of law, without compensation, and violates the right of trial by jury," and that "if the minimum fine provided by the statute is unreasonably great and out of proportion to the act for which it is imposed, considering the nature and circumstances of the act, and such fine would be oppressive and unjust, then it is an excessive fine, and the statute imposing it violates the Constitution of this state, and is invalid and unconstitutional, and the defendant is entitled to an acquittal, even though guilty of the act charged," were also properly refused.

The notice from the deputy commissioner of peach yellows, and the proceedings conducted by him upon the defendant's premises, were sufficient to satisfy every requirement of the Constitutions of Connecticut and of the United States, as well as the principles of natural justice, if the trees in question were in fact diseased with the yellows. Summary proceedings for the abatement of whatever is dangerous to the public health or safety are often necessary, and have always been permitted, when authorized by appropriate legislation. *Raymond* v. *Fish*, 51 Conn. 80, 97, 50 Am. Rep. 3. If, indeed, the trees which the defendant was ordered to destroy did not in fact have the yellows, he was justified in disobeying the order. As to this, he was entitled to demand a trial by jury; and he has had one, in which the question was properly submitted to their determination. *Miller* v. *Horton*, 152 Mass. 540, 10 L. R. A. 116; *New York Health Department* v. *Trinity Church*, 145 N. Y. 32, 27 L. R. A. 710.

Whether the fine prescribed in the statute was excessive presented a question of law, and was properly disposed of as such. It is not so clearly disproportioned to the offense as to come necessarily within the constitutional prohibition, and it is only in case of a plain conflict between the supreme law and an enactment of the legislature that the courts can interfere for the protection of the citizen. *Blydenburgh* v. *Miles*, 39 Conn. 484, 497.

The superior court instructed the jury that as the legislature had, by this statute, declared trees diseased by the yellows to be a public nuisance, that decision was final, and it was not for them to inquire whether they were in fact such, or not. This position is not without authority for its support. *Train* v. *Boston Disinfecting Co.* 144 Mass. 523, 59 Am. Rep. 113. But, whether sound or unsound (as to which we express no opinion), the charge in this particular did the defendant no injury; for it was delivered only with reference to the constitutionality of the statute, and as to that the jury had been already definitely and correctly instructed that it was a constitutional and valid law. Its validity did not depend on the question of nuisance or no nuisance. It was enough that the court could see that reasonable apprehensions of danger from the disease were commonly entertained in the public mind, and that it was not impossible that it was dangerous because contagious. The court below therefore reached the right result, even if it were by the wrong road.

The defendant requested instructions to the effect that, before the commissioner of peach yellows "could legally order trees destroyed, regulations in relation to so ordering trees destroyed must have been adopted or approved by the state board of agriculture, and that, the state having failed to prove any such regulations, the defendant should be acquitted." They were properly refused, because the state had offered evidence tending to show that such regulations had been previously adopted. This evidence was a copy from the records of the board, duly certified by its secretary, under its seal, purporting to set forth the doings of the board at a meeting held several months before the date of the order served upon the defendant. He sought to meet this document by oral testimony from the secretary that the statement in the minutes of the meeting that certain regulations were adopted had been interlined pending this prosecution, and was no part of the original record. This testimony

was properly rejected by the court. It was offered to impeach the record of a public board, and such a record cannot thus be collaterally attacked. *Gilbert* v. *New Haven*, 40 Conn. 102.

It is also assigned for error that James F. Brown, a witness for the state, by whom the order in question was made, when asked what position he held at the time it was issued, was allowed to state that he was then acting as a deputy commissioner of peach yellows. If by this he meant to be understood as saying that he acted as such a deputy commissioner in issuing the order, or in inspecting and condemning the trees, the testimony was properly objected to. If, on the other hand, his meaning was that at the time in question he was acting in other matters generally as such a deputy commissioner, the evidence was admissible. But in either case its reception would be no ground of error, since the copy of record subsequently introduced showed his due appointment to the office in question.

The same witness was allowed to testify that, after an examination of the defendant's orchard, he condemned sixty-four trees, which were diseased with the peach yellows; the defendant excepting, because no facts were stated showing the condition of the trees or symptoms of disease. There was no error in this ruling. It is a familiar rule of law that every man acting officially shall be presumed to have done his duty until the contrary appears. *Booth* v. *Booth*, 7 Conn. 367. This rule rests on the assumption that he will not undertake the execution of his office unless he is reasonably competent to discharge the duties which belong to it. A man cannot be expected to do his duty who does not know what his duty is, and how to perform it. A commissioner or deputy commissioner of peach yellows is charged by statute with the duty of visiting any peach orchard where it is suspected that there are trees diseased with the yellows, making a personal investigation to determine as to the presence of the disease, and, should he find that any trees are infected by it, ordering their destruction. The witness had for more than a month before his inspection of the defendant's trees been a deputy commissioner of peach yellows under this law. This was, to say the least, a circumstance which the court had a right to consider in determining whether to receive him on the footing of an expert, even if he were not to be regarded as presumably *peritus virtute officii*. *The Sussex Peerage*, 11 Clark & F. 85, 125, 134; *Dickenson* v. *Fitchburg*, 13 Gray, 546, 557; *Grayson* v. *Lynch*, 163 U. S. 468, 480, 41 L. ed. 230, 234. The record does not disclose whether any further evidence as to his practical acquaintance with the symptoms of the disease was or was not introduced. The decision of a trial judge in admitting a witness to testify as an expert will not be reviewed, unless it is clearly shown to have been based on incompetent or insufficient evidence.

There is no error in the judgment appealed from.

Torrance and **Fenn**, JJ., concur.

Hamersley, J., concurring in judgment: The defendant relied upon satisfying the jury that, even if every fact alleged in the complaint were found true, nevertheless the law applicable to those facts demanded his acquittal. The propositions of law upon which he mainly relied are: (1) The provisions of the Constitution relative to trial by jury, compensation for property taken for public use, due process of law, and excessive fines, render void the act under which the prosecution is brought. (2) By the true construction of the act itself, the commissioner is authorized to condemn and to destroy peach trees of his own motion, without any process of law, and without any liability for damage, and, by the true construction of the act, this admittedly lawless proceeding is made the basis of the prosecution. (3) The language of the act used in creating the offense is so vague and indefinite that it conveys no meaning, and therefore no crime is defined. He asked the court to instruct the jury that they "are the judges of the law bearing upon the case, as well as the facts," and that they not only have the power, but that it is their duty, to consider the legal questions, even those regarding the constitutionality of the act, and to decide these questions in accordance with their conscientious belief, and especially asked the court to submit to the jury, to decide on their conscientious belief, the legal question whether the language of the act was sufficiently clear and certain to define any crime. No other construction can in common fairness be given to the defendant's request. He was trying his case in reliance on his power to influence the decision of the jury as judges of the law, and demanded his right to have the jury told that, if they decided on their own belief (although the court might express a contrary opinion) that any part of the law bearing on the case was as claimed by the defendant, it was their duty to apply that law to the facts. The court did not comply with these requests. If the defendant had the right to have the jury so instructed, there is error in the judgment. To hold only that the jury cannot decide a question of constitutional law does not meet the issue. It may be true that, if the jury are judges of the law as claimed by the defendant, yet they are not judges of the limitations placed on the powers of the legislature by the Constitution; but this can be so only because the constitutionality of an act either as a question of law or fact is a matter wholly outside the province of a jury. The validity of an act under a written Constitution is a judicial question, but in its very nature is one that must be determined by the court, and is one which, as fact or law, has never been within the issue submitted to a jury since trial by jury was first known. The limitation of governmental power by a law supreme over every department of government was unknown until the close of the last century. It has developed a branch of jurisprudence absolutely new and incapable of administration except by the court. Questions arising under this law are utterly foreign to "trial by jury." It is impossible that the term "right of trial by jury" could ever have included such questions, and their submission to a jury involves a vital change in jury trial, and would be subversive of the foundation on which a strictly constitutional government must rest. But, if the jury are

judges of the law as to every question within the issue submitted to them, they are judges of the law bearing upon the true meaning of the language of a statute, and the extent and meaning of "judicial notice." These questions are within the issue tried to a jury, assuming them to be judges of the law. In the trial below, the defendant was denied the right he claimed to have the jury told that, as to the questions of law within the issue referred to them by the pleadings, they are the judges to decide in accordance with their opinion what the law is. The denial as to the questions within the issue cannot be justified because some of the questions as to which the right was claimed in the defendant's requests were without the issue; especially when neither counsel in framing, nor court in answering the requests, contemplated any such distinction. It is impossible, therefore, to hold that there is no error in the judgment without passing upon the right claimed by the defendant, and denied by the court, in language that was erroneous only because it partially conceded the defendant's claim. I think the court did not err in refusing to charge in accordance with the defendant's request, because it is not true that the jury in the trial of a criminal prosecution are judges of the law, in the sense that it is their duty to review the decisions of the court upon questions of law arising in the case, and to decide the law in accordance with their own judgment.

Trial by jury is a process peculiar to the English common law, slowly developed from diverse experiences, and finally adopted as the best attainable, in certain kinds of litigation, for ascertaining facts from evidence, and applying to them settled principles of law. It seeks to unite the benefits to be derived from the common sense of average citizens in getting at substantial truth from conflicting testimony, and from the learning and skill of the judge in accurately determining the appropriate law. Its main essential feature, which marks its practical value, is that throughout the whole judicial process, from the institution of a case to the final judgment, the judge determines the law, and the jury determines the facts referred to them by the pleadings. These powers of judge and jury are distinct. As Lord Hardwicke said in 1734: "If ever they come to be confounded, it will prove the confusion and destruction of the law of England." Lee t. Hardw. *23, *28. Whenever a question of law is presented, whether it concern the sufficiency of the complaint, the impaneling of the jury, the admission of testimony, or the conclusion of law from the facts admitted or proved, the court alone answers. Whenever the pleadings terminate in an issue of pure fact, the jury alone answers. It happens, however, in some cases, and usually in criminal cases, that, under existing rules of procedure, the issue of fact presented by the pleadings, and referred to the jury, is one where the law and the facts are complicate; *i. e.*, the pure question of fact cannot be fairly determined except in relation to the law, and the pure question of law cannot be determined until the facts are found. In such case the jury may, at their option, pass separately upon the facts by the return of a special verdict, or, applying the law, as stated by the court, to the facts as found by them, determine the whole question presented by the pleadings by means of a general verdict; and the respective powers of court and jury are preserved by the judge stating his determination of the law hypothetically,—if the facts be so and so, this is the law,—leaving the jury to find the facts in view of the law so determined by the judge. Here the court and jury exercise their respective powers, as it were, jointly; and the general verdict should express the law as determined by the judge and the facts as found by the jury. It is evident that, as a general verdict involves an application of the law as declared by the court to the facts as found from the evidence, the jury must consider the law in connection with the evidence in reaching their ultimate conclusion, and in this limited sense they may, with doubtful accuracy, be called judges of the law; but, as the law determined by the court is the law they must consider, it is clear that in no sense which involves any independent determination of what the law of the state is are they the judges of the law. It is within the physical power of the jury to disregard the law, as well as the evidence; and it was to induce the abuse of this power that the phrase "judges of the law" was first perverted from the limited sense in which only it can be used, and became a favorite euphuism in appeals to juries for a violation of duty. These essential features of jury trial—*i. e.*, the power of the court to direct the jury in matters of law, and the power of the jury to apply the law received from the court to the facts found from the evidence, and so determine, by general verdict, issues of fact presented by the pleadings where the law and the fact may be complicate—are involved in the right of trial by jury which our Constitution declares shall remain inviolate. Section 1630 of the General Statutes, in connection with § 1101, is in accordance with, and does not alter, such trial by jury.

The cases of *State* v. *Buckley*, 40 Conn. 246, and *State* v. *Thomas*, 47 Conn. 546, 36 Am. Rep. 98, in so far as they assume that the statute has made the jury judges of the law in any other than the limited sense above stated, do not rest upon sound reason, and are contrary to what must now be considered well settled authority. *State* v. *Carrier*, 5 Day, 131; *State* v. *Smith*, Id. 175, 5 Am. Dec. 132; *State* v. *Ellis*, 3 Conn. 185, 8 Am. Dec. 175; *State* v. *Tuller*, 34 Conn. 280, 287; *State* v. *Fetterer*, 65 Conn. 287, 293; *King* v. *Dean of St. Asaph*, 3 T. R. 429, note; *United States* v. *Battiste*, 2 Sumn. 240, 243; *Pierce* v. *State*, 13 N. H. 536, 554; *Com.* v. *Porter*, 10 Met. 263, 285; *Com.* v. *Anthes*, 5 Gray, 185; *Com.* v. *Rock*, 10 Gray, 4; *United States* v. *Morris*, 1 Curt. C. C. 23, 63; *State* v. *Smith*, 6 R. I. 33, 34; *Duffy* v. *People*, 26 N. Y. 588, 591; *Hamilton* v. *People*, 29 Mich. 173; *State* v. *Burpee*, 65 Vt. 1, 34, 19 L. R. A. 145; *Sparf* v. *United States*, 156 U. S. 51, 39 L. ed. 343.

I think there is no error in the judgment of the superior court which calls for a new trial on any of the grounds stated in the appeal.

Andrews, Ch. J.:

I dissent entirely from the views stated by

Judge Hamersley; I have serious doubts as to the correctness of the opinion written by Judge Baldwin; but I have so far yielded to the arguments of my brethren as not to dissent from the result reached by them.

GEORGIA SUPREME COURT.

J. H. JAMES *et al.*, *Plffs. in Err.*,
v.
H. C. CROSTHWAIT.

(97 Ga. 673.)

*1. **While a bank may, without requiring the deposit of any money,** give to a customer a valid credit upon its books in a stated amount, to be used by him for a special and limited purpose only, this cannot be accomplished merely by entering the credit in the customer's favor, and immediately canceling it by another entry predicated upon the fact that the customer is required to draw at once a check for the full amount of such credit, the result of which is to deprive the customer of any right at all to draw further upon the bank, so far as this particular credit is concerned. Such a transaction amounts to giving such customer no credit whatever.

2. **An entry upon a "pass book" purporting to show that the owner of the book has credit in a bank** for a specified balance, is not, of course, conclusive, or binding upon the bank; but where a banker issued and delivered such a book containing an entry of this kind which was *ab initio* false, and where, after this had been done, a third person, who had seen the book, applied to the banker for information as to the genuineness and accuracy of the apparent credit, at the same time disclosing his reasons for making the inquiry, and the banker, while expressly declining to give, in terms, the information thus sought, did, by concealing the truth, or by other means, induce the inquirer to believe the entry in the book was true and correct, and, in consequence of such belief, to make with the owner of the book a contract whereby such inquirer, though exercising due care in the premises, was defrauded, and suffered a loss,—the banker, if from the particular circumstances of the case he was under an obligation to communicate to the inquirer the exact truth of the matter, was, within proper limits, liable in damages to the latter on account of such loss. Whether or not, in a given case, such an obligation on the part of the banker existed, was a question of fact for determination by the jury in the light of all the surrounding circumstances.

3. **Although it may not, upon a trial of a case of this kind, appear** that in entering the credit and issuing the "pass book" there was originally any intention to thereby mislead the plaintiff, nevertheless, if he was an employee of the owner of the book in a given business to which the entry of the credit directly related, and contemplated, on the faith of such entry, purchasing an interest in that business, and at the time of making the inquiry above mentioned informed the banker of all these facts, thus making it apparent to the latter that it was essential to the inquirer's protection for him to know whether or not the credit was real, and for the amount stated, a finding that the banker was under the duty of revealing the whole truth was not unwarranted; and if, because of his failure to do so, and of other conduct on his part, the plaintiff was misled as to the truth, and in consequence made the contemplated purchase, whereby he sustained a loss less in amount than that represented by the false credit, the banker was liable to him for the same.

4. **The evidence in this case was sufficient** to warrant the finding in the plaintiff's favor for the amount stated in the verdict. There was no material error, if any at all, in admitting, in rejecting, or in refusing to rule out evidence. The requests to charge, so far as legal and appropriate, were covered by the charge given, which was free from error, and which, as a whole, fully and fairly presented the law of the case.

*Headnotes by SIMMONS, Ch. J.

(January 27, 1896.)

ERROR to the City Court of Atlanta to review a judgment in favor of plaintiff in an action brought to recover damages for fraud alleged to have been practised by defendant upon plaintiff. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Hillyer, Alexander, & Lombdin** for plaintiffs in error.

Messrs. **R. J. Jordan** and **Goodwin & Westmoreland,** for defendant in error:

In actions for false representations it is sufficient if such representations materially influenced the conduct of the party, though they were not the sole or predominant inducement.

Safford v. *Grout*, 120 Mass. 20; *James* v. *Hodsden*, 47 Vt. 127; *People* v. *Bosworth*, 64 Hun, 72; *Hatch* v. *Spooner*, 37 N. Y. S. R. 151; *Saunders* v. *McClintock*, 46 Mo. App. 216; *Lebby* v. *Ahrens*, 26 S. C. 275; *Utica Ins. Co.* v. *Tilman*, 1 Wend. 557; *Winter* v. *Bandel*, 30 Ark. 363.

James knew that Lamar wouldn't tell Crosthwait the truth about it as well as he knew he had an existence, and he cannot shelter himself and be relieved of liability in any such manner.

Hicks v. *Stevens*, 121 Ill. 186; *Endsley* v. *Johns*, 120 Ill. 469; *Lebby* v. *Ahrens*, *supra.*

The entry in the bank book by the proper officer of the amount and date of deposit is prima facie evidence that the bank received the amount, and binds the bank like any other form of receipt.

2 Am. & Eng. Enc. Law, p. 102.

Fraud may not be presumed, but being in it-

NOTE.—As to fraud in failing to state material facts, see also Rothmiller v. Stein (N. Y.) 26 L. R. A. 148.

As to misrepresentations not intended to mislead, see also Nash v. Minnesota Title Ins. & T. Co. (Mass.) 28 L. R. A. 753; also Kountze v. Kennedy (N. Y.) 29 L. R. A. 360.

self subtle, slight circumstances may be sufficient to carry conviction of its existence.

Ga. Code, § 2751; 2 Rice, Ev. § 370*a; Johnson* v. *Renfroe,* 73 Ga. 138.

Questions of fraud are for the jury.

Ellis v. *United States Fertilizing & C. Co.* 64 Ga. 575.

James was guilty of actual fraud.

James was also guilty of constructive fraud.

Markham v. *O'Connor,* 52 Ga. 199, 21 Am. Rep. 249; Bishop, Cont. ed. 1887, § 660.

