THE LAWYERS REPORTS ANNOTATED

BOOK XLVIII

ALL CURRENT CASES OF GENERAL VALUE AND IMPORTANCE, WITH FULL ANNOTATION.

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703781

ROCHESTER, N. Y.
THE LAWYERS' CO-OPERATIVE PUBLISHING COMPANY.
1900.

Entered according to Act of Congress, in the Year nineteen hundred, by
THE LAWYERS' CO-OPERATIVE PUBLISHING CO.,
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LAWYERS' REPORTS

ANNOTATED.

PENNSYLVANIA SUPREME COURT.

Carrie LOUGHIN
v.
James McCAULLEY *et al., Appts.*

(186 Pa. 517.)

1. **The provision of a state Constitution against limitation of liability** for injuries resulting in death cannot prevail over the act of Congress permitting limitation of liability for maritime losses.
2. **The limitation of liability of the owners of vessels,** for maritime losses, by U. S. Rev. Stat. 1878, § 4283, may be administered in an action at law against them in a state court to recover for death caused by a collision.
3. **The method for limitation of the ship owner's liability** for maritime losses provided in the act of Congress of 1851 by transfer to a trustee is not exclusive; but the limitation may be claimed under a general denial in an action at law.

(July 21, 1898.)

APPEAL by defendants from a judgment of the Court of Common Pleas, No. 2, for Philadelphia County in favor of plaintiff 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. **H. L. Cheney, John F. Lewis,** and **John G. Johnson,** for appellants:

The defendants should have been permitted to show what fractional parts each owned in the tug, and the value of the tug.

There can be no question but that the court of common pleas of Philadelphia had jurisdiction to try this case if the tort was committed within the limits of the state.

American S. B. Co. v. *Chase,* 16 Wall. 533, 21 L. ed. 372; *Sherlock* v. *Alling,* 93 U. S. 100, 23 L. ed. 819; *McCullough* v. *New York & N. S. B. Co.* 20 U. S. App. 570, 61 Fed. Rep. 364, 9 C. C. A. 521; *Wallace* v. *M'Connell,* 13 Pet. 136, 10 L. ed. 95; *Taylor* v. *Carryl,* 20 How. 583, 15 L. ed. 1028; *Mallett*

NOTE.—*Administration of Federal laws in state courts.*

I. *Introductory.*
II. *Civil laws.*
III. *Criminal and penal laws.*

I. *Introductory.*

The difficulty encountered in reaching a correct answer to the question suggested by the note—a difficulty to which so great a master of constitutional law as Judge Story has contributed by statements in some of his opinions and in his work on the Constitution—has arisen mainly from the tendency to confuse the jurisdiction of the court with the subject-matter over which it is exercised, and the failure to discriminate between the source of jurisdiction and the source of the rights which are the subjects of the jurisdiction. That such jurisdiction and rights may have different sources is illustrated by the practice of the courts of enforcing rights arising out of acts of a foreign country.

This illustration is used by Hamilton in the Federalist (No. 82), where he expresses his opinion that unless the state courts are expressly excluded by acts of Congress they will take cognizance of the causes to which those acts may give birth.

Judge Story, however, in his work on the Constitution (vol. 2, 5th ed. p. 535) says: "And it is only in those cases where, previous to the Constitution, state tribunals possessed jurisdiction independent of national authority that they can now constitutionally exercise a concurrent jurisdiction." He evidently considered this proposition a corollary of the proposition stated by him in Martin v. Hunter, 1 Wheat. 304, 4 L. ed. 97, that Congress cannot confer any of the judicial power of the United States upon the state courts.

This line of argument ignores the possibility that the state courts may, under the state Constitution and state laws, have jurisdiction enabling them to lay hold of new rights as they arise, whatever the source of those rights may be. It was evidently the origin of his *dictum* in Martin v. Hunter, 1 Wheat. 304, 4 L. ed. 97, that state courts cannot take direct cognizance of cases arising under the laws of the United States, since no such jurisdiction existed before the adoption of the Constitution, and it cannot be conferred by Congress. Justice Bradley indicates the fallacy of the argument when he says in Claflin v. Houseman, 93 U. S. 130, 23 L. ed. 833, that the *dictum* is only true as to jurisdiction (not rights) depending on United States authority.

The same confusion with reference to jurisdiction and rights is apparent in Voorhies v. Frisbie, 25 Mich. 476, 12 Am. Rep. 291, which denied the jurisdiction of a state court over an action by an assignee in bankruptcy, under § 35 of the bankruptcy act, to set aside a transfer by the bankrupt as a preference in violation of the act, upon the ground that the right as declared upon by the bill was wholly created by the act. The court says that the state courts can exercise no new "powers" wholly dependent on, and conferred by, statutes of the United States. The minor premise of the argument evidently is that if a state court were to take

v. *Dexter*, 1 Curt. C. C. 178, Fed. Cas. No. 8,988.

That the action occurred on a navigable river did not defeat the jurisdiction of the state court, if the place was within the boundaries of the state.

American S. B. Co. v. *Chase*, 16 Wall. 532, 21 L. ed. 372; *McCullough* v. *New York & N. S. B. Co.* 20 U. S. App. 570, 61 Fed. Rep. 364, 9 C. C. A. 521.

If the court could hear the case at all, it certainly could hear the defense to it.

23 U. S. Stat. at L. 57.

The limitation of the owner's liability is a necessary incident to the ownership of vessel property, and all rights of action against owners as such are limited by this act.

The Rebecca, 1 Ware, 187, Fed. Cas. No. 11,619; *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 6 How. 344, 12 L. ed. 465; *Walker* v. *Western Transp. Co.* 3 Wall. 150, 18 L. ed. 172; *Butler* v. *Boston & S. S. S. Co.* 130 U. S. 555, 32 L. ed. 1023, 9 Sup. Ct. Rep. 612.

It cannot be objected that the defendants should have pleaded specially the act of 1884, because the Pennsylvania procedure act of May 25, 1887, provides expressly, "special pleading is hereby abolished," and "the only plea in the action of trespass shall be not guilty."

Even under the act of 1851, it has been most distinctly asserted, and reasserted, that the benefits of a limitation of liability to the value of the vessel could be obtained in other ways than by the procedure referred to in the act, and under the rules of the Supreme Court.

The Scotland, 105 U. S. 24, *sub nom. National Steam Nav. Co.* v. *Dyer*, 26 L. ed.

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cognizance of a case arising out of the laws of the United States it would be exercising a "new power" wholly dependent on, and conferred by, statutes of the United States. The major premise is undoubtedly correct, and, so far as the minor premise is true, the conclusion against the state court's jurisdiction is justified; but it is not necessarily true, since the state court may have inherent power, not at all dependent on acts of Congress, adequate to the enforcement of new rights, although such rights emanate from acts of Congress.

Gilbert v. Priest, 65 Barb. 444, made a similar decision, based on much the same reasoning. It was, in effect, overruled by Cook v. Whipple, 55 N. Y. 150, which points out that the jurisdiction of the state court over the subject-matter does not depend upon the source from which the subject-matter emanates.

Justice Washington in Houston v. Moore, 5 Wheat. 1, 5 L. ed. 19, accepts the doctrine of Martin v. Hunter, 1 Wheat. 304, 4 L. ed. 97, that Congress cannot confer any of the judicial power of the United States upon the state courts, but explains it, and shows that, while it prevents Congress from conferring jurisdiction upon state courts, it does not, so long as Congress does not exercise its undoubted power to make the jurisdiction of the Federal courts exclusive, prevent the state courts from exercising jurisdiction, even over causes arising out of the acts of Congress, if they can find the requisite authority in their own inherent powers. The opinion states and adopts Hamilton's position already alluded to.

Justice Washington's explanation of the doctrine has been generally followed by the later cases, and is expressly approved in Claflin v. Houseman, 93 U. S. 130, 23 L. ed. 833.

It is thus apparent that the state courts must look to their own inherent powers for the source of their concurrent jurisdiction over cases arising out of the Federal laws, and that the only purpose subserved by the provisions of acts of Congress purporting to confer such concurrent jurisdiction is to negative the exclusive jurisdiction of the Federal courts, or to withdraw the classes of cases to which they relate from the exclusive jurisdiction previously conferred upon such courts.

II. *Civil laws.*

Under the influence of the doctrine of Houston v. Moore, 5 Wheat. 1, 5 L. ed. 19, it was held in Delafield v. Illinois, 2 Hill, 159 (an action by the state of Illinois against a citizen of New York), that the Federal Constitution did not devest the state courts of pre-existing jurisdiction, and that, therefore, Congress did not violate the Constitution in failing to make the jurisdiction of the United States Supreme Court in suits by a state against a citizen of another state exclusive, notwithstanding that the judicial power of the United States is declared by the Federal Constitution to extend to such suits

United States v. Dodge, 14 Johns. 95, held that an action of debt by the United States on a bond for the payment of duties to the collector would lie in the state court. Sections 9 and 11 of the judiciary act purport to confer concurrent jurisdiction on the state courts of suits at common law where the United States is plaintiff.

Teall v. Felton, 1 N. Y. 537, 49 Am. Dec. 352, sustained an action of trover against a postmaster for detaining a newspaper, notwithstanding the contention that if any action could be maintained against him the jurisdiction of the Federal court would be exclusive. It was argued by defendant that the case was one of a class of which the state courts did not take cognizance when the Federal Constitution was adopted, since the postoffice department was entirely the creation of the national statute. The court replied, however, that the plaintiff was not seeking redress under the postoffice laws, but was simply seeking to recover in an appropriate common-law tribunal, competent to afford the remedy, and in a form of action more ancient than the Federal Constitution or the acts of Congress.

Moyer v. McCullough, 1 Ind. 339, held that suit would lie in the state court by a party having the equitable title to public land to obtain the legal title from one to whom the patent was issued by a mistake, notwithstanding that the question depended on the acts of Congress.

Chesapeake & O. R. Co. v. American Exch. Bank, 92 Va. 495, 44 L. R. A. 449, 23 S. E. 935, holds that the section of the United States Revised Statutes forbidding railroad companies to keep cattle confined in cars for more than twenty-eight consecutive hours without unloading them may be made the basis of an action by a shipper in the state court for negligence.

United States v. Graff, 4 Hun, 634, upheld the jurisdiction of the state court over an action by the United States for duties unpaid on imported goods upon the ground that the primary object of the action was, not simply to execute the laws of the United States, but to collect a debt.

Ammidown v. Freeland, 101 Mass. 303, 3 Am. Rep. 359, holds that the state court has jurisdiction of the action given to sellers of goods

1001; *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.* 109 U. S. 578, 27 L. ed. 1038, 3 Sup. Ct. Rep. 379, 617; *The Doris Eckhoff*, 30 Fed. Rep. 140; *Miller* v. *O'Brien*, 35 Fed. Rep. 779; *Craig* v. *Continental Ins. Co.* 141 U. S. 638, 35 L. ed. 886, 12 Sup. Ct. Rep. 97; *The Rosa*, 53 Fed. Rep. 132; *The Garden City*, 26 Fed. Rep. 766.

If the court was unable to extend to the defendants the benefits conferred by the act of 1884, it had no jurisdiction of the cause.

Butler v. *Boston & S. S. S. Co.* 130 U. S. 555, 32 L. ed. 1023, 9 Sup. Ct. Rep. 612.

Messrs. **Fred. Taylor Pusey** and **Wendell P. Bowman**, for appellee:

The 4th section of the act of 1851 provides that a transfer of the interest of the owners to a trustee, to be appointed by the court, shall be deemed a sufficient compliance with the requirements of the act; but the Supreme Court of the United States has held that the giving of a stipulation for the value of the vessel as the court may think proper, or the paying of the money into court, is sufficient compliance with the requirements of the law.

Providence & N. Y. S. S. Co. v. *Hill Mfg. Co.* 109 U. S. 578, 27 L. ed. 1038, 3 Sup. Ct. Rep. 379, 617; *Norwich Co.* v. *Wright*, 13 Wall. 104, 20 L. ed. 585.

The defendants made no offer whatever to give a stipulation, or to pay the value into court, or to convey the vessel to a trustee, so that it is at once evident that they are not entitled to the benefits of the law in this proceeding on this account, irrespective of the question as to whether they could receive its benefits at all in the state courts.

The state court has no jurisdiction at all to administer the benefits of the limited liability laws, and they can only be adminis-

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by United States Stat. 1864, chap. 173, § 97, to recover from the buyer duties imposed on the goods subsequently to the contract.

Actions by or against national banks.

The question as to the concurrent jurisdiction of the state courts over causes arising out of the Federal laws has been frequently raised in actions brought by, or against, national banks. As such banks are the creatures of the Federal laws, and must look to them for the definition of their powers and the source of their authority, actions or proceedings by or against them, of whatever nature, are generally regarded as arising under the laws of Congress, and there is express authority for the position, at least so far as concerns actions by such a bank, in Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204. The correctness of the position with reference to actions against the bank where plaintiff's pleadings admit its existence and authority has been challenged by Cooke v. State Nat. Bank, 52 N. Y. 96, and Ulster County Sav. Inst. v. Fourth Nat. Bank, 59 How. Pr. 482; but Cadle v. Tracy, 11 Blatchf. 101, Fed. Cas. No. 2,279, expressly holds, on the authority of Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204, *supra*, that actions against such banks are necessarily cases arising under the laws of the United States; and the other cases involving the question of concurrent jurisdiction of the state courts over such actions have so treated them.

Mandamus will lie in a state court to compel the officers of a national bank to exhibit to a county assessor a list of names and residences of shareholders with the number of their shares, as required by U. S. Rev. Stat. § 5210. Paul v. McGraw, 3 Wash. 296, 28 Pac. 532; Paul v. Furth, 3 Wash. 296, 28 Pac. 532, and Paul v. Chapin, 3 Wash. 433, 28 Pac. 760.

The state courts have jurisdiction of a suit to compel the directors of a national bank to declare a dividend. Hiscock v. Lacy, 9 Misc. 578, 30 N. Y. Supp. 360.

Brinckerhoff v. Bostwick, 88 N. Y. 52, and Nelson v. Burrows, 9 Abb. N. C. 280, hold that a state court has jurisdiction of an action by the stockholders of a national bank against its directors to recover damages sustained through the latters' negligence.

Assumpsit will lie in a state court against a national bank. Dow v. Irasburgh Nat. Bank, 50 Vt. 112, 28 Am. Rep. 493.

It is true that when these actions were decided the Federal statutes expressly gave, or attempted to give, certain state courts concurrent jurisdiction with the Federal courts; but such jurisdiction, conformably to Houston v. Moore, 5 Wheat. 1, 5 L. ed. 19, appears to have been traced to the inherent powers of the state courts, rather than to the acts of Congress; and there are a number of cases that uphold the jurisdiction of the state courts over actions by or against national banks, even upon the assumption that provisions of the Federal statutes purporting to confer concurrent jurisdiction do not apply.

Thus, First Nat. Bank v. Hubbard, 49 Vt. 3, 24 Am. Rep. 97, expressly recognizes the doctrine that civil cases arising under the Constitution and laws of the United States may be tried and determined in the state courts, unless exclusive jurisdiction of them has been vested in the Federal courts, and holds that the state courts would have jurisdiction of suits brought by national banks, even if § 57 of the act of 1864, purporting to confer concurrent jurisdiction on them, only applied to actions against, and not to actions by, national banks.

So, also, Casey v. Adams, 102 U. S. 66, 26 L. ed. 52, after holding that the provisions of the Federal statutes purporting to confer concurrent jurisdiction upon certain state courts did not apply to local actions, upheld the jurisdiction of a state court, not within those provisions, over such an action.

And Fresno Nat. Bank v. San Joaquin County Super. Ct. 83 Cal. 491, 24 Pac. 157; Adams v. Daunis, 29 La. Ann. 315; Cooke v. State Nat. Bank, 52 N. Y. 96; Robinson v. National Bank, 81 N. Y. 385, 37 Am. Rep. 508; and Holmes v. National Bank, 18 S. C. 31, 44 Am. Rep. 558,—upheld the jurisdiction of state courts not within those provisions of the Federal statutes, after holding that the provisions were merely permissive, and not exclusive.

First Nat. Bank v. Morgan, 132 U. S. 141, 33 L. ed. 282, 10 Sup. Ct. Rep. 37, upheld the jurisdiction of a state court not within such provisions, upon the ground that they merely created a personal privilege that could be waived.

It will be observed that each one of these various constructions of the provisions of the Federal statutes with reference to concurrent jurisdiction left the concurrent jurisdiction of the state court without the express sanction of Congress, so that in those cases also the jurisdiction must have been traced to the inherent powers of the state courts.

Crocker v. Marine Nat. Bank, 101 Mass. 241 3 Am. Rep. 336, while holding that § 57 of the act of 1864 prevents a national bank from being sued in a state court out of the city and county

tered in the district court of the United States of the proper district, or in the circuit court on appeal.

Norwich Co. v. *Wright*, 13 Wall. 104, 20 L. ed. 585; *The Benefactor* v. *Mount*, 103 U. S. 239, *sub nom. New York & W. S. S. Co.* v. *Mount*, 26 L. ed. 351; *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.* 109 U. S. 578, 27 L. ed. 1038, 3 Sup. Ct. Rep. 379, 617; *Re Morrison*, 147 U. S. 14, *sub nom. Morrison* v. *United States Dist. Ct.* 37 L. ed. 60, 13 Sup. Ct. Rep. 246; *Quinlan* v. *Pew*, 5 U. S. App. 382, 56 Fed. Rep. 111, 5 C. C. A. 438; *The Tolchester*, 42 Fed. Rep. 180; *The Mary Lord*, 31 Fed. Rep. 416; *Elwell* v. *Geibel*, 33 Fed. Rep. 71; Benedict, Admiralty, 3d ed. p. 320, ¶ 561.

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

The substantial question in this case is the right of the appellants to have their liability for damages to the plaintiff limited to the value of their respective interests in the vessel which is alleged to have caused the injury. The act of Congress of March 3, 1851, § 3 (9 U. S. Stat. at L. 635 [chap. 43], Rev. Stat. 1878, § 4283), provides that "the liability of the owner or owners of any ship or vessel, for any embezzlement, loss, or destruction by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise shipped or put on board of such ship or vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners respectively in such ship or vessel, and her freight then pend-

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in which it is located, recognizes the general doctrine that civil cases arising under the Constitution and laws of the United States may be tried and determined in the state courts, unless the national Constitution and laws have vested jurisdiction of them in the Federal tribunals.

Actions by or against assignee in bankruptcy.

The question has also been frequently raised in actions brought by, or against, assignees in bankruptcy in the state courts.

Ward v. Jenkins, 10 Met. 591, upheld the jurisdiction of the state court over an action by such an assignee under the Federal bankrupt law of 1841, upon a contract made by the defendants with the bankrupt. The court held, in effect, that the jurisdiction of the state court in cases arising under the provisions of a Federal statute rested, not upon the ground of the judicial authority conferred as such by a law of the United States, but upon the ordinary powers of the state court acting, indeed, in the particular case upon legal rights which had been created or materially affected by the legislation of Congress.

The court further points out that under the Federal Constitution the laws of Congress are the supreme laws of the state,— as much so as statutes enacted by her own legislature.

Stevens v. Mechanics' Sav. Bank, 101 Mass. 109, 3 Am. Rep. 325; Hastings v. Fowler, 2 Ind. 216; Cogdell v. Exum, 69 N. C. 464, 12 Am. Rep. 657; Barnard v. Davis, 54 Ala. 565; Hoover v. Robinson, 3 Neb. 437; Peck v. Jenness, 16 N. H. 516, 43 Am. Dec. 573; Harrod v. Burgess, 5 Rob. (La.) 449; Russell v. Owen, 61 Mo. 185, and Johnson v. Bishop, Woolw. 324, Fed. Cas. No. 7,373,—are to the same effect.

Voorhies v. Frisbie, 25 Mich. 476, 12 Am. Rep. 291, as before shown, denied the jurisdiction of a state court over an action by an assignee in bankruptcy, under § 35 of the bankruptcy act of 1867, to set aside a transfer by the bankrupt as a preference in violation of the act. This decision rests, in part at least, upon the ground that the jurisdiction of the Federal courts was necessarily exclusive, since the right was created by the act. The court attempted to distinguish the case from Ward v. Jenkins, 10 Met. 591, upon the ground that in the latter action the right enforced existed at common law.

There is also an intimation in the opinion that the court considered that the right created by § 35 was in the nature of a penalty, and as such beyond the state courts' jurisdiction.

Brigham v. Claflin, 31 Wis. 607, 11 Am. Rep. 623, is to the same effect as Voorhies v. Frisbie, 25 Mich. 476, 12 Am. Rep. 291, *supra*, but brings out more prominently the penal character of the action. Bromley v. Goodrich, 40 Wis. 131, 22 Am. Rep. 685, reaffirms Brigham v. Claflin, and Sheldon v. Rounds, 40 Mich. 425, held that the bankruptcy court had exclusive jurisdiction of suits to determine the right of an assignee in bankruptcy to property where the right was disputed under the exemption clause of the bankrupt law of 1867, citing Voorhies v. Frisbie, 25 Mich. 476, 12 Am. Rep. 291.

Claflin v. Houseman, 93 U. S. 130, 23 L. ed. 833, however, upheld the concurrent jurisdiction of the state courts over suits under § 35.

Justice Bradley, who wrote the opinion, remarked that if an act of Congress gives a penalty to a party aggrieved without specifying a remedy for its enforcement there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in the state court.

To the same effect as Claflin v. Houseman, 93 U. S. 130, 23 L. ed. 833, are: Eyster v. Gaff, 91 U. S. 521, 23 L. ed. 403; Davis v. Friedlander, 104 U. S. 570, 26 L. ed. 818; McHenry v. La Société Française D'Epargnes, 95 U. S. 58, 24 L. ed. 370; McKenna v. Simpson, 129 U. S. 506, 32 L. ed. 771, 9 Sup. Ct. Rep. 365; Re Central Bank, 6 Nat. Bankr. Reg. 207, Fed. Cas. No. 2,547; Rison v. Powell, 28 Ark. 427; Dambmann v. White, 48 Cal. 439; Isett v. Stuart, 80 Ill. 404, 22 Am. Rep. 194; Wooldridge v. Rickert, 33 La. Ann. 234; Jordan v. Downey, 40 Md. 401; Boone v. Hall, 7 Bush, 66, 3 Am. Rep. 288; Otis v. Hadley, 112 Mass. 100; Lane v. Innes, 43 Minn. 137, 45 N. W. 4; McKiernan v. King, 2 Mont. 72; Gage v. Dow, 58 N. H. 420; Cook v. Whipple, 55 N. Y. 150, 14 Am. Rep. 202; Thompson v. Sweet, 73 N. Y. 622; Kemmerer v. Tool, 78 Pa. 147; and Barton v. Geiler, 3 Lea, 296.

Naturalization proceedings.

As pointed out in a note to State *ex rel.* Rushworth v. Judges of Inferior Ct. of Common Pleas (N. J.) in 30 L. R. A. 763, the courts have not always been in accord as to the true source of the jurisdiction of the state court in naturalization proceedings.

State v. Penney, 10 Ark. 621; Morgan v. Dudley, 18 B. Mon. 714, 68 Am. Dec. 735; *Re* Ramsden, 13 How. Pr. 435; and *Ex parte* McKenzie, 51 S. C. 244, 28 S. E. 468,—seem to hold, in conformity to the general doctrine of Houston v. Moore, 5 Wheat. 1, 5 L. ed. 19, that the juris-

ing." And the act of June 26, 1884, § 18 (23 U. S. Stat. at L. 57 [chap. 121], 1 Supp. Rev. Stat. ed. 1891, p. 443), makes a substantially similar provision in more condensed phraseology: "That the individual liability of a shipowner shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole, and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessels, and freight pending." By the act of June 19, 1886, § 4 (24 Stat. 79 [chap. 421], 1 Supp. Rev. Stat. ed. 1891, p. 494), the act of 1884 is made to apply to "all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters." In *Butler* v. *Boston & S. S. S. Co.* 130 U. S. 527, 32 L. ed. 1017, 9 Sup. Ct. Rep. 612, it was held that this limitation of liability applies to actions for damages for death caused by negligence. And, on this point, see also *Craig* v. *Continental Ins. Co.* 141 U. S. 638, 35 L. ed. 886, 12 Sup. Ct. Rep. 97. It was further held in the former case that the limitation of liability was enacted by Congress as part of the maritime law of the United States, and is coextensive in its operation with the whole territorial domain of that law. It applies, therefore, to the case of a disaster happening within the limits of a county of a state, and to a case where the liability itself arises from a law of the state.

These statutory limitations of liability, so construed by the Supreme Court of the United States, would seem to settle the question in this case in favor of appellants. But it is argued for appellee that they cannot prevail against the prohibition in § 21 of article 3 of the Constitution of Pennsylvania against any limitation of the amount to be recovered for injuries resulting in

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diction cannot rest alone upon the provisions of the acts of Congress which attempt to confer it, but that the state courts must, independently of such provisions, have power adequate to the performance of the acts required to be done in the process of naturalization.

Robertson v. Baldwin, 165 U. S. 275, 41 L. ed. 715, 17 Sup. Ct. Rep. 326, however, holds that the doctrine that Congress cannot vest any of the judicial powers of the United States in the courts or judicial officers of the several states applies only to the trial and determination of "cases" in courts of record, and that Congress is still at liberty to authorize the judicial officers of the several states to exercise such power as is ordinarily given to officers not of record, such, for instance, as the power to naturalize aliens, and perform such other duties as may be regarded as incidental to the judicial power, rather than the judicial power itself.

That case, however, did not involve any question as to naturalization, but related to the power of Congress to authorize justices of the peace to issue warrants for deserting seamen.

When jurisdiction of state courts excluded.

There is some difference of opinion as to whether the jurisdiction of the Federal courts is made exclusive, and the state courts ousted of their concurrent jurisdiction, by an act of Congress which without words of exclusion, merely confers jurisdiction upon the Federal courts. It will be observed that in many cases Congress had either expressly granted concurrent jurisdiction to the state court, or had clearly negatived exclusive jurisdiction in the Federal courts, so that this question did not arise.

Hamilton in stating the doctrine says that in every case in which the state courts are not "expressly" excluded by the acts of the national legislature such courts will take cognizance of the causes to which those acts may give birth.

Houston v. Moore, 5 Wheat. 1, 5 L. ed. 19, *supra*, held that the provisions of the Federal militia laws, conferring jurisdiction of the offense in question upon the Federal court martial, did not exclude the concurrent jurisdiction of the state court martial.

As already shown, Fresno Nat. Bank v. San Joaquin County Super. Ct. 83 Cal. 491, 24 Pac. 157; Adams v. Daunis, 29 La. Ann. 315; Cooke v. State Nat. Bank, 52 N. Y. 96; Robinson v. National Bank, 81 N. Y. 385, 37 Am. Rep. 508; and Holmes v. National Bank, 18 S. C. 31,—hold that the jurisdiction conferred on the Federal and certain state courts by § 5198, U. S. Rev. Stat., is not exclusive of the jurisdiction of other state courts, while Crocker v. Marine Nat. Bank, 101 Mass. 241, 3 Am. Rep. 336, *supra*, and Cadle v. Tracy, 11 Blatchf. 101, Fed. Cas. No. 2,279, hold that the jurisdiction so conferred is exclusive.

Pettilon v. Noble, 7 Biss. 449, Fed. Cas. No. 11,044, holds that § 629, U. S. Rev. Stat., giving United States courts jurisdiction of all suits by or against any banking association established in the district for which the court is held, under any law providing for banking associations, does not devest the concurrent jurisdiction of the state courts.

Claflin v. Houseman, 93 U. S. 130, 23 L. ed. 833, which approves the general doctrine of Houston v. Moore, 5 Wheat. 1, 5 L. ed. 19, intimates a doubt as to the correctness of the decision with reference to the effect of the Federal laws involved in that case on the concurrent jurisdiction.

Ward v. Jenkins, 10 Met. 591, *supra*, held that the various provisions of the Federal bankruptcy act of 1841, conferring jurisdiction upon the United States courts, did not exclude the concurrent jurisdiction of the state courts, and the cases above cited as being to the same effect as that case must have held the same in respect to the act of 1841 or 1867, as the case may have been. The same is true of Claflin v. Houseman, 93 U. S. 130, 23 L. ed. 833, and the other cases, above cited, in line with it; and Wetmore v. McMillan, 57 Iowa, 344, 10 N. W. 725; Clark v. Ewing, 9 Biss. 440, 3 Fed. Rep. 83; Goodrich v. Wilson, 119 Mass. 429; Kidder v. Horrobin, 72 N. Y. 159; Olcott v. Maclean, 73 N. Y. 223; Wente v. Young, 12 Hun, 220; and Wheelock v. Lee, 54 How. Pr. 402,—expressly held that § 4974, U. S. Rev. Stat., providing that legal debts or assets of the bankrupt, if not in excess of $500, might be recovered in a state court, did not take away the jurisdiction of the state court when the debt exceeded that amount.

Copp v. Louisville & N. R. Co. 43 La. Ann. 511, 12 L. R. A. 725, 9 So. 441, denied the jurisdiction of the state court over an action under the interstate commerce act for the recovery of damages for unlawful discrimination, upon the ground that the statute which created the right provided for a remedy before the interstate commerce commission or the district or circuit court of the United States, and that such remedies were exclusive under the rule that where a particular remedy is provided by law such remedy must be sought to the exclusion of all others.

death, and that, in any view, they cannot be administered by a Pennsylvania court in a common-law action.

As to the first objection, it is clear that neither statute nor Constitution of Pennsylvania can be set up against a right given by Congress in its control of the maritime law of the country. That control is paramount, and, when it has been exercised in a particular way, all state authority must conform to it.

The second objection—that the limitation cannot be administered by a state court in a common-law action—must depend primarily on the language of the acts of Congress, and the nature of the right which they confer. If such right is contingent on something to be done by the vessel owner or others, then we must look into the pleadings or the evidence of the acts of the parties. But if, on the other hand, the right is absolute, then, clearly, it cannot be defeated by the plaintiff's choice of the tribunal; and if the state court is unable, through defect of its jurisdiction over parties or subject-matter, or through its methods of procedure, to protect the right, then the court must dismiss the case for want of appropriate powers to determine it in accordance with the paramount law on the subject.

This brings us to the consideration of the acts of Congress. The limitation of liability

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Battin v. Kear, 2 Phila. 301, and Dudley v. Mayhew, 3 N. Y. 9, which were decided before the jurisdiction of the Federal courts over cases arising under the patent right laws was expressly made exclusive, held that § 17 of the act of Congress of July 4, 1836, providing that all cases of that class should be originally cognizable by the circuit courts of the United States, excluded the jurisdiction of the state courts. These decisions rest upon the ground that the rights of the patentee spring wholly from the Federal statutes, and therefore that the remedy provided by the statutes is exclusive.

Missouri River Packet Co. v. Hannibal & St. J. R. Co. 79 Mo. 478, holds that the 1st section of act of Congress of July 26, 1866, "To Authorize the Construction of Certain Bridges," conferring jurisdiction upon the United States district court of any litigation arising from obstruction to navigation by the bridges authorized by the act, does not devest the common-law jurisdiction of the state courts over the matter.

When question arises incidentally.

If, as above shown, the state courts may take concurrent jurisdiction when a cause of action arises out of an act of Congress, *a fortiori*, they may, if they have adequate power and machinery to deal with them, take cognizance of questions incidentally arising under such an act, as in the principal case.

Martin v. Hunter, 1 Wheat. 304, 4 L. ed. 97, *supra*, which goes as far as any case to uphold the exclusive jurisdiction of the Federal courts over matters within the judicial power confided to the United States by the Constitution, recognizes the fact that such questions will arise incidentally in the state courts in the exercise of their ordinary jurisdiction, and makes it the basis of an argument for the appellate jurisdiction of the United States Supreme Court over judgments of the state courts. So, also, Rodney v. Illinois C. R. Co. 19 Ill. 42, while questioning the right of state tribunals to take direct cognizance of cases arising under Federal statutes, holds they can enforce such law when they come incidentally in question.

It may happen, that the state court does not have the necessary methods or machinery to enforce a right under a Federal statute, even when it arises incidentally. In that event, as shown by the opinions in the principal case, and in Chisholm v. Northern Transp. Co. 61 Barb. 363, the state court should dismiss the action.

The power of Congress to exclude from evidence in the state courts instruments not bearing required revenue stamps is discussed in a note to Knox v. Rossi, — L. R. A. —.

Miscellaneous.

This note is not intended to cover the question as to what cases fall within the categories of cases of which Congress has declared the jurisdiction of the Federal courts shall be exclusive. Many of the cases which turn upon that question assume that the state courts have concurrent jurisdiction, unless the case falls within one of such categories.

There are many cases, for instance, which uphold the jurisdiction of the state courts in actions in which a defense going to the validity of a patent has been interposed, after holding that such defense does not bring the action within U. S. Rev. Stat. § 711, declaring that the Federal court shall have exclusive jurisdiction of all cases arising under the patent right laws. The following are cases of that kind: Pratt v. Paris Gaslight & Coke Co. 168 U. S. 255, 42 L. ed. 458, 18 Sup. Ct. Rep. 62; Dunbar v. Marden, 13 N. H. 311; Rich v. Atwater, 16 Conn. 409; Sherman v. Champlain Transp. Co. 31 Vt. 162; Clough v. Patrick, 37 Vt. 421; Burrall v. Jewett, 2 Paige, 134; Middlebrook v. Broadbent, 47 N. Y. 443, 7 Am. Rep. 457; Continental Store Service Co. v. Clark, 100 N. Y. 365, 3 N. E. 335; Head v. Stevens, 19 Wend. 411; Harmon v. Bird, 22 Wend. 113; Cross v. Huntly, 13 Wend. 385; Saxton v. Dodge, 57 Barb. 84; Geiger v. Cook, 3 Watts & S. 266; Siemmer's Appeal, 58 Pa. 155, 98 Am. Dec. 248; McClure v. Jeffrey, 8 Ind. 79; Nye v. Raymond, 16 Ill. 153; Page v. Dickerson, 28 Wis. 694, 9 Am. Rep. 532; Rice v. Garnhart, 34 Wis. 453, 17 Am. Rep. 448; Billings v. Ames, 32 Mo. 265.

III. *Criminal and penal laws.*

Criminal laws.

Notwithstanding that the judiciary act passed by the first Congress after the adoption of the Constitution expressly gave the Federal courts exclusive jurisdiction of all crimes and offenses cognizable under the authority of the United States, and that since that time there has been a general statutory reservation of exclusive jurisdiction to the Federal courts in such cases, the question as to the concurrent jurisdiction of the state courts has arisen in a number of cases, because Congress, by purporting to confer concurrent jurisdiction upon the state courts over certain crimes or offenses, has as to them withdrawn the restriction previously imposed.

It would seem that the question of the concurrent jurisdiction of the state courts over this class of cases must be determined by the same criterion that governs in civil cases—namely, the inherent power of the state courts, unaided by the acts of Congress except so far as they may remove restrictions previously imposed upon such jurisdiction by Congress. The answer, however, is likely to be different in view of the general rule that the courts of one sover-

under both the acts of 1851 and 1884 is general and absolute. By the former the liability "shall in no case exceed," and by the latter "shall be limited to" the value of the individual owner's interest in the vessel. The former provision is contained in § 3 of the act of 1851, and by § 4 it is provided that whenever the loss is by several owners of goods, etc., and the whole value of the vessel and freight is not sufficient, they shall receive compensation in proportion to their respective losses, and the owner of the vessel may take appropriate proceedings in any court for the purpose of apportioning the sum for which he is liable among the parties entitled thereto. It then continues that it shall be sufficient compliance by the owner with the requirements of the act if he shall transfer his interest in the vessel and freight to a trustee for the parties entitled, to be appointed by any court of competent jurisdiction, and thereupon all claims and proceedings against the owner shall cease. There is nothing in this section which in any way changes the positive character of the limitation. The provisions are manifestly in furtherance, not in restriction, of the vessel owner's right, and are directory only, in the sense that they point out a method by which his right may be enforced, but are not exclusive of other methods which may be found effective for the same purpose. And such

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elguty will not execute the criminal or penal laws of another, whereas there is no such rule in respect to purely civil actions.

Justice Story, in Martin v. Hunter, 1 Wheat. 337, 4 L. ed. 105, says that no part of the criminal jurisdiction of the United States can, consistently with the Constitution, be delegated to state tribunals.

If by this he means, cannot be delegated by Congress, he is in accord with the later decisions, but most of the latter have determined the question of the state court's jurisdiction by reference to the criterion mentioned.

Houston v. Moore, 5 Wheat. 1, 5 L. ed. 19, is not authority for the position that Congress may effectively confer concurrent jurisdiction upon state courts over offenses against the Federal laws. It merely held that the Federal militia laws which covered the offense in question in that case did not confer exclusive jurisdiction upon the Federal courts, as was done by the judiciary act with reference to other offenses. This fact, under the doctrine established by the case with reference to concurrent jurisdiction, left the way open for the state court to take jurisdiction if it could find authority to do so independently of any act of Congress, and in that particular case authority was found in a state statute.

The existence of such statute differentiates the case from most of the other criminal cases involving the question of concurrent jurisdiction, since in such cases it was necessary to determine the inherent jurisdiction of the state courts by reference to the general principles of law.

State v. Wells, 2 Hill, L. 687, held that the state court had jurisdiction of a prosecution for opening a letter contrary to the act of Congress regulating the postoffice department.

The court quotes the provision of the Constitution making the laws of Congress the supreme law of the land, and says that an offense against the laws of the United States is an offense against the laws of the state, and the state has a right to punish it upon the principle of the common law that she has the right to punish all violations of her law. This decision was, however, expressly overruled by State v. M'Bride, Rice, L. 400, holding that the state court had no jurisdiction of an offense of stealing a letter from the mail in violation of the act of Congress, and is opposed to the current of authority.

Com. v. Feely, 1 Va. Cas. 321, denies the jurisdiction of the state court over a defendant indicted for stealing mail.

In these cases the judiciary act opposed no obstacle to concurrent jurisdiction, since the statute creating the offenses purported to confer such jurisdiction.

Robertson v. Baldwin, 165 U. S. 275, 41 L. ed. 715, 17 Sup. Ct. Rep. 326, as before stated.

holds that the judicial power which Congress cannot vest in the state courts does not include the power to take affidavits, or to arrest and commit for trial offenders against the United States, and accordingly holds that § 4598 of the Revised Statutes is not unconstitutional because it authorizes justices of the peace to issue warrants to apprehend deserting seamen, and to deliver them up to the master of their vessel.

A similar decision, based on the same principle, had been previously made in *Ex parte* Gist, 26 Ala. 156.

Cases in which the defendants are proceeded against under the Federal statutes are to be distinguished from those like Fox v. Ohio, 5 How. 410, 12 L. ed. 213; State v. Pike, 15 N. H. 83; Moore v. Illinois, 14 How. 13, 14 L. ed. 306; Com. v. Fuller, 8 Met. 313, 41 Am. Dec. 509; and Jett v. Com. 18 Gratt. 939,—in which there was a state statute covering the same offense as the Federal statute.

Penal laws.

Haney v. Sharp, 1 Dana, 442, denied the jurisdiction of the state court over an action for a penalty under the act of Congress relating to the census. The court says that no state tribunal has inherent jurisdiction over, nor can it take jurisdiction of, a penal case arising under an act of Congress, unless some law of the commonwealth has given it the right to do so, and the general government has by an act of Congress also consented. In this case neither of such requisites existed.

United States v. Lathrop, 17 Johns. 4, denied the jurisdiction of the state court over an action of debt by the United States to recover a penalty for selling spirituous liquor in violation of an act of Congress of August 2, 1813, which expressly provides that suit may be prosecuted before any court of the state having jurisdiction in like cases. The court says that a pecuniary penalty for violation of an act of Congress is as much a punishment for an offense against the laws as if a corporal punishment had been inflicted, and that as regards crimes and offenses the government of the United States stands in the same relation to the state government as any foreign government.

Justice Bradley, in Claflin v. Houseman, 93 U. S. 130, 23 L. ed. 833, *supra*, says that if an act of Congress gives a penalty to a party aggrieved without specifying a remedy for its enforcement there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in state. He refers to United States v. Lathrop, 17 Johns. 4, and remarks that the state courts have in certain instances declined to exercise the jurisdiction conferred upon them, but that that fact does not militate against the existence of such jurisdiction. He also criticises

we understand to be the construction settled by the Supreme Court of the United States.