Concealment of material facts may in itself amount to fraud: (1) When direct inquiry is made and the truth evaded; (2) when from any reason one party has a right to expect communication of facts from the other; (3) when one party knows that the other is laboring under a delusion with respect to the property sold, or the condition of the other party, and yet keeps silent.

Broughton v. *Winn,* 60 Ga. 486; *Harlow* v. *Cleghorn,* 65 Ga. 680; 3 Sutherland, Damages, 586; *Augusta Nat. Exch. Bank* v. *Sibley,* 71 Ga. 731.

In all questions of fraud the jury have a wide range.

Abegg v. *Schwab,* 31 N. Y. S. R. 139; *Pool* v. *Ellison,* 56 Hun, 108.

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

H. C. Crosthwait sued J. H. & A. L. James, a banking partnership, and J. H. James individually, alleging that they had damaged him in the sum of $2,675, as follows: About May 20, 1892, plaintiff was employed as book keeper by David Lamar, president of the International Railway & Employees Accident Association, being required, in lieu of giving bond, to deposit $1,000 in defendant's bank as security, the same not to be subject to check. Lamar represented to plaintiff that the association had a paid-in capital of $6,500, and, after making certain charges against that sum, an apparent balance of $4,146.23 was left. Lamar also furnished plaintiff with a pass book from defendant's bank, which showed a credit of the last-named sum in the bank in favor of the association. The business of the association seemed to be good, and plaintiff inquired of the secretary if any stock was for sale. In a day or two Lamar came to him, and offered to sell him an interest of one third for $2,500. Plaintiff called on J. H. James, informed him of the contemplated purchase, and asked him if the amount apparently to the credit of the association was correct. James declined to give any statement as to the balance then in bank, but referred the plaintiff to Lamar, saying: "You go to Lamar. He will tell you just how it is. You put yourself in his hands. He will treat you right, and make you money." Relying on this statement, plaintiff bought, and paid $2,500 for, a one-third interest in the association, but in a few days, Lamar becoming engaged in a controversy, and being arrested, plaintiff grew suspicious, and called on James, and asked him, "How much money has the association in the bank?" James at first hesitated, but finally said: "The association has no money in the bank. It is overdrawn about $200." In response to further questions, James stated that the money had not been in the bank, but the credit on the book was allowed at the instance of Lamar, who at the same time was required to give a check against the apparent amount. The representations made by James, it is alleged, were false and fraudulent, were made to deceive someone, and did deceive plaintiff, because he relied and acted on them; and, but for them, he would not have paid the money to Lamar for the interest he bought. He discovered their falsity in July, 1892. He avers that there was collusion between James and Lamar to deceive him and defraud him out of the sum he paid. The one-third interest he purchased was absolutely worthless, and this was known to James when he made the representation before alleged, which representation was made in bad faith, and with intent to mislead plaintiff to his damage. By referring plaintiff to Lamar for further information, James vouched for the truth of Lamar's statements; and Lamar, when approached, concurred in the false statements of James. They conspired for the purpose of defrauding plaintiff as alleged, etc. The jury found for the plaintiff $2,215.25. Defendants' motion for a new trial was overruled, and they excepted.

There is some conflict in the evidence, but accepting, as we must, that version of the facts which the jury have found to be true, there can be no doubt that the recovery in the plaintiff's favor was warranted. According to the evidence of the defendant J. H. James, the credit entered by him on the "pass book" was merely a fictitious credit. A banker may, it is true, without requiring the deposit of any money, give to a customer a valid credit upon his books in a stated amount, to be used for a special and limited purpose only; but this cannot be accomplished by entering the credit in the customer's favor, and immediately canceling it by another entry, predicated upon the fact that the customer is required to draw at once a check for the full amount of the credit, thus depriving the customer of any right at all to draw further upon the bank, so far as the particular credit is concerned. Such a transaction amounts to giving the customer no credit whatever. It is also true that an entry upon a "pass book," purporting to show that the owner of the book has credit in the bank for a specified balance, is not conclusive or binding upon the bank; and that a banker, when inquired of by a third person as to the amount which a customer has to his credit, is ordinarily under no duty to give any information on the subject. Where, however, the banker has issued and delivered to a customer a deposit book containing a credit in his favor which is *ab initio* false, and a third person, who has seen the book, comes to him, and inquires as to the truth of the apparent credit, explaining at the same time that his reason for doing so is that he contemplates purchasing an interest in the particular business to which the credit relates, a very different case is presented. We think the court properly submitted to the jury whether, under the circumstances, James was under any obligation to communicate to the plaintiff any more than he did communicate, or not to have said what he did say to him; and we think the jury were warranted in finding that his conduct, under the circum-

stances, amounted to a fraud which would entitle the plaintiff to recover. Here, in the first instance, as the testimony of James himself shows, was a false statement, made by him for the purpose of deceiving others as to the amount deposited in the bank to the credit of Lamar's "association," and of inducing such persons to enter into business relations with the "association." It was not necessary, in order to entitle the plaintiff to recover for the deceit, that the representation should have been made directly to him. One who wilfully makes false representations, to be fraudulently used by another as an inducement to a third person to enter into a contract with the party repeating them, is as much guilty of deceit as the latter, and is equally liable to the party deceived. *Cheney* v. *Powell*, 88 Ga. 634. And see notes to *Pasley* v. *Freeman*, 2 Smith, Lead. Cas. 9th Am. ed. from 9th Eng. ed. 1889, p. 1334; *Barry* v. *Croskey*, 2 Johns. & H. 1; *Watson* v. *Crandall*, 78 Mo. 583.

The main purpose in view in making the false entry appears to have been to enable Lamar to exhibit it to certain railroad engineers who were to aid in securing business for the "association," and who were to use it as a basis of representations to be made by them as to the solvency and standing of the "association;" and it was argued that no liability to the plaintiff resulted, since the representation was not intended for him, and the effect it was claimed to have had upon the plaintiff was not within the contemplation of the defendant at the time the entry was made. When approached by the plaintiff, however, and inquired of as to the truth of the entry, James was made aware that the representation would not be confined in its operation to the purpose originally intended, but that its effect would probably be to mislead the plaintiff, and induce him to invest his money in the purchase of an interest in the business from Lamar, unless something were said or done to prevent its having this effect. So that, whether James originally intended the representation to mislead the plaintiff or not, the jury might well conclude that when he was brought face to face with the plaintiff, and given to understand that it was essential to the latter's protection to know whether the credit was real for the amount stated, it was his duty to reveal the truth, and that the failure to do so was, in effect, a direct misrepresentation to the plaintiff. Whether or not such a duty existed on his part, under all the circumstances, was a question for the jury. Code, § 3175.

It was argued that James did all that could be required of him when he referred the plaintiff to Lamar, and that the presumption would be that Lamar would tell the truth. Where two persons unite in putting forth a false statement for the purpose of deceiving and misleading others, we think it would be going very far to say that one of them, when approached by a third person as to the truth of the statement, has a right to assume that the inquirer, if referred to the other party to the falsehood, will get the truth from him. So far from James having a right to assume that the plaintiff would get the truth by going to Lamar, the contrary assumption would have been very much more consistent with the circumstances. Yet, according to the plaintiff's evidence, James did not content himself with referring the plaintiff, for the truth of his own misrepresentation, to the man at whose instance he had made it, but went so far as to vouch for the latter, assuring the plaintiff that Lamar would tell him just how it was, and advised him to put himself in Lamar's hands; he would treat him right, and make him money. Under this state of facts we cannot say that there is nothing to warrant an inference that James intended to deceive and defraud the plaintiff. Fraud being in itself subtle, slight circumstances may be sufficient to carry conviction of its existence (Code, § 2751), and it is peculiarly the province of the jury to pass on these circumstances.

It appears further that the plaintiff was in fact deceived and defrauded. He returned to Lamar, and asked him why he supposed James did not answer his question, and Lamar said he supposed it was because the plaintiff was a comparative stranger to James, but said "it was not because the money was not in the bank." The plaintiff then raised the money to purchase an interest in the business from Lamar, and paid him $2,500 for it. He testified that he did this upon the faith of the entry in the deposit book, in connection with the conduct and statements of James at the interview above referred to. It soon after turned out that the interest he had purchased was practically worthless, and that his loss amounted fully to the sum found in his favor by the jury. It was not necessary, in order for the plaintiff to recover, that the deceit in question should have been the sole inducement which led him to make the investment. It was sufficient if it influenced his conduct materially. Kerr, Fraud & Mistake, 74; 1 Jaggard, Torts, 589, 593. Nor was it necessary that the defendant should be benefited by the deception. *Augusta Nat. Exch. Bank* v. *Sibley*, 71 Ga. 731; 1 Jaggard, Torts, 562. Nor is a recovery precluded by the fact that James was not informed as to the extent of the proposed investment. In the cases referred to on this subject by the plaintiff (*Slade* v. *Little*, 20 Ga. 371; *Hopkins* v. *Cooper*, 28 Ga. 392; *Glover* v. *Townsend*, 30 Ga. 90), there was merely a general representation as to the credit of a person, without any indication in the representation or the circumstances as to the extent to which the credit might safely go. Here there was a representation that a specified sum stood to the credit of the "association" in the defendant's bank, and the amount of the recovery in this action is considerably less than that amount.

We do not deem it necessary to deal specifically with the numerous grounds of the motion for a new trial. What we have said covers the main and controlling questions made in the record. Several of the grounds relating to the admission and rejection of testimony and to the charge of the court are too vague, general, and indefinite to be considered, it not appearing what the testimony referred to was, or what particular portion of the charge is complained of. So far as we can discover from the motion, there was no material error in rejecting or in refusing to rule out evidence. The requests to charge, so far as legal and pertinent, were covered by the charge given,

which was free from error, and which, as a whole, fully and ably presented the law of the case. This is the second verdict in favor of the plaintiff, and, under the evidence in the record, we are constrained to hold that the court did not err in refusing to set it aside.

Judgment affirmed.

ILLINOIS SUPREME COURT.

PEOPLE of the State of Illinois, for the Use of PEORIA COUNTY, *Appt.*,

v.

James W. HILL.

(........Ill.........)

1. **The inclusion of brothers and sisters** in the list of those who are made liable for the support of a poor person whose pauperism has not resulted from intemperance or other bad conduct, by Ill. Rev. Stat. chap. 107, § 1, is not unconstitutional, but the statute transforms an imperfect moral duty into a statutory and legal liability.

2. **The legislature can do any legislative act** that is not prohibited by the state and Federal Constitutions.

3. **The procedure under the pauper's act** (Rev. Stat. chap. 107) to compel the support of a poor person by a relative in which a complaint is filed in a county court and at least ten days' notice given to the defendant by summons, after which the court proceeds in a summary way without further written pleadings to determine the question of the defendant's liability and to make the necessary judgment and orders, is not insufficient to constitute due process of law.

4. **The right of trial by jury in a summary proceeding** under the pauper's act (Rev. Stat. chap. 107) to compel a relative to furnish support for a poor person, is not given by the constitutional guaranty of that right "as heretofore enjoyed."

5. **A demand upon a relative for the support of a pauper** is not required by the pauper's act (Rev. Stat. chap. 107) to be made upon him before filing a complaint to enforce his liability.

6. **The court will take judicial notice** of the public statutes of the state respecting the liability of a county for the support of poor persons.

7. **An allegation that defendant "at and within" a certain county** did unlawfully fail to support his sister who was a pauper will not be held defective in failing to state that she is likely to become a charge upon that county, when it is questioned for the first time on appeal.

(November 9, 1896.)

APPEAL by plaintiff from a judgment of the Circuit Court for Peoria County reversing a judgment of the County Court in its favor in a proceeding brought to compel defendant to pay a certain sum for the support of his sister. *Reversed.*

The facts are stated in the opinion.

NOTE.—The above case seems to be the first in which a statute imposing a liability for the support of indigent relatives has been assailed as unconstitutional.

Messrs. **Richard J. Cooney** and **Frank J. Quinn**, for appellant:

There are cases in which the legislature may take away the right of trial by jury; in civil cases if they please, provided they establish other just rules operating alike upon all.

1 Bishop, New Crim. Proc. § 891; *Hallinger* v. *Davis*, 146 U. S. 314, 36 L. ed. 986; *Missouri* v. *Lewis*, 101 U. S. 22–32, 25 L. ed. 989–992; Cooley, Const. Lim. 6th ed. pp. 29, 30, 505.

Due process of law, so far as the same relates to trial by jury, does not confer a right of trial by jury unless the right existed before the adoption of the Constitution.

State v. *McClear*, 11 Nev. 39.

Messrs. **McCulloch & McCulloch**, for appellee:

The statute of 1874 (Rev. Stat. chap. 107, § 1) is a plain attempt on the part of the legislature to impose upon one person the support of another, where, as in the case of brother and sister, the common law recognizes no such duty. It is taking one man's property for the use of another, without the owner's consent.

The statute of Elizabeth and all that have followed it, until the present statute, were intended to protect the public from loss occasioned by a neglect of duty to support where a natural duty but no legal liability therefor existed.

2 Kent, Com. 191; *State, Griffith*, v. *Osawkee Twp.* 14 Kan. 418.

But where no such duty exists there can be no offense in failing to furnish support, and the legislature is powerless to create a duty which will deprive one man of his property and bestow it upon another.

Chicago v. *O'Brien*, 111 Ill. 532, 53 Am. Rep. 640; Reeves, Dom. Rel. 413; *Wertz* v. *Blair County*, 66 Pa. 18; 1 Bl. Com. 448; *Edwards* v. *Davis*, 16 Johns. 285.

If it is sought to take appellee's property for public use it must be with compensation, and if for private use it cannot be taken at all.

Cooley, Const. Lim. 357; *Sholl* v. *German Coal Co.* 118 Ill. 427, 59 Am. Rep. 379; *Norman* v. *Heist*, 5 Watts & S. 171, 40 Am. Dec. 493; *Sadler* v. *Langham*, 34 Ala. 311; *Hepburn's Case*, 3 Bland, Ch. 95; *Beekman* v. *Saratoga & S. R. Co.* 3 Paige, 45, 22 Am. Dec. 679.

The statute in question authorizes the court to impose a continuing liability upon appellee during the pleasure of the court, to be enforced by attachment for contempt or by execution. It may operate as a perpetual encumbrance, during the life of the pauper, upon the property of the person so charged. This is in plain violation of the constitutional limitations imposed upon the power of the legislature.

Millett v. *People*, 117 Ill. 295, 57 Am. Rep.

869; *Frorer* v. *People*, 141 Ill. 171, 16 L. R. A. 492; *Ramsey* v. *People*, 142 Ill. 380, 17 L. R. A. 853.

Such a proceeding does not come under the law of eminent domain. It does not come under the powers of taxation. It does not come under the police power.

Millett v. *People*, and *State, Griffith*, v. *Osawkee Twp., supra.*

On petition for rehearing.

Rights of property antedate and are superior to all constitutional provisions. The latter are only declaratory of a fundamental principle of law governing all nations.

Cooley, Const. Lim. 37, 175*n*, 354*n*.

The law under which a man can be deprived of his property must be a general law, applicable alike to all persons, and not a law which singles out a particular person or class of persons upon whom the burden is to be laid.

Frorer v. *People*, 141 Ill. 171, 16 L. R. A. 492.

The statute of Elizabeth did not proceed upon the principle of enforcing a simple moral duty. If that were the ground of such legislation, it would be possible to select a certain class of persons of sufficient ability from every community upon whom might be laid the burden of supporting the poor, for this is a moral duty resting equally upon every one of us. This is the province of the poor laws of general application.

1 Bl. Com. 131.

The statute of Elizabeth rests upon the natural duty of maintenance, protection, and education of children "laid on them [the parents], not only by nature herself, but by their own proper act in bringing them into the world."

1 Bl. Com. 359, 360, 446-448, and notes.

From this duty of maintenance springs the reciprocal duty of children to support their parents in cases of necessity.

Laws depriving particular persons or classes of persons of rights enjoyed by the community at large, to be valid, must be based upon some distinction or reason not applicable to others not included within its provisions.

Cooley, Const. Lim. 391.

It is only when such distinctions exist that differentiate, in important particulars, persons or classes of persons from the body of the people, that laws having operation only upon such particular persons or classes of persons have been held to be valid enactments.

Braceville Coal Co. v. *People*, 147 Ill. 66, 22 L. R. A. 340; *Millett* v. *People*, 117 Ill. 295, 57 Am. Rep. 869; *Frorer* v. *People*, 141 Ill. 171, 16 L. R. A. 492; *Ramsey* v. *People*, 142 Ill. 380, 17 L. R. A. 853; *Ritchie* v. *People*, 155 Ill. 98, 29 L. R. A. 79; *Harding* v. *People*, 160 Ill. 459, 32 L. R. A. 445; *Eden* v. *People*, 161 Ill. 296, 32 L. R. A. 659.

The method of procedure is not due process of law.

Ward v. *Farwell*, 97 Ill. 593; *Johnson* v. *Joliet & C. R. Co.* 23 Ill. 203; *Mitchell* v. *Illinois & St. L. R. & Coal Co.* 68 Ill. 286; *Ross* v. *Irving*, 14 Ill. 171; *Owners of Lands* v. *People, Stookey*, 113 Ill. 296.

Where there is a judicial case, and a question of fact, which goes to the very right of recovery, is to be tried, then a trial by jury cannot be denied.

Mascall v. *Drainage Dist. Comrs.* 122 Ill. 620; *Drainage Comrs.* v. *Illinois C. R. Co.* 158 Ill. 357; *Colfax Highway Comrs.* v. *East Lake Fork Special Drainage Dist. Comrs.* 127 Ill. 581.

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

This is a complaint or information filed in the county court of Peoria county, under § 3 of the pauper's act (Rev. Stat. chap. 107), by the state's attorney of said county, in the name and by the authority of the people of the state of Illinois, for the use of Peoria county, against James W. Hill, the appellee, to compel him to contribute to the support of his sister Charlotte Grannis, an unmarried woman; she then and there being a pauper, and wholly without means, and unable to earn a livelihood for herself, in consequence of bodily and physical infirmities. In the county court a motion to quash the complaint and dismiss the cause was overruled, and on a hearing it ordered, adjudged, and decreed that said Hill should, on a certain specified day, pay the sum of $7.50, for the use of Peoria county, for the support of said Grannis, and should pay the further sum of $7.50 on the 1st Monday of each and every month thereafter, for the use of Peoria county, for the support of said Grannis, until the further order of the court in the premises. Upon an appeal by Hill to the Peoria circuit court, he renewed his motion to quash the complaint, which was sustained, and judgment entered quashing the same. From such judgment this further appeal was then taken.

The principle objections urged by appellee to the case made by the complaint challenge the constitutionality of § 1 of the statute in relation to paupers, which provides that every poor person who shall be unable to earn a livelihood in consequence of any bodily infirmity, idiocy, lunacy, or other unavoidable cause, and provided the pauperism is not caused by intemperance or other bad conduct, shall be supported by the father, grandfather, mother, grandmother, children, grandchildren, brothers, or sisters of such poor person, if they, or either of them, be of sufficient ability; and also the constitutionality of the following sections, which give a remedy for the enforcement of such liability without making provisions for a jury trial. He questions the power of the legislature to compel a man, in any event, to support his indigent brothers or sisters, and urges the unconstitutionality of the statute on these two grounds: First, that the legislature has no power to impose upon a citizen a liability of this character; and, second, that the method prescribed by the statute for its enforcement deprives him of that due process of law to which he is entitled.

The duty of parents to provide for the maintenance of their children is a principle of natural law; but the common law does not, like the civil law, fully enforce this mere moral obligation, but simply goes to the extent of requiring parents to support their offspring until they attain the age of maturity. Nor does any common-law obligation impose upon a child the legal duty of maintaining an infirm, aged, or destitute parent. *Edwards* v. *Davis*, 16

Johns. 281; *Stone* v. *Stone*, 32 Conn. 142; *Dawson* v. *Dawson*, 12 Iowa, 512. To remedy these and similar defects in the common law, the statute of 43 Eliz. chap. 2, § 7, was passed. It enacted that the father and grandfather, and the mother and grandmother, and the children, of every poor, old, blind, lame, and impotent person, or other poor person not able to work, being of sufficient ability, shall, at their own charges, relieve and maintain every such poor person, etc. Similar statutes have been enacted in many of the states of the Union. The statute of this state upon which the present proceeding is based to some extent changes the remedy from that afforded by the English statute, and includes grandchildren, brothers, and sisters within the list of those who shall be liable for the support of a poor person. It is to be noted that the English statute did not extend liability beyond the line of lineal consanguinity, but extended it in the lines of both descent and ascent, whereas our statute also extends it to brothers and sisters, who are collateral kindred, related to each other in the first degree. It is urged that our statute is a plain attempt on the part of our legislature to impose upon one person a legal liability for the support of another where no such legal duty or liability existed at common law, and is taking one man's property for the use of another without the owner's consent. But, as we have seen, there was no perfect common-law duty requiring even the parents to maintain their children beyond the period of their minority. In cases of poverty and inability to earn a livelihood, the duty of such parents to support their children after the age of maturity, the duty of grandparents to maintain their grandchildren, and of children to supply the necessaries of life to their parents, were all mere moral and imperfect duties that the common law did not recognize and enforce. It can hardly be said that there is no moral duty whatever imposed upon a man, who has sufficient financial ability consistently with his duty to himself and to others, to supply the necessaries of life to a brother or a sister who is unable to earn a livelihood in consequence of bodily infirmity, idocy, lunacy, or other unavoidable cause, in cases where such brother or sister did not become a pauper from intemperance or other bad conduct. This being so, our statute stands upon the same footing, so far as legal principle is involved, that the statute of Elizabeth stands upon. The support of the poor is a public duty, and, in case of the default of him upon whom is imposed a prior duty to afford such support, the cost of providing the same will be upon the body politic. The object of both the statute of Elizabeth and of our existing statute is to protect the public from loss occasioned by neglect of a moral or natural duty imposed on individuals, and to do this by transforming the imperfect moral duty into a statutory and legal liability. And the right of the legislative department of government to change an imperfect duty into a present duty, or even to create by statute a new legal liability, has been recognized from time immemorial. The legislature of this state can do any legislative act that is not prohibited by the state or Federal Constitutions; and, without and beyond the limitations and restrictions contained in those instruments, the lawmaking power of the state is as absolute, omnipotent, and uncontrollable as that of the English Parliament. *Mason* v. *Wait*, 5 Ill. 127; *People, Grinnell*, v. *Hoffman*, 116 Ill. 587, 56 Am. Rep. 793; *Cairo & St. L. R. Co.* v. *Warrington*, 92 Ill. 157; *Richards* v. *Raymond*, Id. 612, 34 Am. Rep. 151; *People* v. *Wall*, 88 Ill. 75; *Hawthorn* v. *People*, 109 Ill. 302, 50 Am. Rep. 610. In *Firemen's Ben. Asso.* v. *Lounsbury*, 21 Ill. 511, 74 Am. Dec. 115, it is said that the legislative power, except wherein it is limited or restrained by constitutional provisions, confers all legislative power, and authorizes the lawmakers to pass any laws and do any acts which are embraced in the broad and general word "legislation," and that, with the exception noted, it authorizes the passage of any law which could be enacted in the most despotic government, or which the people could enact in their primary capacity. And in *Munn* v. *People*, 69 Ill. 80, it is said: "Every subject within the domain of legislation and within the scope of civil government, and not withdrawn from it by the Constitution of the state, or of the United States, can be dealt with by the general assembly by general laws to affect the whole state and all the people within it." Although the duty of supporting the poor is a public duty, yet it is not a purely public burden, and the systems of poor laws that prevail in England and in this state had their origin in the statute of 43 Eliz. chap. 2; and that statute was based upon these principles: That the primary duty of affording support to a poor and helpless person rested on those upon whom, because of consanguinity, was imposed a natural and moral, though imperfect, duty to relieve and maintain, and that, so long as such primary duty existed and could be enforced, the public should be exonerated from the burden. Within what degree of consanguinity the primary liability shall be upon the relatives of the pauper, instead of upon the public, is largely a matter for legislative determination. Here the statute, which includes collateral relatives of the first degree,—brothers and sisters,—does not extend to such distant collateral relatives as that the courts could pronounce it unreasonable and void; and the statute operates generally and equally upon all persons within the state who fall within the relations and circumstances provided for therein.

The other objection made to the validity of the statute is that the method of procedure is not according to the law of the land. The legal liability imposed is statutory, and the statute fixes the procedure by means of which the liability is to be enforced. The complaint is to be filed in the county court, either by the state's attorney of the county, or by the overseer of the poor of the town or precinct where the poor person resides. At least ten days' notice is to be given the defendant, by summons requiring him to appear and answer the complaint. The court is to proceed in a summary way to hear the proofs and allegations of the parties, without further written pleadings. If the court is satisfied from the allegations and proofs that the defendant is not complying with the statutory requirements, and of his pecuniary ability, then it is to give judgment in the case, and make any and all necessary

orders for the payment weekly to the overseer of the poor of the town or precinct, or to such other person as it shall direct, of such sum, or the defendant's proper contributory share of such sum, to be applied to the support of such poor person, as in the opinion of the court is necessary to properly support such poor person, taking in view the ability of the defendant to furnish such support. The court is authorized to make orders for contributions, as between relatives and orders for partial support. The court may make orders specifying the times during which the payments are to be made, or may leave the time indefinite and until the further order of the court. The orders may, from time to time, on application, be changed, and payments, as they fall due, may be enforced by attachment or by execution. The court, at the hearing, may discharge any defendant that may appear not to be liable for such support, or who is contributing his fair share therefor. If judgment is against the defendant, he may be adjudged to pay the costs, or the costs may be apportioned according to the right of the case; but, if the application is dismissed, it shall be at the costs of the county or town on whose behalf the application is made. This procedure may not be in strict conformity with that provided by the English statute, or that provided in some other state, but it is not necessarily invalid on that account. It is a statutory liability, and there is no reason why the procedure for its enforcement cannot be provided for in the statute fixing the liability. We are unable to see that the method of procedure adopted violates any constitutional right of appellee. It is suggested that it deprives him of the right of trial by jury. It is only the right of trial by jury "as heretofore enjoyed" that § 5 of article 2 of the Constitution provides "shall remain inviolate." This section was not intended to confer the right of jury trial in any class of cases where it had not previously existed; nor was it intended to introduce it into special summary jurisdictions unknown to the common law, and which do not provide for that mode of trial. *Ward* v. *Farwell*, 97 Ill. 593. Cooley, Const. Lim. 6th ed. 504, and authorities cited in note 2. Our conclusion is that there is no merit in either or any of the grounds urged against the constitutionality or validity of the statute.

It is claimed that the complaint is defective in various particulars: The statute does not require that a demand for support should be made before complaint is filed. It nowhere imposes upon either the poor person or any official the duty of making such prior demand. It makes it the duty of the state's attorney or overseer of the poor to make the complaint "upon any failure of any such relative or relatives to support such poor person as provided by this act;" and the complaint expressly charges "that the said James W. Hill has unlawfully failed and neglected to provide for his said sister, the said Grannis, according to the form of the statute in such case made and provided." It is true that in § 2, in designating the relative order in which the relatives of the poor person shall be consecutively and respectively liable for the support of such poor person, the expressions, "shall first be called on," "shall be next called on," "shall next be called on," and "next," are used. But these expressions are manifestly used merely and only for the purpose of designating the order in which liability shall attach to relatives of different degrees of consanguinity.

It is urged that it does not appear from the complaint whether the poor are supported by the county or by the townships. The proceeding is prosecuted for the use of Peoria county. The court will take judicial notice of the public statutes of the state, and that in all of the counties of the state, whether under township organization or not, the duty of supporting paupers is imposed upon the county, except in a few counties, such as Stephenson, Kendall, and Dekalb, where by special, but public, law the duty of support is imposed upon the towns. Pub. Laws 1861, p. 205; Pub. Laws 1863, p. 46; Rev. Stat. chap. 107, §§ 14, 15, 34, 35; *Freeport* v. *Stephenson County Supers.* 41 Ill. 495; *Fox* v. *Kendall*, 97 Ill. 72.

It is finally urged that it nowhere appears that the poor person is, or is likely to become, a charge upon Peoria county. The complaint does state that James W. Hill, "on the 1st day of May, 1894, at and within the county of Peoria, in the state of Illinois, and on divers other days and times as well before as after that day, he then and there being of sufficient ability to do so, did unlawfully fail to support his sister, Charlotte Grannis, she, the said Charlotte Grannis, then and there being a pauper," etc. This is not so specific a statement of residence as good pleading would require, but we are inclined to regard it as substantially sufficient upon the motion to quash, and especially in view of the fact that this ground of objection was not specified with the numerous others that were incorporated in the motion to quash, and seems to have been made for the first time upon the filing of appellee's brief and argument in this court upon the appeal. For the reasons herein stated *the judgment of the Circuit Court quashing the complaint and dismissing the proceeding is reversed*, and the cause is remanded to that court for further proceedings in conformity with the views herein expressed.

Rehearing denied.

PEOPLE of the State of Illinois, *ex rel.* CAIRO TELEPHONE COMPANY,
v.
WESTERN UNION TELEGRAPH COMPANY.

(166 Ill. 15.)

1. **A telegraph company cannot be compelled by mandamus** to permit a telephone to be placed in its office by a telephone company for use in receiving and transmitting messages, although it may have allowed another

NOTE.—As to compulsory business by telephone companies and others, see *note* to Rushville v. Rushville Natural Gas Co. (Ind.) 15 L. R. A. 321.

See also 43 L. R. A. 280.

telephone company to have a telephone in its office for that purpose.

2. It is a matter of common knowledge that telegraph messages must be written.

3. A telegraph company cannot be compelled to receive oral messages, and the fact that it has waived its rights in that respect by receiving messages over the line of one telephone company does not compel it to make a like waiver in favor of another company.

4. The duty of a telegraph company, under Rev. Stat. chap. 134, § 6, to receive or transmit any despatch from another telegraph company, does not, even if the provision extends to telephone companies, require that one company shall permit another company to put a telephone instrument in its office or receive or transmit verbal messages.

(April 3, 1897.)

PETITION for a writ of mandamus to compel defendant to permit relator to put one of its instruments in defendant's office, and requiring defendant to make use of it. *Denied.*

The facts are stated in the opinion.

Messrs. **Lansden & Leek** for petitioner.

Messrs. **Estabrook & Davis,** for respondent:

It is no part of the duty of a telegraph company to maintain communication by telephone with any person. Its duty is to transmit messages by telegraph. It has a right to require messages to be in writing.

Western U. Teleg. Co. v. *Dozier,* 67 Miss. 288; *Kirby* v. *Western U. Teleg. Co.* 7 S. D. 623.

If respondent chooses to waive a right in one case, it certainly does not thereby bind itself to waive the right as to other persons. A course of dealing under a special contract can never establish a custom or course of dealing as to the public in general.

Atchison, T. & S. F. R. Co. v. *Denver & N. O. R. Co.* 110 U. S. 667, 28 L. ed. 291; *Little Rock & M. R. Co.* v. *St. Louis, I. M. & S. R. Co.* 41 Fed. Rep. 559, 2 Inters. Com. Rep. 763; *St. Louis Drayage Co.* v. *Louisville & N. R. Co.* 65 Fed. Rep. 39, 5 Inters. Com. Rep. 137; *Little Rock & M. R. Co.* v. *St. Louis S. W. R. Co.* 27 U. S. App. 380, 63 Fed. Rep. 775, 26 L. R. A. 192, 4 Inters. Com. Rep. 854; *Oregon Short Line & U. N. R. Co.* v. *Northern P. R. Co.* 15 U. S. App. 479, 61 Fed. Rep. 158, 4 Inters. Com. Rep. 718; *People* v. *Chicago & A. R. Co.* 55 Ill. 95, 8 Am. Rep. 631; *Erie R. Co.* v. *Wilcox,* 84 Ill. 239, 25 Am. Rep. 451.

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

The relator filed its petition in this court praying for a writ of mandamus directing the defendant to permit it to put one of its telephones in the telegraph office of defendant at Cairo, Illinois, and requiring defendant at its telegraph stations in said city to receive telegraph messages from and transmit telegraph messages to, the subscribers of relator at Cairo by means of its telephone exchange, in the same manner that defendant receives from, and transmits telegraph messages to, the subscribers of the Central Union Telephone Company by means of the telephone exchange of the latter company. The petition has been answered, and relator has filed its demurrer to the answer, upon which demurrer the cause is submitted for decision. The answer admits substantially all of the matters of fact alleged in the petition, and the facts averred in the answer by way of defense are admitted, so far as well pleaded, by the demurrer. The facts as so appearing are as follows: The relator is a telephone company organized under the laws of this state, and doing business in the city of Cairo. It has in operation more than 300 telephones, and maintains a telephone exchange at a central office, where connections are made between subscribers by means of a switchboard, enabling them to communicate with each other. The Central Union Telephone Company also operates a telephone exchange in the same city. The telephones of the latter company are the property of the American Bell Telephone Company, and are used under a license from that company. The defendant is a corporation engaged in the telegraph business, with wires throughout the United States. It maintains two telegraph stations in Cairo, one of which is its telegraph office, and the other is in the Halliday House, an hotel in said city. Each telephone company has a telephone in said hotel where defendant keeps a telegraph station, and defendant receives and transmits from and to subscribers to the Central Union Telephone Company telegraph messages by using the wires and telephone of that company, and pays for the service. Defendant also has a telephone of the Central Union Telephone Company in its telegraph office, and receives and transmits telegraph messages by that telephone in like manner as at the hotel, and pays the telephone company for the service. Subscribers to relator's telephone desire to receive and transmit messages from and to the telegraph office by means of relator's telephone, and for that purpose the relator has demanded of the defendant to permit it to put one of its telephones in defendant's office, and that defendant shall receive telegraph messages from, and transmit telegraph messages to, relator's subscribers at said telegraph office, and at the hotel where both companies have telephones, in the same manner as it does with the other telephone company. Relator has offered to put in a telephone without charge, and to perform the service without cost or expense to the defendant, but the defendant has refused to permit the telephone to be put into the telegraph office, or to use it there or at the hotel for receiving or transmitting messages. In consequence of this refusal, relator has been compelled to maintain a telephone station near the telegraph office, and to employ a messenger boy to carry messages to and from the telegraph office, which entails expense upon relator. The defendant has entered into a contract with the National Bell Telephone Company and the American Bell Telephone Company which prohibit it from co-operating with any other telephone company, and under which it has employed the Central Union Telegraph Company as a licensee of said companies, to transmit messages by telephone. The existence of these contracts was the only reason given by defendant for refusing to accede to the relator's demands, but did not constitute the only reason in fact. The defendant, in order to insure ac-

curacy and for its protection, requires that all messages received by it should be in writing on blanks furnished by it, subject to certain conditions, printed thereon. In the contracts under which it receives and transmits messages by the Central Union Telephone, it is provided that messages from subscribers by telephone shall be received subject to the rules, regulations, and conditions of defendant, and that it shall be the duty of the telephone company to require from its subscribers assent to said rules, regulations, and conditions, by writing said messages upon the regular contract blanks of defendant. While the defendant has refused to receive for transmission verbal messages over the line of relator, it has never refused to receive and transmit any written messages.

The defendant is bound to treat all persons and corporations alike, and without discrimination, in its business of receiving and transmitting messages by telegraph. The question presented here is whether the conduct of defendant constitutes a discrimination between the telephone companies in the performance of that service. It has refused to transmit messages by means of relator's telephone to the individuals to whom they are addressed, and it has also refused to permit relator to put a telephone in its office or to receive verbal messages over such telephone. When defendant receives a message to be delivered to a person in Cairo, it is its duty to make delivery to that person, and the refusal to transmit the message to such person by the telephone is a refusal to employ the relator in the performance of that duty. So far, at least, this action is one to compel the defendant to accept the services of relator rather than to compel it to perform its duty as a telegraph company without discrimination. There have been a number of cases where individuals or telegraph companies have sought to compel telephone companies to place telephones in certain offices on the same terms given to other subscribers. In several of these cases the telephone company had furnished connection with the Western Union Telegraph Company, the defendant in this case, but had refused like connections and like service to other telegraph companies. It has been uniformly held that telephone companies are bound to furnish the same service and connections to all persons and corporations alike, and the same rule undoubtedly applies to telegraph companies, but there is no case to which we have been referred which holds that a telegraph company is bound to employ any one person or corporation who applies to it, in receiving and transmitting messages between it and the person for whom it performs the service. It could scarcely be said that the duty to treat all persons alike in serving the public would require that, when one messenger boy is employed to carry messages to the persons to whom they are directed, every other boy having equal physical ability to carry messages, who may offer himself for the service, must also be employed; nor that if one person had secured a list of subscribers or patrons for whom he was to deliver messages, and defendant should employ him to make delivery to such subscribers, any other person who should secure 300 or more subscribers, as relator has, would have a right to compel defendant to employ him to deliver messages to his list of subscribers. The defendant undoubtedly has a right to choose its own agencies for the performance of its duties, and is not bound to admit to its service every person or corporation who desires to assist in such performance or act as such agency. Such a choice is not a discrimination between persons or corporations in respect to a matter where they have any right or the defendant owes any duty. So the fact that defendant has employed the Central Union Telephone Company to deliver its messages to persons to whom they are addressed in Cairo certainly does not require it to employ relator when it offers its services in a like employment.