In the case of *The Scotland*, 105 U. S. 24, *sub nom. National Steam Nav. Co.* v. *Dyer*, 26 L. ed. 1001, it was said by Bradley, J.: "The primary enactment in § 4283, Rev. Stat., is that the liability of the owner for any loss or damage . . . shall in no case exceed the amount or value of his interest in the vessel and her freight then pending. Two modes for carrying out this law are then prescribed,—one in § 4284, and the other in § 4285." These sections are the revision and re-enactment of § 4 of the act of 1851 just discussed. The same opinion then proceeds to show that these modes are in aid, and not in restriction, of the owner's right to limit his liability, and are not therefore exclusive, but the defense may be made in any form that the nature of the case and the procedure of the court will permit. And to the same effect are *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.* 109 U. S. 578, 594, 27 L. ed. 1038, 1044, 3 Sup. Ct. Rep. 379, 617,

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the tendency to regard the laws of the United States as emanating from a foreign power, saying that it is founded on an erroneous view of the nature and relation of the state and Federal governments. It is to be observed, however, that Claflin v. Houseman, if regarded as an action for a penalty, was for the benefit of an assignee in bankruptcy, and not for the benefit of the government. Moreover, Justice Gray, in Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224, says, *arguendo*, the courts of the state cannot be compelled to take jurisdiction of a suit to recover a penalty for a violation of a law of the United States, and that the only ground ever suggested for maintaining such suits in a state court is that the laws of the United States are in effect the laws of each state. After remarking that the statement of Justice Bradley in Claflin v. Houseman, 93 U. S. 130, 23 L. ed. 833, on this point was *obiter*, he says that Justice Bradley, the year before, when sitting in circuit (*Ex parte* Bridges), said it would be manifest incongruity for one sovereign to punish a person for an offense against the laws of another.

Jackson v. Rose, 2 Va. Cas. 34; Davison v. Champlin, 7 Conn. 244; and Ely v. Peck, 7 Conn. 239,—are to the same effect as United States v. Lathrop, 17 Johns. 4, *supra*.

On the other hand, United States v. Smith, 4 N. J. L. 33; Buckwalter v. United States, 11 Serg. & R. 193; Hartley v. United States, 3 Hayw. (Tenn.) 45; and Stearns v. United States, 2 Paine, 300, Fed. Cas. No. 13,341,—uphold the jurisdiction of state courts over suits by the United States to recover penalties under acts of Congress which purport to confer jurisdiction upon the state courts. These decisions rest on the ground that the laws of Congress are the supreme laws of the land, and the last-mentioned case alludes to the fact that the proceeding was not a criminal prosecution, but a civil action to recover a penalty for breach of the statute.

That case also disapproved of United States v. Lathrop, 17 Johns. 4, and dissented from the view that the Federal and state governments are to be considered as entirely foreign to each other, and that the case falls under the rule that the courts of one sovereignty will not take cognizance of, and enforce, the Penal Code of another.

In addition to the distinction suggested in Stearns v. United States, 2 Paine, 300, Fed. Cas. No. 13,341, with reference to the form of proceeding for the enforcement of a penalty, there seems to be a further distinction, depending upon the question whether the injury is solely to public, or directly affects private, rights. Actions against national banks to recover the penalty for exacting usury are of the latter kind, and it has been generally held that state courts have jurisdiction of them, the exclusive jurisdiction of the Federal courts having been negatived by the provisions of the acts of Congress purporting to confer concurrent jurisdiction upon the state courts.

To that effect are Kinser v. Farmers' Nat. Bank, 58 Iowa, 728, 13 N. W. 59; Henderson Nat. Bank v. Alves, 91 Ky. 142, 15 N. W. 132; National Bank v. Johnson, 11 Ky. L. Rep. 904; Bank v. Snyder (Pa.) 2 Leg. Rec. Rep. 356; Ordway v. Central Nat. Bank, 47 Md. 217, 28 Am. Rep. 455; First Nat. Bank v. Overman, 22 Neb. 116, 34 N. W. 107; Morgan v. First Nat. Bank, 93 N. C. 352; Schuyler Nat. Bank v. Bollong, 37 Neb. 620, 56 N. W. 209; Hade v. McVay, 31 Ohio St. 231; Lebanon Nat. Bank v. Karmany, 98 Pa. 65; First Nat. Bank v. Gruber, 91 Pa. 377; Bletz v. Columbia Nat. Bank, 87 Pa. 87, 30 Am. Rep. 343; Lynch v. Merchants' Nat. Bank, 22 W. Va. 554, 46 Am. Rep. 520.

The opinion in Bletz v. Columbia Nat. Bank, 87 Pa. 87, 30 Am. Rep. 343, cites, and relies on, Claflin v. Houseman, 93 U. S. 130, 23 L. ed. 833, and says that whatever doubts have been expressed by some state courts as to penalties to be sued for by the United States, or someone in its behalf, in order to vindicate the Federal law, they do not extend to a case involving a private right sued for by the citizen for himself.

The jurisdiction of the state courts, even over such actions, has been denied in Missouri River Teleg. Co. v. First Nat. Bank, 74 Ill. 217, which says that the state court cannot enforce the criminal or penal laws of another sovereignty. In answer to the argument based on the fact that the state courts entertain jurisdiction in cases where national banks are parties either plaintiff or defendant, the court said that the jurisdiction in such cases resulted from the power conferred by the state Constitution and laws, and not from the acts of Congress.

Newell v. National Bank, 12 Bush, 57, was an action by a national bank on a note. The defendant pleaded usury, and sought to set off the forfeiture declared by the acts of Congress in such cases. The court held that the penalties arising under the laws of the United States could not be enforced in state courts.

National Bank v. Eyre, 52 Iowa, 114, 2 N. W. 995; Peoples v. First Nat. Bank, 15 Ky. L. Rep. 748; and First Nat. Bank v. Childs, 130 Mass. 519, 39 Am. Rep. 474,—on the contrary, hold that such forfeiture is available as a defense in a state court. It will be observed that § 5198, U. S. Rev. Stat., which prescribes the penalty for usury, provides for its recovery in an action of debt; so that actions for this penalty are civil in form, and the benefit accrues to the individual.

Whatever may be the rule when the action is for the vindication of a private right, or when the proceeding is not criminal, it is undoubtedly true, in the absence of state legislation, that the state courts cannot find in their own inherent powers, and cannot acquire through acts of Congress, the requisite authority to enable them to entertain a proceeding, criminal in its nature and designed for the vindication of a purely public right, to enforce a criminal or penal statute of the Federal government.

G. H. P.

and *Craig* v. *Continental Ins. Co.* 141 U. S. 638, 35 L. ed. 886, 12 Sup. Ct. Rep. 97. The very point of the admissibility of this defense in an action in a state court was decided in the case of *The Rosa*, 53 Fed. Rep. 132, where a petition by the vessel owner for establishment of limited liability, and for prohibition of further proceedings by a plaintiff in a state court, was dismissed by the district court of the United States on the ground that the defense could be adequately made in the state court. It is true that this conclusion has been dissented from in *Quinlan* v. *Pew*, 5 U. S. App. 382, 56 Fed. Rep. 111, 121, 5 C. C. A. 438, but apparently on the ground that the vessel owner's privilege, not only to have the value of the vessel appraised and his liability limited to that, but also to have all parties compelled to come into the admiralty court with their claims, was absolute under the statute, and could not be refused, in view of the want of power of the state court to enforce the latter branch of the remedy. But even this case does not sustain the contention that the vessel owner may not make his defense in the state court if he so chooses. We are of opinion that appellant's right to make this defense is clear, and we see no difficulty in enforcing it in this action. They should have been permitted to show the value of the tug, and their respective proportions of ownership in it. The most convenient practice then would be, after appropriate instructions to the jury, to direct them, if they found for the plaintiff, to find specially, in addition, the value of the tug, and the proportionate ownership of the several defendants. With these facts specifically found, the verdict could be molded by the court into proper form with less danger of mistake than if the whole were left in a lump to the jury.

The questions of defendant's negligence, and Loughin's own contributory negligence, could not, under the evidence, have been taken from the jury.

A number of questions are raised by the assignments of error in regard to irregularities in the swearing of the jury, and in the verdict and judgment; but, as all of these will be easily avoided at the next trial, it is not necessary to discuss them.

Judgment reversed, and *venire de novo* awarded.

INDIANA SUPREME COURT.

UNION TRUST COMPANY of St. Louis *et al.*
v.
RICHMOND CITY RAILWAY COMPANY *et al.*

ROYAL BRICK COMPANY *et al.*, Interveners, *Appts.*

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

1. **One not a party, but having an interest in the subject-matter** of a pending action, that may be adversely affected by the suit, will be permitted by the court, upon a proper showing, under Burns's Rev. Stat. 1894, § 273, to come into the case for the protection of whatever right or interest he may have in the subject-matter.
2. **A provision in an ordinance authorizing a street railway to be laid,** that the space between the tracks shall be paved in the manner specified "when and as the street may be" thus paved, must be understood to mean that the paving between the tracks shall be at the expense of the company.
3. **The construction which the parties themselves place** upon a contract will be adopted by the court, when its terms are uncertain.
4. **A mortgagee of a street-railway company, though not bound by a compromise contract** between the mortgagor and the city, with respect to liens on the property for paving, cannot accept the benefit of such contract for the relief of the property from a lien existing under the company's charter ordinance without being subjected to the burden of a lien which the contract provided for.
5. **A street railway is within the reason of the rule** of a court of equity which subjects proceeds of mortgaged railway property in the hands of a receiver to the payment of current debts made in the ordinary course of business, if there has been any diversion of the current receipts to increase the value of the security.
6. **A preference of a claim for paving the track of a street railway** out of the proceeds of the property on foreclosure cannot be allowed on account of the purchase by the company of cars and other equipment after the paving was begun, materially increasing the value of the mortgaged property, unless such equipment was paid for out of the current earnings of the company.
7. **A lien upon a street railway for a paving assessment** to which the company is subject under its charter is superior to the lien of a mortgage upon the property.
8. **A judgment on demurrer to an intervening petition,** which makes a final disposition of the case so far as concerns the petitioners, may be appealed from.

(December 12, 1899.)

APPEAL by interveners from a judgment of the Circuit Court for Wayne County dismissing a petition by creditors for intervention in a proceeding to foreclose a mortgage on defendant's property, in which

NOTE.—As to superiority of lien of local assessment over prior lien, see also Seattle v. Hill (Wash.) 35 L. R. A. 372, and *note;* and Dressman v. Farmers' & T. Nat. Bank (Ky.) 36 L. R. A. 121.

As to liability of street railway to paving assessment, see Shreveport v. Prescott (La.) 46 L. R. A. 193, and *note.*

interveners sought to obtain payment for material furnished for improvements which defendant was required to make. *Reversed.*

The facts are stated in the opinion.

Messrs. **H. C. Fox, William L. Taylor,** and **A. C. Lindemuth** for appellants.

Messrs. **Seddon & Blair** and **John L. Rupe,** for appellees:

The appellants' petitions give them no standing in court. They are not intervening petitions as recognized by the statutes, nor are they cross-complaints.

One who attempts to intervene in an action pending between other parties, without bringing himself within the provisions of the statute, is a mere interloper.

Des Moines Ins. Co. v. *Lent,* 75 Iowa, 522, 39 N. W. 826.

Treating the intervening petitions as cross-complaints, they must be tested by the rule of pleadings applicable to such complaints.

A pleading cannot serve the double purpose of an answer and a cross-complaint. It must be the one thing or the other.

Thompson v. *Toohey,* 71 Ind. 296; *Washburn* v. *Roberts,* 72 Ind. 213; *Conger* v. *Miller,* 104 Ind. 592, 4 N. E. 300.

Even as against the Richmond City Railway Company there can be no lien on the property of the company, unless the compromise ordinance is shown to be binding upon the company; for no lien can arise under the franchise ordinance alone.

The mere passage of the compromise ordinance did not make a contract.

Admitting that the compromise ordinance did become a valid and binding contract between the city and the company, a lien could be fixed by the city on the property of the company, only in exactly the same way that it could be fixed on the property of the abutting owners.

Before any assessment could have become a lien upon any property, or before anyone could have been affected by the proceedings, notice must have been given.

McEneney v. *Sullivan,* 125 Ind. 407, 25 N. E. 540.

The general allegation that such proceedings were taken as required by law, even if the statement was not explained by setting out in the petition exactly what was done, is a mere allegation of law, and not a statement of any fact.

Oldfield v. *New York & H. R. Co.* 14 N. Y. 310.

If the city and the company ever intended to construe the franchise ordinance at all, or to give it any such construction, it was not in their power to give to it, after the mortgage was executed, any construction prejudicial to the rights of the bondholders, or in any manner to affect the rights of the bondholders without their consent.

Jones, Corporate Bonds, § 416.

A pleading stating a cause of action must proceed upon a single definite theory; it will be construed, and its theory determined, from its general scope and allegations; and the pleader will be held and conclusively bound by the theory upon which he proceeds in all stages of the cause.

Platter v. *Seymour,* 86 Ind. 323; *Citizens' Street R. Co.* v. *Willoeby,* 134 Ind. 563, 33 N. E. 627; *Chicago, St. L. & P. R. Co.* v. *Bills,* 104 Ind. 13, 3 N. E. 611; *Toledo, St. L. & K. C. R. Co.* v. *Levy,* 127 Ind. 168, 26 N. E. 773; *Jackson* v. *Landers,* 134 Ind. 529, 34 N. E. 323.

The doctrine that a mortgage can be defeated by, or made inferior to, subsequent obligations incurred by the mortgagor, has never received judicial sanction except in a peculiar and limited class of cases.

Turner v. *Indianapolis, B. & W. R. Co.* 8 Biss. 315, Fed. Cas. No. 14,258; *Fosdick* v. *Schall,* 99 U. S. 235, 25 L. ed. 339; *Barton* v. *Barbour,* 104 U. S. 126, 26 L. ed. 672; *Miltenberger* v. *Logansport, C. & S. W. R. Co.* 106 U. S. 286, 27 L. ed. 117, 1 Sup. Ct. Rep. 140; *Wood* v. *Guarantee Trust & S. D. Co.* 128 U. S. 416, 32 L. ed. 472, 9 Sup. Ct. Rep. 131.

There is a "broad distinction" between property to which the doctrine has been applied and the property which is the subject of this action.

A railroad is for the use of the universal public in the transportation of all persons, baggage, and other freight; a street railway is dedicated to the more limited use of the local public, for the more transient transportation of persons only, and within the limits of the city.

Louisville & P. R. Co. v. *Louisville City R. Co.* 2 Duv. 178.

A street railroad or "tramway," as it is sometimes called, whether propelled by mule or electric power, is a matter of purely local concern.

In no sense are these enterprises any more public institutions than are waterworks companies, gas companies, electric-light companies, or telephone exchanges.

The rule in *Fosdick* v. *Schall,* 99 U. S. 235, 25 L. ed. 339, is not to be applied in case of a waterworks company, and the principles upon which the rule rests make it inapplicable in case of a street-railway company, or other merely local enterprise of that class.

Wood v. *Guarantee Trust & S. D. Co.* 128 U. S. 416, 32 L. ed. 472, 9 Sup. Ct. Rep. 131; Jones, Corporate Bonds, § 606; *Litzenberger* v. *Jarvis-Conklin Trust Co.* 8 Utah, 15, 23 Pac. 871.

There was no diversion of the current earnings, either to the payment of interest or the permanent improvement of the property. In fact but little interest was ever paid on the bonds.

One holding a mortgage debt upon a railroad has the same right to demand and expect of the court respect for his vested and contracted priority as the holder of a mortgage on a farm or lot.

Morgan's L. & T. R. & S. S. Co. v. *Texas C. R. Co.* 137 U. S. 171, 34 L. ed. 625, 11 Sup. Ct. Rep. 61; *Thomas* v. *Western Car Co.* 149 U. S. 95, 37 L. ed. 663, 13 Sup. Ct. Rep. 824; *Addison* v. *Lewis,* 75 Va. 701; *Fi-*

delity Ins. Trust & S. D. Co. v. *Shenandoah Valley R. Co.* 86 Va. 1, 9 S. C. 759; *Metropolitan Trust Co.* v. *Tonawanda Valley & C. R. Co.* 103 N. Y. 245, 8 N. E. 488; Jones, Corporate Bonds, §§ 589, 613; 20 Am. & Eng. Enc. Law, pp. 426, 437.

On petition for rehearing.

No theory adopted by counsel in argument upon appeal can affect a party's right to the judgment of the court upon the pleading as it appears in the record, as to its theory and legal effect.

Western U. Teleg. Co. v. *Reed*, 96 Ind. 198; *Citizens' Street R. Co.* v. *Willoeby*, 134 Ind. 563, 33 N. E. 627; *New Pittsburgh Coal & Coke Co.* v. *Peterson*, 136 Ind. 398, 35 N. E. 7; *Balue* v. *Taylor*, 136 Ind. 368, 36 N. E. 269; *Evansville & R. R. Co.* v. *Barnes*, 137 Ind. 306, 36 N. E. 1092; *Copeland* v. *Summers*, 138 Ind. 219, 35 N. E. 514, 37 N. E. 971; *Terre Haute & I. R. Co.* v. *McCorkle*, 140 Ind. 613, 40 N. E. 62; *Carmel Natural Gas & Improv. Co.* v. *Small*, 150 Ind. 427, 47 N. E. 11, 50 N. E. 476; *Chicago, St. L. & P. R. Co.* v. *Bills*, 104 Ind. 13, 3 N. E. 611; *Racer* v. *State*, 131 Ind. 393, 31 N. E. 81; *Western U. Teleg. Co.* v. *Young*, 93 Ind. 118; *Ætna Powder Co.* v. *Hildebrand*, 137 Ind. 462, 37 N. E. 136.

A complaint cannot be made elastic so as to take form with the varying views of counsel.

Mescall v. *Tully*, 91 Ind. 99.

The facts presented do not entitle the appellants to relief by way of priority of payment, as against the mortgagee.

Provisional Municipality v. *Northrup*, 30 U. S. App. 762, 66 Fed. Rep. 689, 14 C. C. A. 59; *Chicago* v. *Sheldon*, 9 Wall. 50, 19 L. ed. 594; *Toledo, D. & B. R. Co.* v. *Hamilton*, 134 U. S. 296, 33 L. ed. 905, 10 Sup. Ct. Rep. 546; *Houston City Street R. Co.* v. *Storrie* (Tex. Civ. App.) 44 S. W. 693.

The assessment is claimed for a repaving and reconstruction of the street.

A charter obligation to pave the street and maintain or keep it in repair creates no obligation to repave or reconstruct.

Western Paving & Supply Co. v. *Citizens' Street R. Co.* 128 Ind. 525, 10 L. R. A. 770, 26 N. E. 188, 28 N. E. 88; *Chicago* v. *Shelton*, 9 Wall. 50, 19 L. ed. 594; *State ex rel. Kansas* v. *Corrigan Consol. Street R. Co.* 85 Mo. 263, 55 Am. Rep. 361; *Farrar* v. *St. Louis*, 80 Mo. 379; *Farmers' Loan & T. Co.* v. *Ansonia*, 61 Conn. 76, 23 Atl. 705; Elliott, Roads & Streets, p. 594; *District of Columbia* v. *Washington & G. R. Co.* 1 Mackey, 361; *Norristown* v. *Norristown Pass. R. Co.* 148 Pa. 87, 23 Atl. 1060.

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

The Richmond City Railway Company had operated a railroad over the streets of the city of Richmond for many years with animal power, and in March, 1889, the city council passed an ordinance granting the company a new franchise for the period of fifty years, and authorizing the company to operate its street railroads by means of cable, electric, or animal power, "or either or any of them," upon the conditions recited in the ordinance. The company accepted said ordinance as amended April 22, 1889, reorganized thereunder, and in January, 1890, to secure its 200 $1,000 bonds, executed to the now appellees its mortgage or all its property and "all rents, profits, tolls, issues, and income derived or arising therefrom." In 1892 it was deemed necessary and expedient by the common council of the city to pave with vitrified brick three squares of Main street, and, having adopted a declaratory resolution and ordinance therefor, gave notice to the Richmond City Railway Company to pave between its tracks on said squares "when and as the street was improved." The company failing to comply with the notice, the city paved between the tracks when and as the street was paved, and upon completion of the work charged against the company the actual cost thereof, namely $3,011.30, and demanded payment. The company failed and refused to pay the demand. Thereafter, in April, 1893, the city, desiring to pave with brick twelve additional squares of Main street, entered into what is termed a "compromise settlement" with the street-car company of all disputes and liabilities of the company to pave between its tracks, and in the settlement agreement it was specifically stipulated, as declared by ordinance and acceptance thereof in writing, that the city should remit its claim of $3,011.30 for the pavement already constructed, and that the company should thereafter pay for all such improvements between its tracks, if the cost thereof should be assessed against its property under the provisions of the Barrett law; the same to become a lien, and be enforced in the same manner as such assessments are enforced against abutting property owners. After the agreement, in the summer of the same year, twelve squares of Main street were, by process of law, paved with brick. The work was performed and materials furnished by the Standard Paving Company under a contract it had with the city for that purpose. The actual and reasonable cost of paving between the company's tracks, for the twelve additional squares, was $13,177.90, which was assessed against its right of way and property for payment in twenty successive semiannual payments, in pursuance of the compromise agreement. It was stipulated in the contract between the city and the Standard Paving Company that the city should be liable, on account of said improvement, only for the cost of so much of the same as bordered on public grounds and for the crossings of streets and alleys, as provided by the ordinance and laws of this state. The railway company refused to pay any part of the sum so assessed against it for pavement between its tracks. The Standard Paving Company purchased the brick used in the improvement of said twelve additional squares from the Royal Brick Company and the Canton Brick Company, appellants herein, and as part payment there-

for the Standard Company duly assigned in writing to said appellants all its interest in the claim against the street-railroad company for paving between its tracks for the said twelve squares. Whatever rights and equities the Standard Paving Company acquired against the railroad company or its property by reason of said improvements were held by the Royal and Canton Brick Companies at the time of filing their petition of intervention. The company having made default in the payment of its obligations secured by its said mortgage, the mortgagees—being the appellees in this case—brought their action in the Wayne circuit court for the foreclosure of their mortgage and the appointment of a receiver, to which action the Richmond City Railway Company, the city of Richmond, and the Standard Paving Company, among many others, were made parties defendant. It was alleged in the complaint that the Standard Paving Company was claiming to hold a lien against the mortgaged property paramount to the mortgage lien of the plaintiffs, which was unfounded; and the paving company was made defendant, and required to assert its lien, if it had any. The default in payment of the street-car company was alleged. The company voluntarily appeared, and filed answer; and a receiver was appointed, qualified, and took full possession of the mortgaged property upon the same day the complaint was filed. Pending the formation of issues between the various parties, the appellant Royal and Canton Brick Companies, without objection from appellees, obtained leave of court to file their intervening petition and become parties to the action of foreclosure. The petition set forth with much detail the facts stated above, and particularly the franchise ordinance, the acceptance and reorganization thereunder, the adoption of electricity as a motive power, the paving of Main street with brick, notice to the railway company to pave between its tracks when and as the street was improved, its failure and refusal to do so, the doing of the work by the city, the assessment of the actual and reasonable cost thereof to the railway company, its refusal and failure to pay the same, the compromise agreement between the city and company, the performance of the conditions by the city and the nonperformance by the company; that the Standard Paving Company, as contractor with the city, did the work and furnished the materials in the paving of the twelve squares of Main street; that the Standard Company purchased of these interveners all the brick used in paving said twelve squares, and in part payment therefor duly assigned to them in writing—which assignment is filed therewith—all rights and equities held by it against the street-car company; that the actual and reasonable cost of paving between the tracks of the railway for the distance of the twelve squares was $13,177.90, which is due and unpaid; that under its contract with the Standard Paving Company the city is not liable for any part of said sum of $13,177.90; that, after the execution of the plaintiff's mortgage, the railway company purchased and added to the mortgaged property in machinery, equipments, and track extensions, property and improvements of the value of $65,000. Prayer: That in any judgment or decree that may be entered herein the claim of these petitioners may be held a just lien upon the mortgaged property of the Richmond City Railway Company, and that, upon sale thereof upon decree of this court, the claim of these petitioners be ordered first paid, after payment of costs, out of the proceeds of such sale, and for all further proper relief. The city of Richmond, appellant, also filed an intervening petition, for the use of the Royal Brick Company *et al.* The plaintiffs filed a demurrer to the petition of the Royal Brick Company *et al.*: First, for insufficiency of facts; and, second, for defect of parties, in this,—that the Standard Paving Company was not made a party defendant. The plaintiff's demurrer was sustained, and the interveners refusing to plead further, and electing to stand by their petition, the court rendered judgment upon the demurrer against them, from which they appeal.

As shown by the briefs, the intervening petitions of all the other appellants have been fully settled out of court, and "the intervening petitions of the Royal Brick Company *et al.* and of the city of Richmond are based upon the same right, seek to enforce the same claim, and are substantially set forth in the same words." We will therefore consider only the questions arising upon the brick company's petition. It is first claimed that the appellants have no standing in court; that they came in neither by complaint, cross-complaint, nor answer; and that there is no such pleading known to our Code as an "intervening petition." While the Code does not, in terms, recognize an intervener as a party litigant, yet this court has many times recognized in a party the attributes of an intervener in equity. *Barner* v. *Bayless*, 134 Ind. 600, 603, 33 N. E. 907, and 34 N. E. 502, and cases cited; *State* v. *Union Nat. Bank*, 145 Ind. 544, 44 N. E. 585. It is the spirit of our Code to settle in a single action the rights and equities of all persons interested in the subject-matter, and to simplify the rules of practice and pleading as far as the same may be done with due regard to the just determination of the controversy. To accomplish this end, therefore, one not a party, and having an interest in the subject-matter of a pending action that may be adversely affected by the suit, will be permitted by the court, upon a proper showing, under § 273, 1 Burns's Rev. Stat. 1894, to come into the case for the protection of whatever right or interest he may have in the subject-matter. *Voorhees* v. *Indianapolis Car & Mfg. Co.* 140 Ind. 220, 39 N. E. 738; *Zumbro* v. *Parnin*, 141 Ind. 430, 40 N. E. 1085. And his pleading, as in this case, is neither a cross-complaint nor an answer, and hence not subject to the objections urged. It seeks neither to set up a cross action against

the plaintiffs, nor to bar their right of recovery. The petitioners are interested in the subject-matter of the suit. Without intervention, the property may be sold, and pass forever beyond their reach. It is now in the custody of the law. The plaintiffs seek its sale and application to the payment of their debt. The common debtor and subject-matter are before the court, and the only relief sought is that, if the sale of the property is ordered, the equities of the interveners in the funds arising therefrom may be enforced against the plaintiffs. There can be no doubt of the remedy thus afforded a stranger to the suit to enter, by leave of court, for the timely protection of his interests; and a petition of intervention need not be as formal as a complaint, and is sufficient in form if it contains a succinct and definite statement or recital of the facts upon which the equities claimed are predicated. *Empire Distilling Co.* v. *McNulta*, 46 U. S. App. 578, 77 Fed. Rep. 703, 23 C. C. A. 415. Appellees have suggested no specific infirmity in the facts alleged, and we are unable to discover any. The objection that the city of Richmond was not a party to the petition is unavailing under the demurrer as presented, and it is not urged that the Standard Paving Company, the petitioners' assignor, was a necessary party.

But it is earnestly urged that the ordinance conferring upon the Richmond City Railway Company the right to occupy the streets of the city of Richmond, exhibited with the petition, imposed no duty upon the railway company to pave between its tracks, and hence no lien, either preferential or specific, was created in the interveners' assignor for the construction of such pavement. With this contention we are unable to agree. In considering the question, it must be borne in mind that the following propositions of law have been by this court declared settled in this jurisdiction, *viz.*: (a) That a charter granted by a city, and accepted by a railway company, constitutes a contract between the city and company; (b) that such a charter must be strictly construed against the company; (c) that such company has no doubtful rights under such charter; (d) that where there are doubts they must be construed against the grantee and in favor of the city. *Western Paving & Supply Co.* v. *Citizens' Street R. Co.* 128 Ind. 530, 10 L. R. A. 770, 26 N. E. 183, 28 N. E. 88; *State ex rel. Keith* v. *Michigan*, 138 Ind. 455, 468, 37 N. E. 1041; *Indianapolis* v. *Consumers' Gas Trust Co.* 140 Ind. 107, 116, 27 L. R. A. 514, 39 N. E. 433.

The first section of the franchise ordinance provides that permission and authority are hereby granted and fully vested in the Richmond City Railway Company, its successors and assigns, to lay, construct, operate, and maintain a single or double track street railroad, with all the necessary and convenient tracks, etc., in and upon all the streets and alleys of said city, subject to the conditions hereinafter mentioned, to wit:

Sec. 2. The motive power of said street railroad shall be cable, electric, or animal.

Sec. 3. The tracks of said railroad shall be so laid as to conform to the established grade of the streets, and in such manner as to be no unnecessary impediment to the ordinary use of the streets and the passage of wagons or other vehicles along and across the tracks.

Sec. 5. If the railroad is operated by electricity, the streets, wherever disturbed, obstructed, or damaged by reason of the construction, repair, or existence of said railroad, shall be by said company properly restored to the same condition as they were prior to such disturbance, and so maintained for one year thereafter.

Sec. 6. The sidewalks, curbs, or gutters disturbed or injured in the erection of poles or wires shall be by said company promptly restored and maintained for one year.

Sec. 7. All tracks shall be laid in the middle of the street.

Sec. 8. The center and cross wires shall at no point be at less elevation than 18 feet above the rails.

Sec. 9. The curb poles shall not exceed 22 feet in height.

Sec. 10. The poles shall not be nearer together than 125 feet, with possible variations to avoid interference with shade trees and ingress and egress of property owners.

Sec. 11. The poles shall be straight, smooth, and painted.

"Sec. 12. (As amended April 22, 1889). In case electric power is used, the rail may be T rail, and the street shall be graveled, paved, or macadamized up flush with top of rail upon the outside thereof when and as the street may be graveled, paved, or macadamized upon which the same are laid, and the street between the rails shall be graveled, paved, or macadamized when and as the street may be graveled, paved, or macadamized upon which the same is laid, upon a level with the top of the rail, and as near to the rail as the same can be done, leaving sufficient space only for the flange of the wheel, and so maintained; and, in case animal power is adopted as the motive power, a flat rail shall be substituted on or before September 1, 1889, on Main street, from Fourth street to Twenty-First street, and on North Eighth street from Main to North E street, and as far east on North E street as Tenth street. Said street railway shall have the right to extend its tracks in Glen Miller Park as now laid, as the said street railway and the committee on parks of said city may hereafter agree, subject to the approval of council."

"Sec. 17. Said Richmond City Railway Company hereby agrees to save said city harmless from any damage, loss, or liability occasioned by the construction, maintenance, or operation of said electric or other street railroad."

It is manifest from the foregoing conditions that it was the intention of the city, in granting authority to occupy its streets for private gain, to relieve the public, so far as

possible, from inconvenience in the use of the streets, and from increased burden in their repair and maintenance. This is made clear by § 3, which prescribes how the tracks shall be laid, and by §§ 5 and 6, which provide that, wherever the streets, sidewalks, curbs, or gutters may be disturbed or damaged by the construction of the railroad, the company shall promptly restore the same to as good a condition as before the disturbance. And what warrant have we for saying that things affixed to a grant as conditions to its enjoyment are not conditions at all, but covenants of the grantor? Furthermore, how may we single out from a class of statements, phrased in the same tense, and alike impersonal as to the party of performance, and say some are covenants of the grantor and some conditions imposed upon the grantee? Yet this is what we are urged by the appellee to do. It is not claimed by appellees that the franchise ordinance imposed upon the city the duty of electing the kind of motive power to be used, as stated by § 2; nor of laying the company's track to conform to the established grade of the streets, as described in § 3; nor of erecting and painting its poles, as directed by §§ 10 and 11; nor of stretching its wires not less than 18 feet above the track, as required by § 8. But they do insist that it imposed upon the city the duty of paving between the company's tracks when and as the street is improved, as required by § 12; the insistence of appellees being that § 12 should be construed as merely declaratory of the mode of conetruction between the tracks that the city should thereafter observe when and as the street was improved upon which the track was laid. If it was the intention that the city should pave between the tracks, what reason was there for a specific covenant to do the work when and as the street was improved? Was it at all likely that the city would choose to do it at any other time? And, in the use of electricity, what concern should the railway company feel about the pavement between its tracks, whether graveled, macadamized, or bricked, or whether it was paved at all? And no reason is apparent, and none is suggested, why the city would voluntarily assume an obligation to pave in a particular manner, and at a particular time, in a contract that would conclude it for fifty years. Besides, the reading of the charter ordinance as a whole, and a consideration of the granting section, with the peculiar and uniform "shall be" in the enumerated conditions, upon which the grant is stated to depend, in the light of the rules of construction above announced, leads to the firm conviction that the adoption of the construction invited by appellees would be to subject ourselves to the irresistible construction that all the things enumerated as conditions of the grant are really covenants of the grantor. And this is not to be thought of. It must be said that they are all one or the other, and to doubt is to construe them against the company. It is also a familiar principle that, when the terms of a written contract are uncertain, the courts will adopt that construction which the parties themselves place upon it. *Vinton* v. *Baldwin*, 95 Ind. 433; *Louisville, N. A. & C. R. Co.* v. *Reynolds*, 118 Ind. 170, 20 N. E. 711; *Pate* v. *French*, 122 Ind. 10, 23 N. E. 673; *Ingle* v. *Norrington*, 126 Ind. 174, 25 N. E. 900; *Vincennes* v. *Citizens' Gaslight Co.* 132 Ind. 114, 16 L. R. A. 485, 31 N. E. 573.

Much space is given to the discussion of the effect of the compromise ordinance of 1893, described in the early part of this opinion, upon the charter ordinance of 1889; but we fail to perceive its importance to the questions involved in this appeal. It does not repeal the charter ordinance of 1889, which supports and limits appellees' mortgage, either in terms or by implication. In fact, it is in aid of the charter by expressly declaring in its prefatory clause that it is "by way of a full settlement and compromise of said dispute;" that is, a full and final settlement and understanding of the extent of the company's liability under its charter of 1889. It was a definition of the franchise ordinance, not a repeal. It was nothing more nor less than an agreed construction of a disputed provision, and one which the court would be bound to adopt as between the parties. But, being subsequent to the execution of the mortgage to appellees, and without their approval, it was, as to them, nugatory. The mortgagees continue to hold the property as they received it from the mortgagor; and they received it in all respects as it was held by the mortgagor at the time the mortgage was delivered. The mortgagor had, therefore, no power to charge the mortgaged property by an unwarranted construction of its charter, nor impose any burden upon the security that did not exist at the time of the mortgage. Hence appellants must find support for their claim under the charter ordinance of 1889, or they have nothing to rest it upon. On the other hand, the compromise ordinance of 1893, being a contract between the city and the mortgagor with respect to the latter's rights and liabilities under its charter, the appellees, as mortgagees, must accept their mortgagor's contract as a whole, or reject it altogether. They cannot have the benefits without the burdens; that is to say, they cannot accept their mortgagor's unauthorized contract to relieve themselves from appellants' preferential claim under the charter ordinance of 1889, and repudiate it to avoid the specific lien fixed upon the mortgaged property by the same instrument. The new contract provides: "Said Richmond City Railway Company hereby agrees to pay all the cost of paving between the rails of its tracks on the residue of said Main street from the west line of Fourth street to the west line of Sixth street, and from the east line of Ninth street to the east line of Twenty-Third street: provided, said improvement is made under the provisions of the Barrett law;" and the estimated cost shall be assessed against the property of said company, "and, when adopted by the common council of said

city, shall be and constitute a valid lien upon all the real estate, right of way, tracks, rolling stock, and machinery of said company." It is specifically alleged in the intervening petition, and admitted by appellees' demurrer to be true, that the city performed all the conditions of said contract on its part, improved twelve of the squares of Main street, as provided for in the contract, and also paved between the company's tracks pursuant to said agreement, at the actual and reasonable cost of $13,177.90, which amount was assessed against the company's property, payable in twenty semiannual payments, etc., in conformity to the provisions of the Barrett law, and that the company wholly failed and refused to pay the same. Accepting the new contract as a whole, the paramount lien and debt of $13,177.90 is admitted by appellees. Rejecting it as a whole, we must return to the ordinance of 1889, and dispose of this case as if the act of 1893 had not been ordained. The point made by appellees that the theory of appellants' petition is that their lien is specific under the ordinance of 1893, and not preferential under the charter act of 1889, and that they must be confined to their theory, cannot be accepted. If it is proper in any case—which we greatly doubt—for a court to arbitrarily declare a party's theory from his initial pleading, where the facts pleaded supply more than one, we are relieved of the task in this instance by the course of appellants' argument. Both ordinances are set forth in the petition at length; but the argument in this court, and which is entirely consistent with the pleading, goes to the effect and theory that the ordinance of 1893, designated by appellants as "supplemental" to the ordinance of 1889, should be accepted (1) as establishing a doubt in the charter as to the company's liability to pave between its tracks, and (2) as settling the doubt against the company by convention of the parties.

The most important question remains, namely, Does the petition exhibit such a claim as a court of equity will decree preferential payment from the proceeds of the mortgaged property? It is said in *Fosdick v. Schall*, 99 U. S. 235, 25 L. ed. 339, by Waite, Ch. J., that "every railroad mortgagee, in accepting his security, impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts, before he has any claim upon the income." "The income out of which the mortgage is to be paid is the net income obtained deducting from the gross earnings what is required for necessary operating and management expenses, proper equipment, and useful improvements. . . . While, ordinarily, the power is confined to the appropriation of income of the receivership and the proceeds of moneyed assets that have been taken into the company, cases may arise where the court will require the use of the proceeds of a sale of the mortgaged property in the following way." It is alleged in the petition that after the execution of the mortgage, and after the commencement of the improvement of Main street, the company purchased and added to its property, machinery, dynamos, motors, street cars, and electrical apparatus to the value of $50,000, and extended their tracks to the value of $15,000. This material increase in the value of the mortgaged property is also admitted by the demurrer. And it is further said, with respect to such acts, in *Fosdick v. Schall*, 99 U. S. 254, 25 L. ed. 339: "Under such circumstances it is easy to see that there may sometimes be a propriety in paying back to the income from the proceeds of the sale what has thus again diverted from the current debts to fund in order to increase the value of the property sold. The same may sometimes be true in respect to expenditures before the receivership. No fixed and inflexible rule can be laid down for the government of the courts in all cases. Each case will necessarily have its own peculiarities, which must, to a greater or less extent, influence the chancellor when he comes to act. The power rests upon the fact that in the administration of the affairs of the company the mortgage creditors have got possession of that which, in equity, belonged to the whole or a part of the general creditors. Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained." The rule is restated by the same eminent jurist in *Burnham v. Bowen*, 111 U. S. 776, 783, 28 L. ed. 596, 599, 4 Sup. Ct. Rep. 675, 679, as follows: "That, if current earnings are used for the benefit of mortgage creditors before current expenses are paid, the mortgage security is chargeable in equity with the restoration of the fund which has been thus improperly applied to their use." There has been no departure in any of the cases cited. It has been adhered to and reaffirmed in them all. The rule has been applied only to railroad companies, and it is earnestly insisted that a street railway is not within the reason of the rule. It is said to operate in the administration of railroads on account of the public character of such institutions, and upon the assumption that they are of public concern. And that a suspension of operation will work an actual detriment to the public. We cannot see how the effect of suspension will be different. Both are transportation companies, both common carriers; and, if suspension in the operation of the one will be an injury to the general public, the suspension of the other will be an injury to the local public, and the difference is one of degree, and not of kind. The doctrine rests upon the principle of mutual benefit to the public, the mortgage and general creditors. If the value of the security is maintained, the system must be kept a going concern; and whatever is essential to this end in labor, repairs, or equipment must be protected by the highest degree of confidence to avoid the mischiefs of suspension. But there can be no restitution where there has been no diversion; that is to say, where there has been no taking of the earnings needed for the

ment of current obligations, and applied in the betterment of the mortgaged property, there is nothing to be restored. And he who invokes the rule must show affirmatively that the mortgage creditors have got that which, in equity, belongs to the petitioner. If the mortgagor increases the value of the mortgaged property from sources other than the earnings, the fact supplies no equity in the general creditor. In this case it is not averred in the petition that the purchase of the electrical equipment, cars, etc., was made from the current earnings of the company, and for the absence of such averment the petition must be held insufficient to bring the claim within the rule just considered. *Burnham v. Bowen*, 111 U. S. 776, 28 L. ed. 596, 4 Sup. Ct. Rep. 675.