The other branch of the case relates to the right to put a telephone into defendant's office, and to compel it to receive verbal messages for transmission. The writ, if granted, would compel defendant, not only to answer telephone calls whenever any person might choose to ring up the office, but also to furnish office room; and it is probably true, as claimed by defendant, that the telephones of two rival companies in its office, perhaps both demanding service at the same time, might be no ordinary nuisance. But, aside from the question whether defendant owes any duty to the public or relator to furnish office room and attend the telephone, we think it is not bound to receive verbal messages. What the relator asks is that its subscribers may call up defendant's operator, and tell him what messages they want to have sent. This would not be in accordance with the course of business of telegraph companies, and it would be most unreasonable to say that a telegraph company must receive or deliver messages by such a method. It is a matter of common knowledge that messages must be written, and whether the conditions and limitations referred to in defendant's answer are reasonable or not, and whether the public may be required to assent to them or not, defendant undoubtedly has a right to require that messages shall be written. The risk of mistake, liability of disputes as to what is said, the uncertainty as to the identity of the person communicating, and other difficulties which will readily suggest themselves, would increase the hazards of the service very greatly. And this applies with equal force both to receiving and transmitting messages over the telephone wires. The only serious question is whether the fact that the defendant has waived its rights in that respect as to the other telephone company requires a like waiver on its part as to the relator, and we do not think that it does. It may be willing to assume risks with another telephone company, of whose responsibility it may be satisfied, which it would not be willing to assume with the relator for proper and sufficient reasons. Such arrangements are founded entirely upon the agreements of parties, and defendant is not bound to admit every other corporation into a like arrangement. This has been the rule as to carriers, and it has been held that they cannot be compelled to contract with one connecting carrier for a through rate, or for through rout-

ing, or for through tickets, because such an arrangement has been made with another connecting carrier. *Oregon Short Line & U. N. R. Co.* v. *Northern P. R. Co.* 15 U. S. App. 479, 61 Fed. Rep. 158, 4 Inters. Com. Rep. 718; *Little Rock & M. R. Co.* v. *St. Louis S. W. R. Co.* 27 U. S. App. 380, 63 Fed. Rep. 775, 26 L. R. A. 192, 4 Inters. Com. Rep. 854; *Little Rock & M. R. Co.* v. *St. Louis, I. M. & S. R. Co.* 41 Fed. Rep. 559, 2 Inters. Com. Rep. 763; *St. Louis Drayage Co.* v. *Louisville & N. R. Co.* 65 Fed. Rep. 39, 5 Inters. Com. Rep. 137.

Relator quotes § 6 of an act to revise the law in relation to telegraph companies, in force July 1, 1874, and insists that defendant is violating that statute by refusing to comply with its demands. That section imposes penalties for the refusal of a telegraph company to receive or transmit any despatch from any other telegraph company. It is claimed that relator is a telegraph company, and it has been so held as to telephone companies in some cases. But if that should be conceded, the statute does not contemplate that defendant shall permit another telegraph company to put a telegraph instrument in its office, nor that defendant shall attend to it and take messages from it, nor that it shall receive or transmit verbal messages from or to such other telegraph company. We think the defendant is not violating the statute.

The writ of mandamus will be denied.

LANCASHIRE INSURANCE COMPANY, *Appt.*,
v.
John CORBETTS for Use of Hugh R. WILSON *et al.*

(165 Ill. 592.)

1. **A foreign corporation having property** and agents in the state, and transacting business there, may be garnished for a debt due to a nonresident.
2. **The jurisdiction of garnishment of a debt** is not determined by the situs of the debt but by the liability of the garnishee to be sued therein.
3. **The mere service of the garnishment writ** does not give the court exclusive jurisdiction as against a garnishment proceeding subsequently begun in another state.
4. **A judgment against a garnishee, rendered without fraud or collusion** after full disclosure of a prior garnishment in a court of another state having collateral jurisdiction, must, after it has been satisfied, be held a complete bar to the proceeding in the other state.
5. **Concurrent jurisdiction exists** in the courts of different states for the garnishment of a foreign corporation which by its agents is doing business in each state.

(January 19, 1897.)

APPEAL by defendant from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County in favor of plaintiff in a garnishment proceeding to reach funds in the hands of defendant which were alleged to belong to Corbetts. *Reversed.*

The facts are stated in the opinion.

Mr. **Myron H. Beach,** for appellant:

An insurance company cannot be subject to garnishment or trustee process because of a claim arising under a policy until proofs of loss required by the terms of the policy have been waived by the company or furnished to the company.

Lovejoy v. *Hartford F. Ins. Co.* 11 Fed. Rep. 63; *Weidert* v. *State Ins. Co.* 19 Or. 261; *Davis* v. *Davis*, 49 Me. 282; *Gies* v. *Bechtner*, 12 Minn. 279; *Nickerson* v. *Nickerson*, 80 Me. 100; *Plimpton* v. *Bigelow*, 93 N. Y. 592; *Dowling* v. *Lancashire Ins. Co.* 89 Wis. 96; *Godfrey* v. *Macomber*, 128 Mass. 188; *Richardson* v. *Lester*, 83 Ill. 55; *Hanover F. Ins. Co.* v. *Connor*, 20 Ill. App. 297; 2 May, Ins. § 459 G; 2 Biddle, Ins. § 1356, p. 507.

An indebtedness to be subject to garnishment must be certainly owing at the time of the service of garnishment process.

Lovejoy v. *Hartford F. Ins. Co.* 11 Fed. Rep. 63; Drake, Attachm. 3d ed. § 667; *Dowling* v. *Lancashire Ins. Co.* 89 Wis. 96; *McCoy* v. *Williams*, 6 Ill. 584; *Cairo & St. L. R. Co.* v. *Hindman*, 85 Ill. 521; *Wood* v. *Buxton*, 108 Mass. 102; *Otis* v. *Ford*, 54 Me. 104; *Jordan* v. *Jordan*, 75 Me. 100; *Hopson* v. *Dinan*, 48 Mich. 612.

A garnishee having once answered, funds of the debtor coming into his hands after such answer, and paid out previous to the filing of additional interrogatories, cannot be reached by the filing of new interrogatories.

American Exch. Nat. Bank v. *Moxley*, 50 Ill. App. 314; *Young* v. *First Nat. Bank*, 51 Ill. 73, *Eddy* v. *O'Hara*, 132 Mass. 56; Drake, Attachm. § 462.

The policies or contracts of insurance by virtue of which the plaintiffs in this action, attaching creditors of John Corbetts, seek to recover, were executed by the Lancashire Insurance Company, in the city of Ripon, Wisconsin, to John Corbetts, respectively, in August and September, 1892.

They remained in his possession until delivered by him on the execution of an assignment for the benefit of his creditors to Carter, his assignee, also in Ripon, Wisconsin, and remained in said state until taken up by payment of the judgment rendered in *Downing* v. *Corbetts*, in the circuit court of Milwaukee county, Wisconsin, May 27, 1893.

The situs of the indebtedness under the contract was either in the state of the residence of the assured, the creditor under the contract, or that of the debtor, the insurer,—in either Wisconsin, where Corbetts resided, or in Manchester, England, where the insurance company had its habitat.

NOTE.—As to garnishment of debt of a nonresident, see Illinois C. R. Co. v. Smith (Miss.) 19 L. R. A. 577, and *note;* also Missouri P. R. Co. v. Sharitt (Kan.) 8 L. R. A. 385; Reimers v. Seatco Mfg. Co. (C. C. App. 6th C.) 30 L. R. A. 364; Wyeth Hardware & Mfg. Co. v. Lang (Mo.) 27 L. R. A. 651; Neufelder v. German American Ins. Co. (Wash.) 22 L. R. A. 287; Bragg v. Gaynor (Wis.) 21 L. R. A. 161; and Douglass v. Phenix Ins. Co. (N. Y.) 29 L. R. A. 113.

See also 40 L. R. A. 237; 41 L. R. A. 331; 42 L. R. A. 283; 44 L. R. A. 101; 45 L. R. A. 257; 48 L. R. A. 452.

Renier v. *Hurlbut*, 81 Wis. 24, 14 L. R. A. 562; *Cleveland, P. & A. R. Co.* v. *Pennsylvania* ("*State Tax on Foreign-Held Bonds*"), 82 U. S. 15 Wall. 300, 21 L. ed. 179; *Missouri P. R. Co.* v. *Sharritt*, 43 Kan. 375, 8 L. R. A. 385; *Bowen* v. *Pope*, 125 Ill. 28; *Haggerty* v. *Ward*, 25 Tex. 144; *Everett* v. *Connecticut Mut. L. Ins. Co.* (1894) 4 Colo. App. 509; *Williams* v. *Ingersoll*, 89 N. Y. 508; *Plimpton* v. *Bigelow*, 93 N. Y. 596; *Douglas* v. *Phenix Ins. Co.* 63 Hun, 393.

Proofs of loss, the furnishing of which was the condition precedent to the recovery of any claim under the policies, had not been rendered to the garnishee insurance company at the time of the service of garnishment process, or at the time of filing the answer to the original interrogatories, and therefore the claim was uncertain and contingent, and was not of such a nature as to make it the subject of garnishment process at those times.

This being the case, the circuit court of Cook county, Illinois, obtained no jurisdiction over any indebtedness up to and at the time of filing the original answer.

Lovejoy v. *Hartford F. Ins. Co.* 11 Fed. Rep. 63; Drake, Attachm. § 706; *Minard* v. *Lawler*, 26 Ill. 301; *Zepp* v. *Hager*, 70 Ill. 223; *Mills* v. *Duryee*, 11 U. S. 7 Cranch, 481, 3 L. ed. 411; *Crafts* v. *Clark*, 31 Iowa, 77; *D'Arcy* v. *Ketchum*, 52 U. S. 11 How. 165, 13 L. ed. 648; *M'Elmoyle* v. *Cohen*, 38 U. S. 13 Pet. 312, 10 L. ed. 177.

Messrs. **Flower, Smith, & Musgrave,** for appellees:

Debts owing the defendant may be garnished before the debtor himself would have had a right of action against the garnishee.

Rev. Stat. chap. 62, §§ 5, 7, 15, 19; *Young* v. *First Nat. Bank*, 51 Ill. 73; *Snider* v. *Ridgeway*, 49 Ill. 522; *Hanover F. Ins. Co.* v. *Connor*, 20 Ill. App. 297; Drake, Attachm. 7th ed. §§ 549, 550.

The practice of filing additional interrogatories after a garnishee has once answered, and requiring further answers, is well established.

Empire Car Roofing Co. v. *Macey*, 115 Ill. 390; Drake, Attachm. § 642; Waples, Attachm. § 351.

A nonresident can be garnished for a debt due to a nonresident under a contract made in another state.

Mineral Point R. Co. v. *Barron*, 83 Ill. 365; *Hannibal & St. J. R. Co.* v. *Crane*, 102 Ill. 249, 40 Am. Rep. 581; *Wabash R. Co.* v. *Dougan*, 142 Ill. 248; *Roche* v. *Rhode Island Ins. Asso.* 2 Ill. App. 360; *Henderson* v. *Schaas*, 35 Ill. App. 155; *Glover* v. *Wells*, 40 Ill. App. 350; *American Cent. Ins. Co.* v. *Hettler*, 46 Ill. App. 416; Waples, Attachm. 2d ed. p. 322; *Harvey* v. *Great Northern R. Co.* 50 Minn. 405, 17 L. R. A. 84; *Wyeth Hardware & Mfg. Co.* v. *H. F. Lang & Co.* 127 Mo. 242, 27 L. R. A. 651; *Connor* v. *Hanover Ins. Co.* 28 Fed. Rep. 549.

The pendency of an attachment suit here might have been successfully pleaded in abatement by the insurance company in any attachment suit subsequently brought in another state, and the rights of the garnishee fully protected.

Roche v. *Rhode Island Ins. Asso.* 2 Ill. App. 360; Drake, Attachm. 7th ed. 700.

On rehearing.

No court has gone further in protecting the rights of domestic creditors as against foreign creditors than has this court.

Holbrook v. *Ford*, 153 Ill. 633, 27 L. R. A. 324; *Townsend* v. *Coxe*, 151 Ill. 62; *Juilliard* v. *May*, 130 Ill. 87; *Woodward* v. *Brooks*, 128 Ill. 222, 3 L. R. A. 702; *May* v. *First Nat. Bank*, 122 Ill. 551.

Can there be any doubt that the defendant Corbetts, although a citizen of Wisconsin, and although the contract should have been made in Wisconsin and the policy delivered and held there, could have come to Illinois and sued here the insurance company, this garnishee?

Hannibal & St. J. R. Co. v. *Crane*, 102 Ill. 249, 40 Am. Rep. 581; *Roche* v. *Rhode Island Ins. Asso.* 2 Ill. App. 364; *Wabash R. Co.* v. *Dougan*, 142 Ill. 253; *Connor* v. *Hanover Ins. Co.* 28 Fed. Rep. 549.

It is rather remarkable that this court should hold that because the courts of Wisconsin have repudiated this very just doctrine in this particular case, therefore this court should acquiesce and thus defeat the claims of the citizens of its own state.

2 Kent, Com. 17th ed. 122; *O'Neil* v. *Nagle*, 14 Daly, 492; Drake, Attachm. 7th ed. § 700; *Irvine* v. *Lumbermen's Bank*, 2 Watts & S. 190; *Cheongwo* v. *Jones*, 3 Wash. C. C. 359; *Mattingly* v. *Boyd*, 61 U. S. 20 How. 128, 15 L. ed. 845; *Sargent* v. *Sargent Granite Co.* 6 Misc. 384; *Wheeler* v. *Raymond*, 8 Cow. 315; *Harvey* v. *Great Northern R. Co.* 50 Minn. 405, 17 L. R. A. 84; *Baltimore & O. R. Co.* v. *May*, 25 Ohio St. 347; *American Bank* v. *Rollins*, 99 Mass. 313, *Lawrence* v. *Remington*, 6 Biss. 44; *Baltimore & O. R. Co.* v. *May*, 25 Ohio St. 347.

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

The appellant insurance company had its domicil of origin in Great Britain, but, by compliance with the laws of each of the states of Illinois and Wisconsin relating to foreign corporations, it transacted business and kept agents and property in both states. In a proceeding by foreign attachment in the circuit court of Cook county against one Corbetts, who lived in Wisconsin, appellees Wilson Bros. & Co. on October 6, 1892, garnished appellant, by process that day served on its agent in Chicago, for a claim of Corbetts against it upon an insurance policy on a stock of goods in Wisconsin, which goods had on October 3 been partially destroyed by fire. Afterwards, but in the same month, garnishment proceedings were instituted in Wisconsin by one Dowling, a creditor of Corbetts, and appellant, by service upon its agent in Wisconsin, was garnished for the same debt owing to Corbetts. Under the facts as they appear, we must hold that the effect of what was done in Wisconsin was that appellant set up in proceedings there the prior garnishment in Illinois, alleging that the jurisdiction here was prior and exclusive; but it was adjudged by the Wisconsin court (a court of competent jurisdiction), following decisions of the supreme court of that state, that the circuit court of Cook county, Illinois, was without jurisdiction in the premises, and

that its proceedings were no defense to the suit in Wisconsin. Judgment was then rendered against the garnishee, which it paid under the compulsion of the judgment and of the laws of Wisconsin, which provided that no insurance company against which any judgment existed and remained unpaid sixty days after its rendition should issue any new policy in that state, and prescribed heavy penalties against officers and agents who should violate the statute. After the first answer in this cause, filed by the garnishee in the Cook county circuit court October 6, 1872, denying all indebtedness to Corbetts, appellees took no further action for nearly two years, nor until the judgment in Wisconsin had been paid, when they filed additional interrogatories. By an amended answer to these interrogatories, appellant set up the Wisconsin proceedings, statute, judgment, and the payment of the judgment; also, that, at the time of the service of the writ in the case at bar, no proofs of loss had been made by Corbetts, and therefore the alleged debt was contingent and uncertain, as it was not, by the policy, payable until sixty days after receipt of proofs of loss, and that it was not, therefore, subject to garnishment. Upon a trial by the court upon agreed facts, the defense was overruled, and judgment rendered against appellant for the amount shown by its answer to have become due and payable to Corbetts under the policy and by virtue of the fire loss. The appellate court having affirmed the judgment, appellant now brings the record to this court, insisting that the law has not been properly adjudged to it in the courts below; that, having fully discharged its duty under the laws of both states, it should not be compelled to pay the debt twice.

The arguments of counsel have been chiefly addressed to the second question, *viz.*, whether, at the time of the service of the writ upon the garnishee, the alleged debt to Corbetts was anything more than a contingent liability, dependent upon the compliance by Corbetts with the provision of the policy requiring proofs of loss to be furnished by him to appellant within a certain time. But, from the view we take of the case, it will not be necessary to consider this question. We are free to say, at the outset, that we cannot look with favor upon any construction of the law which would impose a double liability upon a garnishee who, without collusion, fraud, or negligence, has undertaken to fully discharge his duties under apparently conflicting laws of different jurisdictions. It is, of course, true that every state must enforce its own laws within its own borders for the protection of its own citizens; but either the law, or the construction of it by the courts, in one or the other of the states, is contrary to natural justice, which requires of a garnishee, standing indifferent between creditors contending in different states for the same debt, the payment of that debt more than once. It seems to be the doctrine in Wisconsin, as laid down by the supreme court of that state in *Renier* v. *Hurlbut*, 81 Wis. 24, 14 L. R. A. 562, that in garnishment proceedings the jurisdiction of the court is dependent upon the situs of the debt sought to be appropriated to the payment of the plaintiff's demand, and that, if the situs of the debt is without the jurisdiction, the court has no power to proceed, or to render any judgment against the garnishee. Now, it is the generally accepted doctrine that, so far as so intangible a thing as a debt can be held to have a situs, it follows the creditor, or owner of the credit, and is at his domicil. *Holbrook* v. *Ford*, 153 Ill. 633, 27 L. R. A. 324; *Pomeroy* v. *Rand-McNally & Co.* 157 Ill. 176; *Wyeth Hardware & Mfg. Co.* v. *H. F. Lang & Co.* 127 Mo. 242, 27 L. R. A. 651; Story, Confl. L. § 362; *Consolidated Tank Line Co.* v. *Collier*, 148 Ill. 259. And the notion that the situs of the debt determines the jurisdiction of the court in garnishment has led to the creation of the fiction that for the purposes of garnishment the situs of the debt is changed, and becomes the place where the garnishee lives, and not at the domicil of his creditor. As before said, the proceedings must be had in the jurisdiction of the garnishee, where service can be had upon him, but it does not at all follow that it is because that is the situs of the debt. Thus, it is said by Shinn, in his late work on Attachment and Garnishment (p. 863): "Foreign corporations are subject to the process of garnishment in all cases in which an original action may be commenced against them in the courts of this state to recover the debt in respect to which the garnishment process is served. This is in harmony with the rule before stated, that the demand must be one on which an action at law could be brought by the principal debtor."