Back of the question is another principle. Every right the railway company has in the city of Richmond rests upon the franchise ordinance. It has no power to run a car, collect a fare, or encumber its road in any way, except subject to this ordinance. The obligation to pave between its tracks is of the essence of its being, and can no more be laid aside than its duty to pay its debts. It is written in its charter, and inseparable from it; and when the mortgagees accepted their security they were bound to take the property as they found it, and bound to know that the rights they acquired in the property were subject to the burdens already imposed upon it. The right the appellants seek to enforce is more than a general claim for money, for it is a right blended with the right of the mortgagor to occupy and use the streets, and one which the mortgagees were required to take notice of and estimate in the acceptance of their mortgage. The liability does not rest upon a claim against the mortgagor, but upon the duty which arises out of the occupancy of the streets. In *Midland R. Co. v. Fisher*, 125 Ind. 19, 8 L. R. A. 604, 24 N. E. 756, the owner of land conveyed, in 1873, to a railroad, a right of way. It was incorporated in the deed, as a consideration, that the company should construct a board fence on each side of the railroad as soon as completed. The road was completed in 1876. In 1875 the company mortgaged all its property, and in 1883 the mortgage was foreclosed, and property sold thereunder. The purchaser entered into possession, and began the operation of the road. No fence had been constructed, and in 1886 the owner of the land brought suit against the purchaser, and in disposing of the case the court says: "The appellant is in the possession of the right of way as the grantee of the original contractor, and it must take the benefit it enjoys subject to the burden annexed to it by the contract which gave existence to that benefit. It cannot enjoy the benefit and escape the burden, for the burden and the benefit are so interlaced as to be inseparable. The right to the benefit is so blended with the burden that equity and justice forbid a severance. One who takes a privilege in land to which a burden is annexed has no right to assert a claim to the privilege and deny responsibility for the burden. A party who acquires such a privilege acquires it subject to the conditions and burdens bound up with it, and must, if he asserts a right to the privilege, bear the burden which the contract creating the privilege brought into existence. In *Louisville, N. A. & C. R. Co. v. Power*, 119 Ind. 269, 21 N. E. 751, we said of a railroad company: 'Holding the land under the deed, as it did, it was bound to perform its contract. To permit it to retain the land and repudiate the deed would be against equity and good conscience.' In this instance the covenant written in the deed was an essential part of it, and the agreement to construct the fence was part of the consideration for the land. The case is near akin to that of a suit to enforce a vendor's lien, for here the deed upon its face exhibited the contract, and the facts open to observation showed that the covenant had not been kept. The facts open to observation did more than put the appellant upon inquiry; but, had they done no more than put it upon inquiry, it could not justly claim the rights of a purchaser without notice. It must be held that the covenant in the deed through which the appellant claims, and the facts open to observation, imparted notice of the covenant, and notice, also, of its nonperformance." As before said, the right does not rest against the person, but it is affixed to the thing, and the mortgagees or their grantees may not have the thing without the obligation to discharge the right, for the right runs and abides with the property wherever it goes. We think, therefore, that the petition of intervention exhibits sufficient facts to show that the charter of the mortgagor company required it to pave between its tracks when and as the street was improved, as a condition to its enjoyment, and that the condition was carried into appellees' mortgage, and that the claim of the petitioners, arising thereunder, is paramount to the lien of the mortgage.

Finally, it is objected that a judgment on demurrer to an intervening petition is not such a final judgment as may be appealed from. The judgment appealed from makes a final disposition of the case so far as concerned the petitioners, and was sufficient to warrant the appeal. *Voorhees v. Indianapolis Car & Mfg. Co.* 140 Ind. 220, 39 N. E. 738.

The judgment is reversed, with instructions to overrule the demurrer of appellees to the intervening petitions of the Royal Brick Company *et al.*, and of the city of Richmond, and for further proceedings in accordance with this opinion.

Rehearing denied.

KENTUCKY COURT OF APPEALS.

HENDERSON TRUST COMPANY, Admr., etc., of Mary H. Berner, Deceased, *Appt.*,
v.
John H. STUART.

(.....Ky.....)

1. **The failure to apply for an extension of a vacancy permit for premises that are still vacant** at the expiration of the time for which such a permit has been granted with an agreement by the insurer to extend the time on application therefor constitutes negligence on the part of an executor or administrator with the will annexed, who is in possession of the premises and of the policy of insurance thereon, which will make him liable in damages in case the property is destroyed by fire and the insurance cannot be collected because of the failure to procure the extension of the vacancy permit.

2. **The negligence of an executor in failing to apply for an extension of a vacancy permit** for insured premises which continue vacant, which had been granted with an agreement to extend it on application, is held to be a question of law for the court.

(March 29, 1900.)

APPEAL by defendant from a judgment of the Circuit Court for Henderson County in favor of plaintiff in an action brought to hold defendant liable for the value of a house destroyed after defendant had negligently permitted the insurance to lapse. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Yeaman & Yeaman,** for appellant:

The failure to insure property, or keep it insured, is not such negligence as, in case of loss, will render the administrator or any trustee liable for its value.

Underhill, Trusts, 4th ed. pp. 253, 255, and note.

Mr. **Montgomery Merritt** for appellee.

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

The first error relied on by appellant for a reversal of the judgment rendered against it in the trial court is that the court erred in overruling its general demurrer to the petition of appellee.

The petition sets forth, in substance, that Mrs. Stuart sold a house and lot to Mary H. Berner, and took notes for the purchase money, retaining a lien for their payment, and that under the contract of sale, as further security for the purchase money, Mrs. Berner insured the house against loss by fire in the sum of $2,000, and had the policy made payable to Mrs. Stuart as her interest might appear; that shortly after the sale, Mrs. Berner died, and that appellant, the Henderson Trust Company, qualified as her administrator with the will annexed, and also as guardian of Mary Wilke, the devisee of the house and lot under the will of Mrs. Berner, and that it took possession of the property and also of the policy of insurance under an agreement with appellee that it would look after both; that the house became vacant in violation of the terms of said policy, and, to prevent the voidance of the policy, the appellant procured from the insurance company on the 1st day of April, 1896, a "vacancy permit" for thirty days, and it is alleged that the insurance company agreed that if the property was still vacant at the expiration of the thirty days the permit would be extended for an additional thirty days upon application; that the house was still vacant at the expiration of the "vacancy permit," but that the appellant neglected to ask for or to procure an extension thereof, and that in fourteen days after the expiration of the thirty days allowed, the house was burned and became a total loss; that the appellant trust company sued the insurance company, making appellee a party defendant, and that recovery was defeated on the ground that "the policy had become void by reason of the aforesaid vacancy." And it is insisted that appellant was negligent in permitting the house to remain vacant, and in failing to ask for an extension of the "vacancy permit," and that it is liable for the damages accruing by reason of such negligence.

It is insisted for appellant that the allegations of the petition are insufficient to support a cause of action, because there is no allegation therein that the insurance company was under any obligation to carry the insurance while the property was vacant, or to have granted a request for an additional "vacancy permit" if it had been made; that, under the averments of the petition, the insurance company was under no legal obligation to have extended the "vacancy permit," even if it had been applied for, and that a recovery should not be permitted upon a mere speculation or surmise as to what it might have done gratuitously if application had actually been made to it.

It is the duty of an executor or trustee to preserve the estate in his hands, and to protect it from loss; and he has ordinarily the power to do whatever may be necessary for that purpose. While he is not the guarantor of the safety of the property, he is held to such care in the management of the estate as a competent person would ordinarily exercise under the same circumstances in reference to his own affairs (see *Messmore* v.

NOTE.—For condition in policy as to vacancy or nonoccupancy, see McQueeney v. Phœnix Ins. Co. (Ark.) 5 L. R. A. 744; Halpin v. Insurance Co. of N. A. (N. Y.) 8 L. R. A. 79, and *note;* Continental Ins. Co. v. Kyle (Ind.) 9 L. R. A. 81, and *note;* Limburg v. German F. Ins. Co. (Iowa) 23 L. R. A. 99; Moody v. Amazon Ins. Co. (Ohio) 26 L. R. A. 313; Agricultural Ins. Co. v. Hamilton (Md.) 30 L. R. A. 633; and Home Ins. Co. v. Mendenhall (Ill.) 36 L. R. A. 374.

Stone, 6 Ky. L. Rep. 596; 11 Am. & Eng. Enc. Law, 2d ed. p. 944); and the Henderson Trust Company owed the same duty to protect the property and preserve it from injury and destruction that a careful person would ordinarily have exercised under the same circumstances if the property had belonged to him. There is no statute in this state which requires an executor to insure real estate in his hands against loss by fire, and the failure to take out such insurance is not necessarily such negligence as in case of loss will render the executor or trustee liable for its value, but is a question to be determined from the facts of each particular case; and the cost of the insurance, the value of the property, its liability to destruction by fire, and whether or not the executor had money in his hands that could have been used for that purpose, are the cardinal elements to be considered. But in this case no money was needed. The insurance had already been paid, and all that was necessary on the part of the defendant to keep the policy alive was that it should have made application to the insurance company for the extension of the "vacancy permit," and it seems to us that the failure of the appellant to make such application was such negligence in the care of the property as to make it liable for the injury resulting therefrom. In the answer filed by the Henderson Trust Company there is no denial of the averments of the petition that the "vacancy permit" would have been extended upon application, and that no application or effort was made to get same done; and the president of the company frankly admits in his testimony that the failure to make application for the extension of the "vacancy permit" was due to an oversight of the clerk in the company's office who had charge of these matters. The demurrer was therefore properly overruled.

Negligence or the absence of care is always a question of fact for the jury when there is a reasonable doubt as to the facts or inferences to be drawn from them, but when the facts are either admitted or established by undisputed testimony, it is the duty of the court to declare the law applicable to them. See Field, Neg. § 519; *Ashland Coal & I. R. Co.* v. *Wallace*, 101 Ky. 637, 42 S. W. 744, 43 S. W. 207.

In this case we have these facts admitted in the pleadings: That appellant, as executor, took charge of the policy of insurance and property, and it became vacant in violation of the provision of the policy; that a vacancy permit was granted for thirty days, and the insurance company agreed that it would be extended upon application at expiration if desired, and that this application was not made on account of the oversight and negligence of the appellant company; and that the property was destroyed and the loss of the insurance was directly attributable to such negligence. Under these circumstances; we think it was the duty of the court to declare, as a matter of law, that appellant had not exercised such care in the management of this property as a competent person would ordinarily have exercised under the same circumstances with reference to his own property. This is in substance the effect of the instruction given in this case, and upon the whole facts we are of the opinion that appellant has not been prejudiced.

The judgment is affirmed.

MAINE SUPREME JUDICIAL COURT.

Charles F. JOHNSON, Assignee, etc., of Edward Ware,

v.

John H. EVELETH.

(.....Me.....)

1. **A log-driving company's possession of logs** in a river while driving them, not as agents of the person to whom they have been sold and are being sent, but by virtue of the charter of the company, although all owners of logs driven by it are made members of the company by force of the statute, does not constitute the possession of the person to whom they are being taken, so as to preclude the stoppage of the logs *in transitu* by the seller.
2. **Logs in a river being driven by an incorporated log company**, though it is not a common carrier but has a duty under its charter of driving the logs and the possession of them so far as the logs are susceptible of possession, are subject to the right of stoppage *in transitu* in favor of a person who had sold them and had delivered them in the river for the purpose of their being driven to the purchaser's booms and mill.
3. **A contract for the delivery of logs "over the dam"** at the outlet of a lake into a river, whence they are to be driven by a log-driving company down the river to the booms and mill of a purchaser, does not make the dam the final destination or place of delivery of the logs, so as to terminate the right of stoppage *in transitu* while they are being driven down the river.
4. **Constructive possession of a mass of logs** being driven down a river to the booms and mill of a purchaser does not result in his favor, so as to terminate the right of stoppage *in transitu*, by the fact that a few of the logs have actually floated down to his mill and been received by him.

(December 7, 1899.)

REPORT by the Supreme Judicial Court for Kennebec County for the opinion of the full bench, of a suit to recover the value of certain logs which had been sold by defendant to Ware and stopped *in transitu*. *Judgment for defendant.*

NOTE.—On the subject of stoppage *in transitu*, see Farrell v. Richmond & D. R. Co. (N. C.) 3 L. R. A. 648, and *note;* Fenkhausen v. Fellows (Nev.) 4 L. R. A. 732; Kingman v. Denison (Mich.) 11 L. R. A. 347, and *note;* and Jeffris v. Fitchburg R. Co. (Wis.) 33 L. R. A 351.

The facts are stated in the opinion.

Mr. **Charles F. Johnson**, for plaintiff:

If Mr. Ware knew, or had reasonable grounds for believing, that he was insolvent when these logs were purchased, that would not afford a legal reason for a rescission by the defendant of the contract of sale.

Burrill v. *Stevens*, 73 Me. 395, 40 Am. Rep. 366.

If the logs were stopped by the defendant by virtue of his right of stoppage *in transitu*, there was no rescission of the contract of sale.

Newhall v. *Vargas*, 13 Me. 93, 29 Am. Dec. 489; *Vargas* v. *Newhall*, 15 Me. 314, 33 Am. Dec. 617.

If defendant rescinded the contract because of fraud practised by Mr. Ware, he cannot avail himself of this second ground of defense.

The right of stoppage *in transitu* could not be exercised in this case, because the place of delivery specified in the contract of sale had been reached and the transit was at an end when the logs were turned over the dam at the east outlet of Moosehead lake, and they were then in the constructive, if not actual, possession of Mr. Ware.

Muskegon Booming Co. v. *Underhill*, 43 Mich. 629, 5 N. W. 1073.

A company charged with the duty of driving logs is not a common carrier.

Mann v. *White River Log & Booming Co.* 46 Mich. 38, 41 Am. Rep. 141, 8 N. W. 550.

The original direction given to these logs by the defendant had been fully complied with when they had been towed across Moosehead lake to the dam at the east outlet, and turned over the dam.

Brook Iron Co. v. *O'Brien*, 125 Mass. 446; *Mohr* v. *Boston & A. R. Co.* 106 Mass. 70; *Dixon* v. *Baldwin*, 5 East, 175; *Guilford* v. *Smith*, 30 Vt. 49; *Rowley* v. *Bigelow*, 12 Pick. 307, 23 Am. Dec. 607; 23 Am. & Eng. Enc. Law, p. 913; *Aguirre* v. *Parmelee*, 22 Conn. 473; *Sawyer* v. *Joslin*, 20 Vt. 172, 49 Am. Dec. 768.

Some of these logs had reached Mr. Ware's boom at Winslow before his assignment, and a delivery of part of an entire parcel or cargo, with an intention on the part of the vendor to take the whole, terminates the *transitus*, and the vendor cannot stop the remainder.

2 Kent, Com. 9th ed. p. 746; *Boynton* v. *Veazie*, 24 Me. 286; *Kohl* v. *Lindley*, 39 Ill. 195, 89 Am. Dec. 294; *Jewett* v. *Warren*, 12 Mass. 300, 7 Am. Dec. 74.

Mr. **Harvey D. Eaton** for defendant.

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

This case comes up on report. We think the evidence shows the following facts: On March 22, 1898, one Edward Ware entered into a contract of bargain and sale with the defendant for the purchase of about 1,000,000 feet of logs, numbering 7,663 sticks, then lying in Spencer pond, above Moosehead lake. It was agreed that the logs should be delivered by the defendant "over the dam" at the east outlet of Moosehead lake into Kennebec waters. From that point they were to be driven down the Kennebec river by the Kennebec Log-Driving Company. Ware had booms in Fairfield and Winslow, and a mill at the latter place. The logs were bought by Ware for the purpose of being manufactured into lumber at his mill in Winslow. On May 25, 1898, Ware assigned to the plaintiff for the benefit of his creditors, under the provisions of the insolvent law (Laws 1897, chap. 325, § 16). He was, and for a long time had been, hopelessly insolvent. In the meantime the defendant had caused a large portion of the logs to be delivered "over the dam" at the east outlet, and they were being driven down the Kennebec river towards Ware's booms and mill. Some scattering logs had already reached Ware's mill, and had been sawed. They had drifted down the river, without the necessity of being driven. But the drive proper did not reach Fairfield or Winslow until the last of August, 1898. When the drive reached Shawmut, above the Fairfield boom, August 22d, the defendant took from the river all the logs he had sold to Ware which then remained in the drive, numbering 6,815 sticks, and surveying 808,032 feet. And it is for this taking and alleged conversion that the plaintiff has brought this action of trover. Ware agreed to give four notes for the price of the logs, maturing at different times. At the time of his assignment he had given one note to the defendant, which was subsequently protested for nonpayment, and then tendered back by the defendant to the plaintiff. The other three notes he never gave.

The defendant asserts several grounds of defense, only one of which do we think it necessary to consider. He says he took the logs from the river in the exercise of the right of stoppage *in transitu*. He claims that the log-driving company was a carrier. He says he sold the logs on credit, and that while they were in transit to their ultimate destination in Winslow, and were in the possession of the log-driving company as a carrier, the purchaser became insolvent. And this fact, he says, gave him the right to resume the possession of the logs at any time before they came into the actual possession of Ware, or came to their destination in Winslow.

In reply the plaintiff says: (1) That the log-driving company was not a carrier, or middleman, in such a sense as gave it possession or control of the logs; that the river was the real carrier; that the company provided no means of conveyance or motive power, but simply facilitated the floating of logs down the river by breaking jams and otherwise, and hence that, after the logs passed out of the possession of the defendant by being turned "over the dam," they must have been, constructively at least, in the possession of Ware, while floating upon the river; and, furthermore, that in any event the log-driving company was really only an association of log owners, of whom Ware was one, and that a delivery of the logs to the

company was, in effect, a delivery into the possession of Ware. (2) That by the terms of the contract between Ware and the defendant the "destination" of the logs was "over the dam" at the east outlet, and that when they were so delivered the *transitus* was at an end. And (3) that the facts that some of the logs had floated down the river to Ware's mill, and had been received and sawed by him, constituted a constructive delivery of the whole mass into his possession.

These contentions make it necessary for us to consider the character and duties and method of operation of the Kennebec Log-Driving Company. Its charter and by-laws are made a part of the case. By the charter (Laws 1885, chap. 402), certain persons named, their associates and successors, are constituted "a body politic and corporate," and may sue and be sued, etc. They have power to adopt all necessary regulations and by-laws. "They shall drive to such place of destination on the Kennebec river as may be designated by the owners, or by the directors of said company, and may secure and form into rafts, under rigging, all logs and other timber belonging to said company, or any member thereof, that may be in the East Branch and Kennebec river, for that purpose, below the outlet of Moosehead lake at the dam." "They may remove obstructions, and erect booms, piers, and dams." Section 1. "Any person, persons, or corporations, or their agents, owning logs or other timber to be driven on said rivers at the date of the annual meeting in each year, shall be members of the Kennebec Log-Driving Company, and shall so continue for two years at least from that date." Section 3. Members owning logs to be driven are required to file a correct statement of all such logs or timber, giving the number of feet, with the marks, and the place from which logs are to be driven, and their destination. The expenses of driving, and for damages and losses, are to be assessed upon the owners of the logs driven, and the payment of assessments is secured by a lien upon the logs. Section 4. The company may collect logs or timber remaining in booms or in any place exposed to loss, and deposit the same in suitable places, and properly secure it from loss, and to pay for this service an assessment may be made. Sections 10, 11, 12, 13. "The private property of each member of said company shall be holden to pay all debts contracted by the company after he became a member thereof, and before his withdrawal from the same, in default of company property whereon execution may be satisfied." Section 16.

By these extracts from its charter it appears that the Kennebec Log-Driving Company is a corporation. It is more than a mere association of log owners. To be sure, all owners of logs to be driven are, by force of the statute, members, but all combined are only one corporate body. The corporation and its members are different persons. Hence it follows that a possession by the corporation is not a possession by a member, unless the corporation has been made an agent for that purpose. In this case the corporation does not appear to have been the agent of Ware for any purpose. It was simply performing its corporate duty in receiving and driving the logs. It did that under its charter, and not as agent. In this respect this case is unlike *Muskegon Booming Co.* v. *Underhill*, 43 Mich. 629, 5 N. W. 1073, cited by the plaintiff. There the logs in question had failed to get into the booming company's main drive, and had been left in the rear. The vendees engaged the booming company to send back and get the logs, which they did. The vendees having become insolvent before the logs reached their mill, the vendor, Underhill, sought to exercise the right of stoppage *in transitu*. The court denied this right, but rested its decision on the ground that the vendor, by his contract or acquiescence, "virtually offered possession to [vendees] . . . and that they [the vendees] accepted the offer, and virtually took possession by having the logs taken into custody, at their expense and on their account as owners, by the booming company." Our conclusion is, therefore, that the possession by the log-driving company was not possession by Ware.

The next question in this connection is, May the right of stoppage *in transitu* attach to logs being driven as these were? We have no doubt that it may. It may be conceded that the log-driving company is not a common carrier, although in some respects its duties are analogous to those of common carriers (see *Mann* v. *White River Log & Booming Co.* 46 Mich. 38, 41 Am. Rep. 141, 8 N. W. 550, where the distinction is pointed out); but that is not decisive. When a vendor sends goods sold to the place of destination by private conveyance, the right of stoppage *in transitu* exists the same as if they are sent by common carrier. The vital question is, Are they in transit between the vendor and the vendee? The right of stoppage *in transitu* is merely an extension of the lien for the price which the vendor has after contract of sale and before delivery of goods sold on credit. The term itself implies that the goods are in transit, and that they have not come into the possession of the vendee. It permits the vendor to resume possession before the goods sold have come into the vendee's possession, if the latter has become insolvent. Whether they are in the possession of a carrier, strictly so called, while in transit, or whether they are in possession of a "middleman," is immaterial. 2 Kent, Com. 702. In this case the logs were certainly in transit between the dam at the east outlet and Ware's mill. They were moving down the river. They were kept moving by the agency of the log-driving company. The company broke the jams, cleared the eddies and the banks of logs, took them wherever they became stranded, and drove in the rear. The company having assumed the duty of driving the logs, no one else had the right to interfere with the driving. So far as a mass of logs in a river is susceptible of possession, to that extent the log-driving company was in possession of these logs for the purpose of transporting them. And we

think that was sufficient. It certainly accords with the equitable principles out of which the right of stoppage *in transitu* has grown. *Newhall* v. *Vargas*, 13 Me. 93, 29 Am. Dec. 489. The character of the possession of the log-driving company is only important as it shows that the logs had not come into the possession of the vendee, and were still in transit.

But the plaintiff next contends that, so far as this case is concerned, the *transitus* ended when the logs were turned "over the dam" at the east outlet, because, he says, that was the ultimate destination of the logs, within the meaning of the contract of purchase; that the defendant's agreement was to deliver the logs there; and that, when the logs were so delivered, the *transitus* contemplated by the contract was at an end; and that in any further transit the right of stoppage *in transitu* would not exist. This might be true if by any fair construction of the contract, read in the light of surrounding conditions and circumstances, we could understand that the dam was really the contemplated final destination of the logs, or that the logs were to be delivered at the "dam," and there remain subject to further acts or directions of Ware. *Becker* v. *Hallgarten*, 86 N. Y. 167. But we cannot interpret the contract so narrowly. We must view the situation as the parties did. We cannot shut our eyes to the fact that these logs, at the time of the contract, were above the dam, and above a portion of Moosehead lake; that they were brought to be manufactured in Ware's mill in Winslow; that they must float or be driven down the river all the distance between those points; that it was expected that they would be driven by the log-driving company; that there was no place of deposit at the "dam" for keeping the logs, but that the transit in the lake above the dam and in the river below was actually continuous, the dam being simply the point where the defendant ceased to drive and the company began. In view of these circumstances, should "over the dam" be regarded as the "destination" of the logs? We think not.

The question here is not whether the turning of the logs "over the dam" was a delivery,—such a delivery as would have vested title in the vendee, in case delivery was necessary. It is not a question of title. We assume that Ware had the title to the logs. The defendant bases his right of stoppage *in transitu* upon that fact in part. The exercise of that particular right presupposes that the title of the goods is in the vendee; and, further, the title remains in the vendee even after the exercise of the right. The title is not changed. *Hurd* v. *Bickford*, 85 Me. 217, 27 Atl. 107. The question here is whether, by the delivery at the dam, the logs came into the possession of the vendee, and so far only as the delivery at the dam throws light upon this question is it material. The distinction, in a word, is that property sold may have been delivered so as to affect title, and yet not have come into the possession of the vendee so as to bar the right of stoppage *in transitu*. An illustration of this is found in the common class of contracts where the vendor agrees to deliver to a carrier designated by vendee for shipment to vendee's place of business. A delivery to a carrier under such circumstances vests title in the vendee, and places the goods subject to his risk, but the vendor does not lose his right of stoppage *in transitu* while the goods are in transit to the vendee. *Grout* v. *Hill*, 4 Gray, 361; *Rowley* v. *Bigelow*, 12 Pick. 307, 23 Am. Dec. 607; *Gibson* v. *Carruthers*, 8 Mees. & W. 321. In a case where goods were delivered to the purchasing agent of the vendees to be transmitted to the vendees' factory in another state, it was held that the right of stoppage *in transitu* was not barred. The court said that the delivery of the goods was to the agent, not as owner, nor as agent of the owners to dispose of them in any other way than to transmit them to the vendees' place of business, and that to take away the right of stoppage *in transitu* there must be an absolute delivery to the agent for the use of the vendees, and it must have been a full and final delivery, as contradistinguished from a delivery to a person acting as a carrier or forwarding agent to the principal. *Aguirre* v. *Parmelee*, 22 Conn. 473. To terminate the *transitus* by delivery to a middleman, it must be a delivery not to transport, but to keep. *Guilford* v. *Smith*, 30 Vt. 49. See our own case of *Newhall* v. *Vargas*, 13 Me. 93, 29 Am. Dec. 489. It was held in *Mohr* v. *Boston & A. R. Co.* 106 Mass. 67, that the *transitus* is not at an end until the goods have reached the place contemplated by the contract between the buyer and seller as the place of their destination.

As bearing upon the "destination" of the logs, the plaintiff, in argument, suggests that under the charter of the log-driving company the owner of the logs was required to file with the company a statement of their destination, which was not done, and also that the company does not itself take logs from the river, but the owners separate them from the general drive, and boom them, or take them out, at such points as they please. To these suggestions, it is a sufficient answer to say that it is clear that the intended destination of these logs was at Ware's mill, and that, whatever the rights of Ware to stop the logs, or take them out of the river, may have been, he did not exercise them. He did not take possession of the logs while they were in transit.

Finally, the plaintiff contends, inasmuch as some small portion of the logs had floated down to Ware's mill, and had been received by him before his assignment, that this put him in constructive possession of the whole mass, and terminated the *transitus*. We are unable to come to that conclusion. The surveyor's bill shows that there were 7,663 sticks in the lot of logs purchased. The defendant, when he took possession, found 6,815 sticks in the drive. It appears that some had gone below Ware's mill to Hallowell, and undoubtedly some sticks had been left behind upon the banks or in the eddies of the river. But assuming that the whole

of the remaining 848 sticks had, during the season, floated down to or by Ware's mill, still we do not think that that fact constituted a constructive possession in Ware, or the plaintiff, of the logs which had not come down. It is not like the case where a vendee has taken some portion out of the whole mass, which was then susceptible of possession, and in which case he has thus obtained constructive possession of the whole. Such facts are important sometimes when it is necessary to decide whether a legal delivery has been made. But here, as we have said, it is not a question of technical delivery, but one of actual possession. Here Ware took only such scattering, floating logs as came to him. The remainder were not in his possession. They were still in the possession of the log-driving company. They were still being driven. They were still in actual transit. And we think the vendor had the right to stop them before that transit was ended. Such a conclusion gives effect to the spirit and purpose of the law. *Buckley* v. *Furniss*, 17 Wend. 504; *Mohr* v. *Boston & A. R. Co.* 106 Mass. 67.

Plaintiff nonsuit.

MARYLAND COURT OF APPEALS.

Otho L. SUMMERS *et al.*, *Appts.*,
v.
Henry H. BEELER *et al.*

(.....Md.....)

1. **A restriction as to the building line, inserted in a deed,** cannot inure to the benefit of a prior grantee of another lot on the same street, which is conveyed subject to the same restriction, when the grantor did not impose any servitude upon the land he retained, and the restrictions were not part of a general plan or scheme for the benefit of all the purchasers.

2. **A general plan or scheme for the benefit of all the purchasers of lots sold on the same street,** as shown by a recorded plat, does not appear from the fact that most of the lots are sold subject to the same restriction as to building line, where no restrictions are shown by the plat, and none are imposed on some of the lots that are first sold, while purchasers of some of the other lots have violated the restrictions upon them, and such violations have not been resisted by other purchasers.

(December 9, 1899.)

APPEAL by plaintiffs from a decree of the Circuit Court for Washington County in favor of defendants in a proceeding to enjoin defendants from erecting a building in violation of the restrictions contained in their title deeds. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Daniel W. Doub** and **Frank B. Bomberger,** for appellants:

The condition in the deed of Mrs. Beeler, and of all the lots from 6 to 13 inclusive, is an encumbrance upon the title.

Halle v. *Newbold*, 69 Md. 265, 14 Atl. 662; *Kramer* v. *Carter*, 136 Mass. 504; *Re Higgins' Contract*, 51 L. J. Ch. N. S. 772; *Columbia College* v. *Lynch*, 70 N. Y. 440, 26 Am. Rep. 615; *Peck* v. *Conway*, 119 Mass. 546; *Hamlen* v. *Werner*, 144 Mass. 397, 11 N. E. 684.

The restrictions in the deed of Mrs. Beeler and the other eight lots create easements or servitudes in favor of the other lots.

Sanborn v. *Rice*, 129 Mass. 396.

The plaintiff may enforce the condition in the deed of the adjoining lot belonging to Mrs. Beeler.

Clark v. *Martin*, 49 Pa. 289; *Halle* v. *Newbold*, 69 Md. 265, 14 Atl. 662; *Columbia College* v. *Lynch*, 70 N. Y. 449, 26 Am. Rep. 615.

The mere fact that the original deed of the Summer's lot is prior in date to that of the original deed of the Beeler lot does not deprive Mrs. Summers of the right to enforce the condition in the deed of Mrs. Beeler.

Tallmadge v. *East River Bank*, 26 N. Y. 105; *Whitney* v. *Union R. Co.* 11 Gray, 359, 71 Am. Dec. 715; *Parker* v. *Nightingale*, 6 Allen, 341, 83 Am. Dec. 632; *Linzee* v. *Mixer*, 101 Mass. 512; *Tulk* v. *Moxhay*, 1 Phill. Ch. 774; *Thruston* v. *Minke*, 32 Md. 487; *Newbold* v. *Peabody Heights Co.* 70 Md. 493, 3 L. R. A. 579, 17 Atl. 372; *Clark* v. *Martin*, 49 Pa. 289; *DeGray* v. *Monmouth Beach Club House Co.* 50 N. J. Eq. 329, 24 Atl. 388; *Nottingham Patent Brick & Tile Co.* v. *Butler*, L. R. 15 Q. B. Div. 261, L. R. 16 Q. B. Div. 778.

In New York relief seems to be granted on the theory that the covenant creates an easement over the land of the covenantor for the benefit of all the other lots subject to the same covenant.

Columbia College v. *Lynch*, 70 N. Y. 440, 26 Am. Rep. 615; *Beals* v. *Case*, 138 Mass. 140.

The purpose intended to be accomplished by the restrictions inserted in the deeds of the estate now owned and occupied by the defendant was for the benefit and advantage of other owners of land situated on the same street or court.

Parker v. *Nightingale*, 6 Allen, 341, 83 Am. Dec. 632; *Mulligan* v. *Jordan*, 50 N. J. Eq. 363, 24 Atl. 543.

The building of a bay-window by Mrs. Beeler, the defendant, is a violation of the restrictions in her deed.

Peck v. *Conway*, 119 Mass. 546; *Bagnall* v. *Davies*, 140 Mass. 76, 2 N. E. 786; *Hamlen*

NOTE.—For condition in deed as to building restrictions, see also Atty. Gen. v. Algonquin Club (Mass.) 11 L. R. A. 500; Hutchinson v. Ulrich (Ill.) 21 L. R. A. 391; and Chicago v. Ward (Ill.) 38 L. R. A. 849.

For ordinance establishing building line, see St. Louis v. Hill (Mo.) 21 L. R. A. 226.

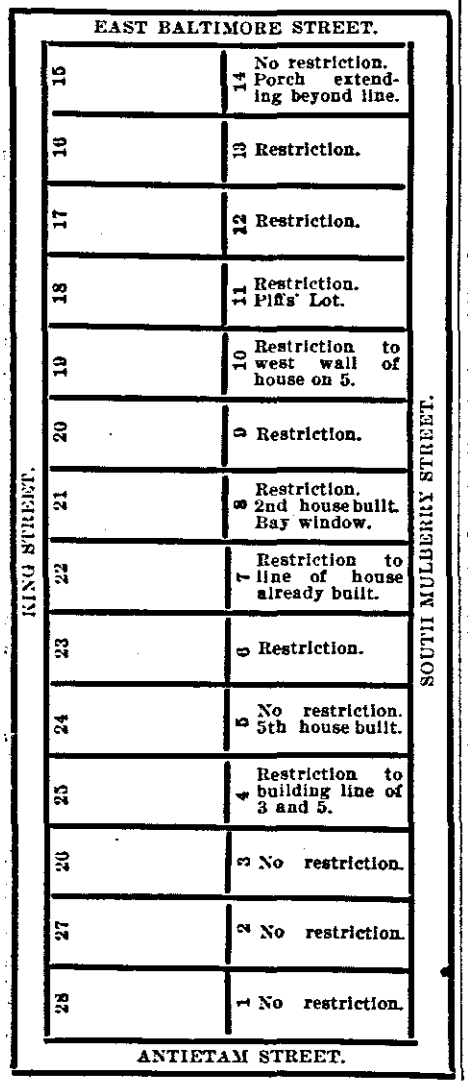
v. *Werner*, 144 Mass. 397, 11 N. E. 684; *Clark* v. *Martin*, 49 Pa. 289; *Sanborn* v. *Rice*, 129 Mass. 396.

Mr. **A. C. Strite** for appellees.

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

This is a bill in equity filed by the appellants to restrain the appellees from erecting upon their own premises, adjoining those of the appellants, a bay window, in violation, as the appellants claim, of restrictions contained in conveyances for their respective premises from a common vendor, to whom their titles are traced through mesne conveyances. A preliminary injunction was granted, and was dissolved upon hearing, and thereupon this appeal was taken.

Rev. C. L. Keedy being the owner of a tract of land in Hagerstown, on the east side of Mulberry street, laid out the tract into twenty-eight lots, fourteen of which fronted on Mulberry street, and fourteen extended back eastward, fronting on King street, as shown in the accompanying plat, which was recorded among the land records of Washington county, but without anything thereon, or in the description of the lots which accompanied the plat, to indicate any restrictions upon the use of the lots, or any of them. In the subsequent sale and conveyance of these lots fronting on Mulberry street, certain restrictions as to the building line to be observed were inserted in some of the deeds, while in others there were no restrictions whatever. Lots 1, 2, 14, 3, and 5 were the first sold, and in the order named, without any restriction as to their use. These conveyances were all made between June 28, 1883, and November 23, 1888. Lot 5 was conveyed to C. P. Mason and W. M. Keedy, and the first house built upon any of the lots was erected here in the spring of 1889, standing back 8 feet from the east line of Mulberry street. On No. 1, a church has been built, with a covered vestibule extending beyond the 8-foot line. On No. 2, three dwellings have been built, each with a two-story bay window extending beyond the 8-foot line. On lots 7, 10, and 14, houses have been built, each with a one-story front porch extending beyond the line. On lot 8 a house was erected in 1889, the front wall of which is on the 8-foot line, with an inclosed porch, making it a one-story bay window, extending beyond the line. All the other houses on the Mulberry street lots have steps extending beyond the 8-foot line. All these lots, except 1, 2, 14, 3, and 5, were sold and conveyed with substantially the same restriction as to building; that is, "that no building or other improvement shall be located, built, or constructed upon said lot closer to the west marginal line thereof than a line running paralliel thereto, and bounding the west wall of the house owned by C. P. Mason and Wm. M. Keedy upon lot No. 5." No. 11 is owned by Mrs. Summers, one of the appellants; and No. 10, by Mrs. Beeler, one of the appellees, who is now building a house thereon, with a bay window extending 3 feet beyond the line of the Mason and Keedy house on No. 5, to which she is limited by the original conveyance of her lot No. 10, and the appellants are seeking to restrain the erection of this bay window. Lot 11 was originally conveyed to the Danzer Lumber Company by deed dated January 2, 1890, containing the restriction above mentioned; and the title thereto has passed to Mrs. Summers by mesne conveyances, each of which refers to the restriction in the original deed. Lot 10 was originally conveyed to Norman B. Scott by deed dated December 16, 1890, with the same restriction; and the title thereto has in like manner passed by mesne conveyances to Mrs. Beeler, each conveyance referring to the original restriction.



In *Halle* v. *Newbold*, 69 Md. 270, 14 Atl. 663, this court, reviewing the cases of *Thruston* v. *Minke*, 32 Md. 487; *Whitney* v. *Union*

R. Co. 11 Gray, 359, 71 Am. Dec. 715, and *Clark* v. *Martin*, 49 Pa. 289, says: "These cases very conclusively settle the law that a grantor may impose a restriction in the nature of a servitude or easement upon the land that he sells or leases, for the benefit of the land he still retains; and if that servitude is imposed upon the heirs and assigns of the grantee, and in favor of the heirs and assigns of the grantor, it may be enforced by the assignee of the grantor against the assignee (with notice) of the grantee." The court observed that in each of the cases reviewed the grantor imposed the servitude upon the land he sold, in favor of the land he retained, while in the case then before the court the grantors imposed the condition upon the land they retained, in favor of the land they sold; but the court said "the principle is the same in both cases." But the case now before us does not fall within either class of cases mentioned. Mr. Keedy sold and conveyed the plaintiff's lot No. 11 January 2, 1890. He had then sold and conveyed eight lots (Nos. 1, 2, 14, 3, 5, 9, 8, and 6), the first five without restriction, and the last three with the restriction mentioned, and he imposed upon the grantee of lot 11 the same restriction; but he imposed no servitude upon the land he retained, which embraced lot 10, in favor of the land he then sold, lot No. 11. He sold and conveyed the defendant's lot No. 10 December 16, 1890, and he imposed the same restriction upon that lot which he had imposed upon lot 11. But this restriction cannot inure to his benefit, as respects lot 11, upon the principle stated in 69 Md., and 14 Atl., because he had sold lot 11 nearly a year before; nor can it inure to the benefit of the plaintiff, upon that principle, as owner of lot 11, because there is no privity either of contract or estate between the plaintiff and the defendant. In *Mulligan* v. *Jordan*, 50 N. J. Eq. 363, 24 Atl. 543, it was held that a purchaser of a lot, whose deed contains a covenant against the erection of any building within a certain distance of the curb line, cannot maintain an action against a subsequent purchaser of an adjacent lot from her grantor, for violation of a like covenant, when there was no such covenant between the two purchasers, and their grantor, although he required similar covenants from all purchasers, did not covenant with the first that he would exact them from subsequent purchasers. The chancery court of New Jersey is a court of high repute, and has dealt with numerous questions of this character; and the facts of the case cited above are so closely analogous to the facts of this case that we cannot do better than adopt the following language from that opinion: "The complainant's deed is prior to that of the defendant. There is no covenant to the complainant from Mr. Roberts, the grantor, that he holds the remainder of the property subject to the same restrictions, or that he will exact similar covenants from the purchasers of the remaining property; nor is the complainant the express assign of defendant's covenant with Mr. Roberts; nor is there any covenant between the plaintiff and the defendant. The right of an owner of a lot to enforce a covenant (to which he is not a party or an assign) restrictive of the use of other lands is dependent on the covenant having been made for the benefit of this lot. Obviously, while a subsequent purchaser might, by the operation of this rule, acquire a right of action against a prior purchaser, the prior purchaser would acquire no rights from a covenant entered into by a subsequent purchaser, unless there exists some condition which will entitle him to the benefit of such covenant."

The condition above mentioned has its illustration in another class of cases in which grantees from a common grantor, whose deeds contain restrictive covenants, conditions, or reservations, have been allowed to enforce them *inter sese;* that is, cases where, "although the covenant or agreement in the deed, regarded as a contract merely, is binding only on the original parties, yet, in order to carry out the plain intent of the parties, it will be construed as creating a right or interest in the nature of an incorporeal hereditament or an easement appurtenant to the remaining land belonging to the grantor at the time of the grant; . . . and the right and burden thus created will respectively pass to, and be binding on, all subsequent grantees of the respective lots of land." *Whitney* v. *Union R. Co.* 11 Gray, 365, 71 Am. Dec. 715, quoted and approved in 69 Md. 270, 14 Atl. 663. But, as is well expressed in *Mulligan* v. *Jordan*, 50 N. J. Eq. 363, 24 Atl. 543, "the right of grantees from a common grantor to enforce, *inter sese*, covenants entered into by each with said grantor, is confined to cases where there has been proof of a general plan or scheme for the improvement of the property, and its consequent benefit, and the covenant has been entered into as part of a general plan to be exacted from all purchasers, and to be for the benefit of each purchaser, and the party has bought with reference to such general plan or scheme, and the covenant has entered into the consideration of his purchase." In that case the court proceeded to say: "The only fact which appears . . . is that the same covenant is incorporated in the deeds of the complainant and defendant, and that Mr. Roberts has inserted the same covenant in each deed he made conveying any portion of the property. This has been held not to be sufficient evidence of the covenant having been entered into for the benefit of other lands conveyed by the same grantor,"—citing in support of this position *Jewell* v. *Lee*, 14 Allen, 145; *Sharp* v. *Ropes*, 110 Mass. 381; *Keates* v. *Lyon*, L. R. 4 Ch. 218; and *Renals* v. *Cowlishaw*, L. R. 11 Ch. Div. 866. In the present case the facts are not nearly so strong as in *Mulligan* v. *Jordan*, because here Mr. Keedy conveyed five of the fourteen lots sold without any restrictions whatever.

In *Nottingham Patent Brick & Tile Co.* v. *Butler*, L. R. 15 Q. B. Div. 268, Justice Wills says: "The principle which appears to me to be deducible from the cases is that where

the same vendor, selling to several persons plots of land, parts of a larger property, exacts from each of them covenants imposing restrictions on the use of the plots sold, without putting himself under any corresponding obligation, it is a question of fact whether the restrictions are merely matters of agreement between the vendor himself and his vendees, imposed for his own benefit and protection, or are meant by him, and understood by the buyers, to be for the common advantage of the several purchasers. If the restrictive covenants are simply for the benefit of the vendor, purchasers of other plots of land from the vendor cannot claim to take advantage of them. If they are meant for the common advantage of a set of purchasers, such purchasers and their assigns may enforce them, *inter se*, for their own benefit." That case was a sale of a parcel of land in 1865, in thirteen lots, to different purchasers, with covenant by each restricting the use of the land as a brickyard. Defendant subsequently bought lot 11, but his deed contained no restriction. In 1882 plaintiff contracted to purchase lot 11, and paid a deposit, but, on discovering the restrictive covenant, claimed to rescind the contract, and sued for the deposit; and it was held that, if the contract were executed, he would be bound by the restrictive covenants; that the owner of the other twelve lots could enforce them against him and each other, and that he was entitled to rescind and recover the deposit. On appeal Lord Esher, M. R., said Justice Wills was perfectly correct, and that "the question whether it is intended each of the purchasers shall be liable, in respect of those restrictive covenants, to each of the other purchasers, is a question of fact, to be determined by the intention of the vendor and of the purchasers, and that question must be determined upon the same rules of evidence as every other question of intention." In that case the property was put up at auction in 1865 in thirteen lots, and one of the publicly announced conditions of sale was that no lot should be used as a brickyard. At that time lots 1 and 2 were sold; in February, 1866, there was a second auction, at which lots 6, 7, and 8 were sold; and in October, 1867, there was a third auction, at which lots 9 and 10 were sold; and the evidence showed that all these were sold on the same terms. Lots 3, 4, and 5 were sold, respectively, in 1865, 1866, and 1867, at private sale; but there was no direct evidence as to the terms on which they were sold, the deeds for these not being produced. Lot 11 was sold at private sale September 4, 1866, and the deed contained the restrictions mentioned at the auction. Lot 13 was sold at private sale in June, 1866, with the same restrictions. These restrictions, among other things, required that all buildings erected should be of a uniform stone color, with slate roofs, and should cost not less than £400 each; and the proof was that every house built conformed to these conditions. Upon this state of proof, the court could reach no other logical or rational conclusion than that the vendor intended, and the purchasers understood, that the covenants should inure to the benefit of every purchaser, and that they entered into the consideration of every purchaser. But, in the case before us, though Mr. Keedy took the pains to record, before sale, a plat of the land, and a description of the lots, he nowhere mentioned any restrictions or conditions as to their use. There was no auction sale at which such restrictions or conditions were made known to the public, nor was such announcement made in any other manner. Not only so, but the five lots first sold were sold without any restrictions; and the purchasers of all the other eleven lots on Mulberry street (which were sold with restrictions), except Mrs. Summers, have treated these restrictions as not made for the common benefit of all these purchasers, both by their own violation of these restrictions, and by their failure to resist similar violations by the other purchasers. We think, therefore, the conduct both of the vendor and of the purchasers forbids the conclusions that their intent and understanding were that these restrictions were part of a general plan or scheme for the benefit of all the purchasers.

The cases chiefly relied on by the appellant do not sustain his contention in this case. Thus, in *Tallmadge* v. *East River Bank*, 26 N. Y. 105, a plat was filed and recorded, showing that every house to be built was to be set back 8 feet from the street. In *Columbia College* v. *Lynch*, 70 N. Y. 449, 26 Am. Rep. 615, an agreement showing restrictions as to all the lots was recorded, and the defendant's purchase was made with express reference and subject to this agreement. It was strenuously contended that the case of *Clark* v. *Martin*, 49 Pa. 289, repudiated the necessity of a general plan in cases like the present, and having been approved by this court in 32 Md., and in 69 Md. and 14 Atl., sustained the appellants' contention. But we do not so understand that case. The language used by the court, and relied on here by the appellants, is as follows: "It was objected at the argument that this remedy applies only as a means of compelling an observance of the terms involved in a general plan of lots, and this element actually exists in about half of the cases just cited, yet they are not decided on that consideration. It is not because a plan is deranged that the court interferes, but because rights are invaded, or about to be; and this fact may exist in a plan of two lots, as well as in one of two hundred. The plan often furnishes the proof of the terms on which sales were made, but the fact of the alleged terms is as effective when proved by a single deed as when proved by a plan." It is manifest from this language that the Pennsylvania court is in full accord with the English chancery court in holding that the question is one of fact to be determined by the intention of the vendor and of the purchasers, and that it is to be determined upon the same rules of evidence as other questions of intention. In the Pennsylvania case there were but two lots under consideration,

and the intention of the parties was as clearly shown by the one deed imposing restrictions upon one lot for the benefit of the other, retained by the vendor, as it could have been by a plan describing the two lots, and detailing the conditions to be imposed on one for the benefit of the other. The case of *Sharp* v. *Ropes*, 110 Mass. 381, is more closely analogous to the present case than any to which we have been referred. Heath laid out a parcel of land in eleven lots, five of which fronted on the north side of Gordon street, and one on the south side of the same street. A plat was recorded, showing the area and description of each lot, but making no reference to any restrictions upon their use. Three of the five lots on the north side of the street were conveyed by Heath, subject to the condition that no house should be built thereon within 20 feet of Gordon street. The other two lots on the north side and the one lot on the south side were conveyed without any restriction. The plaintiff's deed was prior in point of time to defendant's deed, and both were subject to the restriction mentioned. Defendant began the erection of a house within 20 feet of the street, and plaintiff applied for an injunction, which was refused, the court saying: "There is nothing from which the court can infer that the restriction contained in the deed from Heath to the defendant was intended for the benfit of the estate now owned by the plaintiff. No such purpose can be gathered from the plan. . . . Neither of the deeds under which these parties respectively claim purports to give to the grantee any such right against any other grantee. . . . The burden of proof is upon the plaintiff, if she insists upon giving to that condition any wider application, and this burden we do not find that she has sustained." A very elaborate and able review of all the leading American and English cases on this subject will be found in *De Gray* v. *Monmouth Beach Club House Co.* 50 N. J. Eq. 329, 24 Atl. 388, fully sustaining the conclusions of the learned judge of the circuit court.

For the reasons stated, *the decree of the Circuit Court is affirmed* with costs to the appellee in both courts.

David B. ELLICOTT *et al., Appts.,*
v.
Thomas P. ELLICOTT *et al.*

(.....Md.....)

1. **A will giving a grandnephew an estate "for the purpose of securing to him a liberal education,"** requiring him to finish a collegiate course at one of two specified universities, and providing that the property shall pass from him if, "through his own disinclination or incapacity or the indifference of his parent or guardians, he should fail to carry out these intentions," with a further provision that until he is twenty-five years of age the property shall be held by a trustee, who shall "deliver over the property and estate into his hands and possession" when he is twenty-five years old if the directions of the will have been carried out; expressing also a special desire that the grandnephew shall not sell a certain place until he shall attain the age of twenty-five years,—vests in him an equitable estate at the death of the testatrix, subject to be devested by the nonperformance of the condition imposed, which is a condition subsequent, and not precedent.

2. **The death of a person while in college,** thereby making it impossible to perform a condition subsequent imposed by will on an estate which was given him subject to be devested if he should fail to carry out the intentions of the will "through his own disinclination or incapacity or the indifference of his parent or guardians," will not devest the estate so as to prevent its descent to his heirs at law and next of kin, since the performance, becoming impossible by the act of God, is dispensed with.

(January 9, 1900.)

APPEAL by plaintiffs from a decree of the Circuit Court of Baltimore City construing the will of Elizabeth E. Pike, deceased, adversely to plaintiffs' contention that, a life estate having terminated, a trust thereby created had ceased, and the property should be declared vested in the residuary legatees. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Bernard Carter, John Prentiss Poe, S. Johnson Poe,** and **Edgar Allan Poe,** for appellants:

In construing wills, courts always endeavor to ascertain what the intention of the testator is, and, when this intention is discovered, are guided and controlled by it.

The vesting is suspended where the suspension of enjoyment is for reasons personal to the legatee, and not for the convenience of the fund.

Bigelow, Wills, Student Series, p. 255.

An interest is vested, as distinguished from contingent, either when enjoyment of it is presently conferred, or when, if the enjoyment of it is postponed, the time of enjoyment will certainly come to pass. If the right of enjoyment is made to depend upon some event or condition which may or may not happen or be performed, the gift is contingent.

Bigelow, Wills, Student Series, p. 244.

The law favors the early vesting of estates, but the intention of the testator governs, and in ascertaining his intention the whole will must be regarded, and not particular expressions in it only; and if it appears that the condition annexed to the gift was for reasons personal to the legatee and related to the substance of the gift, so that it is to be presumed that without the condition the testator would not have made the gift, and especially where the event upon the happening of which the gift depends is uncertain, and does not relate to the arriving at a given age, then the gift is contingent, and the con-

NOTE.—For inability to perform condition on which gift by will is made, see also Bullard v. Shirley (Mass.) 12 L. R. A. 110.

dition on which it depends is a condition precedent.

Scott v. *West*, 63 Wis. 566, 24 N. W. 161, 25 N. W. 18; *Loder* v. *Hatfield*, 71 N. Y. 98; 29 Am. & Eng. Enc. Law, p. 456; *Cropley* v. *Cooper*, 19 Wall. 176, 22 L. ed. 113; *Tayloe* v. *Mosher*, 29 Md. 452.

Construing the 5th clause and the 11th clause together, it is made apparent that the testatrix intended to give the legatee only so much of the income as was necessary to secure him the liberal education in the mode prescribed by the time designated, that is to say, by his finishing his collegiate course at Harvard or Yale by the time of his arrival at the age of twenty-five years.

Pulsford v. *Hunter*, 3 Bro. Ch. 416; *Leake* v. *Robinson*, 1 Mer. 363.

If, for any of the reasons stated in the 5th clause, he did not graduate before reaching twenty-five years of age, the "money" appropriated for such purpose and not then expended was to pass away from him to the residuary legatees.

To give it to him before that event happened would palpably be to defeat the intent of the testatrix, which clearly was to make no absolute gift of the *corpus*, unless that event did happen.

Loder v. *Hatfield*, 71 N. Y. 98; *Tayloe* v. *Mosher*, 29 Md. 453.

The condition upon which alone his right of enjoyment was to depend was the fact of his graduating before reaching the age of twenty-five years.

Bigelow, Wills, p. 244.

Equity cannot relieve from the consequence of a failure to perform a condition precedent.

4 Kent, Com. 125; *Davis* v. *Angel*, 31 Beav. 223, Affirmed on Appeal, 4 DeG. F. & J. 524.

The contingency was annexed to the substance of the gift, and hence it is plain that the testatrix never meant to make absolute the gift to him unless the event, *viz.*, his graduation, happened.

Tayloe v. *Mosher*, 29 Md. 452; Bigelow, Wills, Student Series, p. 257.

Messrs. **William A. Fisher** and **Arthur Steuart**, for appellees:

A condition will not be raised by implication from a mere declaration in the deed that the grant is made for a special and particular purpose, without being coupled with words appropriate to make such condition.

Kilpatrick v. *Baltimore*, 81 Md. 193, 27 L. R. A. 643, 31 Atl. 805; 3 Kent, Com. 130; *Bigelow* v. *Barr*, 4 Ohio, 358; *Packard* v. *Ames*, 16 Gray, 327.

A grant declared to be for a special purpose, without other words, cannot be held to be on a condition.

Kilpatrick v. *Baltimore*, 81 Md. 193, 27 L. R. A. 643, 31 Atl. 805.

The question whether a condition is antecedent or subsequent depends upon the order of time within which the performance is to occur.

Creswell v. *Lawson*, 7 Gill & J. 240.

And "if the thing to be done does not necessarily precede the vesting of the estate in the grantee, but may accompany or follow it, and may as well be done after as before the vesting of the estate, the condition is subsequent."

Re Stickney, 85 Md. 102, 35 L. R. A. 693, 36 Atl. 654; *Hammond* v. *Hammond*, 55 Md. 582; *Finlay* v. *King*, 3 Pet. 375, 7 L. ed. 701.

A strict construction is applied to conditions subsequent, adversely to the raising of a forfeiture, and the forfeiture must have occurred literally within the terms creating the condition.

2 Jarman, Wills, 6th ed. p. 853; 1 Roper, Legacies, 619; 2 Wms. Exrs. 1273; *Hervey-Bathurst* v. *Stanley*, L. R. 4 Ch. Div. 272.

Since James Pike Ellicott faithfully pursued the directions of the testatrix until his untimely death, the condition was performed.

Merrill v. *Emery*, 10 Pick. 511; 2 Jarman, Wills, 849, 852; *Sutcliffe* v. *Richardson*, L. R. 13 Eq. 606; *Hammond* v. *Hammond*, 55 Md. 575.

If a gift is made "for maintenance and education," or "for education," it is an absolute one; and if the donee dies his personal representatives are entitled to receive it.

Webb v. *Kelly*, 9 Sim. 469; *Bayne* v. *Crowther*, 20 Beav. 400; *Gough* v. *Bult*, 16 Sim. 45; *Brown* v. *Concord*, 33 N. H. 285.

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

By this appeal we are called upon to determine what estate, if any, was vested in James Pike Ellicott under the last will and testament of Mrs. Elizabeth E. Pike. He was the grandnephew of the testatrix, and in his fifteenth year at the time of her death, which occurred in 1891, a few months after her will was executed. He died intestate, in March, 1898, having been twenty-one years of age the December preceding his death. The will is divided into fourteen paragraphs, and the testatrix stated in it that it was written by herself. She first named the executor and trustee, then made a number of devises and bequests, and, after giving $10,000 to each of the four children of her brother William M. Ellicott, in addition to an interest in another fund, made them her residuary devisees and legatees. The paragraphs directly involved in this proceeding are the fifth, tenth, and eleventh, and are as follows:

"(5) I leave the rest of my Baltimore property to my grandnephew James Pike Ellicott for the purpose of securing to him a liberal education. He shall remain at some good preparatory school in the state of Massachusetts until he is fitted to enter either Harvard or Yale University, where he shall remain until he has finished the collegiate course. If, however, through his own disinclination or incapacity, or the indifference of his parent or guardians, he should fail to carry out these intentions, then the money which has been left to him for this purpose shall pass away from him entirely into the body of my estate."

"(10) I give and bequeath to my grand-

nephew James Pike Ellicott, in fee simple, all my real estate situated in the town of Robbinston, Maine, and also all furniture, plate, horses, carriages, boats, harness, by which I mean everything of every description that I own in the town of Robbinston, and not hereafter specially disposed of by me.

"(11) Provided, however, that all the estate and property devised and bequeathed by me to James Pike Ellicott shall be held by my trustee until the said James Pike Ellicott shall have attained the age of twenty-five years, in trust, to rent, manage, and take charge of the real estate, keep it in repair, pay taxes and expenses incidental thereto, also to keep the personal estate invested in good securities, and collect and receive all rents, increase, and interest accruing on said estate, and devote the net income arising therefrom to the special object mentioned above, *viz.*, the education of James Pike Ellicott; it being my desire that he may be thoroughly prepared to enter into any profession for which he has inclination or capacity. All surplus income arising from the property given for his use by this my will, not required in the earlier years of his minority for his education and maintenance, to be carefully invested and accumulated for the later period of his minority, when his collegiate expenses will be increased. In case the above directions have been carried out, upon my said nephew James Pike Ellicott attaining the age of twenty-five years, I desire my trustees to deliver over the property and estate into his hands and possession. But I specially desire my said grandnephew not to sell the Robbinston place till he shall attain the age of twenty-five years, as it is my earnest wish to keep the property as long as possible in the family, and have it go with the name."

James Pike Ellicott graduated at a preparatory school in Massachusetts, and in the fall of 1896 entered the freshman class at Harvard. He was in the sophomore class when he died, but was still under some conditions, either as to his entrance into college or imposed afterwards. The testimony is not altogether clear about that, but it is not material. The question is whether, under this will, he had such a vested estate as descended to his heirs, or whether the property referred to passed to the residuary devisees and legatees named in the will. The court below decreed that the part of the estate of Mrs. Pike thus left young Ellicott became, at her death, vested in him, and at his death descended to his heirs at law, and directed the trustee to at once relinquish control over the same, the period during which he as trustee was directed to hold it having been terminated by the death of young Ellicott. From that decree this appeal was taken.

It may be conceded that the desire of the testatrix, most conspicuously made known in her will, was that this grandnephew, who was named after her deceased husband, should receive such an education and be so prepared for the battle of life that he would reflect credit upon him whose name he bore, although it does not follow that she was not in part influenced by her affection and regard for him. The testimony shows that she always took a very special interest in him, paid nearly, if not all, his expenses after he went to Adams Academy, and gave means from time to time for his benefit. He, at least, does not seem to have been in either of the classes of which she says: "I have not thought it necessary to divide my property among those who have received a larger amount from others than I can give to any. Still less have I cared to remember any who have shamefully and despitefully used me." Her idea undoubtedly was that the best way to provide for him was to have him properly educated; but that was not all, for, after he received the education contemplated by her, he was to have the *corpus* of the estate. If she had only been interested in his education, and had intended that the property set apart for him should be used for that purpose alone, then she could, and probably would, have directed that the *corpus*, on his arrival at the age of twenty-five years, should be otherwise disposed of.

But let us examine the will itself to ascertain the legal effect of the terms used therein, always keeping in mind the intention of the testatrix, so far as indicated by the will and such circumstances as we can properly consider. In paragraph 5 the language is, "I leave the rest of my Baltimore property to my grandnephew James Pike Ellicott, for the purpose of securing to him a liberal education;" in paragraph 10, "I give and bequeath" to him "in fee simple all my real estate situated in the town of Robbinston, Maine, also all furniture," etc.; and in the part that created the trust she said, "Provided, however, that all the estate and property devised and bequeathed by me to James Pike Ellicott" shall be held by the trustee until said Ellicott shall have attained the age of twenty-five years, "in trust," etc. The language thus used by the testatrix in making provision for him was not only sufficient to vest an equitable estate in him immediately upon her death, but, unless qualified by some other parts of the will, is absolutely conclusive of her intention to do so. The form of the gift "shows that a present, and not a future, estate was intended." *Re Stickney*, 85 Md. 103, 35 L. R. A. 693, 36 Atl. 654. She did not even "leave" or "give and bequeath" the property to the trustee for the use of her nephew, but, on the contrary, she not only devised and bequeathed it to the latter, but, in creating the trust and describing what the trustee should hold, she said, "all the estate and property devised and bequeathed by me to James Pike Ellicott." When the trustee was ready to enter upon the discharge of his duties, in order to ascertain what he was to hold, he was compelled to see what was thus devised and bequeathed to James. The gift of the Baltimore property, "for the purpose of securing to him a liberal education," did not, of itself, create a condition; for, as was said in *Kilpatrick* v. *Baltimore*, 81 Md. 193, 27 L. R. A. 645, 31 Atl. 806, "a condition will not be

raised, by implication, from a mere declaration in the deed that the grant is made for a special and particular purpose, without being coupled with words appropriate to make such a condition," and the same principle applies to a devise or bequest. What, then, is there to be found elsewhere in the will to overcome the language used by the testatrix which so strongly indicates her intention to vest the property in her grandnephew? The trust created by paragraph 11 was simply that the trustee should rent, manage, and take charge of the real estate, keep it in repair, pay taxes and expenses incidental thereto, also to keep the personal estate properly invested, and collect the interest, "and devote the net income arising therefrom to the special object mentioned above, *viz.*, the education of James Pike Ellicott." The testatrix also provided for the investment and accumulation of any surplus income not required in the earlier years of his minority "for his education and maintenance," so it could be used when his collegiate expenses would be increased. There is therefore nothing in that to cast any doubt on her intention, so clearly previously expressed, as to his taking the estate. When she made her will, and indeed when she died, he was not yet fifteen years of age, and it was therefore eminently proper that the estate should be left under the control of a trustee until James reached his majority; and as she intended that the income should be used for his education and maintenance, and fixed twenty-five years of age as the time within which he was to complete his collegiate course, it was far better to at once name a trustee, instead of giving his guardian control, especially as his father was her executor and trustee.

The only other provision in the trust which reflects upon the question we are to determine, besides what is in paragraph 5, of which we will speak presently, is "In case the above directions have been carried out, upon my said nephew James Pike Ellicott attaining the age of twenty-five years I desire my trustee to deliver over the property and estate into his hands and possession." The direction "to deliver over the property and estate into his hands and possession," in so far as it reflects upon the question whether the estate was intended by the testatrix to be vested in her nephew, indicates that it was. She did not direct him, under those circumstances, to convey property to her nephew, the title to which up to that time was not vested in him, but simply to deliver over and give the possession of "the property and estate;" which imports that she considered it already vested in him, but that he, up to that time, was to be kept out of the possession of the *corpus*. Nor did she make any provision for the trustee conveying it to any other person or persons if her directions had not been carried out. She therefore could not have supposed that the property was vested in the trustee, excepting such legal title as was in him by intendment of law, as would enable him to discharge his duties as such trustee. She certainly did not intend that, from the time of her death until the period when her grandnephew would reach the age of twenty-five years, if he lived that long, the beneficial interest in the estate should be in the residuary devisees; for there is nothing in the will to suggest that, and as she devised nothing to the trustee, and the legal title was only in him by intendment of law, she must have intended that the equitable interest should be somewhere, and the only possible place indicated by her will where it should be, if not in the trustee, was in James Pike Ellicott, so long as he had not forfeited his right to it.

The provision, "in case the above directions have been carried out," undoubtedly refers to the directions contained in paragraph 5. They are that James shall remain in a good preparatory school in Massachusetts until he was fitted to enter either Harvard or Yale, "where he shall remain until he has finished the collegiate course. If, however, through his own disinclination or incapacity, or the indifference of his parent or guardian, he shall fail to carry out these intentions, then the money which has been left to him for this purpose shall pass away from him entirely, into the body of my estate." The latter part of the clause just quoted adds strength to the appellees' contention that the title to the equitable estate in this property vested in James at the death of the testatrix. It is that "the money which has been left to him for this purpose shall pass away from him entirely;" thus not only speaking of the money "which had been left to him," but when she said it "shall pass away from him" it seems to us that the necessary inference is that it was, in her opinion, in him, and hence could "pass away from him" upon his failure to carry out her intentions as therein expressed. At the argument the meaning of the word "money" in the connection in which it is used was discussed; the appellants contending that its usual and ordinary meaning should be given it, and that its use showed that the intention of the testatrix was not to give him any estate in the *corpus* unless and until he graduated, but only to give him in the meantime so much of the income as was necessary to enable him to become entitled to the *corpus* by the time he should arrive at the age of twenty-five years, by his graduation at or before that time. They say he took an equitable interest in the income, subject to the condition precedent that he should finish his collegiate course at Harvard or Yale by the time he arrived at the age of twenty-five years, and, if he graduated prior to that time, the equitable estate in the income, subject to such condition precedent, was to become a vested estate in the *corpus*, of which, upon his arrival at the age, he was to receive the actual possession, freed from the trust. Although the will furnishes some ground for the contrary contention, it may be conceded that the word "money," thus used by the testatrix, is equivalent to "income," and only meant that. In paragraph 3, in making certain provisions for her sis-

ter Rebecca, the testatrix apparently used the word in its ordinary sense, and she may have intended to do so in this paragraph. But we cannot admit that it at all follows that this use by her of the term "money" shows any intention on her part that he should not have a vested equitable interest in the estate. Until he was twenty-five he was only to have the possession and use of the income,—the money. That is all that owners of equitable estates in properties held by trustees usually have. There are, of course, cases in which they may have the enjoyment and use of the *corpus;* but if the legal title of real and personal property is held by a trustee for the beneficial use of another, who gets the income, the latter ordinarily has an equitable vested interest, which is liable for his debts, and, if not limited to life or some definite period, it will descend to his heirs at law or next of kin. Generally, if the interest from the investment of a fund or the profits of an estate be given by will, the devisee will take the fund or estate absolutely, although that does not obtain when the will shows a different intent (*Cooke* v. *Husbands*, 11 Md. 506); and we cannot see how this direction as to the money passing away from him can be any evidence of the intention of the testatrix not to give him a vested equitable estate, subject to be defeated by the nonperformance of the condition. "It makes no difference, as to the vesting, whether the legal estate be devised to trustees, who are required to convey according to the directions of the will, or whether the interest is provided to take effect without the intervention of trustees, nor that the trust provides for the accumulation of income until the period of payment or distribution arrives." *Tayloe* v. *Mosher*, 29 Md. 451. In this same paragraph, as we have seen, the testatrix had used language which imports an intention to make an absolute gift, as she afterwards did in the tenth paragraph as to the Maine property; and when she provided, in paragraph 11, that a trustee should hold the property in trust, to use the net income for the education and maintenance of her nephew, it would be placing a very narrow construction on the whole will to hold that she only intended to give him an equitable interest in the income until he graduated, and then such interest was to become a vested estate in the *corpus*.

The only causes of his failure to carry out these instructions, which should work the result mentioned, assigned by the testatrix, are "his own disinclination or incapacity, or the indifference of his parent or guardian." The one relied on by the appellants is his "incapacity," and they contend that his death, which prevented him from graduating, whatever he might have done if his life had been spared, is included in that term. But while it is true that the word "incapacity" may sometimes apply to physical as well as mental conditions, was it used by the testatrix in that broad sense? It was used in connection with the education of this young man,—with reference to his power to complete the collegiate course provided at Harvard or Yale. It was not a question whether he would have the necessary funds, for those she was providing, nor the inclination to study, as that was included by another term, but it evidently applied to his mental powers. If, while he was at the preparatory school, his teacher had said of him that he did not have the "capacity" to graduate at Harvard, would that have been understood to have referred to any other than his mental capacity? If when he entered Harvard it had been said, "He will fail to graduate by reason of his incapacity," would it have been thought to refer to his death before graduating? Of course, his death would cause him to be incapable of graduating; but that is not the term that would be used if it was meant that he would not graduate because he would die before doing so. If the testatrix had meant that "if for any reason whatever" he did not graduate he should forfeit the estate, it would have been easy to say so, and it is only reasonable to suppose that if she had intended that, if his death prevented his graduation, it should be forfeited, she would not only have said so in terms that would have admitted of no doubt, but she would probably have directed where it should in that event go. She did so in other instances, and she was evidently a woman of considerable intelligence, and with very decided convictions as to how her estate should go.

The concluding clause of paragraph 11, "But I specially desire my said grandnephew not to sell the Robbinston place till he shall attain the age of twenty-five years, as it is my earnest wish to keep the property as long as possible in the family, and have it go with the name," is relied on by the appellees. When that is taken in connection with the tenth paragraph, in which she gave him that property in fee simple, it certainly does afford some evidence of her intention that the property should be vested in him before he was twenty-five years of age; but if the appellants' theory was correct, that she intended him to have a vested equitable estate as soon as he graduated, although he was not twenty-five, it is possible that she might have for that reason placed that provision in the will; and therefore, in considering the question, we have not attached as much importance to it as might otherwise have been done.

Taking the whole will into consideration, our conclusion is that the testatrix intended to vest an equitable estate in the properties mentioned in her grandnephew at the time of her death, subject to be devested by the nonperformance of the condition imposed by her, which was a condition subsequent, and not precedent. In that conclusion we are supported by the settled rules of construction of wills and the presumptions of law. It undoubtedly favors the early vesting of estates, as has often been said by this and other courts, but nowhere more emphatically than in *Tayloe* v. *Mosher*, 29 Md. 450. The same words may be used to create a condition precedent as a condition subsequent, "but courts are averse to construing condi-

tions to be precedent when they might defeat the vesting of estates under a will." *Pennington* v. *Pennington*, 70 Md. 442, 3 L. R. A. 822, 17 Atl. 333. "It is equally well settled that if the thing to be done does not necessarily precede the vesting of the estate in the grantee, but may accompany or follow it, and may as well be done after as before the vesting of the estate, the condition is subsequent." *Re Stickney*, 85 Md. 102, 35 L. R. A. 696, 36 Atl. 656. Indeed, "in doubtful cases, the disposition of the courts is to construe language as creating a trust or covenant, rather than a condition." *Kilpatrick's Case*, 81 Md. 193, 27 L. R. A. 645, 31 Atl. 806; 6 Am. & Eng. Enc. Law, 2d ed. p. 502. Then the presumption is that the testatrix used the words of gift we have referred to in their usual sense, unless the contrary clearly appears, which is not the case.

Having determined that this was a condition subsequent, the estate was not devested by the death of James, who was engaged in fulfilling the condition when stricken down. The performance becoming impossible by the act of God, it is dispensed with, and the estate vested absolutely. 6 Am. & Eng. Enc. Law, 2d ed. p. 506; *Hammond* v. *Hammond*, 55 Md. 575. In that case the testator left the use of $2,500 to his brother, "for that he, the said C. L. H., shall look after and take care of our beloved brother R. while he shall live, and bury him at his death." Rezin died before the testator, and it was held that the condition annexed to the bequest was a condition subsequent, and, its performance being made impossible by the act of God, the legatee took unconditionally. In *Merrill* v. *Emery*, 10 Pick. 511, the testator left a legacy to his widow, upon condition that she should educate and bring up his granddaughter until she arrived at the age of eighteen years or married. The widow died shortly after the testator, and it was held to be a condition subsequent, and that the nonperformance was excused by the death of the widow. In *Burnham* v. *Burnham*, 79 Wis. 557, 48 N. W. 661, the testator had by his will made certain bequests to each of his children, including Daniel, who was an inebriate and spendthrift, and afterwards added a codicil by which he declared that his son Daniel should not have any part or interest in his estate unless, within five years after the testator's decease, he reformed, and became a sober and respectable citizen, of good moral character. He directed that, "in the event that he shall at that time have become a sober man and have a good moral character," in the opinion of the executors, "I give, devise, and bequeath to him, and order paid over to him, one half of the property and estate bequeathed to him in my will," and that, if he continued to remain sober, etc., for the further period of five years, the other half should be paid him. He also directed his executors to hold and retain this share of his estate in trust until the expiration of five years after his death, and therafter, unless his son had reformed, to pay to the children of Daniel certain sums per annum, and, if he did not reform within ten years, then to pay the fund to Daniel's children. In less than a year after the testator's death Daniel died. It was held that the estate vested in Daniel, subject to the conditions subsequent, and was not devested by his death, but became absolute, and descended to his widow and children, as provided by the statute in cases of intestate estates. Many other cases might be cited illustrating the tendency of the courts to hold conditions to be subsequent, rather than precedent, and to declare estates to be vested, but it is unnecessary. The article in 6 Am. & Eng. Enc. Law, on *Conditions*, cites many of them. We are then of the opinion that this estate, having vested in James Pike Ellicott, subject to the condition subsequent, the nonperformance of which is excused by his death, descended to his heirs at law and next of kin, and the decree will be affirmed. But as it was proper, for the protection of the trustee and to settle the rights of the parties, to have the will construed, we will direct that the costs be paid out of the estate.

Decree affirmed, costs to be paid out of the estate.

ECONOMY SAVINGS BANK, *Appt.*,
v.
Douglas H. GORDON *et al.*

(.....Md.....)

1. **A savings bank is not charged with notice of infirmity** in a mortgage an assignment of which it takes as security for a loan, by the fact that its treasurer is cashier of the bank at which the mortgagee, mortgagor, and a corporation of which they are members, and to raise money for which the mortgage is executed, keep their accounts, so that he might have learned the disposition made of the money borrowed.
2. **A bona fide purchaser for value and without notice of a mortgage** given without any consideration, and which is not accompanied by any negotiable obligation, holds it as a valid encumbrance as against creditors of the mortgagor, since his equities are at least equal to theirs, and in such case the legal title prevails.

(January 10, 1900.)

APPEAL by defendant from a decree of the Circuit Court of Baltimore City in favor of plaintiffs in a suit brought to set aside a mortgage covering property belonging to Cecil R. Atkinson as having been executed in fraud of his creditors. *Reversed.*

The facts are stated in the opinion.

Messrs. **Daniel L. Brinton** and **John P. Poe**, for appellant:

A bona fide holder for value without notice is preferred to creditors.

Smith v. *Pattison*, 84 Md. 341, 35 Atl. 963; *Totten* v. *Brady*, 54 Md. 170; *Fuller* v. *Brewster*, 53 Md. 359; *Cooke* v. *Cooke*, 43 Md.

NOTE.—As to rights of a bona fide purchaser of a mortgage, see also Patterson v. Rabb (S. C.) 19 L. R. A. 831, and Holmes v. Gardner (Ohio) 20 L. R. A. 329.

530; *Glenn* v. *Grover*, 3 Md. Ch. 29; *Anderson* v. *Tydings*, 3 Md. Ch. 167; *Swan* v. *Dent*, 2 Md. Ch. 111, note 9, Brantley's ed.

By bona fide purchasers we mean persons who have either paid or advanced money upon the faith of the grantor's actual title to the property transferred, or who have accepted specific property in payment of a specific debt.

Tyler v. *Abergh*, 65 Md. 20, 3 Atl. 904; *Sleeper* v. *Chapman*, 121 Mass. 404; *Phelps* v. *Morrison*, 24 N. J. Eq. 195; *Spicer* v. *Robinson*, 73 Ill. 519; *Sydnor* v. *Roberts*, 13 Tex. 598; *Smart* v. *Bement*, 4 Abb. App. Dec. 253; *Thompson Nat. Bank* v. *Corwine*, 89 Fed. Rep. 774; *Smith* v. *Pattison*, 84 Md. 341, 35 Atl. 963.

The policy of the law which favors the security of titles as conducive to the public good would be subverted if a creditor having no lien upon the property should yet be permitted to avail himself of the priority of his debt to defeat such a bona fide purchaser.

1 Story, Eq. Jur. 13th ed. p. 387.

It is not enough that an overprudent and cautious person, if his attention had been called to the circumstance in question, would have been likely to seek an explanation of it.

Briggs v. *Rice*, 130 Mass. 50; *Flagg* v. *Mann*, 2 Sumn. 551, Fed. Cas. No. 4,847; *Buttrick* v. *Holden*, 13 Met. 355; *Acer* v. *Westcott*, 46 N. Y. 384, 7 Am. Rep. 355.

A bona fide purchaser for value without notice is protected, and he cannot be adjudged to have notice of anything apparently improbable and which diligent and reasonable inquiry would not disclose.

Seldner v. *McCreery*, 75 Md. 287, 23 Atl. 641; *Lincoln* v. *Quynn*, 68 Md. 299, 11 Atl. 848; *Biddinger* v. *Wiland*, 67 Md. 359, 10 Atl. 202; *Abell* v. *Brown*, 55 Md. 217.

Where a conveyance has been made with the intent to defraud creditors of the grantor, so that it would be voidable as against the grantee, but this grantee has in turn conveyed to a bona fide purchaser for value, the remedial rights of the creditors to have the original and fraudulent transfer set aside are then cut off, and the purchaser has a complete defense against their claim.

2 Pom. Eq. Jur. § 777; *Birdsall* v. *Russell*, 29 N. Y. 250; *Johnson* v. *Hess*, 126 Ind. 293, 9 L. R. A. 471, 25 N. E. 445; Bigelow, Fr. p. 399; *Agra Bank* v. *Barry*, Ir. Rep. 6 Eq. 128.

A bona fide purchaser for value without notice of a secret equitable lien or an unrecorded equitable title is considered as having an equal claim to the consideration of a court of equity, with the holder of the equitable lien or title. His legal title will therefore prevail.

Phelps, Eq. § 241; *Ohio L. Ins. & T. Co.* v. *Ross*, 2 Md. Ch. 25.

The purchaser, to be charged with notice, must have knowledge of some fact to put him on inquiry as to the existence of some right or title in conflict with that which he is about to purchase.

Baker v. *Bliss*, 39 N. Y. 74; *Williamson* v. *Brown*, 15 N. Y. 362; *Birdsall* v. *Russell*, 29 N. Y. 250; *Willis* v. *Vallette*, 4 Met. (Ky.) 186; *David* v. *Birchard*, 53 Wis. 495, 10 N. W. 557.

The creditors of the person against whom the chose in action exists have no concern with any intent of such person to defraud them, though the holder of the chose be equally guilty, after the chose has been assigned for valuable consideration without notice of the fraud.

DeWitt v. *Van Sickle*, 29 N. J. Eq. 209; *Sleeper* v. *Chapman*, 121 Mass. 404; *Bigelow* v. *Smith*, 2 Allen, 264; *Welch* v. *Priest*, 8 Allen, 165; *Logan* v. *Brick*, 2 Del. Ch. 206.

An assignee of a mortgage is a purchaser, and is entitled to the protection of the recording acts as much as a purchaser of the equity of redemption.

1 Jones, Mortg. § 475; *Westbrook* v. *Gleason*, 79 N. Y. 23; *Decker* v. *Boice*, 83 N. Y. 215; *Union College* v. *Wheeler*, 59 Barb. 585; *Pierce* v. *Faunce*, 47 Me. 513.

It does not avail to show that the debtor's assignment was fraudulent, unless it be shown that the assignee participated in the fraudulent intent, or took it under such circumstances that he is chargeable with notice of the fraudulent intent on the part of the assignor.

1 Jones, Mortg. § 828; *Tantum* v. *Green*, 21 N. J. Eq. 364.

A bona fide assignee for value of a mortgage of land may enforce it by foreclosure, although it was originally given as a consideration for a transfer of the land fraudulent as to creditors, and such transfer has been adjudged void.

Smart v. *Bement*, 4 Abb. App. Dec. 253.

The burden of proof that the assignee took the mortgage with notice, or that he is not a bona fide purchaser, is on the party who sets up the fraud.

Marshall v. *Billingsly*, 7 Ind. 250; *Farmers' Bank* v. *Douglass*, 11 Smedes & M. 469; *Langdon* v. *Keith*, 9 Vt. 299.

Messrs. **Taylor & Keech** and **Foster & Foster**, for appellees:

Having proved the mortgage fraudulent, it is void with respect to the rights of Atkinson's creditors, in whosesoever hands it may be found, and no assignee of it can obtain a better title than Steers, the original mortgagee, had.

Inasmuch as Atkinson had creditors at the time the mortgage was given, the only effect of such a voluntary or covinous conveyance could be to hinder them in obtaining the satisfaction of their debts. Consequently, at their suit the mortgage must be held to be void with respect to their rights under the statute of fraudulent and voluntary conveyances.

13 Eliz. chap. 5, Alexander's British Statute, p. 378.

A mortgage has no existence apart from the debt which it is given to secure. It is a mere accessory or incident to the debt; and so far is it inseparably united to the debt (the one being in truth appurtenant to the other) that a separate alienation of either cannot be made, and an assignment of the debt carries in equity the mortgage; and in such a case the mortgagee is held to be a trustee for the assignee of the debt.

Clark v. *Levering*, 1 Md. Ch. 178; *Wash-*

ington F. Ins. Co. v. *Kelly*, 32 Md. 421, 3 Am. Rep. 149; *Byles* v. *Tome*, 39 Md. 461.

This pretended debt, even at best, can only be treated as a mere non-negotiable chose in action; and the assignee of it can in no way obtain any superior title to that of his assignor, and can only take subject to all the equities and defenses to which it is, or might be, subject in the hands of the original pretended creditor.

Harwood v. *Jones*, 10 Gill & J. 404; *Eversole* v. *Maull*, 50 Md. 95.

When a mortgage "stands alone," without an instrument evidencing the debt, or is given to secure a non-negotiable instrument, such as a single bill, or where it is given to secure a note which is indorsed over after maturity, then it passes to an assignee like any other chose in action which is not protected by the law merchant, and the assignee takes only such title as his assignor had.

1 Jones, Mortg. §§ 841 *et seq.*; *Carpenter* v. *Logan*, 16 Wall. 271, 21 L. ed. 313; *Judge* v. *Vogel*, 38 Mich. 569; *Castle* v. *Castle*, 78 Mich. 298, 44 N. W. 378; *Corbett* v. *Woodward*, 5 Sawy. 403, Fed. Cas. No. 3,223; *Westfall* v. *Jones*, 23 Barb. 9; *Schafer* v. *Reilly*, 50 N. Y. 61; *Union College* v. *Wheeler*, 61 N. Y. 88; *Crane* v. *Turner*, 67 N. Y. 437; *Hill* v. *Hoole*, 116 N. Y. 289.

This rule prevails in Maryland.

Central Bank v. *Copeland*, 18 Md. 305, 81 Am. Dec. 597; *Timms* v. *Shannon*, 19 Md. 296, 81 Am. Dec. 632; *Cumberland Coal & I. Co.* v. *Parish*, 42 Md. 598.

On petition for rehearing.