Take the case at bar. Actual service of process in the different suits could be and was had on the appellant company in both states, Illinois and Wisconsin, and it was subject to garnishment in both states; and it would have been subject to similar proceedings in any other states in which, in compliance with their laws, it had established itself for business purposes. Evidently, however, this would not be so for the reason that the debt had a situs in each and all of such states at one and the same time, when it also had a situs at the domicil of the creditor of the garnishee, but the true reason is that the garnishee insurance company was liable to suit by its creditors for the collection of the debt in each and all of the states where it had so established itself for business purposes. To hold that the situs of the debt determines the question of jurisdiction is practically to hold that a debt cannot be garnished at all in foreign attachments, for the very ground of a foreign attachment is the nonresidence of the principal defendant, who, in cases of garnishment, is the creditor of the garnishee; and, if the debt which the garnishee owes to his creditor can be reached only by proceedings had where such creditor resides (that is, where the debt has its situs), it cannot be reached in foreign attachment at all. This is clearly pointed out in an exhaustive opinion by Pitney, V. C., in *National F. Ins. Co.* v. *Chambers*, 53 N. J. Eq. 468, where he shows the utter fallacy of the reasoning used to support decisions that jurisdiction in such cases depends on the situs of the debt attached or garnished. A further reason readily presents itself, in the fact that no proceedings in garnishment of any kind can be maintained where the principal defendant has his domicil (that is, at the situs of the debt), unless the debtor to be served with garnishee process is within the jurisdiction

of the court. The principal defendant in attachment proceedings may, except for the purpose of obtaining a personal judgment, be brought into the court by constructive service, but jurisdiction of the garnishee can be obtained only by actual service of process. 2 Shinn, Attachm. 1000. Thus, it is seen that in garnishment proceedings the place of the residence of the garnishee is of far more importance than the place of residence of his creditors, in obtaining jurisdiction to render a judgment against a garnishee. Id. § 490. And it has been expressly decided by this court that a foreign corporation, having property and agents in this state and transacting business here, may be garnished in our courts for a debt due a resident of the state of its domicil of origin. *Hannibal & St. J. R. Co.* v. *Crane*, 102 Ill. 249, 40 Am. Rep. 581. See also *Wabash R. Co.* v. *Dogan*, 142 Ill. 248. And the reason given is that the foreign corporation had become subject to the process of our courts. And while the courts of Wisconsin and some other states seem to hold to the doctrine that, where there is no personal service of process on the principal defendant, the proceedings must be instituted in the jurisdiction where the debt had its situs (that is, the domicil of the principal defendant), or else at the domicil of origin of the garnishee corporation, we are satisfied that the great weight of modern authority is otherwise, and is in harmony with the rules adopted in this state. *Harvey* v. *Great Northern R. Co.* 50 Minn. 405, 17 L. R. A. 84; *Mobile & O. R. Co.* v. *Barnhill*, 91 Tenn. 395; *Handy* v. *Insurance Co.* 37 Ohio St. 366; *Wyeth Hardware & Mfg. Co.* v. *H. F. Lang & Co.* 127 Mo. 242, 27 L. R. A. 651; *Nichols* v. *Hooper*, 61 Vt. 295; *Cross* v. *Brown*, 19 R. I. —; *Mooney* v. *Buford & G. Mfg. Co.* 34 U. S. App. 581, 18 C. C. A. 421, 72 Fed. Rep. 32. This rule is limited, of course, to the garnishment of debts, and has no application to attachment or garnishment proceedings to reach tangible property having an actual situs in another state, for in such a case the property sought to be reached is without the jurisdiction of the court. 2 Shinn, Attachm. 858; *Bowen* v. *Pope*, 125 Ill. 28; Waples, Attachm. 227, 249.

It is said by all the authorities that the garnisher is, in his relation to the garnishee, merely substituted to the rights of his own debtor, and can recover only where the principal defendant could recover. *Samuel* v. *Agnew*, 80 Ill. 553; *Richardson* v. *Lester*, 83 Ill. 55; 2 Shinn, Attachm. 853. And, as the principal debtor could have recovered the debt garnished in the case at bar by suit in Illinois, no good reason appears why attachment and garnishment would not lie in favor of appellees here. It is obvious, then, that the grounds upon which the Wisconsin court based its judgment are untenable. But the question still remains whether the Wisconsin court did not have jurisdiction to garnish the same debt in Wisconsin, under its laws, and to render the judgment it did render, and whether the payment of that judgment was not sufficient, when set up in the answer, to bar the further prosecution in Illinois of the suit at bar.

It is well settled that in ordinary actions a suit pending in one state cannot be pleaded in abatement or in bar of another suit in a different state, but that both may proceed until judgment is rendered in one of such suits, when it may be set up in bar of the further maintenance of the other, and that it makes no difference which was first commenced. *McJilton* v. *Love*, 13 Ill. 486, 54 Am. Dec. 449; *Allen* v. *Watt*, 69 Ill. 655; *Dunham* v. *Dunham*, 162 Ill. 589, 35 L. R. A. 70; *Jones* v. *Jones*, 108 N. Y. 415. But the suit in Wisconsin and the suit in Illinois were not between the same parties, the plaintiffs in garnishment in the two cases being different persons; and, while both were proceeding to appropriate and recover the same debt to satisfy their respective demands against the same creditor of the garnishee, it has been held (whether correctly or not we are not called upon to decide) that a judgment in one such case, without payment, cannot be set up in bar of the other. 2 Black, Judgm. ¶¶ 597, 801. And it has also been held that by the service of the garnishee summons, or "trustee process," as it is called in some of the states, the garnisher acquires a contingent or inchoate lien upon the debt, or, as it is sometimes said, there has been an involuntary assignment of the same to him, dependent, of course, for its perfection, upon the subsequent obtaining of judgment (*National F. Ins. Co.* v. *Chambers*, 53 N. J. Eq. 468; 8 Am. & Eng. Enc. Law, p. 1101, note; Shinn, Attachm. *supra*), and that where, after a garnishee or trustee has been so charged by service of the process, he goes into another state, and is there garnished by another person for the same debt, the first proceeding may be pleaded in abatement to the second (*Embree* v. *Hanna*, 5 Johns. 101; *Wallace* v. *McConnell*, 38 U. S. 13 Pet. 136, 10 L. ed. 95; *Whipple* v. *Robbins*, 97 Mass. 107, 93 Am. Dec. 64; *American Bank* v. *Rollins*, 99 Mass. 313). Thus, in *Embree* v. *Hanna*, 5 Johns. 101, Chief Justice Kent, among other things, said: "If the attachment had been conducted to a conclusion, and the money recovered of the present defendant, I think it could not have been made a question whether that payment would not be a bar to the present suit. Nothing can be more clearly just than that a person who has been compelled by a competent jurisdiction to pay a debt once should not be compelled to pay it over again. It has accordingly been a settled and acknowledged principle in the English courts that, where a debt has been recovered of a debtor, under this process of foreign attachment, in any English colony, or in these United States, the recovery is a protection in England to the garnishee against his original creditor, and he may plead it in bar,"—citing cases. If, then, the defendant would have been protected under a recovery had by virtue of the attachment, and could have pleaded such recovery in bar, the same principle will support a plea in abatement of an attachment pending and commenced prior to the present suit. The attachment of the debt in the hands of the defendant fixed it there in favor of the attaching creditors. The defendant could not afterwards lawfully pay it over to the plaintiff. The attaching creditors acquired a lien upon the debt binding upon the defendant, and which the courts of all other governments, if they recognize such proceedings at all, cannot fail to regard. *Qui prior est tempore potior est*

jure. If we were to disallow a plea in abatement of the pending attachment, the defendant would be left without protection, and be obliged to pay the money twice; for we may reasonably presume that, if the priority of the attachment in Maryland be ascertained, that state would not suffer that proceeding to be defeated by the subsequent act of the defendant in going abroad and subjecting himself to a suit and recovery here. Substantially the same doctrine was, in a similar case, announced by the Supreme Court of the United States in *Wallace* v. *McConnell*, 38 U. S. 13 Pet. 136, 10 L. ed. 95. So also, to a certain attest, *Whipple* v. *Robbins*, 97 Mass. 107, 93 Am. Dec. 64, and *American Bank* v. *Rollins*, 99 Mass. 313 (Massachusetts cases), where, in the latter case, it was said: "A trustee process is in the nature of a proceeding *in rem.* It is a sequestration of the debt due from the trustee in order that it may be devoted to the payment of one to whom the trustee's creditor is himself indebted." And it was there said that the doctrine constitutes an important exception to the ordinary rule that *lis pendens* in a foreign court is not a good plea. In *Whipple* v. *Robbins*, 97 Mass. 107, 93 Am. Dec. 64, where it was held that the payment of the judgment rendered in Connecticut in a trustee proceeding begun after the suit was commenced in Massachusetts was not a sufficient defense to the latter suit, where such a judgment was obtained by default, the court said: "But the trustee did not make any disclosure of the pendency of the present suit. He withheld from the court in Connecticut this fact essential to a fair adjudication. He allowed himself to be defaulted, and his payment under such circumstances must be regarded as voluntary, if not collusive, and therefore no protection against the present action. *Wilkinson* v. *Hall*, 6 Gray, 568. What effect we should have given to the payment under the Connecticut judgment if the trustee had been compelled to pay there, notwithstanding a full disclosure of the facts, because the courts of that state had disregarded the pendency of this action and refused to adopt the principles which we regard as settled by *Wallace* v. *McConnell*, is a question we need not prematurely consider." In the case cited (*Wilkinson* v. *Hall*) the judgment which had been paid and which was pleaded in bar was rendered in the trustee proceedings begun after the *Wilkinson Case* was commenced, and it was held not to be a good bar, because the trustee withheld facts essential to the determination of the cause, and the court said: "It is obviously just, that if he has been compelled to pay the debt once by the judgment of the court of competent jurisdiction, he should not be compelled to pay it again. If, therefore, the debt was recovered of the defendant under a process of foreign attachment, fairly and without collusion on his part, he may effectually plead it in bar here." In *Garity* v. *Gigie*, 130 Mass. 184, where both suits were begun on the same day, but the trustee, after having been served in the morning in the state of New Hampshire, went to Boston, and was there served with process in the afternoon, and judgment was first rendered in the New Hampshire case, and was paid, Mr. Chief Justice Gray, in delivering the opinion of the supreme court of Massachusetts, said: "That court [the New Hampshire court] having first acquired jurisdiction of the fund attached, and having, after a full disclosure by the trustee of the facts relating to the suit pending and the service made in this commonwealth, rendered judgment and execution against him, upon which he has paid over the fund, that payment affords a conclusive reason for not charging him anew."

It will be noticed that in these cases more importance is given to the fact that judgment had been rendered against the trustee in a court of competent jurisdiction in another state, without fraud or collusion on his part, and upon full disclosure by him, that he had, by compulsion of the law, paid such judgment, than to mere priority in the time in the beginning of the suits or in the service of the writs. There is, moreover, a distinction, we think, between cases of the character of those above commented upon and the case at bar. However slight the distinction may appear, still this is not a case where the garnishee, having been duly served with process of garnishment in one state, and become subject to the jurisdiction of the court there, and bound to respond exclusively to whatever judgment that court might render, has gone into another state and there been served with another writ, in favor of another creditor of the same debtor, as in *Embree* v. *Hanna*, 5 Johns. 101. In such a case the courts of the latter state might well feel bound, upon principles of comity, to recognize as superior the right of the plaintiff in the first suit, which had attached before they had any jurisdiction of the garnishee, and thus, while fully regarding the rights of its own citizen, give due observance to the maxim that he who is first in point of time is stronger in right. In the case at bar the garnishee was established for business purposes, and had agents in both states, and was subject to the process and jurisdiction of the courts of both states at one and the same time. While we cannot agree to the doctrine which the Wisconsin court seems to hold, that the mere fact that because Corbetts, who owned the credit sought to be reached, resided in that state, their jurisdiction was exclusive, neither can we hold that, by the mere service of the garnishment writ, exclusive jurisdiction was acquired by this court in this state. If the principle stated in *Wilkinson* v. *Hall*, 6 Gray, 568, be applied to the case at bar,—a case having other features which have been noticed, and which make its application still more just,—the Wisconsin judgment, having been rendered after a full disclosure by the garnishee of the prior garnishment, and without any fraud or collusion on its part, must, together with the enforced payment thereof, be held a complete bar here. This, we think, is obviously true, whether, upon legal principles applicable to the facts of this case, it be held that the proceeding is in the nature of a proceeding *in rem*, or, without regard to the situs of the *res*, it be held that the courts of this state have jurisdiction on the ground that the garnishee is subject to the process of our courts, and liable to be sued here for the recovery of the debt sought to be appropriated. For if, by legal fiction, it can be said that, for the purpose of garnishment in

foreign attachment proceedings, the *res* was in in this state, and might therefore be proceeded against here, still by no process of reasoning can it be held that it was any the less in Wisconsin at the same time, where not only the garnishee was also established for business purposes, but where its creditor, the owner of the debt, had his domicil. It was therefore a case where there was concurrent jurisdiction in the two states, and exclusive jurisdiction in neither. But the plea in abatement filed in the Wisconsin court went to the jurisdiction of that court, by alleging that the jurisdiction acquired by the circuit court of Cook county was prior and exclusive; and, as the jurisdiction of the Wisconsin court was concurrent with said circuit court, the plea was properly held to be insufficient to abate the suit. The rule that, where courts have concurrent jurisdiction, the one first acquiring jurisdiction will retain it until the matter is finally disposed of, does not apply, as before said, to courts in different states, but in such cases the suits may proceed concurrently. And, where they are between the same parties, the judgment first rendered may be pleaded in bar to the further maintenance of the other suit. This rule has been held to apply to divorce cases, where the separated pair are residing and suing for a divorce each in a different state. The suits partaking of the nature of proceedings *in rem* (that is, as against the status of marriage which exists between the pair in both states), the judgment first rendered dissolved the marriage, especially where there has been personal service, is a bar when pleaded to the other suit, though such other suit was first commenced. *Jones* v. *Jones*, 108 N. Y. 415; *Dunham* v. *Dunham*, 162 Ill. 589, 35 L. R. A. 70. If, then, the courts in both states had the right to proceed concurrently, the judgment first rendered was a valid judgment, and could be, and was, enforced against the garnishee. We have been referred to no case, and we know of none, where a second payment has been enforced upon a state of facts similar to that contained in this record. If the garnishee may, without its fault, and after complying in good faith with the laws in both jurisdictions, be compelled to pay the same debt twice, it may be compelled to pay it as many times as there are jurisdictions in which it transacts business. Yet it is the doctrine of all the authorities that the garnishee is not to be placed in any worse position by the garnishment than he occupied as the debtor of the principal defendant, nor subjected to any greater liabilities because of the garnishment.

We have established the doctrine in this state, as before shown (*Hannibal & St. J. R. Co.* v. *Crane*, 102 Ill. 249, 40 Am. Rep. 581), that the company was subject to garnishment here because it was subject to the process of our courts, and could be sued and the debt recovered here, but it does not follow that, because the writ was first served on the garnishee in this state, our courts acquired exclusive jurisdiction, and that the courts of Wisconsin, where the garnishee was also subject to suit for the recovery of the same debt, must await the final action of our courts. It could not reasonably be expected that the courts of other states would accede to such a doctrine. Yet nothing short of this would support the judgment appealed from, unless, indeed, it be held that it is the mere misfortune of the appellant that it is liable to respond as garnishee for the same debt in every state where it may be temporarily domiciled for business purposes. And it is manifest that the grounds on which it has been held that the courts of this state will sustain garnishment proceedings against foreign corporations present and doing business in this state, to reach debts owing to citizens of other states, are equally potent to support garnishment proceedings in another state at the same time in favor of another creditor. To reverse this judgment is not to discriminate against our own citizens, as contended by counsel. They have the same facilities for obtaining the first judgment and its satisfaction as have the citizens of other states, and can exercise the same diligence, and thus avoid conflicts of jurisdiction, and the tieing up of the fund by indefinite delay. We must therefore hold that by force of the judgment and its satisfaction the debt which appellees were seeking to appropriate to the payment of their demand was extinguished, not by the voluntary act, fraud, or collusion of the garnishee (which, by all the authorities, would have destroyed its immunity from a second payment), but by compulsion of law. After such payment there was no longer in existence any debt to sustain the further proceedings by appellees in the circuit court of Cook county. For the error in not discharging the garnishee *the judgments of the Appellate and Circuit Courts are reversed.*

INDIANA SUPREME COURT.

Morton E. RUNNER, Assignee, etc., of Commercial Bank of Oxford, *Appt.*,
v.
Robert S. DWIGGINS.

(........Ind.........)

1. **The statutory liability of a shareholder** of an insolvent bank cannot, in the absence of statutory authority, be enforced by the assignee of such bank.

2. **The assignee of an insolvent bank cannot enforce the statutory liability** against a shareholder, under Rev. Stat. 1894, § 2908, providing that the trustee shall proceed to collect the "rights and credits" of the assignor.

(March 11, 1897.)

APPEAL by plaintiff from a judgment of the Circuit Court of Lake County in favor of defendant in an action brought to en-

NOTE.—The above case emphasizes the general rule on the subject, and the authorities elsewhere substantially agree with the doctrine of this case.

As to the enforcement of stockholders' liability outside of the state, see *note* to Cushing v. Perot (Pa.) 34 L. R. A. 737.

See also 38 L. R. A. 415; 47 L. R. A. 617.

force a statutory liability against defendant as a holder of stock in an insolvent bank. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Haywood & Burnett** and **Olds & Griffin,** for appellant:

The method of enforcement of the statutory liability by suit of all the creditors, or by one or more creditors for the benefit of all, against all the stockholders, is totally inapplicable under the modified liability of stockholders given by § 2933.

Cuykendall v. *Corning,* 88 N. Y. 136.

A receiver is the representative of the debtor, and is not a trustee for the creditors, and consequently could not act for the creditors as he is not their agent, but is the agent of the debtor.

State, Shepard, v. *Sullivan,* 120 Ind. 199.