Unless all the knowledge gained by Schott as a man, during the course of the transaction, was utterly and completely blotted out of his mind on every occasion when he acted as treasurer of the Economy Savings Bank in this matter, then the Economy Bank knew, in the only way it could know,—*i. e.*, through one of its corporate officers,—everything that this court and the lower court knew when they held that there was no consideration for the mortgage from Cecil R. Atkinson to A. J. Steers, and that it was a mere scheme for raising money to stave off the pending insolvency of the concerns in which the Atkinson brothers were interested.

4 Thomp. Corp. §§ 5189 *et seq.*; 1 Morawetz, Priv. Corp. §§ 540b, 540c; *United States Ins. Co.* v. *Shriver*, 3 Md. Ch. 381; *Hoffman Steam Coal Co.* v. *Cumberland Coal & I. Co.* 16 Md. 456, 77 Am. Dec. 311.

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

On July 30, 1897, Cecil R. Atkinson executed a mortgage upon a warehouse owned by him, on South Howard street, in Baltimore city, to Alonzo J. Steers, which recited that he was indebted to Steers "in the full sum of fifteen thousand dollars, payable February 10th, 1898," and that it was executed to secure the payment of this debt, with interest thereon. The mortgage was in due form, was regularly acknowledged, and had attached to it a proper affidavit as to the bona fides of the consideration therein stated, and it was recorded on the day after its date. No note accompanied the mortgage, but it contained a covenant to pay the mortgage debt and interest. About the same time Steers, the mortgagee, applied to the American National Bank to lend him $6,000 offering to assign the mortgage as security for the loan. Schott, the cashier of the bank, explained to him that a national bank could not lend money upon real-estate security, but informed him that the appellant savings bank, of which he (Schott) was treasurer, had some money on hand, and would lend him $5,000 upon the mortgage, if the security proved to be ample, but the matter must first be referred by the appellant to a committee, who would investigate and report upon the security. Steers assented to the terms suggested by Schott, and a committee from the appellant went upon the mortgaged premises and examined them, and reported favorably upon the loan, provided there were no encumbrances upon the property prior to the mortgage. The matter was then referred by the appellant to its attorney to examine the title, Steers placing the mortgage in its hands for that purpose. The attorney examined the title, and reported favorably upon it, whereupon the appellant, on August 6, 1897, lent the $5,000 to Steers, and at the same time took from him an assignment of the mortgage as security for the loan. The $5,000 so loaned was given to Steers in the check of the appellant to his order upon the American National Bank, in which the appellant had on deposit at that time more than the amount of the check. Steers indorsed the check to the Eastern Electric Company, which at once deposited it to its own credit in the bank upon which it was drawn, and the $5,000 was passed to the credit of the electric company, and charged to the appellant upon the books of the bank. The money was then used by the electric company, to the extent of $2,000, in the payment of a loan which had been made by one Myerdick upon a previous unrecorded assignment of the Atkinson mortgage, and the remaining $3,000 was almost entirely paid to the American National Bank in satisfaction of obligations due to it by the Eastern Electric Company or by George H. Atkinson, a brother of Cecil R. Atkinson, the mortgagor. Steers subsequently assigned his equity in the $15,000 mortgage to one C. S. Hinchman as collateral security for a loan of $2,000. It appears from the record that Cecil R. Atkinson, the mortgagor, and his four brothers, William J., George H., Harry, and Richard F., were promoters by profession, and together operated and controlled the Eastern Electric Company and other kindred corporations, all of which proved to be speculative enterprises, and soon became insolvent and passed into the hands of receivers. Steers, who was put upon the stand by the appellees, testified that the consideration for the $15,000 mortgage from Atkinson to him consisted of $10,000 of Best Telephone Company bonds and $5,000 of Best Telephone Company stock, which he had let Atkinson have prior to the execution of the mortgage; but his testimony was so inconsistent and contradictory in its differ-

ent portions that it cannot be accepted as reliable. The whole testimony touching the consideration for the mortgage leads to the conclusion that there was no substantial consideration for it, but that it was executed to provide a means of raising money to assist the Atkinson brothers in staving off the impending insolvency of the Eastern Electric and Best Telephone Companies, and the other enterprises which they were then attempting to keep afloat. On December 29, 1897, nearly five months after the loan of the $5,000 to Steers by the appellant, and the assignment to the latter of the mortgage, Douglas H. Gordon, one of the appellees, obtained a judgment for $5,442.30 against the mortgagor, Cecil R. Atkinson, and his brother William J. Atkinson, on a note given by them to him on November 13, 1896, for a loan which he then made to them upon Best Telephone Company bonds and stock as collateral. Gordon testified that at the time he made this loan William J. Atkinson stated that his brother Cecil R. owned the Howard street warehouse, and he (Gordon) suggested that he be given a mortgage on the warehouse as security for the loan about to be made by him. W. J. Atkinson declined to procure the mortgage, saying that it would injure his brother's credit, but stated that Gordon would have the benefit of the property by having its owner, Cecil R. Atkinson, upon the note. Gordon testified that he relied on this statement of William J. Atkinson in making the loan. Harry W. Boureau, the other appellee, obtained a judgment for $503.80 against William J. Atkinson and Cecil R. Atkinson on September 29, 1897. On December 18, 1897, after Boureau had obtained his judgment, and after Gordon had sued the Atkinsons, but before he had gotten his judgment, the appellees instituted the present case, which is a creditors' suit in equity against the appellant, Cecil R. Atkinson, Steers, and Hinchman. The bill of complaint alleged that the mortgage from Atkinson to Steers, and the successive assignments of it by him to the appellant and Hinchman, were all without consideration, and fraudulent, and prayed to have them declared void. The appellant answered the bill, denying its material allegations, and setting up its title to the mortgage to the extent of the $5,000 loaned on it, and interest, as a bona fide purchaser for value, without notice of any infirmity in it. Neither Hinchman nor Steers answered, and a decree *pro confesso* was entered against them. The case against the appellant came regularly to a hearing, and the court below at first filed an opinion sustaining the appellant's claim; but upon a rehearing of the case the learned judge changed his views of the case, and filed another opinion, of a contrary tenor, and signed the decree appealed from, denying the appellant's claim to a lien on the property, and directed it to be sold for the benefit of the creditors of the mortgagor. In his second opinion the learned judge held, upon the authority of the *Cumberland Coal & I. Co. Case*, 42 Md. 598, that the appellant, although he found it to be a bona fide purchaser for value of the mortgage, without notice, was not entitled to a lien for its loan to Steers, and interest, made upon the faith of the mortgage, because the latter, not being accompanied by a negotiable obligation, was a mere chose in action, which the appellant must be treated as having taken subject to all equities that might have been urged against it in the hands of Steers, the mortgagee.

Under the facts of the case, the appellant must be regarded as a bona fide purchaser for value of the mortgage, without notice. It advanced its $5,000 upon the mortgage in the ordinary course of business, after a careful inquiry into the value of the property, and an investigation of the title upon the public records. It was not concerned in the disposition made by Steers of the borrowed money, not one dollar of which went back into its hands, or was expended for its benefit. It was not put upon inquiry as to the bona fides of the mortgage by the fact that Schott, its treasurer, was also cashier of the American National Bank, where Steers and the Eastern Electric Company and one or more of the Atkinson brothers kept their accounts, and that he might have seen by an examination of the books of the bank what disposition was made of the borrowed money. There was in fact nothing in the use made of the money to suggest any infirmity in the mortgage.

The next question to be determined is, What are the rights of the appellant, as such bona fide purchaser, against the claims of the appellees? As there was no attempt by Steers to assign the mortgage debt to one person, and the mortgage to another, we are not called upon to consider the relative equities of one who claims as assignee of the debt and another who claims as assignee of the mortgage, as the court were in the cases of *Clark v. Levering*, 1 Md. Ch. 178, and *Byles v. Tome*, 39 Md. 461, which were in part relied on by the appellees. What we have to consider is the attitude of the appellant, as the bona fide purchaser of both debt and mortgage, towards the creditors of the mortgagor, who were such at the time the mortgage was made. The mortgage was not given to secure an actual indebtedness of $15,000, as it professes on its face to have been. Its execution was evidently a means adopted by the parties to it to clothe Steers, the mortgagee, with the appearance of a good title to a large debt secured by a valid mortgage, in order to enable him to raise money upon it. It was not fraudulent, in the sense that its execution had been procured by fraud, misrepresentation, or constraint practised on the owner of the land who executed it, as was the case in *Central Bank v. Copeland*, 18 Md. 305, 81 Am. Dec. 597, and *Cumberland Coal & I. Co. v. Parish*, 42 Md. 598, in each of which the defrauded mortgagor was protected in equity against the assignee of the fraudulent mortgage. In the present case the execution of the mortgage was the voluntary and deliberate act of the mortgagor, from which he had no equity to be relieved, even as against the mortgagee. *Snyder v. Snyder*, 51 Md. 77; *Cushwa v. Cushwa*, 5 Md. 44. We have therefore no question be-

fore us of subjecting the rights of the appellant, as assignee of the mortgage, to any equities to which the assignor would have been liable in favor of the mortgagor; for here it is plain that there were no such equities. The present mortgage is to be regarded as fraudulent only in the sense that, having been made to secure a simulated, and not a real, indebtedness, it operated to hinder, delay, or defraud the creditors of the mortgagor, and was therefore obnoxious to the provisions of the statute of 13 Eliz. chap. 5. The real question in the case is thus narrowed down to a comparison of the relative strength of the claims on the mortgaged property of the appellant, as assignee of the specific lien of the mortgage, and the appellees, as subsisting general creditors of the mortgagor, having reduced their debts to judgments after the assignment of the mortgage had been made. If the conveyance under consideration had been a fraudulent deed, instead of a mortgage, the right of the appellant, as a bona fide purchaser, to a lien on the property for the $5,000 advanced, and interest, could not seriously be questioned. *Cone* v. *Cross*, 72 Md. 102, 19 Atl. 391; *Hull* v. *Deering*, 80 Md. 432, 31 Atl. 416; *Hinkle* v. *Wilson*, 53 Md. 293; *Worthington* v. *Bullitt*, 6 Md. 198. The broader and more general proposition that a bona fide purchaser, without notice, under a deed from a fraudulent grantee, takes a good title, which is not impaired by the fact that judgments were obtained against the fraudulent grantor prior to the conveyance by the fraudulent grantee, is well sustained by authority. 4 Kent, Com. 464; *Sleeper* v. *Chapman*, 121 Mass. 404; *Phelps* v. *Morrison*, 24 N. J. Eq. 195; *Totten* v. *Brady*, 54 Md. 170; *Swan* v. *Dent*, 2 Md. Ch. 111 (note 9, Brantly's ed.); Wait, Fraud. Conv. § 369. In the case of *Farmers' Bank* v. *Brooke*, 40 Md. 257, the title of a bona fide purchaser of a mortgage note to the lien of the mortgage securing it was upheld against the suit of the creditors of the mortgagor, although it was admitted that the note and mortgage had been given in prejudice of the rights of his creditors, and would have been void as against them in the hands of the mortgagee. The fact that the mortgage in that case was accompanied by a promissory note distinguishes it from the case at bar, but the circumstance of the negotiability of the mortgage debt was not expressly mentioned or dwelt upon in the court's opinion. See also *Danbury* v. *Robinson*, 14 N. J. Eq. 218, 219, 82 Am. Dec. 244.

A bona fide mortgagee from a fraudulent grantee has in a number of cases been held to be entitled to protection, to the extent of the debt due him, against the creditors of the fraudulent grantor, upon the ground that a mortgagee is to be treated as a purchaser, to the extent of his interest, within the meaning of the term "purchaser" as used in statutes such as that of 13 Eliz. chap. 5; and this where the mortgage was not accompanied by a negotiable instrument. *Ledyard* v. *Butler*, 9 Paige, 136, 137, 37 Am. Dec. 379; *Murphy* v. *Briggs*, 89 N. Y. 451; *Shorten* v. *Drake*, 38 Ohio St. 76; *Moore* v. *Metropolitan Nat. Bank*, 55 N. Y. 41, 14 Am. Rep. 173.

If the mortgage in the present case had been made directly from Cecil R. Atkinson to the appellant, no question could be made by Atkinson's creditors as to the appellant's lien upon the mortgaged property to the extent of the money advanced bona fide upon the faith of the property at the time the mortgage was made. When, therefore, Atkinson clothed Steers with the appearance of a good mortgage title of record to the property, for the purpose of enabling him to raise money upon the mortgage, and the appellant, relying upon this appearance of good title in Steers, after a careful examination of the public records and a failure to find any prior encumbrances upon the property, parted with its money in good faith, it is entitled to the favor of a court of equity in the consideration of the relative equities of the parties to the controversy. This court, in *Seldner* v. *McCreery*, 75 Md. 296, 23 Atl. 643, said: "Where a title is perfect on its face, and no known circumstances exist to impeach it or put a purchaser on inquiry, one who buys bona fide and for value occupies one of the most highly favored positions in the law." The appellant did not trust to the personal responsibility of the mortgagor, but lent its money upon the faith of the particular property covered by the mortgage, and required an assignment of the mortgage at the time of so doing. On the contrary, the appellees trusted to the mortgagor, or to such other collaterals as he lodged with them; and the appellee Gordon, although he knew when he lent his money that Cecil R. Atkinson owned the Howard street warehouse, did not insist upon having a lien on it for his loan, but deliberately relied, so far as the warehouse was concerned, upon his right as an ordinary creditor of its owner. The equities of the appellant are at least equal to those of the appellees, and, having the legal title to the warehouse, it has the stronger claim thereon under the familiar principle that where equities are equal the legal title must prevail. Pom. Eq. Jur. § 417; Wait, Fraud. Conv. § 370; *Townsend* v. *Little*, 109 U. S. 512, 27 L. ed. 1015, 3 Sup. Ct. Rep. 357; *Black* v. *Cord*, 2 Harr. & G. 103; *Basset* v. *Nosworthy*, 2 White & T. Lead. Cas. in Eq. 4th Am. ed. 1. In *Dyson* v. *Simmons*, 48 Md. 214, it was held, upon the authority of many cases there cited, that if a party makes, or affects to make, a mortgage which proves to be defective by reason of some informality or omission, even on the part of the mortgagee himself, the conscience of the mortgagor is bound, and equity will recognize and enforce the lien of the defective mortgage, and give it precedence over the subsisting creditors of the mortgagor, and also over judgments obtained against him after the date of the mortgage. General creditors have no lien on the property of the debtor, and a judgment is only a general lien, and is for that reason subordinate to the prior specific equitable lien of such a defective mortgage. The case at bar does not come directly within the principle asserted in the last-mentioned case, but it is certainly one in which, by reason of its peculiar facts, the conscience of the mortgagor was especially bound to the appellant;

and we think the same course of reasoning might well be applied, within proper limits, to the appellant's protection.

This court has frequently been called upon to assert and define the rights of the creditors of a grantor, as against a conveyance made by him which, by reason of inadequacy or want of consideration, or even by design, operated to hinder, delay, or defraud them. The court has not hesitated to strike down such conveyances at the suit of the creditor, holding that one cannot make a voluntary conveyance of his property, as against the rights of subsisting creditors, nor can he, as against such creditors, sell it for a consideration that bears no adequate relation to its real value. When, however, in such cases, the rights of parties, even if they were the immediate grantees under the conveyance, who had in good faith parted with value in reliance upon the conveyance, have had to be measured against those of the creditors, it has uniformly been held that, in order to do full justice to all the parties in such cases, a court of equity, in setting aside the deed, will allow it to stand as security for the consideration actually paid, and apply the balance to the payment of the vendor's debts. These propositions were distinctly upheld in the cases already cited of *Cone* v. *Cross*, *Hull* v. *Deering*, *Hinkle* v. *Wilson*, and *Worthington* v. *Bullitt*. We regard the principle of the last-mentioned cases, in none of which was the position of the party claiming under the conveyance strengthened by any element of negotiability in the subject-matter of the thing assigned to him, as properly applicable to the one at bar. The mortgaged property should be sold, and the proceeds of the sale, after deducting proper expenses, applied first to the payment of the $5,000 lent by the appellant to Steers, with interest thereon, and then to the payment of the creditors of Cecil R. Atkinson, the mortgagor, who have come or may come into the case, according to their legal priorities.

We do not mean by this decision to disturb the authority of the *Cumberland Coal & I. Co. Case*, upon which the learned judge below mainly relied in changing his opinion, nor that of the *Copeland Case*. In each of these cases the issue on trial was between the owner of property who had been fraudulently induced to execute a mortgage upon it, and an assignee of the fraudulent mortgage, and they were both cases of flagrant fraud in fact. The rights of the creditors of the grantor were not in issue in either case. In the *Cumberland Coal & I. Co. Case* the court asserted the proposition that the transfer of a mortgage is so far within the rule which applies to choses in action, that when the assignment is made without the concurrence of the mortgagor, as in that case, the assignee takes subject to the same equities and defenses to which the assignor was liable. We do not, however, understand the court, by what was said in that opinion, to intimate that, when the equities in behalf of the creditors of the mortgagor in such a case came to be asserted, their claims would be enforced without regard to the proposition, so frequently upheld by this court in setting aside fraudulent conveyances at the suit of the creditor of the grantor, that, in order to do justice to all parties in such cases, the conveyances would be allowed to stand as security for the consideration actually paid on the faith of it by the party holding the legal title under it.

Decree reversed, and cause remanded for further proceedings in accordance with this opinion.

Rehearing denied.

UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

Henry M. NARRAMORE, *Plff. in Err.*,
v.
CLEVELAND, CINCINNATI, CHICAGO, & St. LOUIS RAILWAY COMPANY.

(96 Fed. Rep. 298, 37 C. C. A. 499.)

1. **The provision of a penalty for violation of a statute** enjoining upon railroad companies the duty of blocking switches does not make that remedy exclusive of actions by persons injured by the neglect to do so, unless that intention is to be inferred from the whole purview of the statute.

2. **Continuance, without complaint, in service** of a railroad company with knowledge that it has not complied with a statute requiring under penalty the blocking of switches, does not constitute an assumption of risk of injury therefrom.

3. **Assumption of risk is a term of the contract of employment,** expressed or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of his duty shall be at his risk.

4. **The courts will not enforce or recognize an agreement,** express or implied, on the part of a servant to waive the per-

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NOTE.—*Liability of an employer for injuries received by servants owing to the want of blocking at switches.*

I. *Want of blocking not negligence per se apart from statute.*
II. *Statutes requiring frogs, etc., to be blocked.*
III. *Want of blocking considered as a risk assumed by the servant.*

I. *Want of blocking not negligence per se apart from statute.*

In common-law actions the liability of railway companies for failing to provide blocking in frogs and similar places on their tracks, where there is danger that the feet of employees may be caught while they are engaged in the performance of their duties, has always been treated as primarily an open question of fact, the difference of opinion disclosed by the decisions of courts of review having reference, in the first place, to the question whether a want of blocking is a circumstance which of itself justifies the inference of negligence, and, in the next place, to the proper weight to be

formance of a statutory duty imposed on the master for the protection of the servant, and in the interest of the public, and enforceable by criminal prosecution.

5. **An employee's contributory negligence is a defense** to an action founded on a violation of the statutory duty of a railroad company to block guard rails and frogs.

(July 5, 1899.)

ERROR to the Circuit Court of the United States for the Southern District of Ohio, Western Division, to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

Before *Taft* and *Lurton*, Circuit Judges, and *Thompson*, District Judge.

Statement by **Taft**, Circuit Judge:

This writ is brought to review a judgment for the defendant in a suit to recover damages for personal injuries sustained by plaintiff while in defendant's employ as a yard switchman in its railroad yards at Cincinnati, Ohio. While plaintiff was attempting to couple two freight cars, his foot was caught in an unblocked guard rail, and in his effort to extricate the foot his right hand was crushed between the drawheads of the cars, and injured so badly as to require amputation. Plaintiff had been in defendant's employ seven months. About one third of that time he was engaged during the daytime, and two thirds during the night. He had had nine years' experience as a railroad man. A railroad man of experience can see at a glance whether a guard rail or switch is blocked or not. There were a great many

attributed to the evidence relied upon to support or rebut this inference.

A finding that the absence of blocking imported negligence was upheld in Sherman v. Chicago, M. & St. P. R. Co. (1885) 34 Minn. 259, 25 N. W. 593.

In Missouri P. R. Co. v. Baxter (1894) 42 Neb. 793, 60 N. W. 1044, the court did not doubt that the failure of the company to block its frogs was evidence of negligence, but held that the petition did not state facts sufficient to constitute a cause of action, since there was no allegation that the servant did not know, and was excusably ignorant, of their condition.

Compare also Rush v. Missouri P. R. Co. (1887) 36 Kan. 129, 12 Pac. 582. A case which tends to support the same view is Union P. R. Co. v. James (1896) 163 U. S. 485, 41 L. ed. 236, 16 Sup. Ct. Rep. 1109, but the actual rulings were on other points (see below); and the case of Southern P. Co. v. Seley, referred to below, seems to commit the supreme court to the theory that evidence merely of the want of blocking is not enough to establish culpability.

By most courts, however, it has been considered that the servant, in order to make good his right to recover damages for injuries from this cause, must do more than merely establish the want of blocking. That is to say, he has the burden of proving that frogs, etc., without blocking are not reasonably safe for the purpose for which they are designed (Spencer v. New York C. & H. R. R. Co. (1893) 67 Hun, 196, 22 N. Y. Supp. 100; Chicago, R. I. & P. R. Co. v. Lonergan (1886) 118 Ill. 41, 7 N. E. 55), and must show that, upon the whole, the use of the block would be prudent, and guard against dangers in one direction without the introduction of perils in another. McGinnis v. Canada Southern Bridge Co. (1882) 49 Mich. 466, 13 N. W. 819.

Evidence which is merely to the effect that, where blocks are used, it may be safer for the employees than where they are not used, will not justify the inference of negligence. Chicago, R. I. & P. R. Co. v. Lonergan (1886) 118 Ill. 41, 7 N. E. 55; Huhn v. Missouri P. R. Co. (1887) 92 Mo. 440, 4 S. W. 937.

A court will not pronounce a railway company negligent, where no proof is given that blocked frogs are a device in general use on other roads. Spencer v. New York C. & H. R. R. Co. (1893) 67 Hun, 196, 22 N. Y. Supp. 100.

Where the evidence is that the usage of railway companies in regard to blocking frogs is conflicting, some adopting and some rejecting that precaution. McNeil v. New York, L. E. & W. R. Co. (1893) 71 Hun, 24, 24 N. Y. Supp. 616.

Nor where the utmost that is established by the plaintiff's evidence is that the device of blocking is still an experiment, and of doubtful practicability. Chicago, B. & Q. R. Co. v. Smith (1885) 18 Ill. App. 119; Chicago, R. I. & P. R. Co. v. Lonergan (1886) 118 Ill. 41, 7 N. E. 55.

In the latter case the court said: "It must appear, before the defendant can be held liable, that the switch or turn-out, as constructed and used, was not reasonably safe, or that it was not constructed with the usual care and skill. An employer is not required to change his machinery in order to apply or adopt every new invention. . . . The fact that a few of the railroads of the country have adopted this new device, or that the defendant has used it on a part of its road, is not enough to establish its utility, and establish negligence in every other road that adheres to the old system. The old system of constructing switches must be condemned." It was accordingly held error to instruct the jury that the law requires a railroad company to use reasonable and ordinary care and diligence in providing and maintaining reasonably safe structures, tracks, sidetracks, switches, turn-outs, etc., and if it fails to do so, and an injury happens in consequence thereof to an employee in the exercise of due and reasonable care, then the railroad company would be liable. The specific negligence charged in the declaration being the omission to use blocking, such an instruction would be understood by the jury as laying down the rule that the company was absolutely required to use blocks. (Mulkey, Ch. J., and Shope and Magruder, JJ., dissent.)

"An employer is not bound to make use of the newest mechanical appliances for the purpose of insuring the safety of his employees, especially if it does not appear that, on the whole, it would be advantageous to them. So, a railway company is not bound to block its frogs, particularly if it does not appear that, in doing so, it would not entail greater dangers than it would avert." McGinnis v. Canada Southern Bridge Co. (1882) 49 Mich. 466, 13 N. W. 819.

In Southern P. Co. v. Seley (1894) 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530, it was held error to refuse the following instruction: "The jury are instructed that, if they find from the evidence that the railroad companies used both the blocked and the unblocked frog, and that it is questionable which is the safest or most suitable for the business of the roads, then the use of the unblocked frog is not negligence, and the jury are instructed not to im-

guard rails and switches in the yards where plaintiff worked. With the exception of a few, where experimental blocks were used, the defendant did not use blocks in either its guard rails or switches. Plaintiff said he did not know that the guard rail in which his foot was caught was not blocked, and that he had not noticed whether the guard rails and switches of defendant generally were blocked or not. The plaintiff relied on the following statute of Ohio, passed March 23, 1888 (85 Ohio Laws, p. 105): "Every railroad corporation operating a railroad or part of a railroad in this state shall, before the first day of October, in the year one thousand eight hundred and eighty-eight, adjust, fill, or block the frogs, switches, and guard rails on its tracks, with the exception of guard rails on bridges, so as to prevent the feet of its employees from being caught therein. The work shall be done to the satisfaction of the railroad commissioner. Any railroad corporation failing to comply with the provisions of this act shall be punished by a fine of not less than one hundred dollars, nor more than one thousand dollars." It appeared from the evidence that the defendant company was operating this railroad at the time of the passage of the act, and has operated it ever since. At the close of the evidence the trial court directed the jury to return a verdict for the defendant on the ground that defendant's failure to block its rails and switches was obvious, and the plaintiff must be held, notwithstanding the statute, to have assumed the risk of injury therefrom, and upon such verdict entered judgment for the defendant.

Messrs. **Edgar W. Cist** and **Harlan Cleveland,** with *Mr.* **Charles M. Cist,** for plaintiff in error:

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pute the same as negligence to the defendant, and they should find for the defendant." In the lower court ((1890) 6 Utah, 319, 23 Pac. 751) it had been held negligence not to have blocking.

A special finding that the frogs of the defendant company were the same as those used by the principal roads in the country was one of those upon which the plaintiff's right to recover was denied in Lake Shore & M. S. R. Co. v. McCormick (1881) 74 Ind. 440. To the same effect, see Richmond & D. R. Co. v. Risdon (1891) 87 Va. 335, 12 S. E. 786, declaring that to maintain unblocked frogs of a standard pattern is not negligence (dissenting, Lewis, J., whose opinion is noticed below), and Smith v. St. Louis, K. C. & N. R. Co. (1878) 69 Mo. 32, 33 Am. Rep. 484, holding a railroad company not liable for injuries caused by a guard rail of a pattern in general use, through a safe one might have been constructed.

[The following cases are a portion of the many that might be cited to the point that general usage is an absolute protection to the master: Kehler v. Schwenk (1891) 144 Pa. 348, 13 L. R. A. 374, 22 Atl. 910; Titus v. Bradford, B. & K. R. Co. (1890) 136 Pa. 618, 20 Atl. 517; Corcoran v. Wanamaker (1898) 185 Pa. 496, 39 Atl. 1108; Allison Mfg. Co. v. McCormick (1888) 118 Pa. 519, 12 Atl. 273; Guinard v. Knapp-Stout & Co. Company (1897) 95 Wis. 482, 70 N. W. 671; Kansas & T. Coal Co. v. Brownlie (1895) 60 Ark. 582, 31 S. W. 453; Louisville & N. R. Co. v. Allen (1885) 78 Ala. 494; Keenan v. Waters (1897) 181 Pa. 247, 37 Atl. 342; Schultz v. Bear Creek Refining Co. (1897) 180 Pa. 272, 36 Atl. 739; Bohn v. Chicago, R. I. & P. R. Co. (1891) 106 Mo. 429, 17 S. W. 580; Atchison, T. & S. F. R. Co. v. Alsdurf (1892) 47 Ill. App. 200; Dooner v. Delaware & H. Canal Co. (1895) 171 Pa. 581, 33 Atl. 415; Georgia P. R. Co. v. Propst (1887) 83 Atl. 518, 3 So. 764; Grant v. Union P. R. Co. (1891) 45 Fed. Rep. 217; Stringham v. Hilton (1888) 111 N. Y. 188, 1 L. R. A. 483, 18 N. E. 870; Boess v. Clausen & P. Brewing Co. (1896) 12 App. Div. 366, 42 N. Y. Supp. 848; Kaye v. Rob Roy Hosiery Co. (1889) 51 Hun, 519, 4 N. Y. Supp. 571; Whatley v. Block (1894) 95 Ga. 15, 21 S. E. 985; Dingley v. Star Knitting Co. (1890) 58 Hun, 605, 12 N. Y. Supp. 31, Affirmed in 134 N. Y. 552, 42 N. E. 35; Prybilski v. Northwestern Coal R. Co. (1898) 98 Wis. 413, 74 N. W. 117; The Lizzie Frank (1887) 31 Fed. Rep. 477; Lehigh & W. B. Coal Co. v. Hayes (1889) 128 Pa. 294, 5 L. R. A. 441, 18 Atl. 387; Hale v. Cheney (1893) 159 Mass. 268, 34 N. E. 255; Rooney v. Sewall & D. Cordage Co. (1894) 161 Mass. 153, 36 N. E. 368; Goodnow v. Walpole Emery Mills (1888) 146 Mass. 261, 15 N. E. 576; Donahue v. Washburn & M. Mfg. Co. (1897) 169 Mass. 574, 48 N. E. 842.]

By other courts very much less weight is ascribed to the fact that the defendant company had complied with the usage of other roads.

In Huhn v. Missouri P. R. Co. (1887) 92 Mo. 440, 4 S. W. 937, it was held that the question whether the company was negligent in maintaining a guard rail without blocking could not be resolved merely by showing how many roads used blocks. Such a fact was merely one for the consideration of the jury.

It was also held in Austin v. Chicago, R. I. & P. R. Co. (1895) 93 Iowa, 236, 61 N. W. 849, that an instruction was correct which declared that a brakeman who was injured through catching his foot in a space left unfilled between the ties on each side of the bars of a switch was not precluded from recovering by proof that this arrangement was customary.

The following vigorous argument by Lewis, J., in his dissenting opinion in Richmond & D. R. Co. v. Risdon (1891) 87 Va. 335, 12 S. E. 786, is worth quoting: "That the 'frogs' were dangerous is not disputed. But it is contended that they were of the standard pattern, and that that fact of itself repels the imputation of negligence. From this view I dissent. If a standard frog, unguarded and situated as this one was, in a place where there are many tracks and where cars are shifted at all hours of the day and night, is not reasonably safe, then the company, in allowing it to remain unguarded, was guilty of negligence, and the jury rightly so found. Nor upon this point are we left to inference. The expert evidence for the plaintiff is conclusive that the dangerous condition of the frogs could easily have been guarded against by the device of 'filling' them with cinders, which simple and inexpensive method renders them safe to those whose duties call them upon the track, and at the same time does not interfere with their ordinary use. The witness Perry, who for a number of years was in the employ of the defendant company as roadmaster, testifies that at terminal points, or in yards where much shifting is done, the frogs ought always to be filled, as a protection to switchmen, and this is so well understood, he says, that the laws of some states expressly require it to be done. And why should they not be filled? Why should the servant be exposed to unnecessary risks that can so easily be guarded against? Is the rule that the master must exercise reasonable or

The failure on the part of a railroad company to comply with this statute is negligence *per se*.

Cincinnati, H. & D. R. Co. v. *Van Horne*, 37 U. S. App. 262, 69 Fed. Rep. 139, 16 C. C. A. 182; *Lake Erie & W. R. Co.* v. *Craig*, 37 U. S. App. 654, 73 Fed. Rep. 642, 19 C. C. A. 631.

No claim of contributory negligence was urged at the trial, and if it had been put forward the question would have then been for the jury, not for the court.

Kane v. *Northern C. R. Co.* 128 U. S. 91, 32 L. ed. 339, 9 Sup. Ct. Rep. 16; *Grand Trunk R. Co.* v. *Ives*, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679.

The distinction between the acquiescence of a careful man in a known danger, which is a matter of contract,—assumption of risk,—and that disregard of personal safety, which is contributory negligence, is well marked. *Hough* v. *Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; *New Jersey & N. Y. R. Co.* v. *Young*, 1 U. S. App. 96, 49 Fed. Rep. 723, 1 C. C. A. 428; *Northern P. R. Co.* v. *Babcock*, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978; *Snow* v. *Housatonic R. Co.* 8 Allen, 441, 85 Am. Dec. 720; *Gardner* v. *Michigan C. R. Co.* 150 U. S. 349, 37 L. ed. 1107, 14 Sup. Ct. Rep. 140; *Union P. R. Co.* v. *O'Brien*, 161 U. S. 451, 40 L. ed. 766, 16 Sup. Ct. Rep. 618.

An examination of the principles on which the doctrine of "assumption of risk" rests will show that it has no application in the case of the violation of a statute.

The principle underlying this doctrine will be found to be that no negligence is properly attributable to the master where the servant, having knowledge of the dangerous business or defective appliances, agrees to continue to work.

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ordinary care a meaningless phrase—a mere jingle of words? I think not."

For other cases and *dicta* supporting the general proposition that conformity to the usage of other employers is not conclusive in the master's favor, see Indermaur v. Dames (1866) L. R. 1 C. P. 274, 35 L. J. C. P. N. S. 184, 12 Jur. N. S. 432, 14 L. T. N. S. 484, 14 Week. Rep. 586, 1 Harr. & R. 243, per Willes, J.; Walsh v. Whiteley (1888) L. R. 21 Q. B. Div. 371, 57 L. J. Q. B. N. S. 586, 36 Week. Rep. 876, 53 J. P. 38, per Lord Esher; Wabash R. Co. v. McDaniels (1882) 107 U. S. 454, 27 L. ed. 605, 2 Sup. Ct. Rep. 932; Geno v. Fall Mountain Paper Co. (1895) 68 Vt. 568, 35 Atl. 475; Sawyer v. J. M. Arnold Shoe Co. (1897) 90 Me. 369, 38 Atl. 333; Kansas City, M. & B. R. Co. v. Burton (1893) 97 Ala. 240, 12 So. 88; McCormick Harvesting Mach. Co. v. Burandt (1891) 136 Ill. 170, 26 N. E. 588; Reichla v. Gruensfelder (1892) 52 Mo. App. 43; Hosic v. Chicago, R. I. & P. R. Co. (1888) 75 Iowa, 683, 37 N. W. 963; Craver v. Christian (1887) 36 Minn. 413, 31 N. W. 457; Molaske v. Ohio Coal Co. (1893) 86 Wis. 220, 56 N. W. 475; Chicago & G. W. R. Co. v. Armstrong (1895) 62 Ill. App. 228; Martin v. California C. R. Co. (1892) 94 Cal. 326, 29 Pac. 645.

Where a railway company has been in the habit of blocking its guard rails at some particular place, there is a special ground for charging it with negligence in failing to replace them when forced out by accident; but it has been held that, even conceding there is a duty to see that there is a blocking under such circumstances, it is plain that, upon general principles, the servant cannot recover for an injury caused by the want of the blocking, in the absence of evidence showing that it had been displaced so long that the company might, by the exercise of reasonable care, have discovered its absence. Haskins v. New York C. & H. R. R. Co. (1894) 79 Hun, 159, 29 N. Y. Supp. 274. See *note* to Walkowski v. Penokee & G. Consol. Mines (1898; Mich.) 41 L. R. A. 33.

The failure of a railroad company to block a guard rail in its yard is not ground for recovery by a switchman thrown from a car, whose arm was caught and crushed between the guard rail and the main rail; blocking being intended only to prevent feet from being caught. Rutledge v. Missouri P. R. Co. (1892) 110 Mo. 312, 19 S. W. 38.

Witnesses introduced in a personal injury case for the purpose of showing a coal company's negligence in not blocking its railroad switch rails may, to show their experience as railroad men, testify that switches were blocked before and after the accident in certain railroad yards where they worked. Nor is it a valid objection to their testimony that they acquired their experience from work at ordinary railroad yards, and not at switch tracks about coal shafts. Hamilton v. Rich Hill Coal Min. Co. (1891) 108 Mo. 364, 18 S. W. 977.

Where both parties in an action for indemnity for an injury caused by an unblocked frog go to trial on the single question whether it was or was not blocked at the time of trial, the defendant cannot take for the first time on appeal the point that the case should have been tried upon the theory that the defendant, if it had once blocked the frog, incurred no liability by reason of its subsequent displacement, unless it had actual or constructive notice of such displacement. Union P. R. Co. v. James (1896) 163 U. S. 485, 41 L. ed. 236, 16 Sup. Ct. Rep. 1109.

In the absence of any testimony as to the condition of a frog prior to an accident, the jury are at liberty to infer that it had never been blocked. *Ibid.*

In International & G. N. R. Co. v. Bell (1889) 75 Tex. 50, 12 S. W. 321, the court reversed a judgment for a brakeman based on a finding that the company was negligent as regards the manner in which the guard rail was laid with respect to the track rail, but the reversal was merely on the ground that the instructions had imposed too high a degree of diligence on the company, and it is not apparent from the report what precise precautions it was contended that the company should have adopted.

II. *Statutes requiring frogs, etc., to be blocked.*

In many jurisdictions the obligations of railway companies in regard to blocking have been definitely fixed by statute, the failure to comply with such a statute being, of course, negligence *per se*. Cincinnati, H. & D. R. Co. v. Van Horne (1895) 37 U. S. App. 262, 69 Fed. Rep. 139, 16 C. C. A. 182; Craig v. Lake Erie & W. R. Co. (1896) 35 Ohio L. J. 15.

That the duty they impose is also personal and nonassignable in such a sense that a railway company cannot relieve itself from responsibility by delegating its performance to an employee, see Le May v. Canadian P. R. Co. (1890) 17 Ont. App. Rep. 293.

The statutes requiring blocking to be used are as follows:

Michigan: Laws 1883, No. 174, § 22, 3 How. Stat. § 3397 (a). See also Ashman v. Flint & P. M. R. Co. (1892) 90 Mich. 567, 51 N. W. 645.

The duty imposed by this statute is not ful-

Smith v. *Baker* [1891] A. C. 352; *Thomas* v. *Quartermaine*, L. R. 18 Q. B. Div. 685; *O'Maley* v. *South Boston Gaslight Co.* 158 Mass. 135, 47 L. R. A. 161, 32 N. E. 1119; *New Jersey & N. Y. R. Co.* v. *Young*, 1 U. S. App. 96, 49 Fed. Rep. 723, 1 C. C. A. 428; *Hough* v. *Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; Cooley, Torts, § 559; *Clarke* v. *Holmes*, 7 Hurlst. & N. 937; *Baddeley* v. *Granville*, L. R. 19 Q. B. Div. 423; *Boyd* v. *Brazil Block Coal Co.* (Ind. App.) 50 N. E. 368; *Durant* v. *Lexington Coal Min. Co.* 97 Mo. 62, 10 S. W. 484.

The exemption of the master from liability to a servant for an injury resulting from a risk or danger of the employment which the servant knows and appreciates grows out of, and depends upon, the contract of employment.

Bailey, Personal Injuries Relating to Master & Servant, 180; *Hough* v. *Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; *Tuttle* v. *Detroit, G. H. & M. R. Co.* 122 U. S. 195, 30 L. ed. 1116, 7 Sup. Ct. Rep. 1166; *Chicago, M. & St. P. R. Co.* v. *Ross*, 112 U. S. 382, 28 L. ed. 789, 5 Sup. Ct. Rep. 184; *Northern P. R. Co.* v. *Herbert*, 116 U. S. 647, 29 L. ed. 758, 6 Sup. Ct. Rep. 590; *Gardner* v. *Michigan C. R. Co.* 150 U. S. 349, 37 L. ed. 1107, 14 Sup. Ct. Rep. 140; *Union P. R. Co.* v. *O'Brien*, 161 U. S. 451, 40 L. ed. 766, 16 Sup. Ct. Rep. 618; *Texas & P. R. Co.* v. *Archibald*, 170 U. S. 665, 42 L. ed. 1188, 18 Sup. Ct. Rep. 777.

It is not a valid defense as against an action for negligence *per se*.

No contract is valid whereby an employee of a railroad company undertakes for a stipulated sum, or in consideration of employment, not to hold the company liable for negligently injuring him.

Lake Shore & M. S. R. Co. v. *Spangler*, 44 Ohio St. 471, 58 Am. Rep. 833, 8 N. E. 467; *Louisville & N. R. Co.* v. *Orr*, 91 Ala. 548, 8 So. 360; *Hissong* v. *Richmond & D. R. Co.* 91 Ala. 514, 8 So. 776; *Richmond & D. R. Co.* v. *Jones*, 92 Ala. 218, 9 So. 276; *Hartford F. Ins. Co.* v. *Chicago, M. & St. P. R. Co.* 36 U. S. App. 152, 70 Fed. Rep. 201, 17 C. C. A. 62, 30 L. R. A. 193; *Miller* v. *Chicago, B. & Q. R. Co.* 65 Fed. Rep. 305; *Chicago, B. & Q. R. Co.* v. *Miller*, 40 U. S. App. 448, 76 Fed. Rep. 440, 22 C. C. A. 264; *Owens* v. *Baltimore & O. R. Co.* 35 Fed. Rep. 715, 1 L. R. A. 75.

If plaintiff were chargeable with constructive knowledge that the frogs or guard rails generally were not blocked, then he must be equally chargeable with knowledge of the fact that the company was experimenting with blocks preparatory to introducing them generally.

Such conduct of the company amounted

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filled by the adoption of a method of blocking which the ordinary use of the road renders ineffectual in two or three days,— in this case by the wheel flange wearing down the blocking so far that it became practically useless. The alternative safe method suggested was to give the blocking a grooved or furrowed surface so as to allow the flanges of the wheels to pass without interference. Eastman v. Lake Shore & M. S. R. Co. (1894) 101 Mich. 597, 60 N. W. 309.

Ohio: Rev. Stat. 7th ed. § 9822, 85 Ohio Laws, 105, March 23, 1888.

The word "employee," in this statute means all those who, "by rightful authority of the company, are engaged in the business of walking over these frogs and guard-rails," although employed and paid by another company. Atkyn v. Wabash R. Co. (1889) 41 Fed. Rep. 193.

Upon familiar principles, the fine imposed by this statute does not exclude an action for damages. New York, C. & St. L. R. Co. v. Lambright (1891) 5 Ohio C. C. 433.

Rhode Island: Laws 1894, chap. 1282, § 1.

Wisconsin: Laws 1889, chap. 123, Sanborn & Berryman Anno. Stat. § 1809 (a); Curtis v. Chicago & N. W. R. Co. (1897) 95 Wis. 460, 70 N. W. 665.

Canada: The blocking of frogs on all railways under the control of the Dominion legislature in Canada is prescribed by § 262, railway act 51 Vict. chap. 29.

The proviso in subsection 4 of this section, allowing the filling there mentioned to be left out in the winter months by permission of the railway committee, is not applicable to the filling prescribed in subsection 3. Washington v. Grand Trunk R. Co. (1897) 28 Can. S. C. 184, Reversing (1897) 24 Ont. App. Rep. 183.

A switch foreman injured while uncoupling cars, by having his foot caught in a frog, is a "person injured" within the meaning of these sections. Le May v. Canadian P. R. Co. (1890) 18 Ont. Rep. 314, Affirmed 17 Ont. App. Rep. 293.

By the existing Ontario workmen's compensation for injuries act, 53 Vict. chap. 30 (Ont. Rev. Stat. 1897, chap. 160, § 5, subsec. 3), railway companies are required to block frogs. See also a similar provision in the earlier act of 49 Vict. chap. 28 (Ont. Rev. Stat. 1887, chap. 141, § 4, subsec. 3).

III. *Want of blocking considered as a risk assumed by the servant.*

In many cases the question whether a want of blocking imports negligence on the master's part may become of no practical importance in view of the fact that the servant brings himself within the operation of the familiar rule that he cannot recover for injuries caused by his continuing to expose himself to dangers of which he had actual or constructive notice. The plaintiff's action was deemed to be barred on this ground in the following cases: Appel v. Buffalo, N. Y. & P. R. Co. (1888) 111 N. Y. 550, 19 N. E. 93 (switchman after working for several years in a yard is presumed, as matter of law, to understand the risks created by the want of blocking); Southern P. Co. v. Seley (1894) 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530 (dangers arising from the use of unblocked frogs in a certain yard presumed to be accepted by a conductor of freight trains, whose duty frequently brought him into that yard); Spencer v. New York C. & H. R. R. Co. (1893) 67 Hun, 196, 22 N. Y. Supp. 100 (plaintiff had been working near the frog for an hour and a half in broad daylight, and the frog was in plain sight); Rush v. Missouri P. R. Co. (1887) 36 Kan. 129, 12 Pac. 582 (switchman who has been working for two months in a yard is affected with notice of the want of blocking between a guard and main rail at a certain place).

To same effect, see Ames v. Lake Shore & M. S. R. Co. (1893) 135 Ind. 363, 35 N. E. 117; St. Louis, I. M. & S. R. Co. v. Davis (1892) 55 Ark. 462, 18 S. W. 628 (1891) 54 Ark. 389, 15 S. W. 895; Lake Shore & M. S. R. Co. v. Mc-

to a notification to him that it intended shortly to block the guard rails.

It was an implied promise, and plaintiff should be presumed to have relied upon it as upon any promise to repair a defect.

Northern P. R. Co. v. *Babcock*, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978; *Monsarrat* v. *Keegan*, 58 U. S. App. 377, *sub nom. Valley R. Co.* v. *Keegan*, 87 Fed. Rep. 855, 31 C. C. A. 255.

Messrs. **Harmon, Colston, Goldsmith, & Hoadly,** for defendant in error:

Knowing the fact that no rails were blocked, plaintiff's ignorance about this particular rail would have been of no consequence.

Missouri P. R. Co. v. *Somers*, 71 Tex. 700, 9 S. W. 741; *Kohn* v. *McNulta*, 147 U. S. 238, 37 L. ed. 150, 13 Sup. Ct. Rep. 298.

His duties brought him constantly over and about these frogs and guard rails, so that a man exercising his sight and employing his ordinary senses could not have avoided discovering and knowing the fact that the guard rail was not blocked, and understanding such danger as resulted from that fact.

Appel v. *Buffalo, N. Y. & P. R. Co.* 111 N. Y. 553, 19 N. E. 93; *Southern P. Co.* v. *Seley*, 152 U. S. 154, 38 L. ed. 395, 14 Sup. Ct. Rep. 530.

Whatever the negligence of one party, it is not the proximate cause of an injury resulting to the other, if the other, after discovering such negligence, might have avoided its consequence by reasonable prudence on his own part.

Assuming that when plaintiff was hurt defendant was presently violating the statute to plaintiff's knowledge, this would not entitle him to recover on the facts shown here.

Knisley v. *Pratt*, 148 N. Y. 372, 32 L. R. A. 367, 42 N. E. 986; *O'Maley* v. *South Boston Gaslight Co.* 158 Mass. 135, 47 L. R. A. 161, 32 N. E. 1119; *E. S. Higgins Carpet Co.* v. *O'Keefe*, 51 U. S. App. 74, 79 Fed. Rep. 900, 25 C. C. A. 220; *Graves* v. *Brewer*, 4 App. Div. 327, 38 N. Y. Supp. 566; *Krause* v. *Morgan*, 53 Ohio St. 26, 40 N. E. 886; *Pittsburgh & W. Coal Co.* v. *Estievenard*, 53 Ohio St. 43, 40 N. E. 725; *Atkyn* v. *Wabash R. Co.* 41 Fed. Rep. 193; *Cleveland, C. C. & St. L. R. Co.* v. *Baker*, 63 U. S. App. 553, 91 Fed. Rep. 224, 33 C. C. A. 468; *Victor Coal Co.* v. *Muir*, 20 Colo. 320, 26 L. R. A. 435, 38 Pac. 378; *Holum* v. *Chicago, M. & St. P. R. Co.* 80 Wis. 299, 50 N. W. 99; *Grand* v. *Michigan C. R. Co.* 83 Mich. 564, 11 L. R. A. 402, 47 N. W. 837; *Taylor* v. *Carew Mfg. Co.* 143 Mass. 470, 10 N. E. 308; Wood, Master & Servant, § 397.

Injuries from unblocked frogs and rails come within the rule of obvious risk.

Southern P. Co. v. *Seley*, 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530; *Lake Shore & M. S. R. Co.* v. *McCormick*, 74 Ind. 440;

Cormick (1881) 74 Ind. 440; Chicago, B. & Q. R. Co. v. Smith (1885) 18 Ill. App. 119; McGinnis v. Canada Southern Bridge Co. (1882) 49 Mich. 466, 13 N. W. 819.

The danger arising from the want of a block between a rail and a guard rail at a switch is so obvious that even an inexperienced brakeman will, as matter of law, be presumed to understand the risk incident to working without it. Mayes v. Chicago, R. I. & P. R. Co. (1884) 63 Iowa, 562, 14 N. W. 340, 19 N. W. 680, modifying on rehearing the opinion expressed at the first hearing,—that it was for the jury to say whether the inexperience of the brakeman was a sufficient excuse for his nonappreciation of the danger.

A railway servant is not necessarily debarred from recovery for an injury caused by a want of blocking at a frog, for the reason that, although he did not know that the frog in question was not blocked, he knew that some of the frogs were not blocked. Sherman v. Chicago, M. & St. P. R. Co. (1885) 34 Minn. 259, 25 N. W. 593 (instruction to opposite effect, rightly refused). The court said: "If the defendant's habit, custom, or mode of doing business at that yard was to protect the frogs by blocks,—if that was the rule of its conduct,—Sherman had a right to assume, where he had not notice to the contrary, that such mode or custom had been followed in respect to any particular frog. He had a right to assume, in the absence of such notice, that the defendant had acted according to the general rule adopted by it for its business, although he may have known some instances in which it had not done so. The omission at that yard to put in the blocks, not as a general rule, but in isolated instances, would not make out a case like that of the Hughes Case, of an unsafe and careless custom or habit of doing business, known, or which by the use of his senses ought to be known, to an employee; in which case the employee, by continuing in the employment without objection on his part, or promise on the part of the master to change it, is held to assume the risk incident to that mode of doing the business. A single instance, or any number of instances, not amounting to a custom or mode of business, of culpable negligence on the part of the master, will not cast on the employee the risk of subsequent or other similar acts of negligence."

In Quebec the risk of a brakeman's catching his foot in an unblocked frog seems to be regarded as an ordinary risk incidental to his employment. Bourgeault v. Grand Trunk R. Co. (1887) Mont. L. R. 5 S. C. 249, holding the plaintiff unable to recover upon an allegation that the frog was out of order.

As it is manifest that a split switch cannot be blocked without destroying its efficiency, the risk arising from the absence of blocking in this case is one of those assumed by a man who enters the service of a railroad company which, to his knowledge, uses such switches. Grand v. Michigan C. R. Co. (1890) 83 Mich. 564, 11 L. R. A. 402, 47 N. W. 837.

It should be remembered that, under the Missouri doctrine, a brakeman is not debarred from recovery for injuries received by a want of blocking merely because he knew of such want. It must also be shown that a continuance of his work threatened immediate danger such as no prudent man would encounter. Huhn v. Missouri P. R. Co. (1887) 92 Mo. 440, 4 S. W. 937.

As the servant assumes the risk incident to the use of his master's appliances in the condition in which they have always been since he begun work, in so far as he is affected with notice of such condition, a general verdict for the plaintiff cannot stand where it is specially found that there had been a change in the condition of the frogs and switches on defendant's road, and that the plaintiff might have known of such condition if he had taken pains to inquire about it. Lake Shore & M. S. R. Co. v. McCormick (1881) 74 Ind. 440.

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Wood v. *Locke*, 147 Mass. 604, 18 N. E. 578; *Missouri P. R. Co.* v. *Baxter*, 42 Neb. 793, 60 N. W. 1044; *Rush* v. *Missouri P. R. Co.* 36 Kan. 129, 12 Pac. 582; *Mayes* v. *Chicago, R. I. & P. R. Co.* 63 Iowa, 562, 14 N. W. 340, 19 N. W. 680; *Richmond & D. R. Co.* v. *Risdon*, 87 Va. 335, 12 S. E. 786; *St. Louis, I. M. & S. R. Co.* v. *Davis*, 54 Ark. 389, 15 S. W. 895; *Wilson* v. *Winona & St. P. R. Co.* 37 Minn. 326, 33 N. W. 908.

Taft, Circuit Judge, delivered the opinion of the court:

In the absence of the statute, and upon common-law principles, we have no doubt that in this case the plaintiff would be held to have assumed the risk of the absence of blocks in the guard rails and switches of the defendant. His denial of knowledge of the fact that the particular guard rail causing the injury was unblocked is entirely immaterial. Nor is his vague statement that he was so busy as not to notice whether the rails and switches of plaintiff generally were unblocked in a yard where there were hundreds of guard rails and switches, and in which he was constantly at work for seven months, of more significance or weight. His evidence upon this point is not creditable to him. He could only have been ignorant of the admitted policy of the defendant in respect to blocks through the grossest failure of duty on his part in a matter that much concerned his personal safety and the proper operation of the road. In such a case the authorities leave no doubt that the servant assumes the risk of the absence of the blocks, and the employer cannot be charged with actionable negligence towards him. *Southern P. Co.* v. *Seley*, 152 U. S. 145, 38 L. ed. 391, 14 Sup. Ct. Rep. 530; *Appel* v. *Buffalo, N. Y. & P. R. Co.* 111 N. Y. 550, 19 N. E. 93; *Richmond & D. R. Co.* v. *Risdon*, 87 Va. 335, 339, 12 S. E. 786; *Wood* v. *Locke*, 147 Mass. 604, 18 N. E. 578; *Lake Shore & M. S. R. Co.* v. *McCormick*, 74 Ind. 440; *Wabash R. Co.* v. *Ray*, 152 Ind. 392, 51 N. E. 920; *Rush* v. *Missouri P. R. Co.* 36 Kan. 129, 12 Pac. 582; *Mayes* v. *Chicago, R. I. & P. R. Co.* 63 Iowa, 562, 14 N. W. 340, 19 N. W. 680; *Wilson* v. *Winona & St. P. R. Co.* 37 Minn. 326, 33 N. W. 908; *Missouri P. R. Co.* v. *Baxter*, 42 Neb. 793, 60 N. W. 1044; *St. Louis, I. M. & S. R. Co.* v. *Davis*, 54 Ark. 389, 15 S. W. 895.

The sole question in the case is whether the statute requiring defendant railway, on penalty of a fine, to block its guard rails and frogs, changes the rule of liability of the defendant, and relieves the plaintiff from the effect of the assumption of risk which would otherwise be implied against him. We have already had occasion to consider in a more or less direct way the effect of the statute. *Cincinnati, H. & D. R. Co.* v. *Van Horne*, 37 U. S. App. 262, 69 Fed. Rep. 139, 16 C. C. A. 182; *Lake Erie & W. R. Co.* v. *Craig*, 37 U. S. App. 654, 73 Fed. Rep. 642, 19 C. C A. 631. In these cases we held that the failure on the part of a railway company to comply with the statute was negligence *per se*. A further consideration of the statute confirms our view. The intention of the legislature of Ohio was to protect the employees of railways from injury from a very frequent source of danger by compelling the railway companies to adopt a well-known safety device. It was passed in pursuance of the police power of the state, and it expressly provided, as one mode of enforcing it, for a criminal prosecution of the delinquent companies. The expression of one mode of enforcing it did not exclude the operation of another, and in many respects more efficacious, means of compelling compliance with its terms, to wit, the right of civil action against a delinquent railway company by one of the class sought to be protected by the statute for injury caused by a failure to comply with its requirements. Unless it is to be inferred from the whole purview of the act that it was the legislative intention that the only remedy for breach of the statutory duty imposed should be the proceeding by fine, it follows that upon proof of a breach of that duty by the railway company, and injury thereby occasioned to the employee, a cause of action is established. *Groves* v. *Wimborne* [1898] 2 Q. B. 402, 407; *Atkinson* v. *Newcastle & G. Waterworks Co.* L. R. 2 Exch. Div. 441; *Gorris* v. *Scott*, L. R. 9 Exch. 125. In this case there can be no doubt that the act was passed to secure protection and a newly defined right to the employee. To confine the remedy to a criminal proceeding in which the fine to be imposed on conviction was not even payable to the injured employee or to one complaining, would make the law not much more than a dead letter. The case of *Groves* v. *Wimborne* involved the construction of a statute quite like the one at bar, and a right of action was held to be given thereby to the injured servant in addition to the criminal prosecution. The courts of Ohio have given the statute under discussion the same construction. *New York, C. & St. L. R. Co.* v. *Lambright*, 5 Ohio C. C. 433, affirmed by the supreme court of Ohio without opinion, 29 Ohio L. J. 359.

Do a knowledge on the part of the employee that the company is violating the statute, and his continuance in the service thereafter without complaint, constitute such an assumption of the risk as to prevent recovery? The answer to this question is to be found in a consideration of the principles upon which the doctrine of the assumption of risk rests. If one employs his servant to mend and strengthen a defective staircase in a church steeple, and in the course of the employment part of the staircase gives way, and the servant is injured or killed, it would hardly be claimed that the master was wanting in care towards the servant in not having the staircase which fell in a safe condition. Why not? Because, even if no express communication is had upon the subject, the servant must know, and the master must intend, that the dangers necessarily incident to the employment are to be at the risk of the servant, who may be presumed to receive greater compensation for the work on ac-

count of the risk. The foregoing is an extreme case, perhaps, but it fairly illustrates the principle of assumption of risk in the relation of master and servant. Assumption of risk is a term of the contract of employment, express or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk. In such cases the acquiescence of the servant in the conduct of the master does not defeat a right of action on the ground that the servant causes or contributes to cause the injury to himself; but the correct statement is that no right of action arises in favor of the servant at all, for, under the terms of the employment, the master violates no legal duty to the servant in failing to protect him from dangers the risk of which he agreed expressly or impliedly to assume. The master is not, therefore, guilty of actionable negligence towards the servant. This is the most reasonable explanation of the doctrine of assumption of risk, and is well supported by the judgments of Lord Justices Bowen and Fry in the case of *Thomas* v. *Quartermaine*, L. R. 18 Q. B. Div. 685, 695. See also language of Lord Watson in *Smith* v. *Baker*, [1891] A. C. 325, and *O'Maley* v. *South Boston Gaslight Co.* 158 Mass. 135, 32 N. E. 1119. It makes logical that most frequent exception to the application of doctrine by which the employee who notifies his master of a defect in the machinery or place of work, and remains in the service on a promise of repair, has a right of action if injury results from the defect while he is waiting for the repair of the defect, and has reasonable ground to expect it. *Hough* v. *Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; *Northern P. R. Co.* v. *Babcock*, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978; *Snow* v. *Housatonic R. Co.* 8 Allen, 441, 85 Am. Dec. 720; *Gardner* v. *Michigan C. R. Co.* 150 U. S. 349, 37 L. ed. 1107, 14 Sup. Ct. Rep. 140. From the notice and the promise is properly implied the agreement by the master that he will assume the risk of injury pending the making of the repair.

If, then, the doctrine of the assumption of risk rests really upon contract, the only question remaining is whether the courts will enforce or recognize as against a servant an agreement, express or implied on his part, to waive the performance of a statutory duty of the master imposed for the protection of the servant, and in the interest of the public, and enforceable by criminal prosecution. We do not think they will. To do so would be to nullify the object of the statute. The only ground for passing such a statute is found in the inequality of terms upon which the railway company and its servants deal in regard to the dangers of their employment. The manifest legislative purpose was to protect the servant by positive law, because he had not previously shown himself capable of protecting himself by contract; and it would entirely defeat this purpose thus to permit the servant "to contract the master out" of the statute. It would certainly be novel for a court to recognize as valid an agreement between two persons that one should violate a criminal statute; and yet, if the assumption of risk is the term of a contract, then the application of it in the case at bar is to do just that. The cases upon the subject are by no means satisfactory, and, strange as it may seem, but few are in point. There is one English case which entirely supports our conclusion, and several *dicta* by English judges of like tenor. Several American cases on their facts also sustain the principle, though it must be confessed they do not very clearly state the true ground of their conclusion. There is one American case which is directly to the contrary, and possibly one other ought so to be regarded. There are several American cases that are said to be opposed to our view, but an examination of the facts in each will clearly distinguish them from the case at bar.

In the case of *Baddeley* v. *Granville*, L. R. 19 Q. B. Div. 423, the action was for the wrongful death of a miner, due to his employer's violation of a statute, and the defense of assumption of risk was set up. Section 52 of the coal mines regulation act of 1872 required a banksman to be constantly present while the men were going up or down the shaft, but it was the regular practice of the defendant, as the plaintiff's husband well knew, not to have a banksman in attendance during the night. The plaintiff's husband was killed, in coming out of the mine at night, by an accident arising through the absence of a banksman. It was held that the plaintiff's intestate did not, by continued service after he knew of the violation of the statute, thereby assume the risk of danger therefrom. The court says (page 426): "An obligation imposed by statute ought to be capable of enforcement with respect to all future dealings between parties affected by it. As to the result of past breaches of the obligation, people may come to what agreements they like, but as to future breaches of it there ought to be no encouragement given to the making of an agreement between A. and B. that B. shall be at liberty to break the law which has been passed for the protection of A. . . . If the supposed agreement . . . comes to this: that the master employs the servant on the terms that the latter shall waive the breach by the master of an obligation imposed on him by statute, and shall connive at his disregard of the statutory obligation imposed on him for the benefit of others as well as of himself, such an agreement would be in violation of public policy, and ought not to be listened to."

The judges deciding the case of *Thomas* v. *Quartermaine*, L. R. 18 Q. B. Div. 685, 696, 703, had affirmed the view that assumption of risk did not apply to the neglect of a specific statutory duty imposed for the benefit of a class, but it was not the case before them. They said that the case of *Clarke* v. *Holmes*, 7 Hurlst. & N. 937, 6 Hurlst. & N. 349, proceeded on this ground, though it is

difficult to find the ground stated in the opinions. *Durant* v. *Lexington Coal Min. Co.* 97 Mo. 62, 10 S. W. 484; *Grand* v. *Michigan C. R. Co.* 83 Mich. 564, 11 L. R. A. 402, 47 N. W. 837; *Litchfield Coal Co.* v. *Taylor*, 81 Ill. 590; and *Boyd* v. *Brazil Block Coal Co.* (Ind. App.) 50 N. E. 368,—were all cases where assumption of risk would have been a complete defense if applicable in case of a failure by the master to discharge a statutory duty to the servant, and the latter's express or implied acquiescence therein; and yet the servant was given judgment. The reasons stated in some of these cases for the conclusion are not entirely satisfactory, and in the cases from Illinois and Indiana no distinction is made between the doctrine of assumption of risk and of contributory negligence, but they are all authorities on their facts for our conclusion. The case of *Knisley* v. *Pratt*, 148 N. Y. 382, 32 L. R. A. 367, 42 N. E. 986, however, presented the precise question for decision, and the court of appeals held expressly that a servant, by continuing in the employment of a master who is violating a statute passed to protect the servant, does assume the risk of danger from such violation, and cannot make it the ground of recovery. This is followed by the circuit court of appeals for the second circuit in a New York case. *E. S. Higgins Carpet Co.* v. *O'Keefe*, 51 U. S. App. 74, 79 Fed. Rep. 900, 25 C. C. A. 220. The court of appeals of New York, in *Huda* v. *American Glucose Co.* 154 N. Y. 474, 482, 40 L. R. A. 411, 48 N. E. 897, does not treat the question decided in the *Knisley Case* as controlling the case of servants acquiescing in and assuming the risk of a violation of a fire-escape statute by their master, and the court declined to decide it. The decision in the *Knisley Case* is largely based on the decision of *O'Maley* v. *South Boston Gaslight Co.* 158 Mass. 135, 47 L. R. A. 161, 32 N. E. 1119, and *Goodridge* v. *Washington Mills Co.* 160 Mass. 234, 35 N. E. 484. We think the learned court of appeals of New York failed to observe that the *O'Maley* and *Goodridge Cases* were not suits under a statute defining and enjoining a specific duty of a master for the protection of servants, but were suits under an employer's liability act, which relieved the servant from the burden of certain defenses by the master in suits for injury sustained by him while in his master's employ, but did not attempt to change the master's duty to the servant, or to change the standard of negligence between them as that was fixed at common law. Hence it was held by the supreme judicial court of Massachusetts that the doctrine of assumption of risk applied to suits under the statute as at common law, and *Thomas* v. *Quartermaine*, L. R. 18 Q. B. Div. 685, which was also a suit under an employer's liability act, was much relied on. And yet in *Thomas* v. *Quartermaine*, as we have seen, the two lord justices, forming the majority deciding the case, expressly pointed out that in a suit under a statute positively fixing a standard of duty the doctrine of assumption of risk could not be applied. The distinction between the employer's liability act and acts for the protection of servants in the nature of police legislation, like the act under consideration, is clearly shown in *Griffiths* v. *Dudley*, L. R. 9 Q. B. Div. 357, where, though the court held that a servant might "contract the employer out" of liability under the former act, it was said that this could not be done in respect of liability arising under a statute like the one at bar, passed for the protection of servants. The *Knisley Case*, which, in our judgment, was wrongly decided, and many others in which a right conclusion was reached, seem to us to confuse an agreement to assume the risk of an employment, as it is known to be to the servant, and his contributory negligence. That, under certain circumstances, the one sometimes comes very near the other, and cannot easily be distinguished from the other, may be conceded; but in most cases there is a broad line of distinction, and it is so in this case. For years employees worked in railroad yards in which blocks were not used, and yet no one would charge them with negligence in so doing. The switches and rails were mere perils of the employment. Assumption of risk is in such cases the acquiescence of an ordinarily prudent man in a known danger, the risk of which he assumes by contract. Contributory negligence in such cases is that action or nonaction in disregard of personal safety by one who, treating the known danger as a condition, acts with respect to it without due care of its consequences. The distinction has been recognized by the Supreme Court of the United States. In *Union P. R. Co.* v. *O'Brien*, 161 U. S. 451, 40 L. ed. 766, 16 Sup. Ct. Rep. 618, the court said: "The second instruction was properly refused because it confused two distinct propositions,—that relating to the risks assumed by an employee in entering a given service, and that relating to the amount of vigilance that should be exercised under given circumstances."

In *Hesse* v. *Columbus, S. & H. R. Co.* 58 Ohio St. 167, 169, 50 N. E. 355, Judge Shauck, speaking for the supreme court of Ohio, said: "Acquiescence with knowledge is not synonymous with contributory negligence. One having full knowledge of defects in machinery with which he is employed may use the utmost care to avert the dangers which they threaten."

The distinction is exceedingly well brought out in *Cleveland, C. C. & St. L. R. Co.* v. *Baker*, 63 U. S. App. 553, 91 Fed. Rep. 224, 33 C. C. A. 468, by Judge Woods, speaking for the circuit court of appeals for the seventh circuit. There the action was for damages against a railroad company for injury sustained by reason of a breach of a Federal statute requiring the company to furnish grab irons. The statute, out of abundant caution, expressly provides that the continued service of the employee with knowledge of the breach of statutory duty by the company should not be regarded as an assumption of the risk. The court held that this proviso did not prevent the company from

successfully maintaining the defense of contributory negligence. Assumption of risk and contributory negligence approximate where the danger is so obvious and imminent that no ordinarily prudent man would assume the risk of injury therefrom. But where the danger, though present and appreciated, is one which many men are in the habit of assuming, and which prudent men who must earn a living are willing to assume for extra compensation, one who assumes the risk cannot be said to be guilty of contributory negligence if, having in view the risk of danger assumed, he uses care reasonably commensurate with the risk to avoid injurious consequences. One who does not use such care, and who, by reason thereof, suffers injury, is guilty of contributory negligence, and cannot recover, because he, and not the master, causes the injury, or because they jointly cause it. Many authorities hold that contributory negligence is a defense to an action founded on a violation of statutory duty, and this undoubtedly is the proper view. Such is the case of *Krause* v. *Morgan*, 53 Ohio St. 26, 40 N. E. 886, where the employee, in spite of a warning from his superior, and in the face of the most palpable danger, exposed himself to certain injury, and then sought to hold his employer liable because he had not employed the statutory methods of protecting him from the danger. In *Lake Erie & W. R. Co.* v. *Craig*, 37 U. S. App. 654, 73 Fed. Rep. 642, 19 C. C. A. 631, we held that the *Krause Case* was one of contributory negligence, and followed it as such. The syllabus confuses the difference between assumption of risk and contributory negligence, but the syllabus and opinion are, of course, to be restrained to the facts. The following cases, relied on by counsel for the railway company, were also cases of contributory negligence in suits for violation of specific statutory duty: *Pittsburgh & W. Coal Co.* v. *Estievenard*, 53 Ohio St. 43, 40 N. E. 725; *Victor Coal Co.* v. *Muir*, 20 Colo. 320, 26 L. R. A. 435, 38 Pac. 378; *Holum* v. *Chicago, M. & St. P. R. Co.* 80 Wis. 299, 50 N. W. 99; *Grand* v. *Michigan C. R. Co.* 83 Mich. 564, 11 L. R. A. 402, 47 N. W. 837; and *Taylor* v. *Carew Mfg. Co.* 143 Mass. 470, 10 N. E. 308. In the last two cases the distinction between contributory negligence and assumption of risk is clearly referred to.

For the reasons given, we think the court below was in error in holding that the plaintiff assumed the risk of injury from the failure of the defendant to comply with the statute passed for his protection, and that the case should have been submitted to the jury on the issue whether, assuming the unblocked guard rails and frogs as a condition of the situation, he used due care to avoid injury therefrom.

Judgment reversed, at costs of the defendant, with directions to order a new trial.

Petition for certiorari to remove case to Supreme Court of United States denied October 16, 1899.

LOUISIANA SUPREME COURT.

SUCCESSION OF Francois MEUNIER.

(52 La. Ann. 79.)

*1. **The judgment appealed from annulled the will** and the probate thereof, and recognized plaintiffs as heirs of the deceased. But it did not in terms send them into possession, nor was there an award against the executors, specifically, for a sum as representing the net proceeds of the estate in their hands. *Held*, a case where the trial judge could fix the amount of the suspensive appeal bond.

2. **One of the executors, acting in his individual capacity, was competent** as surety on such appeal bond for the legatee who had appealed.

3. **Objection that the appeal was taken** in the name of the agent and attorney in fact of the legatee, instead of in the name of the legatee, *held*, under the facts and pleadings of the case, not tenable.

4. **Donations and bequests are permissible to trustees** for educational, charitable, or literary purposes, or for the benefit of institutions, existing or to be founded, the object of which is to promote education, literature, or charity. Act 1882, No. 124.

5. **But this permission is restricted to educational, charitable, and literary objects** within the state of Louisiana, and to institutions founded and to be founded under the laws of the state for such purposes.

6. **To avoid the dispositions of wills** and testaments, it must plainly appear that they come within the prohibitions of the law.

7. **Where a bequest in a will in one view is illegal**, and in another view lawful, the latter will be adopted, and the will sustained.

8. **A legacy to the commune of Carouge**, canton of Geneva, Switzerland, which is directed to be placed at interest, and with the interest to endow annually two poor girls, and to give a pension to ten old persons of the two sexes, is held to be a legacy to pious and charitable uses, and sustainable.

*Headnotes by BLANCHARD, J.

(June 12, 1899.)

APPEAL by legatees under the will of Francois Meunier from a decree of the Civil District Court for the Parish of Orleans, Division C, declaring the will void and recognizing claims of the heirs at law. *Reversed.*

The facts are stated in the opinion.

NOTE.—For bequest to community in a foreign country, see also *Re* Huss (N. Y.) 12 L. R. A. 620.

Mr. **Charles Louque,** for appellants:

In 1882 the legislature passed act No. 124, p. 172, which irrevocably made the doctrine of charitable trusts a part of our system of laws.

Under this act, the state courts are bound to apply and enforce the full doctrines of charitable trusts.

The jurisdiction of the chancery courts has been recognized in all the states of this Union, and their jurisprudence has been applied uniformly to all charities of the nature of Francois Meunier's bequests.

Vidal v. *Philadelphia*, 2 How. 192, 11 L. ed. 231; Story, Eq. Jur. §§ 1136 *et seq.*; Perry, Tr. §§ 689 *et seq.*

Under the act of 1882 substitutions and *fidei commissa*, which were prohibited, are now permissible, as regards charitable trusts.

Supposing that the commune was incapable of acting as trustee, the charitable bequest is nevertheless good.

Vidal v. *Philadelphia*, 2 How. 197, 11 L. ed. 233; Perry, Tr. §§ 722–731, and note; *Handley* v. *Palmer*, 91 Fed. Rep. 949.

It is a maxim of the court never to allow a certain and valid trust to fail for want of a trustee.

Perry, Tr. § 731; *Burrill* v. *Boardman*, 43 N. Y. 254, 3 Am. Rep. 694; *Inglis* v. *Sailor's Snug Harbour*, 3 Pet. 113, 114, 7 L. ed. 622, 623; *Coggeshall* v. *Belton*, 7 Johns. Ch. 292, 11 Am. Dec. 471; *Vidal* v. *Philadelphia*, 2 How. 196, 11 L. ed. 233; *Perin* v. *Carey*, 24 How. 501, 16 L. ed. 710; *Handley* v. *Palmer*, 91 Fed. Rep. 949.

Courts look with favor upon charitable bequests, and endeavor to carry them into effect.

Story, Eq. Jur. §§ 1169, 1170, 1181; Perry, Tr. § 709.

It is immaterial whether the person to take be *in esse* or not, or the legatee was, at the time of the bequest, a corporation capable of taking or not.

Handley v. *Palmer*, 91 Fed. Rep. 952.

The legislature could incorporate the trustees afterwards.

Vidal v. *Philadelphia*, 2 How. 127, 11 L. ed. 205; *Girard* v. *Philadelphia*, 7 Wall. 1–15, 19 L. ed. 53–56; *Handley* v. *Palmer*, 91 Fed. Rep. 955.

If the beneficiaries were so named that the trustees would have no discretion, the bequest would not be classed as public charity.

Story, Eq. Jur. §§ 1169–1181; Perry, Tr. §§ 687, 710–732; *Vidal* v. *Philadelphia*, 2 How. 192, 11 L. ed. 231; *Perin* v. *Carney*, 24 How. 507, 16 L. ed. 712.

Indefiniteness is of its essence.

Handley v. *Palmer*, 91 Fed. Rep. 952.

Bequests will be paid over to trustees in foreign countries.

Perry, Tr. § 741; Story, Eq. Jur. §§ 1184–1186; *Richmond* v. *Milne*, 17 La. 322, 36 Am. Dec. 613.

Gifts of this nature were recognized valid before the act of 1882.

McDonogh's Succession, 7 La. Ann. 472. See also *Vidal* v. *Philadelphia*, 2 How. 184, 11 L. ed. 228; Perry, Tr. §§ 732, 741; Story, Eq. Jur. § 1184; *Inglis* v. *Sailor's Snug Harbour*, 3 Pet. 113, 114, 7 L. ed. 622, 623; *Perin* v. *Cary*, 24 How. 501, 16 L. ed. 710; *Williams* v. *Western Star Lodge No. 24 of F. & A. M.* 38 La. Ann. 629.

Mr. **G. V. Soniat,** for appellees:

A last will, which orders all the properties of the testator to be sold and the sums realized to be placed at interest, and with the interest to endow, each year, two poor girls, and to give pensions to ten old persons of the two sexes, does not convey full ownership to the legatee; it creates a trust estate, and thereby violates the law.

Civil Code, 1520; *Perin* v. *McMicken*, 15 La. Ann. 154; *Kernan's Succession*, 52 La. Ann. 48, 26 So. 749; *Harper* v. *Stanbrough*, 2 La. Ann. 380; *Franklin's Succession*, 7 La. Ann. 395; *Tournoir* v. *Tournoir*, 12 La. 23; *Marshall* v. *Pearce*, 34 La. Ann. 558; *McCan's Succession*, 48 La. Ann. 145, 19 So. 220; *Beauregard's Succession*, 49 La. Ann. 1176, 22 So. 348.

Such a will is also void on account of uncertainty in the beneficiaries; and their choice being left to the city of Carouge, the nominal donee, would make this a testament by the intervention of a commissary or attorney in fact, and thereby the same contravenes a prohibitory law.

Civil Code, 1573; *Fink* v. *Fink*, 12 La. Ann. 301.

The city of Carouge, Switzerland, is incapable of receiving a legacy of realty situated in Louisiana, because—

(a) The treaty of 1850, passed between Switzerland and the United States, limits such inheritances to citizens of the contracting parties. A city is not a citizen, and therefore the city of Carouge cannot inherit.

Bouvier, Law Dict. *verbo City*; *Walsh* v. *Lallande*, 25 La. Ann. 188; *Paul* v. *Virginia*, 8 Wall. 168, 19 L. ed. 357; *Muller* v. *Dows*, 94 U. S. 277, 24 L. ed. 76.

(b) Because the said treaty expressly states that "the foregoing privilege (of acquiring property, etc.), however, shall not extend to the exercise of political rights, etc."

(c) The want of capacity in the city of Carouge at the death of the testator, resulting from a positive prohibition in the laws of Switzerland prohibiting cities to receive any legacy burdened with a condition, cannot be supplied, cured, or removed by a subsequent permission from the legislative body of Switzerland.

First Congregational Church v. *Henderson*, 4 Rob. (La.) 210; *New Orleans* v. *Hardie*, 43 La. Ann. 251, 9 So. 12; *Rachal* v. *Rachal*, 1 Rob. (La.) 115.

(d) Act 124 of 1882 is restrictive to corporations organized under the laws of Louisiana. It is evident that a city in Switzerland cannot organize as a corporation for charitable purposes under the laws of Louisiana.

La. Rev. Stat. 677; *Franklin's Succession*, 7 La. Ann. 416.

On application for rehearing.

Mr. **J. McConnell,** also for appellees:

The opinion declares in terms that "the will in question is not obnoxious to the maxim *Le mort saisit le vif*, for the title of the estate is immediately vested in the commune of Carouge." This conclusion, as the executors had no seisin, made the town of Carouge immediately, on the death of Meunier, acquire the title to the stores on Royal street and other property described in the will.

Cross, Succession, p. 44; *Addison* v. *New Orleans Sav. Bank*, 15 La. 527; *Brooks* v. *Norris*, 6 Rob. (La.) 183; *Calvit* v. *Mulhollan*, 12 Rob. (La.) 258; *Womack* v. *Womack*, 2 La. Ann. 339.

This conclusion is necessary because it is essential that the heir of the decedent, whether testamentary or legal, should acquire the succession immediately. It follows, therefore, that the court sanctions this will as a valid title to the stores on Royal street in New Orleans, in favor of this municipal corporation acquiring real estate here, although created and existing under a foreign European government. Such a result is condemned both by municipal and international law.

1 Dill. Mun. Corp. § 435, p. 533.

The testamentary executors did not have the seisin. This being the case, the sale made by the executors was unauthorized by law.

Civil Code, 1660, 1669; *Boatwright's Succession*, 12 La. Ann. 893; *Massey's Succession*, 46 La. Ann. 126, 15 So. 6; *Dumestre's Succession*, 40 La. Ann. 571, 4 So. 328.

Indefiniteness is of the essence of charity when exercised by municipal corporations. Such charities must be of a catholic or universal character.

1 Dill. Mun. Corp. p. 536, and note; *Perin* v. *Carey*, 24 How. 465, 16 L. ed. 701; *Vidal* v. *Philadelphia*, 2 How. 127, 11 L. ed. 205; 2 Kent, Com. 280.

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

Francois Meunier died, leaving a last will and testament, olographic in form, by which he bequeathed to the city of Carouge, canton of Geneva, Switzerland (his native city), all the property in the city of New Orleans owned by him, consisting of several pieces of real estate, shares of stock, money, and bills due him, all of the aggregate value of about $25,000. He directed this property to be sold, and then followed a declaration to the effect that the city of Carouge "shall place the said sum at interest, and with the interest shall endow each year two poor girls, and shall give a pension to ten old persons of the two sexes, without any distinction of religion." He named Jerome Meunier, Joseph Bayle, and Emile Hoehn as testamentary executors. The will was admitted to probate, the executors were confirmed as such, and letters testamentary issued to them. Subsequently, collateral heirs of the deceased, his first cousins, residing in Switzerland and France, presented a petition for the annulment of the will. They represented that the deceased left no ascendants nor descendants, and that they, with others mentioned, were his closest of kin and sole heirs. The will is attacked as being against public policy and in derogation of the laws of the state of Louisiana, where the properties it deals with are situated, and where the will is to have effect. It is averred that the city of Carouge is a foreign municipal corporation, incapable of receiving and taking charge of an estate here; that the dispositions of the will in its favor are not sanctioned by the laws of Louisiana, nor by the treaty ratified between the United States and the Swiss Republic; that the laws of Switzerland did not at the date of the execution of the will, nor that of the probate thereof, authorize the city of Carouge to accept the legacy burdened with the conditions stipulated; and that no comity in this respect exists between the state of Louisiana, or the United States, and Switzerland. As further ground of avoiding the will, it is charged that the bequest to the city of Carouge creates a trust, or *fidei commissum*, obnoxious to the law of Louisiana; that by the terms of the will the said city is not vested with full ownership of the property or funds bequeathed, but, on the contrary, is required to invest the funds, and to hold the same in trust perpetually for the purpose of endowing each year "two poor girls" and pensioning "ten old persons," whose existence is uncertain, and whose names, residences, and nationality are not given; and that this is an attempt to will by testament, through the intervention of a commissary or attorney in fact, and constitutes a prohibited substitution. The petitioners represent that, with the will declared void, the inheritance of the property of the deceased devolves upon them, under the laws of Louisiana, and the treaties in force between Switzerland and the United States. The judgment of the court *a qua* sustained the opposition to the will, decreed its nullity, and recognized the claimants as heirs at law of the deceased. An order for a suspensive appeal from this decree was taken by the executors and the representative of the city of Carouge.

Motion to Dismiss Appeal.

A motion is made here to dismiss the appeal on several grounds, one of which is that the record is incomplete. It suffices to say, we do not find it so.