On the other hand, the assignee is the representative of the creditors, and is not the agent of the debtor; as the assignee is in the true sense a trustee, it is entirely consistent with principle to hold that he is the representative of the beneficiaries and not of the creator of the trust.

Voorhees v. *Carpenter,* 127 Ind. 303; *Root* v. *Potter,* 59 Mich. 498; *Robinson* v. *Bliss,* 121 Mass. 428; 28 Cent. L. J. 270; *Ward* v. *Lewis,* 4 Pick. 518; *Doe, Grimsby,* v. *Ball,* 11 Mees. & W. 532; Burrill, Assignm. 622, § 392.

During the whole course of the trust the assignee is bound to look primarily to the interests of the creditors whom he is in the first instance represents.

Burrill, Assignm. p. 622, ¶ 390.

In order to carry property, things in action, or valuable interests into the trust, it is not necessary that they be described or mentioned in the deed of assignment.

Seibert v. *Milligan,* 110 Ind. 106; *Hasseld* v. *Seyfort,* 105 Ind. 534.

The intent of the law in relation to voluntary assignments for the benefit of creditors is to secure an equitable distribution of the debtor's estate and prevent one creditor from obtaining undue advantage over others, and the "court should not, by a technical construction of the language of the law, defeat the evident legislative purpose."

Black v. *Weathers,* 26 Ind. 245.

The spirit of the act contemplates the assignee as representing creditors in bringing suits, looking after their interest, and gathering together the assets and resources of the assignor for the purpose of paying the debts of the creditors.

Wheeler v. *Thayer,* 121 Ind. 64.

The purpose of the law is to bring to the assignee all the available means to pay the debts of creditors.

Voorhees v. *Carpenter,* 127 Ind. 302; *Root* v. *Potter,* 59 Mich. 498.

Messrs. **Simon P. Thompson, Frank Foltz, H. R. Kurrie,** and **Elliott & Elliott,** for appellee:

All the stockholders should be joined, and the decree so molded as to make the proper apportionment; and this is the proper practice under our statute.

Overmyer v. *Cannon,* 82 Ind. 457; *Umsted* v. *Buskirk,* 17 Ohio St. 113; *Perry* v. *Turner,* 55 Mo. 418; *Pierce* v. *Milwaukee Constr. Co.* 38 Wis. 253; *Coleman* v. *White,* 14 Wis. 700, 80 Am. Dec. 797; *Pfohl* v. *Simpson,* 74 N. Y. 137.

The statutory liability of stockholders under § 2933, 2 Rev. Stat. 1894, is to the creditors and not to the corporation, and is secondary and not primary, being very similar to that of a surety.

If this be true, the corporation is certainly a necessary party, unless it is shown, at least, that judgment has already been obtained against it.

2 Beach, Priv. Corp. § 702; *Rocky Mountain Nat. Bank* v. *Bliss,* 89 N. Y. 338; *Patterson* v. *Franklin* (Pa.) 35 Atl. 205.

Whether the liability be secondary or primary, it is to creditors and not the corporation, and it is in no sense an asset of the corporation.

Such statutory liability, or the right to enforce it, did not pass to the assignee, although in a sense, and to some extent, he may represent all the creditors as well as the corporation.

Morawetz, Priv. Corp. § 869; Thomp. Corp. § 3560; Taylor, Priv. Corp. 721; *Jacobson* v. *Allen,* 12 Fed. Rep. 454; *Dutcher* v. *Marine Nat. Bank,* 12 Blatchf. 435; *Bristol* v. *Sanford,* 12 Blatchf. 341; *Wright* v. *McCormack,* 17 Ohio St. 86; *Umsted* v. *Buskirk,* 17 Ohio St. 113; *Lane* v. *Morris,* 8 Ga. 468; *Liberty Female College Asso.* v. *Watkins,* 70 Mo. 13; *Hancock Nat. Bank* v. *Ellis,* 166 Mass. 414; *Wincock* v. *Turpin,* 96 Ill. 135; *Farnsworth* v. *Dewey,* 91 N. Y. 308; *Pfohl* v. *Simpson,* 74 N. Y. 137, 138; *Minneapolis Paper Co.* v. *Swinburne Co.* (Minn.) 69 N. W. 144; *Re People's Live Stock Ins. Co.* 56 Minn. 180; *Wallace* v. *Milligan,* 110 Ind. 498.

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

The Commercial Bank of Oxford, Indiana, is a bank of discount and deposit, organized and incorporated under the statutes of this state. Rev. Stat. 1894, § 2921 (Rev. Stat. 1881, § 2684). On the 19th day of May, 1893, being in an insolvent condition, it made a voluntary assignment to appellant under the statutes, authorizing an embarrassed debtor to make a general assignment of all his property in trust for all of his bona fide creditors. Appellee is one of the stockholders of the insolvent bank, and this action was instituted to recover $5,000 by appellant as such assignee, upon the statutory liability of appellee existing under § 2933, Rev. Stat. 1894 (Rev. Stat. 1881, § 2696), being § 13 of the act pertaining to the incorporation of banks, as amended by an act approved March 9, 1895 (p. 202). This section provides that the shareholders of such associations shall be individually responsible to an amount over and above their stock equal to the par value of their respective shares, for all debts or liabilities of the association. Appellee demurred to the complaint, upon the grounds, among others, that appellant had not the legal capacity to sue, and for insufficiency of facts. The demurrer was sustained, and judgment was rendered in favor of appellee.

The principal question presented for our determination is that of the right of appellant, as the assignee of the insolvent banking association, to sue for and enforce against appellee the liability under the statute as a shareholder.

The learned counsel for appellant insist that *this right is vested* in the latter. They cite, however, no statute, nor are we aware of any, that expressly confers upon an assignee of an insolvent corporation the right to enforce such a liability against its stockholders. Section 2899, Rev. Stat. 1894 (Rev. Stat. 1881, § 2662), relating to assignments by failing debtors, provides that "any debtor . . . in embarrassed or failing circumstances may make a general assignment of all of his property," etc. Section 2908, Rev. Stat. 1894 (Rev. Stat. 1881, § 2691), provides that "the trustee shall proceed to collect the rights and credits *of the assignor*," etc. Certainly, it cannot be asserted with any reasonable support that this peculiar liability imposed by the statute upon those who became shareholders of a banking association organized under the existing law is in any sense an asset, right, or interest of the bank, which it, as an insolvent debtor, can, by its deed of assignment, pass to its assignee, or in any manner vest the enforcement thereof in him. In the absence of some statutory provision conferring the right, neither the corporation nor its assignee nor receiver can enforce such a liability as that in question. The statute creating the liability against the stockholders was enacted for the benefit of the creditors of the bank, and it is these creditors, when the right of action accrues, that are authorized, under our present statutes, to maintain the action. This doctrine is affirmed and settled by many authorities. See *Wallace* v. *Milligan*, 110 Ind. 498; *Ewing* v. *Stultz*, 9 Ind. App. 1; *Jacobson* v. *Allen*, 12 Fed. Rep. 454; *Wright* v. *McCormack*, 17 Ohio St. 86; *Umsted* v. *Buskirk*, 17 Ohio St. 113; *Liberty Female College Asso.* v. *Watkins*, 70 Mo. 13; *Re People's Live-Stock Ins. Co.* 56 Minn. 180; *Pfohl* v. *Simpson*, 74 N. Y. 137; *Farnsworth* v. *Wood*, 91 N. Y. 308; *Wincock* v. *Turpin*, 96 Ill. 135; *Dutcher* v. *Marine Nat. Bank*, 12 Blatchf. 435; *Lane* v. *Morris*, 8 Ga. 468; Elliott, Railroads, §§ 185–187; Morawetz, Priv. Corp. § 869; Thomp. Corp. § 3560; Taylor, Priv. Corp. § 721; Cook, Stock & Stockholders, § 216; *Minneapolis Paper Co.* v. *Swinburne Co.* (Minn.) 69 N. W. 144. Mr. Morawetz, in the section of his work above cited, says: "A provision of this character does not *increase the capital* or pecuniary resources of a corporation, except indirectly, by increasing its commercial credit; its object is merely to provide a security for creditors in addition to the security furnished by the company's capital. The liability thus assumed by the shareholders is solely for the benefit of the company's creditors. The corporation and its officers and agents cannot dispose of or control it in any manner. They cannot collect it by an assessment upon the shareholders; nor can they assign it to a trustee for the benefit of creditors, though the corporation be *insolvent*." Judge Thompson, in his Commentaries on Corporations, in the section cited, says: "It may be stated as a general rule, that statutes making stockholders individually liable to creditors, independently of what they owe the corporation on account of their stock, create a right flowing directly from the stockholders to creditors. The sums thus secured to creditors form no part of the assets of the company, but are a supplemental or superadded security for the benefit of creditors. An attempted assignment of this security is therefore inoperative. No action to enforce such liability can be brought by a receiver or assignee of the corporation; such an action must be brought by *one or more* of the creditors." In Cook on Stock & Stockholders, in the section to which we have referred, the *author says*: "The statutory liability of the stockholder is created exclusively for the benefit of corporate creditors. It is not to be numbered among the assets of the corporation, and the corporation has no right or interest in it. It cannot enforce it by an assessment upon the shareholders. Nor can the corporation, upon insolvency, assign it to a trustee for the benefit of creditors." In the case of *Jacobson* v. *Allen*, 12 Fed. Rep. 454, in the course of the opinion *of the court, it is said*: "Numerous authorities recognize the right of a receiver or assignee in bankruptcy to sue for *the recovery of* unpaid stock, but in these cases the corporation could have maintained the action. So, also, the right of such an officer is maintained to recover assets of the corporation which the corporation could not have recovered, because it would have been estopped from asserting its own fraudulent or illegal conduct in the disposition of the assets. These authorities fall short of the present point. The receiver of an insolvent corporation makes his title through *the corporation*. He cannot, through his appointment, acquire that which the corporation never had. He *represents* the creditors of the corporation in the adminstration of his trust, but his trust relates only to the corporate assets. As trustee for creditors, he represents them in following the assets of the corporation, and can assert their rights in cases where the corporation could not have been heard. He is not a trustee for creditors in relation to assets which belong to them individually, or as a body. . . . Neither a receiver, an assignee in bankruptcy, nor an assignee under a voluntary general assignment for the benefit of creditors, each of whom represents creditors as well as the *insolvent*, acquires any right to enforce a collateral obligation given to a creditor or to a body of creditors by a third person for the payment of the debts of the insolvent." In *Farnsworth* v. *Wood*, 91 N. Y. 308, which was an action by a receiver to enforce against stockholders of a corporation the personal liability to creditors imposed by the statute of the state of New York, Rapello, J., speaking for the court, said: "The liability does not exist in favor of the *corporation itself*, *nor* for the benefit of all its creditors, but only in favor of such creditors as are within the prescribed *conditions*. . . . The rights of certain creditors to prosecute their claims against certain of the stockholders never were the property of the corporation, nor rights of action vested in it nor is there any provision of the statute, which transfers these rights of action from the creditors to the receiver."

The contention of appellant that the rule which denies the right of a receiver of a corporation to enforce the statutory liability against a *stockholder is not applicable* to an assignee, is without force, and cannot, in reason, be maintained. In this respect the rights

of an assignee under the assignment are not enlarged over those of a receiver. It is true that either an assignee or receiver of an insolvent corporation may enforce the collection of unpaid stock subscription, and set aside fraudulent conveyances of property made by the corporation. The very object of the law in awarding him this right is to enable him to reach and convert to the payment of the debts of the concern what the law regards as its assets for that purpose. It is true, under a well-recognized rule, the corporation itself will not be permitted to successfully assail its own fraudulent conveyance or disposition of its assets. Its property so conveyed, however, in the eye of the law, is still regarded as assets, so far as creditors are concerned, and may be reached as such, for their benefit, by an action instituted by an assignee or receiver to set aside such fraudulent conveyances. But the liability provided by the statute against the stockholders is not, as we have seen, considered as an asset or right of the corporation, and therefore does not in any manner pass or vest in the assignee by virtue of the assignment; hence the authorities which sustain the right of the assignee to assail a fraudulent disposition by the corporation of its assets do not support appellant's contention in regard to his right to recover in the case at bar. The authorities which deny the right of a receiver to enforce the liability in question are in reason, we think, equally applicable to an assignee of an insolvent corporation. We are of the opinion that this action cannot be maintained by appellant, and the demurrer was therefore properly sustained.

Judgment affirmed.

CALIFORNIA SUPREME COURT.

CALIFORNIA POWDER WORKS, *Appt.*,
v.
ATLANTIC & PACIFIC RAILROAD COMPANY, *Respt.*

(113 Cal. 329.)

1. **A common drayman** employed, not merely to haul powder to a railroad depot, but to ship it to destination, has authority to make a special contract of shipment exempting the carrier from liability for loss by fire.

2. **A carrier receiving blasting powder for transportation** can insist upon such terms and limitation of common-law liability as it sees fit, since it is not obliged to receive and transport such dangerous articles.

3. **A contract exempting a carrier from**

NOTE.—*Limitation of common carrier's duty and liability in case of dangerous articles.*

The law upon this question is to be drawn from inference or from *dicta* rather than from decided cases. CALIFORNIA POWDER WORKS v. ATLANTIC & PACIFIC R. CO. seems to be the first case to have squarely decided that the carrier is not bound to transport dangerous articles, although there has been what may be regarded as a general understanding that such is the fact.

Duty to give notice of dangerous character of article.

It has been generally held that the shipper was bound to notify the carrier if he wished to ship a dangerous substance and some of the cases have intimated that the carrier might refuse to receive the shipment if it wished to do so.

A person who employs a carrier to carry an article of such dangerous nature as to require extraordinary care in its conveyance must communicate the fact to the carrier or he will be responsible for any injury which may result to the carrier from his omission. Farrant v. Barnes, 11 C. B. N. S. 553, 31 L. J. C. P. N. S. 137, 8 Jur. N. S. 868. The court says that the shipper "knowing the dangerous character of the article and omitting to give notice of it to the . . . [carrier] so that he might exercise his discretion as to whether he would take it or not was guilty of a clear breach of duty."

Where the owner of a general ship undertakes that he will receive goods and safely carry them and deliver them at the destination, the shippers undertake that they will not deliver to be carried in the voyage packages of goods of a dangerous nature which those employed on behalf of the shipowner may not by inspection be reasonably expected to know to be of a dangerous nature, without expressly giving notice that they are of a dangerous nature. Brass v. Maitland, 6 El. & Bl. 470, 26 L. J. Q. B. N. S. 49, 2 Jur. N. S. 710.

In Williams v. East India Co. 3 East, 192, it is said "that the declaration in imputing to the defendants the having wrongfully put on board a ship without notice to those concerned in the management of the ship an article of an highly dangerous and combustible nature imputes to the defendants a criminal negligence, cannot be questioned."

The shipper cannot hold the carrier liable for the injury if he delivers to the carrier an article which he knows is liable to do injury to other goods with which it may come in contact as well as to itself, without notifying the carrier of the danger. Hutchinson v. Guion, 5 C. B. N. S. 162, 28 L. J. C. P. N. S. 63, 4 Jur. N. S. 1149.

In Edwards v. Sherratt, 1 East, 604, where grain was shipped at a time when it was in danger of incurring the wrath of a mob, the court says no man in his senses would under these circumstances have taken corn under a liability as a common carrier.

If goods of a dangerous character are shipped without notice to the carrier, and he is ignorant of their character, he will not be liable to the owner in case they are damaged on the voyage. Pierce v. Winsor, 2 Cliff. 18, Affirming Pierce v. Winsor, 2 Sprague, 35.

If a shipper delivers to the carrier in apparently harmless packages a dangerous explosive without notifying him of its contents he will be liable for the injury caused by an explosion. Boston & A. R. Co. v. Shanly, 107 Mass. 576. In that case the court says: "One who has in his possession a dangerous article, which he desires to send to another, may send it by a common carrier if he will take it; but it is his duty to give him notice of its character, so that he may either refuse to take it, or be enabled, if he takes it, to make suitable provision against the danger."

liability for loss by fire from any cause whatsoever in transporting blasting powder is not void as unconscionable and unreasonable.

(July 17, 1896.)

APPEAL by plaintiff from a judgment of the Superior Court for the City and County of San Francisco in favor of defendant in an action to recover the value of property destroyed while in defendant's possession for transportation. *Affirmed.*

The facts are stated in the opinion.

Messrs. **E. S. Pillsbury** and **F. D. Madison**, for appellant:

The bill of lading was not signed by plaintiff or by anyone for it, consequently plaintiff cannot be bound by the clause therein contained whereby defendant attempts to relieve itself from liability for loss by fire.

Schroeder v. *Schweizer Lloyd Transport Versicherung's Gesellschaft*, 66 Cal. 294; Civil Code, § 2309.

Plaintiff cannot be bound by McNally's acts.

The agent acted entirely without authority and consequently the principal cannot be bound by his acts.

Bryan v. *Berry*, 6 Cal. 394; *Beaman* v. *Lovett*, 46 Cal. 387; *Holbrook* v. *McCarthy*, 61 Cal. 216; *Blood* v. *Shannon*, 29 Cal. 393.

There are two essential features of ostensible or apparent authority, *viz.:* the party must believe that the agent had authority, and such belief must be generated by some act or neglect of the person to be held.

Harris v. *San Diego Flume Co.* 87 Cal. 526.

In order to establish such an ostensible authority the duty was imposed upon defendant to show at least one instance wherein the agent has done a like act, and such act had been previously authorized by plaintiff or subsequently ratified.

Robinson v. *Nevada Bank*, 81 Cal. 106; *Consolidated Nat. Bank* v. *Pacific Coast S. S. Co.* 95 Cal. 15.

Authority to sign release could have been conferred only by an instrument in writing.

Civil Code, § 2309; *Schroeder* v. *Schweizer Lloyd Transport Versicherung's Gesellschaft*, 66 Cal. 294; *Upton* v. *Archer*, 41 Cal. 85, 10 Am. Rep. 266; *Alta Silver Min. Co.* v. *Alta Placer Min. Co.* 78 Cal. 629; *Folsom* v. *Perrin*, 2 Cal. 603.

The shipper must give the carrier notice of the dangerous character of the goods shipped. Barney v. Burnstenbinder, 64 Barb. 212.

Statutory provisions.

The United States statutes prohibit the carrying of nitroglycerine upon vehicles engaged in interstate passenger traffic, and it applies to a freight train which carries passengers. United States v. Saul, 58 Fed. Rep. 763.

The English statute incorporating the Great Western Railway provides that every person who shall send or cause to be sent by the railway any goods of a dangerous quality shall distinctly mark them or give notice in writing to the servant of the carrier with whom they are left. Hearne v. Garton, 2 El. & El. 66, 28 L. J. M. C. N. S. 216, 5 Jur. N. S. 648, 33 L. T. 256.