Another ground is that the trial court was without authority to fix the amount of the suspensive appeal bond, and that no appeal suspending the execution of the judgment could be taken without the giving of a bond exceeding by one half the sum of $15,387.50, which was the net amount of the estate left in the hands of the executors after the payment of the debts of the deceased and the expenses of administration. The bond given was for less than the sum mentioned, but was for the amount fixed by the court. The judgment appealed from annulled the will and the probate thereof. It further recognized the petitioners as heirs of the de-

ceased, and as such entitled to the dead man's estate. But it did not, in terms, send them into possession. There was no order directing the recognized heirs to be put into possession. Neither did the judgment mention the amount of the net proceeds of the estate then in the hands of the executors. There was no judgment against the executors, specifically, for a sum as representing such proceeds. Under these circumstances, it was a case where the district judge was empowered to grant a suspensive appeal, and fix the amount of the bond to be given as such. *Edwards' Succession*, 34 La. Ann. 216; *Coyle* v. *Creevy*, 34 La. Ann. 539; *State ex rel. Durand* v. *Parish Judge*, 30 La. Ann. 285; *Cloney's Succession*, 29 La. Ann. 327.

A further objection is that the only party who signed the bond as surety is Edward Hoehn, who, in his capacity of coexecutor, is appellant herein. The contention is that Hoehn individually cannot be surety for Hoehn, executor, appellant. Neither can he. *State* v. *Probate Ct. Judge*, 2 Rob. (La.) 449; *Lafon* v. *Lafon*, 2 Mart. N. S. 571. It may be, too (though on this we express no opinion), that Hoehn, in his individual capacity, is not competent as surety for his coexecutor Jerome Meunier on an appeal bond given by the two executors. It is not necessary to decide this question, for Hoehn individually was clearly competent as surety on the appeal bond for the other appellant, the city of Carouge. Even, therefore, were the appeal held not good as to the executors, it must be maintained as to the real party in interest, the legatee under the will, and this necessarily would bring the case before us on its merits.

But it is contended the city of Carouge has not appealed. This contention is based on the fact that the motion and bond of appeal recite that "Louis Rittener, the duly-qualified agent of the commune of Carouge," appeals. It is urged that this is not an appeal by the city of Carouge. We find that citation in this proceeding to annul the will was prayed for against "the city of Carouge, Switzerland, through her accredited agent, Louis Rittener;" that the answer of the city of Carouge to the demand reads, "into court comes Louis Rittener, the duly-qualified agent and attorney in fact of the commune of Carouge," etc.; and that the judgment upon the issues made up by this answer is against "the city of Carouge, Switzerland, herein represented by Louis Rittener, its duly-qualified agent and attorney in fact." Under these circumstances, while the way in which the appeal was taken and the bond drawn may be objectionable from the standpoint of technically correct pleading, the appeal taken by the party filing the answer which joined the issue, and who is recognized in appellees' pleadings as the agent and attorney in fact of the city of Carouge, must be held to be the appeal of the latter. The motion to dismiss is denied.

On the Merits.

Testamentary substitutions and *fidei commissa*, have been prohibited in this state from the earliest times. This prohibition was established in the interest of public order and state policy, and held to embrace within its scope the trust estates of the common law. Numerous decisions of this court attest the jealous care with which this policy of the law has been enforced. From the adoption of the Code of Louisiana of 1808 down to the year 1882, no legislative enactment appreciably modified its force, or weakened the stringency of its application to testamentary dispositions. In the latter year, however, a marked divergence from the beaten path of the law in this respect appeared among the statutes of the state. Act No. 124 of the Acts of 1882 was adopted, the object of which is to exempt all donations *mortis causa* or *inter vivos* made to trustees for educational, charitable, or literary purposes, or for the benefit of educational, literary, or charitable institutions already existing or to be founded, from the operation of the laws of the state relative to substitutions, trusts, and *fidei commissa*. It is part of the history of the state of that period that this departure from, or, rather, modification of, the ancient policy of the law, was coincident with the munificent dispositions made, or then about to be made, by the venerable and philanthropic Paul Tulane for the laudable purpose of founding in the city of New Orleans, where his active life had been spent and his fortune amassed, a great university, which, bearing his name, stands today alike a justification of the aforesaid modification of the law of trusts, a monument to his memory, and a blessing to mankind. As the law of Louisiana now stands, therefore, donations and bequests can be made to trustees for educational, charitable, or literary purposes, or for the benefit of institutions, existing or to be founded, the object of which is to promote education, literature, or charity. But it is clear from the language of the act of 1882 that its intention is to restrict this permission to educational, charitable, and literary objects within the state of Louisiana, and to institutions founded or to be founded under the laws of the state for such purposes. As the city of Carouge, a political institution in a foreign jurisdiction, can never exercise authority of any kind within the state of Louisiana, nor incorporate itself under our laws, nor authorize trustees to incorporate themselves here for the purpose of dispensing charity, it must be held that the act of 1882 can have no bearing, operation, or effect on the legacy under consideration, and no influence in the settlement of the question raised. It is equally clear that the charity intended by the bequest of the testator was to find its practical application in Switzerland, and not in Louisiana. We may therefore dismiss the act of 1882 from further consideration. The legacy to the city of Carouge is to be judged by the codal provisions of the law as the same stood prior to the act of 1882, and stand or fall according as it may or may not measure up to the requirements

of a valid testamentary disposition. The question, then, just now to deal with, is, Does this bequest evidence a substitution of *fidei commissum* prohibited by the law?

To create a substitution is to bequeath property to one or more, to be succeeded in the enjoyment thereof by others designated by the testator. The *fidei commissum* is to bequeath property to be held for and delivered to another. It is a mandate or trust, with no interest conferred on the legatee, who is charged only to preserve and deliver. *McCan's Succession*, 48 La. Ann. 157, 19 So. 220. It is a charge to receive for and deliver to another. [*Mathurin* v. *Livaudais*] 5 Mart. N. S. 303. To fall, this legacy must come clearly within the scope of one or the other of these prohibitions, for the law and the courts lean to the upholding of the dispositions made by testators of their estates. Eminent civilians have declared that, "wherever the testamentary power has been established, a will or testament is an exertion of human liberty and of human volition over property;" and by others truly has it been said that "the last will of those who depart this life is the last expression of their love, friendship, and gratitude," to be regarded as sacred, and, where it violates no law, to be respected, even as the grave of the dead is respected. *Michon Succession*, 30 La. Ann. 217. To anathematize the dispositions of wills, to decree them null, it must clearly appear they come within the prohibitions of the law. *Cole* v. *Cole*, 7 Mart. N. S. 416. A doubt existing must be resolved in favor of their validity. Rev. Civ. Code, art. 1713; *McCluskey* v. *Webb*, 4 Rob. (La.) 204; *Ducloslange's Succession*, 4 Rob. (La.) 409; [*Cole* v. *Cole*] 7 Mart. N. S. 417; *Farrar* v. *McCutcheon*, 4 Mart. N. S. 47; *Arnaud* v. *Tarbe*, 4 La. 504; *State* v. *McDonogh*, 8 La. Ann. 173; *Auld's Succession*, 44 La. Ann. 593, 10 So. 877.

The argument against the will is it was the intent of the testator that the commune of Carouge should have his estate, and be charged with the duty or trust to preserve the same for indefinite third persons, to wit, "two poor girls," and "ten old persons of the two sexes," to whom, annually, its profits should be paid,—not to the same "two poor girls" and "ten old persons" each year, but to such persons fulfilling that designation whom, each year, the commune may, in its discretion, select as beneficiaries of the charity. The requirement is that it be paid out each year to such persons. As to that, the commune has no discretion, but has discretion as to the choice of persons to become the recipients of the bounty, provided they are "poor girls," in the one instance, and "old persons," in the other instance. The argument, further, is that, while this clause in the will may not constitute a substitution, it does create a trust and *fidei commissum*; that it is a bequest in trust to the city of Carouge, which is charged with the duty of holding, preserving, administering, and investing the legacy, and applying its profits to the amelioration of the condition of certain indefinite and innominate persons, to wit, two poor girls and ten old persons; that the city is the instrumentality made use of by the testator for preserving and conveying his estate to the indefinite persons named; that if the bequest had been made to "two poor girls" and "ten old persons," residents of the city of Carouge, it would be void for uncertainty (for instance, what "two poor girls," what "ten old persons"); that, to avoid this uncertainty, the bequest is made to the city of Carouge as trustee to select the "two poor girls" and "ten old persons" who annually shall be the beneficiaries of the bounty of the testator; that thus to the city of Carouge a commission in perpetual trust is given to be executed; that the funds representing the legacy are to remain unimpaired, are to be preserved indefinitely, and the proceeds of the investment of the same are to be distributed by the city as the commissary or attorney in fact of the testator, to the girls and old persons annually who may be selected by the trustee; and that the clause in the will, therefore, is a testamentary disposition committing to the choice of a third person the institution of the beneficiary of the will, and comes under the express ban and prohibition of article 1573 of the Revised Civil Code. This argument would prevail if it were the only interpretation of which the will is susceptible. But there is another view to be taken of the will, and we think a legal one. While the testator willed his estate, real and personal, in Louisiana, to the commune of Carouge, he directed his executors to sell the property, and to convert all the effects of the estate into cash, and to transmit the funds thus derived to the legatee. The executors have obeyed this injunction by selling the property, and the proceeds thus derived, minus the debts and charges of the administration, are the subject of this controversy. This will therefore does not complicate the simple tenures by which alone our laws permit the property to be held, nor does it tie up indefinitely, and take out of commerce, the property of the succession. Money was really the thing donated, and it was contemplated it should be used by the legatee so as to produce an annual revenue, which is not to be preserved and returned to another, but is to be applied to pious or charitable purposes. The title intended is one to the city of Carouge in full ownership, with a destination to pious or charitable uses. Such a disposition is lawful, and may be carried into effect if the uses to which it is to be put be such for which the city would be otherwise bound to provide. One of the directions of the will is to provide for old persons of the two sexes, and one of the duties recognized in all enlightened countries as resting upon communities incorporated into cities is to care for the indigent. *State* v. *McDonogh*, 8 La. Ann. 259. Legacies for pious uses are described to be those which are destined to some work of piety or object of charity. Id. 171. They are not only not prohibited by the law, but viewed with favor. *Ibid.* It

is no objection to the validity of a legacy to pious uses that it is for the benefit of the poor. The legatee of such a legacy is vested with the title, even though the destination affixed to the property by the testator follow it in his possession. Id. 172. The law makes no distinction between a legacy to the poor of a city, and a legacy to the city for the poor. In both cases it is a legacy for pious uses, and the city is the recipient. *McDonogh Will Case*, 8 La. Ann. 247. Legacies for pious uses are recognized by the law for the purpose of procuring aid from individuals in supplying those wants which the state itself, or the communities into which it is divided, are bound to provide for in the interest of society, and as a function of government, falling within the circle or coming within the scope of the duties of government. Id. 249. The police and good order of a city include the education of youth, and the care of the poor within its limits. Deduced at first from the principles of Christianity, it has become an elementary principle in the theory of government. Id. 255; Domat, Des Comm. 107.

When analyzed, the provisions of this will are found to be lawful, simple, and reasonable; to contain nothing hostile to any consideration of public policy. There is no trust created by it. The bequest is absolute to the city of Carouge for all time, burdened only with a charge to dedicate it to pious and charitable uses. It is not obnoxious to the maxim, *Le mort saisit le vif*, for the title of the estate is immediately vested in the commune of Carouge. It is not to be surrendered at any time to anyone. No one is named, to whom the estate is to be transmitted. The direction that the proceeds of the property are to be placed at interest, and the profits thus derived are to be used in the way indicated in the will, does not bring it within the scope of the prohibitions of the law. This direction is, we think, more to be regarded as in the nature of a request to the legatee. It was the expression of a wish, a desire. It was not a disposition. It was advice and recommendation. Rev. Civ. Code, art. 1713, we think, authorizes this meaning to be given to the words. 8 La. Ann. 237. It will be observed that it was only with regard to the interest on the fund representing the estate that any request is made or direction given, and even that is not required to be preserved for or disbursed to any particular person named. In a general way two poor girls and ten old persons annually are directed to be aided from the profits of the fund; but this must be held to be within the discretion of the commune, as to the persons to be aided, for no particular poor girls or old persons are invested with the right of enforcing the disposition. This does not come within the scope of *fidei commissum* which, as we have seen, is understood to be a disposition, *causa mortis*, by which the heir or legatee is requested to give or return a certain thing to another person. Dom. lib. 4, title 2, § 2. By "another person" is meant a person or institution so named or indicated as to individualize him or her or it. That is not the case here. This bequest is to the city of Carouge, and to it alone. 8 La. Ann. 172. It was in no sense a legacy to any other person. The direction to use the interest for a given purpose did not vest any part of the legacy in any particular person as beneficiary thereof. The city of Carouge is instituted universal legatee. By virtue of this institution, it is clothed with full right of ownership over the funds of the succession. There is and can be no substitute to take the estate at any time. The city has perpetual existence. It is a moral person, perpetually renewed by the successive renewal of its inhabitants. While this legacy to it is to be viewed as one burdened with the charge of a specific destination for the behoof of the city, the latter is not encumbered with the duty of returning it at any time to anyone. It is an obligation consisting *in faciendo*, nothing more. 8 La. Ann. 230. It is a gift to the city made *in præsenti*, with the charge of specific destination; and, since taking care of the destitute is a duty devolving on municipalities, this legacy is really to be viewed as one to the city of Carouge, with the charge of investment for its own interest. The most that can be said against the legacy is that it is one with a charge. But this does not make it a *fidei commissum*, for, under the law, charges and conditions may be placed on all heirs and legatees, except forced heirs as to their *légitime*. We hold that the city of Carouge, under the proper view to be taken of this will, is in no sense a trustee. It holds the legal estate of the property or funds donated to it. The terms of the will are terms of disposal. They express the transfer of ownership from the person of the testator to the legatee. The disposition and control of the fund after it is placed in the city's hands would be in virtue of ownership, not trusteeship. The testator did not devise the legacy to persons needing and entitled to receive charity, though it was the object and intention that needy persons are to be benefited by it, if carried out. *Burke's Succession*, 51 La. Ann. 538, 25 So. 387; *New Orleans* v. *Hardie*, 43 La. Ann. 255, 9 So. 12. But, even if the legacy had been devised directly to the poor of the city of Carouge, it would come within the letter of the law, for the city could and would take charge of it and administer it for the beneficiaries. Rev. Civ. Code, art. 1549; *Fink* v. *Fink*, 12 La. Ann. 301; [*State* v. *McDonogh*] 8 La. Ann. 256. We think the needy persons intended to be benefited by the provision of the will are those of the city of Carouge coming within the description of the will.

This case, we think, comes within the rule of those decisions of this court of which *Milne* v. *Milne*, 17 La. 46, the *McDonogh Will Case*, 8 La. Ann. 171, and the *Western Star Lodge Case*, 38 La. Ann. 620, are types, rather than within the rule of those decisions of which *Franklin's Succession*, 7 La. Ann. 395, is a type. The case of *Burke's Succession*, 51 La. Ann. 538, 25 So.

387, cited by plaintiffs, is not in point; and that of *Kernan's Succession*, 52 La. Ann. 48, 26 So. 749, is to be differentiated from the instant case. There the devise was to Archbishop Janssens, of the diocese of Louisiana, and to his successors, of certain real property (lots and houses) in the city of New Orleans "upon condition that out of the revenues or rents thereof an asylum or home for the poor of both sexes shall be founded, endowed, and maintained, similar, so far as possible, to that of St. Michael's in the city of Rome, Italy." Sustaining the attack of the heirs on the will on the ground that it sought to create a *fidei commissum*, and proposed a prohibited substitution, the court said: "Whether we hold the church or the archbishop to be the legatee, we are confronted with the difficulty arising from the title the will seeks to create. The will conveys no ownership. The title, such as it is, is one of mere administration. Whether held by the church or the archbishop, the property is to be forever inalienable." The court held the will obnoxious in seeking to introduce an impossible and illegal tenure, and that no such title as that conveyed has any place under our system of laws. Here the real bequest was a legacy of money, for the will directed the sale of the property, the proceeds of which were devised to the city of Carouge for pious and charitable uses. No property here was to be held forever inalienable. Had the argument advanced by plaintiff in the case at bar been sustained in the *McDonogh Will Case*, where substantially it was made, the munificent bequests made by that philanthropist to the cause of education in the cities of New Orleans and Baltimore would have failed, and the enduring monuments to his memory, in the form of commodious and substantial public-school buildings which dot the former city all over, would never have been erected. Had it been made and sustained against the bequest of Alexander Milne in 1841, the town of Fochabers, in Scotland, would never have enjoyed the bounty of its native son, who, amassing a fortune here, devised a portion thereof ($100,000) to that municipality for the establishment and maintenance of free schools, and the Duke of Richmond's suit in its behalf [*Richmond* v. *Milne*] 17 La. 320, 36 Am. Dec. 613, would have been in vain. If it had been made by the legal heirs of James Smithson in the courts of Great Britain, and sustained, against the princely bequest of £100,000 sterling devised by that enlightened Englishman to the United States for the purpose of founding at the capital of the Republic a great scientific institution "for the increase and diffusion of knowledge among men," the Smithsonian Institute would not to-day be in existence. The law of Louisiana is not the illiberal institution the argument against the validity of Francois Meunier's will presupposes. We find nothing prohibitive of the transmission of the funds of the legacy to the commune of Carouge, there to be dedicated to the charitable uses intended by the testator.

But it is insisted the city of Carouge is incapable of receiving the legacy, and one of the grounds advanced for this contention is that the treaty of 1850 between the United States and the Swiss Republic restricts the right of acquiring property in the territory of the other to citizens, and that this excludes the city of Carouge, which cannot be held included within the term "citizens." The city of Carouge is a political corporation,—such a one as is defined by our Code as "an intellectual body." Rev. Civ. Code, art. 427. It is a college of inhabitants, the members of which succeed each other, so that the body continues always the same, notwithstanding the change of the individuals which compose it, and which, for certain purposes, is considered as a natural person. *Ibid.* Such corporations are substituted for persons, may possess an estate, have a common treasury, and are capable of receiving legacies and donations. Rev. Civ. Code, art. 433. It is too narrow a construction, therefore, which excludes the city of Carouge from the benefits of the first and fifth articles of the treaty with the Swiss confederation. The latter article gives to heirs (whether by testament or without) of citizens of each of the contracting parties the right to succeed to property, to inherit it and take possession thereof, with the further stipulation that one who, on account of being an alien, cannot hold real property (if such be the case), is to be accorded the right to sell same and remove the proceeds. Our law declares, "All persons may dispose or receive by donation *inter vivos* or *mortis causa*, except such as the law expressly declares incapable." Rev. Civ. Code, art. 1470. Cities and corporations are ranked among persons, and they are not incapable. "Corporations are placed by our laws on the same footing as natural persons, as to their capacity to take by devise." [*Milne* v. *Milne*] 17 La. 54. "Donations *inter vivos* and *mortis causa* may be made in favor of a stranger, when the laws of his country do not prohibit similar dispositions from being made in favor of a citizen of this state." Rev. Civ. Code, art. 1490. The treaty with Switzerland permits citizens, respectively, of the United States and of the Swiss Republic, to make such dispositions of property in favor of each other; and the laws of Switzerland do not prohibit dispositions of property from being made in favor of citizens of this state or of the United States. The *procureur général* of Switzerland certifies that no law of that confederation places any obstacle in the way of the acceptance of a legacy of the nature of that of Francois Meunier's will, when the council of state authorizes the acceptance, and it is shown that this authorization has been duly given. But it is insisted, as further ground for the contention that the city of Carouge is incapable of receiving the legacy, that this authorization by the council of state was necessary because the legacy contained a charge, and the law of Switzerland does not permit municipalities to accept "any legacy or donation containing any charges or con-

ditions." From this the argument proceeds that at the time of the death of the testator, and the probate of his will, the legatee, city of Carouge, did not possess the capacity of inheriting or taking the legacy; that the legal heirs did; and that the ownership and seisin thus invested in the latter could not by any subsequent event be taken away. We do not find that there is any prohibition in the laws of Switzerland against municipalities accepting legacies,—only that, where such legacies contain a charge or condition, the permit of the council of state to accept must be had. The capacity to accept, therefore, exists,—to become executory, however, in case a charge or condition is attached to the legacy, only upon permission being granted by the council of state. Where the legacy contains no charge or condition, the capacity to accept is executory, in full right. Where there is a charge or condition, this capacity to accept is merely suspended until the permit is granted. There was then no want of capacity in the city of Carouge to accept; and when the council of state acted, as it did, and gave the permission to accept, the bar was removed. The case of *First Congregational Church* v. *Henderson*, 4 Rob. (La.) 210, cited in opposition to this view, is not in point; for there, at the time of the testator's death, there was a positive prohibition in the charter of the church against receiving any legacy exceeding $1,000. So the court held properly that "the want of capacity at the death of the testator, resulting from a positive statutory prohibition then in force, cannot be supplied, cured, or removed by any subsequent legislative enactment." In the instant case there was no "absence of those qualities required in order to inherit" at the moment the succession was opened. Rev. Civ. Code, art. 950. The legatee here existed at the time the testator died (Rev. Civ. Code, art. 953), and possessed the heritable quality, the exercise of which was merely suspended until permission to accept was had from the council of state. The capacity to receive was one thing, and existed. The exercise of it was another thing, and was merely inoperative until the council of state acted. Rev. Civ. Code, art. 1473; *Milne* v. *Milne*, 17 La. 46. Many years ago, in this state, Julien Poydras, dying, bequeathed by will $30,000 to the parish of Point Coupée, and a like sum to the parish of West Baton Rouge, the interest on which he directed to be appropriated as dowries to the indigent young women of the parishes, to encourage their marriage. Trouble arising as to the power or capacity of the parishes to accept the legacies, the legislature passed acts authorizing the police juries of the said parishes to accept the same, and it was done. [*Milne* v. *Milne*], 17 La. 55; Acts 1825, p. 82; Acts 1837, No. 29.

We hold against plaintiffs on both the grounds urged against the capacity of the city of Carouge to receive and take the legacy, and, deeming the legacy not one coming within the prohibitions of the law, it follows that the will attacked must be sustained as a valid disposition of the testator's estate.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be annulled, avoided, and reversed, and it is now ordered and decreed that the demand of plaintiffs herein be rejected and dismissed. It is further ordered, etc., that the last will and testament of Francois Meunier, deceased, be sustained as a lawful testamentary disposition of property, and the executors thereof are directed to recognize the city of Carouge, canton of Geneva, Switzerland, as the universal legatee under said will, and to pay over to the said city, or its duly-accredited representative, the funds on hand representing the net proceeds, after payment of the debts of the deceased and the charges of administration, of the sale of the property of the estate of the testator. It is further ordered, etc., that costs of this proceeding in both courts be taxed against plaintiffs.

Breaux, J., concurs in the decree. **Monroe**, J., having decided the case in the court of first instance, takes no part in the decision on the appeal.

Rehearing denied November 20, 1899.

MICHIGAN SUPREME COURT.

Alfred RICE
v.
DETROIT, YPSILANTI, & ANN ARBOR RAILWAY, *Plff. in Err.*

(.....Mich.....)

1. **The duty of a street-railway company to sell tickets** in quantities at reduced rates on each car, by virtue of the terms of its franchise, from a certain town from which it runs to a neighboring city, extends to a passenger on the line who gets on the car and offers to buy such tickets at a point outside the town.

2. **A street-railway company which has assumed to comply with the terms of its franchise** requiring sales of tickets at reduced prices for a certain trip, by providing separate tickets for different parts of the trip, without offering any through-trip tickets for sale, and which has accepted a ticket for one portion of the trip, cannot escape liability for refusing to sell tickets at the reduced price for the remaining part of the trip, on the ground that its franchise obliges it to sell through tickets only.

(February 20, 1900.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of plaintiff in an action brought to recover back an excess of fare paid under protest on de-

NOTE.—For regulation of fares on street railways, see Sternberg v. State (Neb.) 19 L. R. A. 570, and *note;* and Detroit v. Fort Wayne & B. I. R. Co. (Mich.) 20 L. R. A. 79.

fendant's cars because of defendant's refusal to sell a trip ticket at less cost. *Affirmed.*

The facts are stated in the opinion.

Mr. **J. Emmet Sullivan** for plaintiff in error.

Messrs. **Smith & Curtis** and **Rice & Meeker** for defendant in error.

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

The defendant and appellant in this cause is a street railway that maintains and operates a railway between the city of Detroit, the township of Springwells, the village and township of Dearborn, and other places. The cars of the defendant go over the track of the Detroit Citizens' Street-Railway Company to the city hall, in the city of Detroit. Defendant has been selling five tickets for 50 cents, each good for a trip between the city hall, in the city of Detroit, and the village of Dearborn. Each of the five tickets is divided into two parts,—one good from the village of Dearborn to the Flint & Pere Marquette Railroad crossing, and the other good between the Flint & Pere Marquette Railroad crossing and the city hall, in the city of Detroit. The franchise granted to defendant by the village of Dearborn provided as follows: "It is further provided that the same grantee shall charge not to exceed the following rates, to wit: From any point in said village of Dearborn to Woodward avenue, in the city of Detroit, fifteen (15) cents cash fare, good either way, or two tickets for twenty-five (25) cents, good either way; a strip of five (5) tickets shall be sold for fifty (50) cents." By the terms of the Dearborn franchise, the defendant may charge 5 cents for a ride in said township; and the Springwells franchise permits a charge of 5 cents from the Flint & Pere Marquette Railroad crossing to Deaborn township. The plaintiff on the 21st day of July, 1898, in the city of Detroit, boarded a car bound for the village of Dearborn. He gave the conductor a portion of a through ticket which entitled him to ride to the Flint & Pere Marquette Railroad crossing, in the township of Springwells. Upon arriving at the crossing the conductor came to take up fare for the trip between the Flint & Pere Marquette Railroad crossing and the village of Dearborn. Plaintiff tendered 50 cents, and demanded a sale to him of a strip of five tickets good between the city hall, or Woodward avenue, in the city of Detroit, and the village of Dearborn,—not specially for the purpose of paying his fare to Dearborn with a portion of the strip, but for the purpose of being carried to and fro between the city hall, in the city of Detroit, and the village of Dearborn. The conductor, not having any of these strips or tickets, demanded that the plaintiff pay 10 cents for the trip between the Flint & Pere Marquette Railroad crossing and the village of Dearborn, which plaintiff paid under protest. He thereafter brought suit against defendant for 5 cents. A judgment in the circuit court on appeal from the justice was rendered for the plaintiff for 5 cents and costs, by direction of the court.

The pleadings are not printed in the record, so that we must assume that no point was intended to be made as to the sufficiency of the declaration. We have, then, a case in which defendant is operating under a franchise imposing a duty to sell five tickets for 50 cents, good between the city hall, Detroit, and any point in the village of Dearborn. The franchise further provided: "All such tickets shall be kept for sale upon each and every car operated by it." It is contended that the franchise is in force only within the territorial limits of the township, and does not cover territory in other townships. We do not think this contention can be sustained. The franchise is in the nature of a contract, and imposes obligations upon the company which those having occasion to ride from Dearborn to Detroit have a right to enforce. It is urged that the case of Kissane against this same defendant (Mich.) 79 N. W. 1104, is authority for defendant's contention. No such doctrine is announced in that case. It was held, it is true, that the plaintiff was not compelled to rely on the restrictions contained in the franchise granted by the municipality in which he boarded the car, but that he might, under such franchise, pay his fare to a point in another municipality, and there avail himself of the terms of a franchise granted by the latter. The plaintiff's right under this franchise is not different than it would have been had the franchise in Springwells been silent on the subject of fares. The defendant saw fit to contract with the village of Dearborn for a rate outside the limits of the village, and to agree that tickets should be sold on its cars. This contract it cannot repudiate.

But it is urged that no damage was shown, for the reason that the tickets which the defendant was accustomed to sell (consisting, as they did, of two parts) were not the kind of tickets required by the franchise, and that the company was not required to accept the strip from the Flint & Pere Marquette crossing to Dearborn, but was only required to furnish a through ticket. It might be a sufficient answer to say that a failure to sell the tickets to plaintiff when demanded entitled him to nominal damages, at least, and that no more than nominal damages were recovered; but a further answer is that defendant has placed its own construction on the requirements, and has provided tickets in form to suit itself. The plaintiff was entitled, by means of such tickets, to a ride from the city hall to Dearborn for 10 cents. He sought to obtain it by means of the only ticket kept by the defendant for sale. One part of such a ticket had been given up, and, if he had been able to obtain the tickets requested, the remaining portion of the ride could have been paid for with the other coupon.

The judgment is affirmed.

The other Justices concur.

William L. FULLER, *Plff. in Err.*,
v.
LOCOMOTIVE ENGINEERS' MUTUAL LIFE & ACCIDENT INSURANCE ASSOCIATION.

(.....Mich.....)

The amputation of about one fourth of a person's foot does not give any right to the full amount of insurance on the ground that all the use of the foot is lost, under a by-law of a mutual benefit association providing for full payment in case of the "amputation of a limb (whole hand or foot)," as the word "whole" applies to the foot as well as the hand, and the injury insured against is not the loss of the use of a hand or foot, but the amputation of a limb that should include a whole hand or a whole foot.

(December 30, 1899.)

ERROR to the Circuit Court for St. Clair County to review a judgment in favor of defendant in an action brought to enforce payment of an amount alleged to be due on a policy of accident insurance. *Affirmed.*

The facts are stated in the opinion.

Mr. **John B. McIlwain,** for plaintiff in error:

If the question should depend upon the extent of plaintiff's disability, the testimony tending to show it should all have been admitted, and the court should have stated the law and left the jury to say whether plaintiff's disability came within the law as given to them.

Turner v. *Fidelity & C. Co.* 112 Mich. 429, 38 L. R. A. 529, 70 N. W. 898; *Lord* v. *American Mut. Acci. Asso.* 89 Wis. 19, 26 L. R. A. 741, 61 N. W. 293; *Sneck* v. *Travelers' Ins. Co.* 88 Hun, 94, 34 N. Y. Supp. 545; *Sheanon* v. *Pacific Mut. L. Ins. Co.* 77 Wis. 618, 9 L. R. A. 685, 46 N. W. 799.

In a contract of this kind the court will not be inclined to adopt a legal construction varying from the grammatical construction, to the prejudice of the party insured, or to defeat substantial justice.

The contract is open to the construction contended for by plaintiff, and, this being so, the law is well settled that where the provisions in an insurance policy are susceptible of two constructions, the one most favorable for the insured will be adopted.

Turner v. *Fidelity & C. Co.* 112 Mich. 429, 38 L. R. A. 529, 70 N. W. 898; *Utter* v. *Travelers' Ins. Co.* 65 Mich. 545, 32 N. W. 812; *Grand Rapids Electric Light & P. Co.* v. *Fidelity & C. Co.* 111 Mich. 148, 69 N. W. 249; May, Ins. § 175; Wood, Ins. §§ 60, 62; *Allen* v. *St. Louis Ins. Co.* 85 N. Y. 473; 11 Am. & Eng. Enc. Law, p. 286; *Anderson* v. *Fitzgerald,* 4 H. L. Cas. 484; *First Nat. Bank* v. *Hartford F. Ins. Co.* 95 U. S. 673, 24 L. ed. 563; *Hohn* v. *Inter-State Casualty Co.* 115 Mich. 79, 72 N. W. 1105.

The law does not specify where the foot must be amputated to entitle the insured to recover.

In contracts providing indemnity in case of the "loss of a foot" the decisions are uniform in holding these words to mean "the loss of the use of a foot," and that amputation is not necessary.

1 Am. & Eng. Enc. Law, 2d ed. p. 301; *Lord* v. *American Mut. Acci. Asso.* 89 Wis. 19, 26 L. R. A. 741, 61 N. W. 293; *Sheanon* v. *Pacific Mut. L. Ins. Co.* 77 Wis. 618, 9 L. R. A. 685, 46 N. W. 799; *Sneck* v. *Travelers' Ins. Co.* 88 Hun, 94, 34 N. Y. Supp. 545.

Messrs. **Phillips & Jenks,** for defendant in error:

The policy itself, in the absence of fraud, duress, or mistake, must be looked to, to ascertain the meaning and intent of the parties; and where the contract is clear, precise, and unambiguous in its terms, and the sense is manifest, there is no need of a resort to rules of construction.

Joyce, Ins. §§ 185, 205, 207; *Hartford F. Ins. Co.* v. *Davenport,* 37 Mich. 609; *Supreme Lodge, K. of H.* v. *Nairn,* 60 Mich. 44, 26 N. W. 826.

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

The plaintiff was a member of a mutual benefit association, and held a certificate which he claims to entitle him to payment of $3,000 under article 19 of the by-laws, which is as follows: "Any member while engaged in any lawful avocation receiving bodily injuries which alone shall cause amputation of a limb (whole hand or foot), or total and permanent loss of eyesight, he shall receive the full amount of his policy." The defendant refuses payment upon the ground that the injury sustained does not bring him within the by-law, for the reason that the injury did not cause amputation of a whole hand or foot. The circuit judge directed a verdict for the defendant, and the plaintiff has appealed.

The record contains diagrams showing the size and shape of the whole left foot and the maimed right foot. They were made by drawing a pencil around them while the plaintiff stood upon a piece of paper. The length of the whole foot is $11\frac{5}{16}$ inches to the end of the great toe, while the amputated foot is exactly $7\frac{1}{2}$ inches on a line drawn through the center of the foot, and $7\frac{3}{4}$ inches if drawn in the direction of the great toe. It is thus demonstrated that the foot is shortened $3\frac{3}{16}$ inches, which is as nearly one fourth as it well could be. This one fourth is from the toe, and it leaves three fourths of the foot. This would leave all of the heel, and substantially all of the hollow

NOTE.—As to what constitutes loss of foot or hand, see Sheanon v. Pacific Mut. L. Ins. Co. (Wis.) 9 L. R. A. 685; Stever v. People's Mutual Acci. Ins. Asso. (Pa.) 16 L. R. A. 446; Lord v. American Mut. Acci. Asso. (Wis.) 26 L. R. A. 741.

As to what constitutes a total loss of sight of both eyes, see Humphreys v. National Benefit Asso. (Pa.) 11 L. R. A. 564.

As to what constitutes total disability, see Turner v. Fidelity & C. Co. (Mich.) 38 L. R. A. 529, and *note;* also Lobdill v. Laboring Men's Mut. Aid Asso. (Minn.) 38 L. R. A. 537.

of the foot, and possibly a part of what is called the "ball of the foot." We do not overlook the statement that the skin of the sole was left longer to lap upward over the end, and perhaps part of the top, of the mutilated foot, but this cannot have lengthened it materially. It is claimed that it would be 1 inch. Counsel claim that the proof shows that all use of the foot is lost, and insist that this brings them within the spirit and meaning of the contract. They contend: First, that the contract should be read as though it said, "Foot or whole hand," —in other words, that the qualifying adjective, "whole," should not be applied to "foot;" and, second, that in any event the whole foot was amputated when it was so far removed as to be useless in the performance of the natural functions of a foot.

The natural construction of the words would be the same as though the by-law had said, "Whole hand or whole foot." Furthermore, the injury insured against is not the amputation of a hand or foot, but a limb; and the words in brackets, "whole hand or foot," are used as explanatory of what was meant by the word "limb," *i. e.* an amputation, not necessarily a whole arm or leg, at the elbow or knee, but any amputation of a limb that should include a whole hand or a whole foot.

We are cited upon the second proposition to some authorities which are said to hold that, if the beneficial use of a member is lost, there may be a recovery. That would be a reasonable construction of a contract of insurance that should insure against the "loss of a hand or foot," for it might well be said that a foot or hand is lost when it is so impaired as to be of no further use, and that is as far as the authorities have gone. What is meant by the loss of a hand? Ordinarily the term "loss" is obvious, but when it is considered in the light of surrounding circumstances, *viz.*, an insurance policy that indemnifies against the loss of a hand or an entire hand, it is not unreasonable to hold that the parties understood that any injury to the hand which rendered it useless was a loss of the hand or entire hand. In *Sheanon* v. *Pacific Mut. L. Ins. Co.* 77 Wis. 618, 9 L. R. A. 685, 46 N. W. 799, where "an insurance policy provided that the principal sum should be paid if the insured, from a violent and accidental injury which should be externally visible, should 'suffer the loss of the entire sight of both eyes, or the loss of two entire feet, or one entire hand and one entire foot,' the insured was accidentally shot in the back; the bullet penetrating his spine, and producing immediate and total paralysis of the lower part of his body, and entirely destroying the use of both feet. Held, that he had suffered 'the loss of two entire feet,' within the meaning of the policy." The court said: "The question is, Does the policy cover such an injury? The policy covers both death and indemnity; the company agreeing to pay the principal sum if the insured, from a violent and accidental injury which should be externally visible, should 'suffer the loss of the entire sight of both eyes, or the loss of two entire hands or two entire feet, or one entire hand and one entire foot.' This is the language of the policy, and the question is, What does it mean, or what must be understood by it? Is its meaning that the insured is not entitled to recover the insurance money unless his legs and feet have been amputated or severed from his body, or does it mean that the injury must have destroyed the entire use of his legs and feet, so that they will perform no function whatever? The contention of the learned counsel for the defendant is that the clause is to be understood in the former sense, and implies an amputation or physical severance of the feet from the body, and does not include an injury such as paralysis, though such injury actually deprives the insured of all use of his feet and legs. We cannot adopt such a construction of the contract. To our minds the loss of the hands and feet embraced in the policy is an actual and entire loss of their use as members of the body; and if their use is actually destroyed, so that they will perform no function whatever, then they are lost as hands and feet. In ordinary and popular parlance, when a person is deprived of the use of a limb we say he has lost it. This is the ordinary sense attached to the word when used in such a connection. Now, if the feet and hands cannot be used for the purpose of moving about or walking, or for holding and handling things, they are in fact lost as much as though actually severed from the body. The expression 'loss of feet' would generally be understood to mean a loss of the use of these members; and if the lower portions of the plaintiff's body and his feet are completely paralyzed, and he is permanently and forever deprived of their use, he has suffered 'a loss of two entire feet,' within the meaning of the policy." The next case in chronological order to which our attention is called is *Stevens* v. *People's Mut. Acci. Ins. Asso.* 150 Pa. 132, 16 L. R. A. 446, 24 Atl. 662. There it was held that "an accident policy insuring against involuntary, external, violent, and accidental injuries, and not against disease of any kind, or against disabilities which are the result wholly or in part of disease or bodily infirmities, and providing for a stipulated indemnity for partial permanent disablement, which is defined to be the loss of one hand or foot or both eyes, does not cover the case of indemnity for an injury where the foot is not lost or injured, and it may be used constantly by means of an appliance of a plaster jacket to the spine, although the foot could not be used if the appliance were removed." It was held that he had neither lost the foot nor the use of it. The case of *Sneck* v. *Travellers' Ins. Co.* is next in order of time. This case was tried twice, and is reported in 81 Hun, 331, 30 N. Y. Supp. 881, and 88 Hun, 94, 34 N. Y. Supp. 545. The understanding in that case was based upon a "loss by severance of one entire hand or foot." At the first review the court held that it was error to submit the case

to the jury where the proof showed that the hand was removed a short distance back of the knuckle. Bradley, J., dissented; urging that the policy insured against loss of the hand, and that, it being shown that the entire use of the hand was lost, there might be a recovery. Upon the second hearing this view was taken; Warner and Ward, JJ., sustaining it; Lewis, J., dissenting; and Bradley, J., not voting; and this order was afterwards affirmed by the court of appeals in 156 N. Y. 669, 50 N. E. 1122. Again, in *Lord* v. *American Mut. Acci. Asso.* 61 N. W. 293, 26 L. R. A. 741, the supreme court of Wisconsin held that "it is for the jury to determine whether a total loss of three fingers and a part of another on the same hand, destruction of the joint of the thumb, and a cutting of the hand, is a loss of the hand, 'causing immediate, continuous, and total disability,' within the meaning of that clause in a policy of accident insurance." 89 Wis. 19, 26 L. R. A. 741. A number of cases are collected in a note to *Turner* v. *Fidelity & C. Co.* (Mich.) 38 L. R. A. 535, 536. In 1 Am. & Eng. Enc. Law, 2d ed. p. 301, this subject is summed up as follows: "It has been contended on behalf of the insurance companies that the provisions in regard to the 'loss' of the hands and feet must be understood to imply an actual amputation or physical severance of those members from the body. But this view has not met with favor from the courts; it being held that, to entitle the insured to recover, physical severance is unnecessary, but it is sufficient if he has been deprived entirely of the use of the feet and hands as members of the body. And there can scarcely be any doubt as to the soundness of this view, for if the feet and hands cannot be used for the purpose of moving about or walking, or for holding and handling things, they are in fact lost as much as though actually severed from the body. Many of the companies have altered their policies so as to read, 'the loss of feet or hands by severance' thereof; but this provision has been held to be intended to refer to the manner rather than to the exact physical intent of the injury." These cases establish the proposition that where an insurance policy insures against the loss of a member, or a loss of an entire member, the word "loss" should be construed to mean the destruction of the usefulness of the member, or the entire member, for the purposes to which, in its normal condition, it was susceptible of application. In all of these policies the word "loss" is used, and it is the loss of the member that is in terms insured against. As indicated in the last authority cited, the attempts of the insurance companies to avoid this construction by so changing the policy that it reads, "Loss by severance of feet or hands," has failed; the courts holding, as before, that it is the loss of the use of the member which was the object of the contract. In the present case the word "loss" is eliminated, and the insurance is against "an injury that shall cause the amputation of a limb (whole hand or foot), or total and permanent loss of eyesight." This language is not ambiguous, and, if the insurance company intended to limit its liability to cases where the entire member was actually amputated, they could not well have chosen more apt and certain language to indicate it, without supplementing it with a negative statement that should exclude recovery for the amputation of less than the entire foot or hand; and it is doubtful if that would not be open to the same construction as the language actually used. This company is comprised of the insured. They make contracts of insurance which protect against certain injuries merely. It is not for us to make contracts for them, nor should we enlarge their liabilities. We may determine the intention of the contracting parties as disclosed by the contract if it is ambiguous, or in the light of the circumstances under which it is made, if it is fairly susceptible of a different meaning from that naturally implied by the unexplained use of the words. This is neither.