Right to refuse shipment.

In Porcher v. Northeastern R. Co. 14 Rich. L. 181, the court quoted with approval the following from Story, Bailments: "If he [the carrier] refuses to take charge of the goods because his coach is full or because they are of a nature which will at the time expose them to extraordinary danger or to popular rage, or because he has no convenient means of carrying such goods with security, etc., these will furnish reasonable grounds for his refusal, and will, if true, be a sufficient legal defense to a suit for the noncarriage of the goods."

In Fish v. Chapman, 2 Ga. 349, 46 Am. Dec. 393, it is said "a common carrier is bound to convey the goods of any person offering to pay his hire unless his carriage be already full or the risk sought to be imposed upon him extraordinary, or unless the goods be of a sort which he cannot convey or is not in the habit of conveying."

In Fitzgerald v. Great Western R. Co. 39 U. C. Q. B. 525, it seems to have been assumed that a condition that the carrier will not be liable for loss or damage to goods of a combustible nature was valid.

In Johnson v. Midland R. Co. 4 Exch. 367, 18 L. J. Exch. N. S. 366, 6 Railway, Cas. 61, which was an action for refusing to carry coal, the contention of plaintiff's counsel was that under the statute if the carrier chooses to become a carrier at all it is bound to carry every description of goods not dangerous and along the whole line.

In Pearson v. Duane, 71 U. S. 4 Wall. 605, 18 L. ed. 447, it was held that the carrier might refuse to carry a person who had been expelled from a town by revolutionary authorities under threat of death if he returned, when in the opinion of the master of the vessel his carriage would tend to promote greater difficulty.

The carrier may refuse to take lard which is packed in such a condition that it cannot be carried without injury to the rest of the cargo. Boyd v. Moses, 74 U. S. 7 Wall. 316, 19 L. ed. 192.

But in one case it would seem that the disposition of the court was to enforce the carrier's liability even in case of dangerous substances. It was held that "if the contents of a package are perishable, or easily broken, or explosive, so that the danger of loss is increased, and the exercise of an unusual degree of care is made necessary, good faith requires the shipper to make the facts known to the carrier. . . . The carrier is relieved in these cases, not from the duty to exercise care and diligence in the transportation of his customer's goods, but from the consequences of the failure of the shipper to advise him fully of facts and circumstances material to the contract the suppression of which is in effect a fraud upon him. His obligations as a common carrier are not reduced. He is bound to the exercise of great care by the nature of his undertaking. Willock v. Pennsylvania R. Co. 166 Pa. 184, 27 L. R. A. 228. This was said in reference to a shipment of petroleum.

Carrier may take dangerous substances.

In Walker v. Chicago, R. I. & P. R. Co. 71 Iowa, 658, it was held that the carrier had a right to transport a car of giant powder so as not to be liable for injury to buildings injured by its explosion while standing on a side track at the terminus of the road.

But if the carrier agrees to transport a high explosive under a name which will put its employees off their guard, it will be liable for injuries to them caused by an explosion of the substance. Standard Oil Co. v. Tierney, 92 Ky. 367, 14 L. R. A. 677.

H. P. F.

An agent for a particular act or transaction is called a special agent.

Civil Code, 2297; Story, Agency, § 17.

Therefore any act he may have done in excess of his express authority was not binding upon the plaintiff.

Story, Agency, § 126; 2 Kent, Com. § 620; Smith, Mercantile Law, 162; *Blum* v. *Robertson*, 24 Cal. 127.

It was defendant's duty to inquire of the drayman the extent of his authority.

Smith, Mercantile Law, 162; Wade, Law of Notice, § 660; *Mudgett* v. *Day*, 12 Cal. 139; *Hayes* v. *Campbell*, 63 Cal. 143.

Defendant should certainly have made careful inquiry as to the validity and scope of the agency, and it cannot now take advantage of its neglect in this particular.

Brown v. *Rouse*, 104 Cal. 672; *Mudgett* v. *Day*, 12 Cal. 139; *Hayes* v. *Campbell*, 63 Cal. 143.

The drayman had no authority implied from his employment to release respondent from the duties and obligations it owed appellant.

Southern Exp. Co. v. *Armstead*, 50 Ala. 350; *Fillebrown* v. *Grand Trunk R. Co.* 55 Me. 462, 92 Am. Dec. 606; *Merchants' Despatch Transp. Co.* v. *Jæsting*, 89 Ill. 152; *Duffy* v. *Hobson*, 40 Cal. 240, 6 Am. Rep. 617.

It is an inherent element of ratification that the party to be charged with it must have fully known what he was doing.

Brown v. *Rouse*, 104 Cal. 672.

Respondent was a common carrier of powder.

Civil Code, § 2168; *New York C. R. Co.* v. *Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627.

The stipulation waiving the liability was unjust, unreasonable, without consideration, and void.

Atchison, T. & S. F. R. Co. v. *Dill*, 48 Kan. 210; Civil Code, § 2169; *Southern Exp. Co.* v. *Moon*, 39 Miss. 822; *York Mfg. Co.* v. *Illinois C. R. Co.* 70 U. S. 3 Wall. 107, 18 L. ed. 170; *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 79 U. S. 6 How. 382, 12 L. ed. 482; *Wehmann* v. *Minneapolis, St. P. & S. S. M. R. Co.* 58 Minn. 22; *Merchants' Despatch Transp. Co.* v. *Theilbar*, 86 Ill. 71; *Messenger* v. *Pennsylvania R. Co.* 37 N. J. L. 531, 18 Am. Rep. 754; *Merchants' Despatch Transp. Co.* v. *Jæsting*, 89 Ill. 152; *New York C. R. Co.* v. *Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627; Redman, Carr. 75, § 2, *Atchison, T. & S. F. R. Co.* v. *Dill*, 48 Kan. 210.

There was no consideration to support it.

Wehmann v. *Minneapolis, St. P. & S. S. M. R. Co.* 58 Minn. 22; *McFadden* v. *Missouri P. R. Co.* 92 Mo. 343; *Southern Exp. Co.* v. *Moon*, 39 Miss. 822; *Atchison, T. & S. F. R. Co.* v. *Dill*, 48 Kan. 210; *Louisville & N. R. Co.* v. *Gilbert*, 88 Tenn. 430, 7 L. R. A. 162, *Louisville & N. R. Co.* v. *Manchester Mills*, 88 Tenn. 653; *Louisville & N. R. Co.* v. *Sowell*, 90 Tenn. 17; *Woodburn* v. *Cincinnati, N. O. & T. P. R. Co.* 40 Fed. Rep. 731.

Respondent was not released by the fire-exemption clause in the bill of lading.

When the shipper takes a receipt or bill of lading and says nothing, the legal presumption is that he does not assent to its terms and conditions, and that in order to bind him thereby his knowledge and assent must be shown by an express parol agreement or by his signature to the bill of lading.

New Jersey Steam Nav. Co. v. *Merchants' Bank*, 47 U. S. 6 How. 344, 12 L. ed. 465; *York Mfg. Co.* v. *Illinois C. R. Co.* 70 U. S. 3 Wall. 107, 18 L. ed. 170; *New York C. R. Co.* v. *Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627; *Woodburn* v. *Cincinnati, N. O. & T. P. R. Co.* 40 Fed. Rep. 731; *The Guildhall*, 58 Fed. Rep. 799; *Michigan C. R. Co.* v. *Mineral Springs Mfg. Co.* 83 U. S. 16 Wall. 318, 21 L. ed. 297; *The Brantford City*, 29 Fed. Rep. 373.

Mr. **C. N. Sterry,** for respondent:

In the absence of any statutory restrictions the carrier had the right to limit its liability by special contract.

Hutchinson, Carr. §§ 240, 241; Wood, Railway Law, § 425; *Germania F. Ins. Co.* v. *Memphis & C. R. Co.* 72 N. Y. 90, 28 Am. Rep. 113; *Kirkland* v. *Dinsmore*, 62 N. Y. 171, 20 Am. Rep. 475; *Louisville & N. R. Co.* v. *Brownlee*, 14 Bush, 590; *Morrison* v. *Philadelphia & C. Constr. Co.* 44 Wis. 405; *Black* v. *Wabash, St. L. & P. R. Co.* 111 Ill. 351, 53 Am. Rep. 628; *Jones* v. *Cincinnati, S. & M. R. Co.* 89 Ala. 376; *Hadd* v. *United States & C. Exp. Co.* 52 Vt. 335, 36 Am. Rep. 757; *Squire* v. *New York C. R. Co.* 98 Mass. 239, 93 Am. Dec. 162; *Hoadley* v. *Northern Transp. Co.* 115 Mass. 304, 15 Am. Rep. 106; *Farnham* v. *Camden & A. R. Co.* 55 Pa. 53; *Snider* v. *Adams Exp. Co.* 63 Mo. 376; *McMillan* v. *Michigan S. & N. I. R. Co.* 16 Mich. 113, 93 Am. Dec 208; *Robinson Bros.* v. *Merchants' Despatch Transp. Co.* 45 Iowa, 470; *Bank of Kentucky* v. *Adams Exp. Co.* 93 U. S. 174, 23 L. ed. 872; *Merrill* v. *American Exp. Co.* 62 N. H. 514.

Civil Code, § 2174, reads as follows: "The obligations of a common carrier cannot be limited by general notice on his part, but may be limited by special contract."

This section is simply a declaration of what the common law generally was in the United States prior to the adoption of this section.

Hutchinson, Carr. 2d ed. ¶ 237 *et seq.*; 3 Wood, Railway Law, Minor's ed. ¶ 425 *et seq.*

The authority to McNally to transfer this shipping order could have been conferred by parol.

Hutchinson, Carr. ¶ 242.

The agent of the owner of goods with authority to deliver them to the carrier for transportation is to be presumed to have all the necessary power to carry it into effect; and if it becomes necessary for him to accept a receipt from the carrier containing conditions as to liability in order to procure the carrier's consent to receive and forward them the owner becomes bound by his acceptance.

Hutchinson, Carr. 2d ed. ¶¶ 265, 266; *Squire* v. *New York C. R. Co.* 98 Mass. 239, 93 Am. Dec. 162; *Nelson* v. *Hudson River R. Co.* 48 N. Y. 498; *Zimmer* v. *New York C. & H. R. R. Co.* 137 N. Y. 460; *Wallace* v. *Matthews*, 39 Ga. 617, 99 Am. Dec. 473; *Van Schaack* v. *Northern Transp. Co.* 3 Biss. 394; Wheeler, Modern Law of Carriers, 274; *York Mfg. Co.* v. *Illinois C. R. Co.* 70 U. S. 3 Wall. 107, 18 L. ed. 170; *Christenson* v. *American Exp. Co.* 15 Minn. 270, 2 Am. Rep. 122; *Rawson* v. *Holland*, 59 N. Y. 611, 18 Am. Rep. 394; *Mills* v.

Michigan C. R. Co. 45 N. Y. 622, 6 Am. Rep. 152; *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 47 U. S. 6 How. 344, 12 L. ed. 465.

At the time of the shipment of the powder in controversy the defendant was under no obligations to accept or receive the same except upon such terms and conditions as it chose to make, it not being a common carrier of common black blasting powder in steel or iron kegs.

3 Wood, Railway Law, § 426; Hutchinson, Carr. 2d ed. § 77; 2 Rorer, Railroads, § 1231; *Pfister* v. *Central P. R. Co.* 70 Cal. 169, 59 Am. Rep. 404; *Central R. & Bkg. Co.* v. *Lampley*, 76 Ala. 357, *Honeyman* v. *Oregon & C. R. Co.* 13 Or. 352, 57 Am. Rep. 20; *Coup* v. *Wabash, St. L. & P. R. Co.* 56 Mich. 111, 56 Am. Rep. 374.

A common carrier having the absolute right to refuse to carry a certain class of freight can, as to such freight, carry it as a private carrier, upon such terms and conditions as the shipper and it may agree upon.

Hutchinson, Carr. 2d ed. § 4; *Piedmont Mfg. Co.* v. *Columbia & G. R. Co.* 19 S. C. 353; *Lake Shore & M. S. R. Co.* v. *Perkins*, 25 Mich. 329, 12 Am. Rep. 275.

Mr. **William F. Herrin,** also for respondent:

An agent who is employed by the owner of the goods to procure them to be transported by a common carrier has generally an implied authority to make an agreement with the carriers as to the terms upon which the goods are to be transported.

Wheeler, Modern Law of Carriers, 274; *Aldridge* v. *Great Western R. Co.* 15 C. B. N. S. 582; *Shelton* v. *Merchants' Despatch Transp. Co.* 59 N. Y. 262; *Illinois C. R. Co.* v. *Jonte*, 13 Ill. App. 424; *Brown* v. *Louisville & N. R. Co.* 36 Ill. App. 140; *Van Schaack* v. *Northern Transp. Co.* 3 Biss. 394; *Jennings* v. *Grand Trunk R. Co.* 127 N. Y. 438; *Moriarty* v. *Harnden's Express*, 1 Daly, 227; *Root* v. *New York & N. E. R. Co.* 76 Hun, 23.

The limitation of the carrier's liabilty as an insurer is recognized as valid because it is in itself just and reasonable.

New York C. R. Co. v. *Lockwood*, 84 U. S. 17 Wall. 379, 21 L. ed. 640; *Southern Exp. Co.* v. *Caldwell*, 88 U. S. 21 Wall. 264, 22 L. ed. 556; *Hart* v. *Pennsylvania R. Co.* 112 U. S. 331, 28 L. ed. 717.

Contracts using general language such as appears in this case are uniformly held not to contemplate an exclusion of liability for negligence, and are therefore valid.

Hooper v. *Wells, F. & Co.* 27 Cal. 12, 85 Am. Dec. 211; *Wells* v. *Steam Nav. Co.* 8 N. Y. 375; *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 47 U. S. 6 How. 344, 12 L. ed. 465; *Bank of Kentucky* v. *Adams Exp. Co.* 93 U. S. 174, 23 L. ed. 872.

You cannot hold the carrier if the loss of goods is shown to have resulted from the fault or negligence of the shipper.

Goodman v. *Oregon R. & Nav. Co* 22 Or. 14; *American Exp. Co.* v. *Smith*, 33 Ohio St. 511, 31 Am. Rep. 561; *Truax* v. *Philadelphia, W. & B. R. Co.* 3 Houst. (Del.) 233; Lawson, Carr. 5, 6; 2 Am. & Eng. Enc. Law, p. 853; *Fordyce* v. *McFlynn*, 56 Ark. 424; *Bohannan* v. *Hammond*, 42 Cal. 227.

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

Plaintiff brought its action to recover from defendant the value of a carload of blasting powder, destroyed while in transit upon defendant's railroad. The findings are not attacked. It is claimed, however, that they do not support the judgment. It is also contended that the court erred in admitting in evidence a certain shipping order.

The facts disclosed by the findings are the following: Plaintiff was a manufacturer of powder. Its factory was situated at Santa Cruz, California. It had for many years been in the habit of shipping its products over the line of the Southern Pacific Company, and of the Atlantic & Pacific Railroad Company, defendant herein. When the shipment was designed for a point upon the line of the defendant company, the powder was received by the agent of the Southern Pacific Company at San José, acting for the defendant company, and by this agent a shipping order was taken, and a bill of lading returned therefor. Santa Cruz, the place of manufacture of the powder, is connected with San José by a narrow-gauge railroad, owned or controlled by the Southern Pacific Company. At San José the depots of the narrow-gauge railroad and of the broad-gauge railroad (over which the powder was shipped for exportation without the state) were some distance apart. By reason of the haul upon the streets of San José from one depot to another, thus necessitated, the Southern Pacific Company declined to accept a through shipment of the powder from Santa Cruz; and, under special contract with plaintiff, the powder was shipped to San José, there transferred by an agent under the control of the plaintiff from the narrow-gauge depot to the broad-gauge station, and by this agent placed upon suitable cars provided, and shipped to its ultimate destination. "At the time of the shipment of the powder in controversy, and for several years prior thereto, the plaintiff had always employed one John McNally, who was a common drayman at San José, to haul all the powder which the plaintiff had transported to San José over the narrow-gauge railroad, and which was destined for points on the Southern Pacific or the Atlantic & Pacific, from the narrow-gauge railroad to the Southern Pacific, and to there ship it for the plaintiff to its destination; the course of business being that the secretary of the plaintiff company at San Francisco, who had charge of the shipping business of the plaintiff, would, in the case of each of said shipments, write to McNally that the shipment was made from Santa Cruz, and for him to transfer it to the broad gauge depot, and there ship it to its point of destination, instructing him to what point and the name of the consignee, and sending him with his instructions a directed envelope within which to inclose the bill of lading, and mail it to the company at San Francisco, or to hand the envelope to the railroad agent, and have him mail it to the company." "McNally, on receiving such instructions, would receive the powder from the narrow-gauge railroad, and haul it upon his drays to the broad-gauge depot, and there load it himself into such car or cars as the Southern Pa-

cific agent would designate, and, upon its being loaded, would fill out a shipping order upon printed blank forms furnished by the agent of the Southern Pacific for such purpose. These blank forms were all exactly alike for all kinds of goods. . . . Upon delivery of such shipping order to the agent of the Southern Pacific, filled out and signed, such agent would have the property checked, and, if correct, would ship bill of lading, which would either be delivered to McNally, and by him sent to the company at San Francisco, or McNally would deliver to the agent an envelope directed to plaintiff company, and the agent would inclose bill of lading in the same, and forward it to plaintiff. Each of these methods was pursued indiscriminately. The shipping order was retained by the agent of the railroad company, and kept in his office, and neither it nor a copy of it would be delivered to the agent or McNally, but would always be signed in the name of the plaintiff by McNally." For several years previous to the shipment in question, plaintiff had shipped over the Southern Pacific in this manner a great deal of powder, on an average from one to two or more carloads per month. The defendant never in any way objected to taking the powder, on the ground that it was a dangerous article, and that it was not bound to carry it; nor did the defendant at any time, in any way, declare to plaintiff or to the said drayman that it would take the powder only as a private carrier. It required McNally in each instance to sign the shipping order. The plaintiff, in the case of each of said shipments, would advise McNally of the same, and direct him where to ship the powder; and the secretary would, in due course of time, receive the bill of lading. None of the officers of plaintiff's company ever authorized McNally to sign any shipping orders, or ever had any actual knowledge of the fact that he was signing such orders, nor had it actual knowledge that the defendant ever claimed that there was any different contract between them than that contained and expressed in the bill of lading. The conditions in the bill of lading are identical with those of the shipping order. Defendant's agent at San José had no authority to receive the goods, except upon the signing of such a shipping order, and such agent would not have received or accepted the goods unless such a shipping order was delivered to him, properly signed. There was during all of the time but one rate on powder, and no one could have procured the shipment of any powder over either of said railroads without such shipping order signed, and such bill of lading issued; the agents of both companies being furnished with but one form of shipping order and one form of bill of lading for all goods and merchandise, and having no authority to receive goods for shipment on any other terms.

The preceding quotations are from the findings, which are not attacked. The powder in question was shipped in the manner indicated. It exploded while in transit, in the territory of Arizona, entirely destroyed the car in which it was placed, partially destroyed two other cars and their contents, and killed two men upon the train. The immediate cause of the explosion is unknown, but it is found that it was occasioned by fire communicated in some way to the powder. It is also found that the defendant was not guilty of any negligence or misbehavior in the matter.

The views which we take, and which will hereafter be expressed, render unnecessary the consideration of many questions ably and elaborately presented by respective counsel. They will be passed by, not as being unimportant, but as being unnecessary to this determination. Thus, we will not consider whether the bill of lading issued by the defendant to plaintiff, and by the plaintiff retained without protest, constitutes a unilateral contract, binding upon plaintiff. Nor will we consider the question whether § 2176 of the Civil Code, defining the mode in which common carriers' liability may be limited, is or is not applicable to contracts with defendant, or is or is not applicable to any contract not wholly to be performed within the state as being an unwarranted and illegal interference with and restriction upon the exclusive right of Congress to regulate interstate commerce; for we are of the opinion that the shipping order signed in the name of the plaintiff by McNally as its agent was a contract within the scope of his authority to make, and therefore binding upon the plaintiff. This order conformed to the requirements of § 2176 of our Civil Code; and, as it released the defendant corporation from liability for loss occasioned by "fire from any cause whatsoever," its admission in evidence was proper, and its proof relieved the defendant of liability.

The finding of the court, as above quoted, is to the effect that McNally was the authorized agent of plaintiff, not merely to haul the powder as a common drayman, but "to ship it for the plaintiff to its destination." The circumstance that he was in fact a common drayman, and that defendant's agent knew him to be such, does not militate against the force of this declaration. There was nothing inconsistent in the agency to haul as a drayman with the agency to ship as representative of the consignor. Any competent person, regardless of his profession or business vocation, might have been employed by plaintiff to ship for it. There is here no question of ostensible agency, or of a failure of defendant to make due inquiry as to the scope of the powers of the agent. The finding expressly declares that McNally was employed to ship. Having this power, he was entitled to make a special contract of shipment, as was done in this case. An agent who is employed by the owner or consignor of goods to procure them to be transported by a common carrier has a general and implied authority to make an agreement with the carrier as to the terms upon which the goods are to be transported. *Christenson* v. *American Exp. Co.* 15 Minn. 270 (Gil. 208), 2 Am. Rep. 122; *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 47 U. S. 6 How. 344, 12 L. ed. 465; *Nelson* v. *Hudson River R. Co.* 48 N. Y. 498; *Zimmer* v. *New York C. & H. R. R. Co.* 137 N. Y. 460; *Van Schaack* v. *Northern Transp. Co.* 3 Biss. 394; *Aldridge* v. *Great Western R. Co.* 15 C. B. N. S. 582; *Jennings* v. *Grand Trunk R. Co.* 127 N. Y. 438; *Illinois C. R. Co.* v. *Jonte*, 13 Ill. App. 424; *Squire* v. *New York C. R. Co.* 98 Mass. 239, 93 Am. Dec.

162; Hutchinson, Carr. § 265; Wheeler, Carr. chap. 13, § 2.

Nor are the exemptions contained in the contract of the shipping order void for lack of consideration. The defendant was not obliged to receive and transport the powder at all. A common carrier is not bound to receive goods which are so defectively packed that their condition will entail upon the company extra care and extra risk; nor dangerous articles as nitroglycerine, dynamite, gunpowder, aquafortis, oil of vitriol, matches, etc. 3 Wood, Railway Law, § 426; Hutchinson, Carr. § 113, 2 Rorer, Railroads, § 1231; *Pfister* v. *Central P. R. Co.* 70 Cal. 169, 59 Am. Rep. 404; *New York C. R. Co.* v. *Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627; *Lake Shore & M. S. R. Co.* v. *Perkins*, 25 Mich. 329, 12 Am. Rep. 275.

It was thus optional with the defendant to accept the powder for transportation or not; but, if it chose to accept it, it could accept it upon such terms and with such limitation of its common-law liability as it saw fit. *Piedmont Mfg. Co.* v. *Columbia & G. R. Co.* 19 S. C. 353. And, from the nature of the goods, the consideration expressed was sufficient to support the entire contract. *York Mfg. Co.* v. *Illinois C. R. Co.* 70 U. S. 3 Wall. 107, 18 L. ed. 170.

The terms of exemption releasing the carrier from liability for fire from any cause whatsoever will not be held void as unconscionable or unreasonable. It is well settled that a common carrier may not relieve itself from any liability imposed upon it by law under the dictates of public policy; but, upon the other hand, upon any question of private right, or the right of private property, it may, for a consideration, lessen the degree of responsibility which attaches to it as an insurer, by any contract not in itself unreasonable. Anyone may waive the advantage of a law intended solely for his own benefit, but a law established for a public reason cannot be contravened by private agreement. Civil Code, § 3513. If necessary, the condition above referred to would be construed as an exemption from liability by fire occasioned by any cause, other than that of defendant's negligence. *Hooper* v. *Wells, F. & Co.* 27 Cal. 12, 85 Am. Dec. 211; *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 47 U. S. 6 How 344, 12 L. ed. 465; *Bank of Kentucky* v. *Adams Exp. Co.* 93 U. S. 174, 23 L. ed. 872; *Wells* v. *Steam Nav. Co.* 8 N. Y. 375.

The conclusion having been thus reached that the contract of the shipping order made by plaintiff's agent McNally was authorized, that it was based upon a consideration, and that its terms were reasonable, the other propositions urged, as above stated, are rendered unnecessary of determination.

The judgment appealed from is affirmed.

We concur: **Temple, J.; McFarland, J.**

NEW JERSEY SUPREME COURT.

STATE of New Jersey; CAPE MAY, DELAWARE BAY, & SEWELL'S POINT RAILWAY COMPANY, *Prosecutor*,

v.

City of CAPE MAY *et al.*

(........N. J........)

***A city council, under the charter of the city, which confers power upon the council to make ordinances** to regulate the public streets, to prevent immoderate driving or riding, to provide the manner in which corporations or persons shall exercise any privilege granted to them in the use of the streets, to regulate the running of locomotive engines and railroad cars therein, and to protect persons and property, is authorized to enact an ordinance that all passenger cars operated by trolley or electric power in the streets of the city shall have proper and suitable fenders on the front of such cars to prevent accident, and that it shall be unlawful to operate such cars in the streets of the city without such fenders.

(November 5, 1896.)

*Headnote by LIPPINCOTT, J.

CERTIORARI to review the action of the City Council of Cape May in passing an ordinance requiring the use of fenders on street-railway cars. *Affirmed.*

The facts are stated in the opinion.

Mr. **E. A. Armstrong** for prosecutor

Mr. **D. J. Pancoast** for defendants.

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

On the 9th day of July, 1895, the city council of the city of Cape May passed the following ordinance, to wit:

"An ordinance requiring the use of fenders on all passenger cars operated by trolley or electric power in the streets of the city of Cape May.

"Sec. 1. Be it ordained and enacted by the inhabitants of the city of Cape May in city council assembled, and it is hereby enacted by the authority of the same: That hereafter all passenger cars operated by trolley or electric power in the streets of the city of Cape May shall have proper and suitable fenders on the front of said cars to prevent accidents, and that it shall be unlawful to operate street cars within the city without such fenders."

Section 2 provides a penalty for a violation

NOTE.—For regulation of speed of street car, see case of the same name, *post*, 656.

For regulation as to stopping car at street crossing, see other case of same name, 36 L. R. A. 657.

See also 36 L. R. A. 656.

of this ordinance, and § 3 provides that it shall take effect immediately. This certiorari has been brought to review this ordinance.

The ordinance in this case was passed by the council in the manner prescribed by the city charter. The city charter of the city of Cape May authorizes the city council thereof to enact ordinances to regulate the streets of the city, to provide for the manner in which corporations and persons shall exercise any privilege granted to them in the use of the same, to prevent immoderate driving or riding in the streets, to regulate the running of locomotive engines and railroad cars therein, and such ordinances as they may deem necessary for the good government, order, and protection of persons and property. Pub. Laws 1875, p. 206, §§ 19, 20; Gen. Stat. p. 312. The prosecutors are operating an electric street railway on the streets of the city of Cape May, under an ordinance granting it that privilege. *State, Cape May, D. B. & S. P. R. Co.*, v. *Cape May*, 58 N. J. L. 565.

It has been held at the present term of this court that ordinances passed by the city council, reasonably regulating the rate of speed at which the prosecutor shall run its cars through the streets, and also to compel it to make full stops before crossing intersecting streets, are valid regulations in the exercise of the police powers implied from the authority granted by the charter of the city to the council. Such ordinances, being reasonable, will be sustained. It is difficult to perceive, in view of the statutory power conferred upon the city council, upon what ground this ordinance can be attacked, as the improper exercise of the power of the regulation of the use of the street for the protection of the traveling public. The franchise or privilege of the prosecutor to operate its cars in the streets of the city is founded upon the grant by the city. The reasonable control of this use of the streets of the city has not been devested by the ordinance under which the railway is operated. The grant was to use the streets with cars of the prosecutor propelled by electric power, a power capable of producing a high and dangerous rate of speed, from which collision would result perhaps, in probable serious injury to others in the use of the streets. The law is well settled in this state that these street railways have no exclusive use of the streets and not even the exclusive use of the tracks upon which the cars were operated. The legislative power to control and regulate the streets has been delegated to the governing body of the municipality, and it is under this power that the privilege has been conferred upon the prosecutor, and it is still within the power of the city council by invocation of this same legislative authority to so regulate the use of the streets as shall render their use by electric cars consistent with the safety of the general public from accident and injury. The ordinance can be tested only in view of the extraordinary propulsive power by which such cars are operated, and the danger arising from the high rate of speed which may be obtained, and other dangers incident from their operation in the streets; and reasonable regulations in the shape of ordinances to protect the ordinary public travel upon the highways have always been supported whenever questions as to the validity of such regulations have arisen. The ordinance under review in matter of principle in no wise differs from ordinances regulating the rate of speed of the cars, or other appliances owing their origin impliedly to the authority vested in the municipality to regulate the use of its streets. The legislature, when it authorized the use of the public streets for these purposes, was presumed to have intended that the grantee of the franchises should hold its privileges subject to such regulations as were reasonably necessary for the common use of the street for a street railway and for ordinary travel. *State, North Hudson County R. Co.*, v. *Hoboken*, 41 N. J. L. 71; *State, Consolidated Traction Co.*, v. *Elizabeth*, 58 N. J. L. 619, 32 L. R. A. 170.

Nearly all kinds of reasonable regulations can be imposed upon street railways in the use of the streets by the municipality, under the authority granted by the legislature to pass ordinances to regulate the use of the streets, and such regulations are never declared unlawful on the ground that they impair the franchises of the companies. The power granted to municipal bodies to legislate by ordinances is a grant to a subordinate body, and its legislative acts, when counter to the acts of the state legislature, must give way; but these companies nevertheless hold their franchises subject to such municipal regulations as do not unreasonably interfere with the exercise of the franchises conferred by the legislature. The franchises are exercised upon a public highway, for the public benefit, which highway is acquired and improved for the benefit and advantage of the public at large. The position is different from that of a railroad company exercising its franchises upon a roadbed of its own. The grantee in the former case is subject to municipal regulations of a greater scope in the interest of the public at large than would be justifiable in the case of companies occupying and using their own roadbeds. *State, Consolidated Traction Co.*, v. *Elizabeth*, 58 N. J. L. 619, 32 L. R. A. 170; *Allen* v. *Jersey City*, 53 N. J. L. 522; *State, Trenton Horse R. Co.*, v. *Trenton*, 53 N. J. L. 132, 11 L. R. A. 410; Booth, Street Railway Law, §§ 223-230. Under this power, ordinances regulating the use of the streets by street railways have become frequent, especially so since the introduction of electricity as a motive power, with its capacity for a high rate of speed, as well as other dangerous and obstructive capacities. Their operation must be reasonably safe, reasonably consistent, and in harmony with the legal customary use of the street by the general public; and ordinances to enforce this rule of law are reasonable in purpose and effect. Even direct legislative authority to a street-railway company to carry passengers over the streets of a city does not exempt the corporation from municipal or police control. The principle is a general one that when a business is authorized to be conducted by a corporation within a municipality, the latter presumptively possesses the same right to regulate it that it has over a like business conducted by private persons. A grant to a corporation of the right to own property and transact business affords no immunity from any police control to which the citizen could be subjected; and a reasonable

regulation of the enjoyment of the franchise is not a denial of the right, nor an invasion of the franchise, or a deprivation of its property, or interference with the business of the corporation. The company is presumed to know that the business of operating a city street railway must be conducted under such reasonable rules and regulations as the municipality may impose, and subject to its share of the burdens incident to the conduct of the municipal government. Dill. Mun. Corp. 4th ed. § 720; *State, Trenton Horse R. Co.*, v. *Trenton*, 53 N. J. L. 132, 11 L. R. A. 410, and cases cited; *State, Consolidated Traction Co.*, v. *Elizabeth*, *supra*. Ordinances regulating speed and directing where stops should be made have been held reasonable (Dill. Mun. Corp. 4th ed. § 713; *Hanlon* v. *South Boston Horse R. Co.* 129 Mass. 310; Booth, Street Railway Law, § 229); to compel the removal of earth falling on the track (*Pittsburgh & B. Pass. R. Co.* v. *Birmingham*, 51 Pa. 41); to compel a company to employ a conductor to assist the driver (*State, Trenton Horse R. Co.*, v. *Trenton*, 53 N. J. L. 132, 11 L. R. A. 410); to keep the street between the rails in repair (*State, North Hudson County R. Co.*, v. *Hoboken*, 41 N. J. L. 71); to pass such ordinances as may be necessary for the common use of streets for a street railway and ordinary travel (*Ibid.*). The city can require a greater degree of care on the part of the company in running its cars, as a consideration for granting the franchise, than may be required by law towards one in the ordinary use of the street. *Fath* v. *Tower Grove & L. R. Co.* 105 Mo. 537, 13 L. R. A. 74. Ordinances to compel the cleaning and sprinkling of tracks have been frequent, and their validity sustained. Cars can be required to be run at certain hours, and at fixed intervals; and the corporation can be required to remove snow from the streets. *Broadway & S. Ave. R. Co.* v. *New York*, 49 Hun, 126. Ordinances have been upheld prohibiting the use of salt or saltpeter or salt of any character on the tracks. *State, Consolidated Traction Co.*, v. *Elizabeth*, *supra*. The use of sand on the tracks can be prohibited by ordinance. *Dry Dock, E. B. & B. R. Co.* v. *New York*, 47 Hun, 221. An ordinance has been held valid which prevented cars driven in the same direction from approaching within 300 feet of each other. *Bishop* v. *Union R. Co.* 14 R. I. 314, 51 Am. Rep. 386. The dangers created by the use of electricity as a propulsive power of street railways of necessity creates a new department of police regulations. The use of an agency so dangerous as electric power is a proper subject for the exercise of police control, for the purpose of obviating danger, so imminent even in its most careful use. The ordinances which confer the right to construct electric railways in the public streets carefully guard the method of construction, whenever it is important for the protection of public or private interests to do so. *State, Kennelly*, v. *Jersey City*, 57 N. J. L. 292, 26 L. R. A. 281. Such regulations may be contained in the grant of the privilege to use the street for the purpose of an electric street railway, as conditions annexed to the grant; but their absence there does not prevent the municipality from their subsequent enactment, if they be reasonable for the protection to the ordinary use to which the highway is lawfully devoted, and on the proper exercise of the general power of the state, conferred upon a subordinate political body, to protect the lives and property and promote the welfare of its citizens, and all other persons, natural or artificial, who have the right to claim the protection, in these respects, of the law. The maxim, "*Sic utere tuo ut alienum non lædas*," is quite applicable to a street railway operated by electric power in its use of the streets of a city; and ordinances enforcing the doctrine are not only valid, but salutary, as an exercise of municipal regulation.

The construction of the road and its equipment would seem reasonably to be a subject of municipal control, when, as in this case, there is nothing in the legislative grant to construct and maintain the street railway, which forbids such control, and where, as in this case, the charter of the city confers power upon the city council by ordinance not only to regulate the use of the streets, but to prescribe the manner in which corporations and persons shall exercise any privilege in the use of the same, and empowers them to make and establish such ordinances as they may deem necessary and proper for good government, for the maintenance of order, and the protection of persons and property. An ordinance requiring splices on electric lines to be insulated was declared a valid exercise of municipal control. *Clements* v. *Louisiana Electric Light Co.* (1892) 44 La. Ann. 692, 16 L. R. A. 43. An ordinance providing guard wires in the operation of an electric street railway, where several electric wires crossed each other and hung at different heights, was sustained as a reasonable exercise of the police power, under statutes conferring the right of regulation of the use of streets. *State, Wisconsin Teleph. Co.*, v. *Janesville Street R. Co.* (1894) 87 Wis. 72, 22 L. R. A. 759. It must, at this day, be conceded that municipal authorities having the regulation of the use of streets have the power to pass all ordinances to reasonably guard and secure ordinary public safety and convenience, whether in relation to the construction of the road or its equipment. Ordinances to regulate street railways, when reasonable, are valid. *State, Atty. Gen.*, v. *Madison Street R. Co.* 72 Wis. 612, 1 L. R. A. 771; *State, Cream City R. Co.*, v. *Hilbert*, 72 Wis. 184. What can be more reasonable and necessary for the protection of the ordinary travel and use of a street than that an electric car, capable of being driven at a high rate of speed, should have attached guards of some kind or other against accident and injury. The test is whether it is reasonably designed to guard some public or private right from threatened injury from the operation of these cars. Tiedeman, Pol. Power, 597–599. Upon reason and authority, this ordinance is justified as an exercise of reasonable municipal or police power in behalf of the protection of the public engaged in ordinary business or travel upon the streets of the city. The precise kind of fender is not regulated by this ordinance, but it is neither uncertain nor unreasonable because of this. The term "fender" is well defined and readily understood as a guard and protection against danger, and it is left to the prosecutor using a reasonable discretion, and with-