The instruction of the learned circuit judge was correct, and *the judgment is affirmed.*

The other Justices concur.

MINNESOTA SUPREME COURT.

STATE of Minnesota, *Respt.*,
v.
George A. ZENO, *Appt.*

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

***1. It is competent for the legislature of this state,** in the interests of the public health and welfare, to enact laws for the purpose of regulating and throwing restrictions around the occupation or calling of barbers.

2. Gen. Laws 1897, chap. 186, in so far as it prohibits any person from following the occupation of a barber in this state without first obtaining a certificate of registration as therein required, **is valid, and not in violation of the Constitution.**

*Headnotes by BROWN, J.

(February 5, 1900.)

APPEAL by defendant from an order of the Municipal Court of Minneapolis denying a new trial after conviction for violating the statute against following the occupation of barber without a license. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Albert H. Hall** and **C. J. Cahaley,** for appellant:

The act under which defendant was tried and convicted is vicious in the extreme, since its evident purpose is the legalizing of a trade union or trust; and its offensive pa-

NOTE.—As to license for business affecting public health, see State v. Nelson (Minn.) 34 L. R. A. 318; State *ex rel.* Moriarity v. McMahon (Minn.) 38 L. R. A. 675.

ternalism is in clear contravention of constitutional limitations.

Re Jacobs, 98 N. Y. 115, 50 Am. Rep. 636.

The act cannot be justified as an exercise of police power.

The law will not allow the right of property to be invaded under the guise of a police regulation for the promotion of health when it is manifest that is not the object and purpose of the regulation.

Austin v. *Murray*, 16 Pick. 121; *Watertown* v. *Mayo*, 109 Mass. 315, 12 Am. Rep. 694; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394; *Re Jacobs*, 98 N. Y. 110, 50 Am. Rep. 636; *State* v. *Donaldson*, 41 Minn. 82, 42 N. W. 781.

The act is unconstitutional, since it deprives defendant of life, liberty, and property without due process of law.

People v. *Girard*, 73 Hun, 457; *People* v. *Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *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, 4 Sup. Ct. Rep. 652; *Live Stock Dealers & B. Asso.* v. *Crescent City L. S. L. & S. H. Co.* 1 Abb. (U. S.) 398, Fed. Cas. No. 8,408; *Wynehamer* v. *People*, 13 N. Y. 398; *People ex rel. Manhattan Sav. Inst.* v. *Otis*, 90 N. Y. 48.

Mr. L. A. Reed for respondent.

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

Defendant was convicted in the municipal court of the city of Minneapolis of a violation of chapter 186, Gen. Laws 1897, and appeals from an order denying his motion for a new trial. Defendant is a barber, and has followed that occupation since 1880,—most of the time in this state. At the time of the violation of the law in question he was located and engaged in such calling at the city of Minneapolis. On the 1st day of April, 1899, he performed certain acts within his calling upon the persons of John Madden and Rudolph Schall, without first having obtained a license as required by such law; and for this he was convicted, and sentenced to pay a fine. There is no controversy about the facts. Defendant violated the law by continuing in his occupation without a license, and was properly convicted, unless it be held that the law is unconstitutional and void. The sections of the law applicable to this case are as follows:

"Sec. 1. It shall be unlawful for any person to follow the occupation of barber in this state unless he shall have first obtained a certificate of registration as provided in this act; provided, however, that nothing in this act contained shall apply to or affect any person who is now actually engaged in such occupation, except as hereinafter provided."

Sections 2 *et seq.* provide for a board of examiners, and prescribe their duties. Section 7 provides that persons engaged in the occupation of barbers in this state at the time of the approval of the act shall be entitled to license certificates upon the payment of a fee of $1, and filing with the secretary of the board an affidavit of residence, etc.

"Sec. 8. Any person desiring to obtain a certificate of registration under this act shall make application to said board therefor, and shall pay to the treasurer of said board an examination fee of $5, and shall present himself at the next regular meeting of the board for examination of applicants, whereupon said board shall proceed to examine such person, and being satisfied that he is above the age of nineteen (19) years, of good moral character, free from contagious or infectious diseases, has either (a) studied the trade for three (3) years as an apprentice under a qualified and practising barber, or (b) studied the trade for at least three (3) years in a properly appointed and conducted barber school under the instructions of a competent barber, or (c) practised the trade in another state for at least three (3) years, and is possessed of the requisite skill in said trade to properly perform all the duties thereof, including his ability in the preparation of the tools, shaving, hair-cutting, and all the duties and services incident thereto, and is possessed of sufficient knowledge concerning the common diseases of the face and skin to avoid the aggravation and spreading thereof in the practice of said trade; his name shall be entered by the board in the register hereafter provided for, and a certificate of registration shall be issued to him. . . .

"Sec. 14. Any person practising the occupation of a barber without having obtained a certificate of registration, as provided by this act, . . . is guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine," etc.

The question as to the constitutionality of this statute is the only one involved in the case. Counsel for defendant assail the statute from all directions, and urge its invalidity on several grounds, but we need consider the points made by them only so far as they are pertinent to the statute as applied to this particular case. We will not stop to inquire whether it would be within the power of the legislature to limit the number of apprentices a barber should be permitted to have at one and the same time. Such question has no bearing upon the one now before us. It will be time enough to consider and determine it when it is presented in some case where that particular violation is complained of. The question in this case is, Is it competent for the legislature to prohibit persons from practising the calling of a barber without first obtaining a license or certificate of registration? Laws enacted for the purpose of regulating or throwing restrictions around a trade, calling, or occupation, in the interests of the public health and morals, are everywhere upheld and sustained. Such laws are within the police power of the state, and are universally sustained where enacted in the interests of the public welfare. The question presented in cases where the validity of such laws is called in question is no longer the power or authority of the legislature to enact them, but whether the occupation, calling, or business sought to be regulated is one involving the public health and interests. A person

engaged in such an occupation is not alone interested therein. The public served by him is also interested. He is interested to the extent that it provides and furnishes him with employment and a means of livelihood. The public is interested in his competency and qualifications, and it is eminently proper that there be thrown around the calling protection from intrusion by incompetents, and others inimical to the public good. It is unnecessary to discuss the grounds upon which such laws are upheld, or the objections urged against them. Counsel for defendant ably present their side of the question, but the authorities are all against them. We cite, as pertinent to the question, *State ex rel. Powell* v. *State Medical Examining Bd.* 32 Minn. 327, 50 Am. Rep. 575, 20 N. W. 238; *State ex rel. Chapman* v. *State Bd. of Medical Examiners*, 34 Minn. 387, 26 N. W. 123; *Barbier* v. *Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *People ex rel. Nechameus* v. *Warden of City Prison*, 144 N. Y. 529, 27 L. R. A. 718, 39 N. E. 686; *Singer* v. *State*, 72 Md. 464, 8 L. R. A. 551, 19 Atl. 1044; *Dent* v. *West Virginia*, 129 U. S. 121, 32 L. ed. 625, 9 Sup. Ct. Rep. 231.

Is the occupation of a barber a calling or trade involving to any degree the public health and public good? If it is, the law must be sustained. We hold that it is, and that the health of the citizen, and protection from diseases spread from barber shops conducted by unclean and incompetent barbers, fully justify the law. It is a fact of which we must take notice that the people of to-day come in contact with, and engage the services of, those following the occupation of barber, as much as, if not more than, any other occupation or profession. We must take notice of the fact, too, that the interests of the public health require and demand that persons following that occupation be reasonably familiar with, and favorably inclined towards, ordinary rules of cleanliness; that diseases of the face and skin are spread from barber shops, caused, no doubt, by uncleanliness or the incompetency of barbers. We must take notice of the fact that to attain proficiency and competency as a barber requires training, study, and experience,—training in the art, and study and experience in the management and conduct of the calling. A design and purpose to protect the public from injurious results likely to follow from such conditions is the foundation of statutes like this. And, as we must take judicial notice of the foregoing facts, the foundation for this law is apparent. And it may be said, further, that there is as much reason for a law of this kind as to barbers as there is for such a law as to dentists, pharmacists, lawyers, and plumbers. It is enacted in the interests of the public health and welfare, and we sustain it.

The contention of appellant that if the law is sustained he will be unable to continue in his business, because he cannot now obtain a license, is not sound. He was a barber engaged in the occupation at the time of the approval of the law, but he failed to make application for a license under the terms of § 7, above quoted, within ninety days, or at all; and his contention is that, because he does not come within either of the three classes of applicants specified in § 8, he cannot obtain a license at all. This statute, like all statutes enacted in the interests of the public welfare, is entitled to a broad and liberal construction, and one that will give force and effect to the intention of the law-making power. Applying such a construction, we hold that a person who has followed the occupation of a barber for three years in this state, and is otherwise possessed of the necessary qualifications, is entitled to a certificate of registration, the same as a person coming into the state from another state. There was no intention to discriminate against barbers of this state and in favor of those residing in other states, and a construction of the law which would result in such discrimination cannot be permitted.

This disposes of all questions deserving special mention.

Order affirmed.

Conrad J. ERTZ, *Respt.*,
v.
PRODUCE EXCHANGE of the City of Minneapolis *et al.*, *Appts.*

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

***A complaint which alleges that the plaintiff, a dealer in farm produce,** had a profitable business, that the defendants had conspired together to refuse to deal with him and to induce others to do likewise, it not appearing that their interference with his business was to serve any legitimate interests of their own, but that it was done maliciously, to injure him, and that the conspiracy had been carried into execution, whereby his business was ruined, states a cause of action.

(February 8, 1900.)

APPEAL by defendants from an order of the District Court for Hennepin County overruling a demurrer to a complaint filed to recover damages for injuries to plaintiff's business by defendants' alleged wrongful combination to refuse to deal with him. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Stiles & Stiles** for appellants.

Messrs. **James Robertson** and **M. C. Brady**, for respondent:

The opinion in *Bohn Mfg. Co.* v. *Hollis*, 54 Minn. 223, *sub nom. Bohn Mfg. Co.* v. *Northwestern Lumber Men's Asso.* 21 L. R. A. 337, 55 N. W. 1119, was written with reference

*Headnote by START, Ch. J.

NOTE.—For boycott or conspiracy to injure business, see also Bohn Mfg. Co. v. Northwestern Lumbermen's Asso. (Minn.) 21 L. R. A. 337, and *note;* Cote v. Murphy (Pa.) 23 L. R. A. 135; Jackson v. Stanfield (Ind.) 23 L. R. A. 588; Graham v. St. Charles Street R. Co. (La.) 27 L. R. A. 416; Macauley Bros. v. Tierney (R. I.) 37 L. R. A. 455; Hartnett v. Plumber's Supply Asso. (Mass.) 38 L. R. A. 194; Brewster v. C. Miller's Sons (Ky.) 38 L. R. A. 505; Doremus v. Hennessy (Ill.) 43 L. R. A. 797; and Boutwell v. Marr (Vt.) 43 L. R. A. 803.

only to the case under consideration, and it cannot stand (even in the absence of an anti-trust statute) as a general rule.

There was an attempt on the part of retail dealers to protect their business from the encroachments of a wholesaler. In the case at bar it is an attempt of some retailers, through malice, to injure the business of a competitor.

In the one case it was not actionable, and in the other it was.

Delz v. *Winfree*, 80 Tex. 400, 16 S. W. 111; *Van Horn* v. *Van Horn*, 52 N. J. L. 284, 10 L. R. A. 184, 20 Atl. 485; *Doremus* v. *Hennessy*, 176 Ill. 608, 43 L. R. A. 797, 52 N. E. 924.

The *Bohn Case* has not met with favor by the majority of the courts of last resort.

Hopkins v. *Oxley Stave Co.* 49 U. S. App. 709, 83 Fed. Rep. 912, 28 C. C. A. 99; *Jackson* v. *Stanfield*, 137 Ind. 592, 23 L. R. A. 583, 36 N. E. 345, 37 N. E. 14.

Injuries to property indirectly brought about by menaces, false representations, or fraud create as valid a cause of action as any direct injury from force or trespass.

Addison, Torts, p. 20; *Walker* v. *Cronin*, 107 Mass. 562; *Carew* v. *Rutherford*, 106 Mass. 10, 8 Am. Rep. 287.

The complaint in this action shows (1) intentional and wilful acts, (2) calculated to cause injury to plaintiff in his lawful business, (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of defendants (constituting malice), and (4) actual loss and damage resulting. This was sufficient.

Walker v. *Cronin*, 107 Mass. 562; *Delz* v. *Winfree*, 80 Tex. 400, 16 S. W. 111; *Van Horn* v. *Van Horn*, 52 N. J. L. 284, 10 L. R. A. 184, 20 Atl. 485; *Boutwell* v. *Marr*, 71 Vt. 1, 43 L. R. A. 803, 42 Atl. 607; *People ex rel. Mellhany* v. *Chicago Live Stock Exchange*, 170 Ill. 556, 39 L. R. A. 373, 48 N. E. 1062; *Graham* v. *St. Charles Street R. Co.* 47 La. Ann. 214, 27 L. R. A. 416, 16 So. 806; *McHenry* v. *Sneer*, 56 Iowa, 649, 10 N. W. 234.

Chapter 359, Laws 1899, controls and governs the action at bar.

The legislature, not content with making the acts of appellants unlawful, has by § 2 of said act made them criminal.

The allegations of the complaint bring appellants clearly within the statute.

United States v. *Trans-Missouri Freight Asso.* 166 U. S. 324, 41 L. ed. 1021, 17 Sup. Ct. Rep. 540; *United States* v. *Addyston Pipe & Steel Co.* 54 U. S. App. 723, 85 Fed. Rep. 279, 29 C. C. A. 141, 46 L. R. A. 122.

Where a party commits an act which is criminal, and another suffers damages in consequence, a right of action accrues to the injured party.

Cooley, Torts, 88–124; 8 Am. & Eng. Enc. Law, 2d ed. p. 598; 1 Bishop, Crim. Law, 264; 2 Addison, Torts, 850; *Doremus* v. *Hennessy*, 176 Ill. 608, 43 L. R. A. 797, 52 N. E. 924.

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

The defendants interposed a general demurrer to the complaint in this case, and they appealed from the order of the district court of the county of Hennepin overruling their demurrer. The material facts alleged in the complaint are these: The plaintiff is now, and for two and a half years past has been, engaged, at the city of Minneapolis, in the business of a commission merchant, buying and selling farm produce and commodities. His profits from his business, prior to the committing of the wrongs hereinafter stated by the defendants, were $20,000 per year. To enable him to conduct his business, it has been and is necessary for him to buy such farm produce and commodities in the market at Minneapolis, and resell the same to his customers. The defendants, during the time the plaintiff has so conducted his business, have been, and still are, engaged in buying and selling farm produce and commodities, and they are practically all the persons, firms, and corporations who are engaged in such business in the city of Minneapolis, and during such time they have and still do control, regulate, and govern the quantity and price of such farm produce and commodities, and the purchase and sale thereof. The plaintiff, prior to July 19, 1899, was accustomed to and did purchase the produce and commodities so dealt in by him from the defendants, and paid them therefor in full. But on the day named, and at various subsequent times, the defendant the produce exchange conspired, confederated, and agreed to and with all of the other defendants herein not to sell to, or buy of, plaintiff, in any manner, any farm produce or commodities for the purpose of carrying on his business. The defendant the produce exchange then and there did maliciously solicit and procure from all of its codefendants, and each of them, and from many other persons to the plaintiff unknown, an agreement not to sell to, or buy from, plaintiff such products and commodities, and did so induce its codefendants, and each of them, and other persons, by the aid of, and through the influence of, all of the defendants, not to sell to, or buy of, the plaintiff any of such products and commodities, for the purpose of his business or otherwise. In pursuance of such conspiracy, each and all of the defendants have, with such malicious and unlawful intent, ever since July 19, 1899, refused so to sell to, or buy of, the plaintiff, and have daily circulated among and reported to the patrons of the plaintiff that he was unable to buy, such products and commodities, with the intent of inducing such patrons to discontinue doing business with the plaintiff. The business of the plaintiff, by reason of the premises, has been ruined, and he has been damaged thereby in the sum of $25,000.

If the allegations of the complaint are true, and the demurrer admits them, it is certain that the plaintiff has suffered material financial injury by the acts of the defendant. Does the law afford him any remedy? Counsel for the defendants insist that the question must be answered in the negative, because their acts in the premises were lawful, and, being so, the intent with which

they did the acts is immaterial. It may be conceded that, if the acts of the defendants were lawful, the motive which actuated them is immaterial in determining the strict legal rights of the parties. The question, then, is, Were the defendants' acts legal? In its broadest aspect, this question involves considerations of the highest importance to the individual and to the public. The genius of our free institutions encourages all men to seek better fortunes, higher levels, and larger opportunities for success in life. Therefore, within proper limits, it is both lawful and commendable for men to combine for the purpose of securing better wages or larger returns from their business ventures. It is not, however, our purpose to enter upon any general discussion as to the limitations upon this right of men to combine for the purpose of furthering their own interests, without reference to the rights of others. Our sole purpose is to inquire whether the acts of the defendants in this case were, as to the plaintiff, lawful. The defendants rely upon the case of *Bohn Mfg. Co.* v. *Hollis*, 54 Minn. 223, *sub nom. Bohn Mfg. Co.* v. *Northwestern Lumbermen's Asso.* 21 L. R. A. 337, 55 N. W. 1119, in support of their contention that the defendants' acts in question were lawful. The general propositions of law laid down in the decision in that case are sound, as applied to the facts of that particular case, which were substantially these: The defendants were retail lumber dealers, and formed a voluntary association, by which they mutually agreed that they would not deal with any wholesale dealer who should sell lumber to persons not dealers at the place where a member of the association was carrying on business. The object of the association was to protect its members against sales by wholesale dealers to contractors and consumers. In case a wholesale dealer made any such sale, and refused to make amends therefor, as provided by the by-laws of the association, its secretary was required to notify all of its members of the fact, and thereafter such members were to refrain from dealing with the offending wholesale dealer. The plaintiff, the Bohn Manufacturing Company, a wholesale dealer, having made such a sale, the secretary of the association was about to send notice of the fact to all of its members. Thereupon the company commenced an action for a permanent injunction, enjoining the defendants from issuing such notices. This court held that the action would not lie. The decision was correct, but it is not applicable to the alleged facts in this case. It is to be noted that the defendants in the *Bohn Case* had similar legitimate interests to protect, which were menaced by the practice of wholesale dealers in selling lumber to contractors and consumers, and that the defendants' efforts to induce parties not to deal with offending wholesale dealers were limited to the members of the association having similar interests to conserve, and that there was no agreement or combination or attempt to induce other persons not members of the association to withhold their patronage from such wholesale dealer. In this respect the case differs essentially from the one at bar, in which the complaint does not show that the defendants had any legitimate interests to protect by their alleged combination. On the contrary, it is expressly alleged in the complaint that the combination, which was carried into execution, was for the sole purpose of injuring the plaintiff's business, and that the defendants conspired to induce the plaintiff's patrons and persons, other than the defendants, to refuse to deal with him. Such alleged acts on the part of the defendants are clearly unlawful.

It is true, as claimed by the defendants and as stated in the *Bohn Case*, that a man, not under contract obligations to the contrary, has a right to refuse to work for, or deal with, any man or class of men, as he sees fit, and that the right which one man may exercise singly many may lawfully agree by voluntary association to do jointly, provided they do not interfere with the legal rights of others. But one man singly, nor any number of men jointly, having no legitimate interests to protect, may not lawfully ruin the business of another by maliciously inducing his patrons and third parties not to deal with him. See *Walker* v. *Cronin*, 107 Mass. 562; *Delz* v. *Winfree*, 80 Tex. 400, 16 S. W. 111; *Graham* v. *St. Charles Street R. Co.* 47 La. Ann. 214, 27 L. R. A. 416, 16 So. 806; *Hopkins* v. *Oxley Stave Co.* 49 U. S. App. 709, 83 Fed. Rep. 912, 28 C. C. A. 99.

This is just what the complaint in this case charges the defendants with doing, and we hold that it states a cause of action.

Order affirmed.

STATE of Minnesota, *Respt.*,
v.
Lyman E. COWDERY, *Appt.*

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

***1. A provision in a storage receipt,** issued under § 7646, Gen. Stat. 1894, that the stored property may be mingled with other property of the same kind, or transferred to other elevators or warehouses, does not confer authority on the warehouseman to sell the property described therein.

2. Under such a receipt, when it in other respects conforms to the provisions of § 7646, Gen. Stat. 1894, the contract is a bailment, and not a sale.

3. Flax is included within the meaning and intent of §§ 7645 *et seq.*, Gen. Stat. 1894, and is subject to the protection of the warehouse law.

4. The evidence in this case does not show beyond a reasonable doubt that there was an intent to defraud the prosecutor, which is an essential ingredient of the offense charged, and the conviction is therefore set aside.

(February 6, 1900.)

*Headnotes by LOVELY, J.

NOTE.—As to sale of goods stored by warehouseman, see Hall v. Pillsbury (Minn.) 7 L. R. A. 529, and *note*.

APPEAL by defendant Cowdery from a judgment of the District Court for Dodge County convicting him of larceny in fraudulently misappropriating flax which had been delivered to him for storage. *Reversed.*

The facts are stated in the opinion.

Messrs. **Childs, Edgerton, & Wickwire** for appellant.

Messrs. **W. B. Douglas,** Attorney General, and **C. W. Somerby,** for respondent:

The tickets issued to complaining witness by the firm of Cowdery & Wheeler were contracts of bailment.

State v. *Barry* (Minn.) 79 N. W. 656; *Newhall* v. *Paige,* 10 Gray, 368; 3 Jones, Bailm. 56.

Wherever a criminal intent can be shown along with the other essentials of the offense, a prosecution under the Penal Code for larceny will lie.

The jury found from all the circumstances the essential criminal intent.

All that is necessary on this question of intent is that the intention to appropriate another's property to one's own use be present at the time of the taking, and it is sufficient if the intention be to appropriate such property for the time being; and a mental reservation or hope entertained, to be able in the future to make restitution, does not relieve the act of its criminal character.

McLain, Crim. Law, ¶¶ 641, 651.

The indictment was sufficient.

State v. *Barry* (Minn.) 79 N. W. 656; *State* v. *Comings,* 54 Minn. 359, 56 N. W. 50; *Ritter* v. *State,* 111 Ind. 324, 12 N. E. 501; *People* v. *Hill,* 3 Utah, 334, 3 Pac. 75; *State* v. *Comfort,* 22 Minn. 271; *State* v. *New,* 22 Minn. 76.

Mr. **J. J. McCaughey** also for respondent.

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

Defendant, who was jointly indicted with another person, was convicted of the crime of larceny, as bailee, in fraudulently appropriating a quantity of flax to his own use, with intent, as charged in the indictment, "to deprive the owner thereof of his property," under the provisions of subdivision 2, § 6709, Gen. Stat. 1894. Lyman E. Cowdery was a warehouseman, and, with his partner, was running an elevator at Kasson, where he received, from time to time, quantities of flax from the prosecuting witness, Bradshaw, aggregating in amount 760 bushels, and evidenced by nine receipts or tickets, which were given to the owner of the flax, and which the prosecution insist constituted the relation of bailor and bailee between the parties thereto, under the warehouse laws of this state. Sections 7645 *et seq.,* Gen. Stat. 1894. The warehousemen became insolvent, made an assignment, and were unable either to furnish the flax or put up the equivalent in money. The defendant insists that the tickets or storage receipts did not create the relation of bailment between defendant (who was tried alone) and the owner of the flax, but by the terms of such receipts constituted a sale thereof to the defendant and his partner, or, at least, authority to part with the flax; that the warehouse law, under which such contract of bailment must be established, does not apply to flax; also that, by reason of the previous business relations and conduct of the owner of the property stored with the defendant, the latter was led to believe that he was authorized to deal with the flax without reference to the terms of the receipts; from which, as defendant claims, it follows that there was no proof of the necessary intent to defraud, which as alleged in the indictment is an essential element of the statute, and must therefore be proved. The warehouse receipts referred to contain the requisites of § 7646, Gen. Stat. 1894, in all respects. They, "in clear terms state the amount, kind, and grade of the grain stored, the terms of storage," and, in addition, the following provision, which embraces the pith of the contention upon the construction of the storage receipt, *viz.:* "Express authority is given, by acceptance hereof, that said grain or seed may be mingled with grain or seed of other persons, and shipped or removed to any other elevator we may select." And it is urged that these provisions, which authorize a removal of the flax, etc., take this case out of the provisions of the Penal Code.

It is urged, in support of this claim, that an interpretation of the warehouse statutes should be made that does not conflict with the generally settled rules of the common law, and that the particular provision of these contracts quoted above is inconsistent with the theory of a bailment. While it is unquestionably true that the commingling of the property of one person with the property of another, with the consent of the owners, so as to destroy the specific identity of each, conclusively negatives the relation of bailor and bailee upon common-law rules, it must be remembered that it was the object of the statute to provide a remedy for the protection of the agricultural producers of this state which they did not have before, and, if the purpose and practical means by which such protection is afforded is to be found clearly expressed in the statute, it necessarily must be the statute, instead of the common law, that we are to interpret. It is our duty to discover the true legislative intent expressed by the statute, for, within constitutional limitations, that is always the real test in such cases. We cannot allow a repeal or modification of a statute by the law which the statute itself seeks to change; this is self-evident. Neither can we abridge the effectiveness of a wholesome statute by judicial construction or finesse. The very nature of the business that has long been conducted in this state by the owners of elevators and warehouses in dealing with the agricultural producers would lead to the inference that the provisions of the statute referred to were intended to create on the part of the warehousemen an obligation to have the owner's property or its equivalent ready for delivery when called for. The receipt, according to the statute, must be in

writing, and it must state amount and grade of grain, charges for storage, and advances paid, which receipt shall be prima facie evidence that the holder thereof has in store with the party issuing such receipt the amount of grain, of the kind and grade mentioned in such receipt, and penal provisions follow against false statements, etc. The suggestion arises, Why should this contract be in writing? Why so explicit? and Why, upon its face, should evidence of its present money value be required, unless it was intended to be evidence of title and to become negotiable? And it follows that, if the title of the property is to remain in the owner, by necessary implication, that the contract, while not a common-law bailment, becomes vested with the characteristics of that trust relation, and is a bailment under the statute. We do not think that the acts of mingling produce of one person with that of another, or the removal of such property from one elevator to another, are in necessary conflict with this view. These acts are essential in the conduct of the elevator and warehouse business. It must be mingled with other produce, if it is taken in store, or there would have to be a warehouse for every patron; and, in facilitating the business in question, it likewise may be necessary to remove the property stored from one depository to another, to accomplish practical ends. The earnestness of the able counsel for defendant in presenting their views upon this point has led to this consideration of this view, rather than any serious doubt upon the question itself; for we think the contention now urged has been anticipated and specifically provided against by the warehouse law itself. Section 7645, Gen. Stat. 1894,—the preceding section to the one last referred to,—provides, *inter alia*, "that whenever any grain shall be delivered for storage to any person . . . such delivery shall in all things be deemed and treated as a bailment, and not as a sale, of the property so delivered, notwithstanding such grain may be mingled by such bailee with the grain of other persons, and notwithstanding such grain may be shipped or removed from the warehouse, elevator, or other place where the same was stored," etc. While this language remains in the statute, it is difficult to see how there can be room for interpretation, for the language of the receipts in this case is almost identical with the provisions which the statute declares shall not affect the liability of the warehouseman as bailee, and that this court has so understood its effect is clear from its decision in *State* v. *Barry* (Minn.) 79 N. W. 556. Upon the receipts themselves we think it is clear that defendant was a bailee, and amenable to the law under which he was indicted.

Again, it is urged for defendant that the warehouse acts do not provide for storage of flax, which is not included in any proper definition of the word "grain." The distinctive word of the statute is "grain," and "flax" is not specifically referred to by that name, and it, of course, becomes a question whether the storage of flax was within the legislative intent when these acts were passed. An imposing array of dictionaries and encyclopedias were produced on the argument to show that grain is a berry and flax a fiber. But this is a question of reasonable construction of a statute, rather than a scientific analysis, which must yield to the popular understanding that ought to prevail in such cases. Courts appeal to dictionaries in questions of doubt in science, and perhaps in search of evidence of popular understanding, when in doubt. But where, within the knowledge of the court, the dictionary conflicts with popular understanding, the latter will be adopted, although it may require a subsequent enlargement of the definitions of the lexicographer, which is continually necessary, since the dictionary is an evidence, rather than an originator, of definitions. We have no doubt whatever from the custom at the time these statutes were enacted that they were supposed to apply to flax. It would startle the legislature that enacted them, or the legislatures that have convened since without recognizing the necessity of amending them, as well as the farmers of this state, who have continuously, since the law was passed, accepted receipts for deposits of flax, to tell them that in that respect it was not the intention of the lawmakers to protect them as well as the growers of wheat and barley. We think it would likewise startle the warehousemen themselves to construe such a distinction into the law. The defendant evidently saw no difference at the time of the issuance of his receipts to Bradshaw, for the words "grain" and "flax" are used convertibly in such receipts, and we judge from the record that his able counsel did not urge this view during the trial, or until after their briefs in this court had been printed. While in criminal cases, under the harsh penal statutes that once governed in England, nice and technical constructions upon indictments and statutes were adopted *in favorem vitæ*, a more liberal rule has since prevailed, more consistent with common sense, and we shall adopt in this case the construction which protects the numerous bailors of flax in this state, which we have no doubt was within the legislative, as well as the popular, mind when these laws were enacted.

The remaining assignments of error, with the exception of one, relate to alleged errors that are not likely to occur again, and, in view of the disposition we shall make of this case, need not be considered.

The evidence of defendant's intent to defraud in this record is solely the presumption arising from his inability to turn over to the prosecutor the flax stored upon demand, and it seems doubtful if the complaining witness intended a criminal prosecution until many months afterwards, when such demand, which seems to have been merely formal, without expectation that it would be complied with, was made. It is true that this proof of demand and refusal raises a presumption of guilt, and makes a prima facie case against defendant, but this presumption is so overcome by opposite infer-

ences, from admitted and undisputed facts, that we cannot permit the verdict to rest upon it alone. We do not find in this record any of the indicia of crime usual in similar prosecutions. The defendant had made no preparations for business collapse. He had run his affairs in the usual way, which had grown up, under the sanction of prosecutor and his other patrons, for many years, until, on a declining market, he found himself short, and unable to meet all his obligations. That defendant was a man of irreproachable character was established at the trial by a formidable number of witnesses, some of whom had stored produce with him, and had suffered loss, under the same circumstances as the complaining witness. Previous to the suspension of defendant's business, he and the prosecutor had conducted their business relations upon terms of unlimited confidence, for many years. The latter had stored his produce with defendant, sometimes receiving receipts and sometimes not. In all such cases it seems that such deposits were treated by defendant as if he had authority to dispose of them according to his best judgment, with the sanction of the prosecutor. These and other facts disclosed by the record lead us to the conclusion that this verdict should not be allowed to stand. Our views in this respect are strengthened by a statement of the learned trial court, which expressed doubts of the justness of the result.

It is ordered that *the judgment of the court below be set aside*, and a new trial awarded.

MISSISSIPPI SUPREME COURT.

J. J. HODGES, *Appt.*,
v.
W. L. CAUSEY.
(.....Miss.....)

1. **A trespassing dog cannot lawfully be killed** merely because the owner has been notified to keep the dog off the premises.
2. **The reasonable necessity for killing a trespassing dog** is a question for the jury under all the facts and circumstances of the case.
3. **The value of a dog which has no market value** may be shown by proving the pedigree, characteristics, and qualities of the dog, and then proving by witnesses who know these things their opinions as to the value.

(January 1, 1900.)

APPEAL by plaintiff from a judgment of the Circuit Court for Sunflower County in favor of defendant in an action brought to recover damages for the killing of a dog. *Reversed.*

The defense was that the dog was trespassing, and that the killing was done to prevent it from damaging corn and cotton in the field through which it was running, and that plaintiff had been notified to keep the dog off defendant's premises.

Further facts appear in the opinion.

Messrs. **W. S. Chapman** and **W. R. Chapman** for appellant.

Messrs. **Frank Johnston** and **Thomas R. Baird** for appellee.

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

It may be that "property in dogs is of an imperfect or qualified nature," as held in *Sentell* v. *New Orleans & C. R. Co.* 166 U. S. 698, 41 L. ed. 1169, 17 Sup. Ct. Rep. 693; *Ward* v. *State*, 48 Ala. 161, 17 Am. Rep. 31; *Wilton* v. *Weston*, 48 Conn. 325; and *Carthage* v. *Rhodes*, 101 Mo. 175, 9 L. R. A. 352, 14 S. W. 181. And it is doubtless true that much of the conflict of decision touching this subject is due to the varying statutes of different states as regards their being the subject of larceny, etc. But it is very correctly said in the learned note to *Hamby* v. *Samson* (Iowa) 67 Am. St. Rep. at page 297, that "in the United States there has been a quite noticeable tendency in legislation and judicial decisions to recognize a complete property in dogs." When the right to kill a trespassing dog is in question, doubtless the difference in nature and instincts between the dog and ordinary domestic animals, as the horse or cow, may properly enter into its solution. It is said in the exhaustive note to this same case of *Hamby* v. *Samson* (Iowa) 40 L. R. A. at page 510, that "it is generally held that a merely trespassing dog cannot be killed," and the authorities pro and con are cited. In that note, and also in the note to *Tonawanda R. Co.* v. *Munger*, 49 Am. Dec., at page 260, illustrations are given of the conditions under which it would be lawful to kill a trespassing dog: Sheep-killing dogs may be killed; dogs destroying deer, fowls, or other animals, where necessary to their preservation; howling dogs on one's premises may be killed, etc. But it is said the dog must be killed at the time and not on account of past damage done by him. Id., and authorities. The true rule is thus stated in 67 Am. St. Rep., note, at pages 294, 295: "But one is never justified in going to excessive lengths in the defense of himself or his property from assault or injury. The method of defense adopted must bear a certain relation to the character or seriousness of the threatened injury. . . . The fact that a dog is trespassing does not justify his wanton or malicious destruction." And again: "In any case, the question as to whether the defendant was justified in killing or injuring plaintiff's dog should be submitted to the jury, to be decided from a consideration of the pe-

NOTE.—As to the right to kill dogs, see Hubbard v. Preston (Mich.) 15 L. R. A. 249, and *note*; also Simmonds v. Holmes (Conn.) 15 L. R. A. 253; Jenkins v. Ballantyne (Utah) 16 L. R. A. 689; Nehr v. State (Neb.) 17 L. R. A. 771; Bowers v. Horan (Mich.) 17 L. R. A. 773; Patton v. State (Ga.) 24 L. R. A. 732; and Hagerstown v. Witmer (Md.) 39 L. R. A. 649.

culiar facts and circumstances of the case." The court virtually told the jury, in its modifications of plaintiff's instructions, that, "if they believed defendant had warned plaintiff not to let his dogs run in his field," defendant was not liable. This was error. Notice to keep his dogs out was one fact, but not the only fact, to be considered. Notice of that sort is not conclusive. See authorities collected in paragraph 3, 49 Am. Dec. 259. When it is borne in mind of what great value some dogs are, the reasonableness of the general rule against the right to kill a mere trespassing dog is apparent. See *Mullaly* v. *People*, *supra*, 86 N. Y. 365, and note, 40 L. R. A. p. 510. Here, at the time this English deerhound was killed, she was running through the corn rows in November, when the corn was thoroughly matured. She had done at that time no damage to the cotton. The defendant says he killed her to prevent her doing damage by knocking out cotton from the stalks. The jury should not have been told that notice was a perfect defense. All the circumstances in evidence were before them, and the reasonableness of the alleged necessity of killing the dog to save property should have been left to them, as a question of fact, under proper instructions as to the law.

The court also erred in its instruction as to the necessity of proving market value. The doctrine supported by reason and the authorities is that you may prove the market value if the dog has any, and, if not, then his "special or pecuniary value to his owner, that may be ascertained by reference to his usefulness and services." *Heiligmann* v. *Rose*, 81 Tex. 222, 13 L. R. A. 275, 16 S. W. 932. And it is perfectly competent to prove the pedigree, characteristics, and qualities of the dog, and then prove, by witnesses who know these things, their opinions as to the value. *Bowers* v. *Horen*, 93 Mich. 420, 17 L. R. A. 773, 53 N. W. 535. And on both these propositions see, specially, the notes to *Hamby* v. *Samson* (Iowa) 67 Am. St. Rep. 292, 293, with the authorities, and the other in 40 L. R. A. 515, 518 (viii.), *et seq.*

Judgment reversed, verdict set aside, and cause remanded for a new trial.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Daniel D. FORD
v.
MT. TOM SULPHITE PULP COMPANY.

(172 Mass. 544.)

1. **An employer need not warn an employee** whose special business is to oil a shaft and bearing, of his introduction of a set screw to fasten a collar near the end of the shaft, although it projects in such a manner as to be likely to catch the clothing of persons coming near it.
2. **Evidence that it is not customary in factories to have collars** with projecting set screws placed on revolving shafts near pulleys, where it is necessary for employees to go frequently, is not admissible to show the duty of a particular employer towards his employees.

(February 28, 1899.)

REPORT by the Superior Court for Hampshire County for the opinion of the Supreme Judicial Court, of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Judgment for defendant.*

The facts are stated in the opinion.

Mr. **John B. O'Donnell**, for plaintiff:

The principle by which the servant is presumed to assume the risks of the business should not be so extended as to impair in the least degree the obligation resting upon the master, in the prosecution of a business involving unusual risk of health, of life, or limb, to employ well-guarded instruments and competent agents.

Cayzer v. *Taylor*, 10 Gray, 274, 69 Am. Dec. 317.

NOTE.—*Right of a servant to recover for injuries caused by projecting screws in shafts and other moving machinery.*

I. *Discussion of the question whether the maintenance of a set screw imports negligence at common law.*
II. *Liability of master under statutes.*
III. *Defenses of assumption of risks and contributory negligence.*

I. *Discussion of the question whether the maintenance of a set screw imports negligence at common law.*

The doctrine adopted by some courts is that a master is, as matter of law, not guilty of negligence in maintaining an uncovered shaft with a projecting screw, this doctrine being referred to the principle that it is a common contrivance preferable to any known device for the purpose which it is designed to serve. Hale v Cheney (1893) 158 Mass. 268, 34 N. E. 255 (there plaintiff was only sixteen years of age, but no weight was attached to this fact); Goodnow v. Walpole Emery Mills (1888) 146 Mass. 261, 15 N. E. 576; Dillman v. Hamilton (1898) 14 Mont. Co. L. Rep. 92 (plaintiff was twenty years old); Lewis v. Simpson (1892) 3 Wash. 641, 29 Pac. 207.

Or, as the rule may also be stated, to leave gearings, set screws, and other parts of machinery unboxed is not negligence, where other manufacturers in the same line of business operate their machinery in the same manner. Wabash Paper Co. v. Webb (1896) 146 Ind. 303, 45 N. E. 474.

It follows, therefore, that although there may be a safer kind of set screw which is also in common use, the master owes the servant no duty to box the pulley or shaft, or to change the set screw for a safer one. Rooney v. Sewall & D. Cordage Co. (1894) 161 Mass. 153, 159, 36 N. E. 368; Goodnow v. Walpole Emery Mills (1888) 146 Mass. 261, 15 N. E. 576.

But it has recently been held by one of the Federal courts of appeals that the doctrine that a master is not bound to abandon the use of a particular machine which is in common use because there are other better and safer machines to be had, cannot be successfully invoked for the purpose of excusing him for his failure to place a suitable guard around machinery which is of such a nature, or so located, as to be a constant menace to the safety of those who, in the discharge of their duties, are constantly compelled to pass in close proximity to it. In such a case the obligation to place a suitable guard around the machinery is

When the plaintiff entered the defendant's service he impliedly agreed to assume all the obvious risks of the business, including the risk of injury from the kind of machinery then openly used. This could not include working near such a set screw in the dark.

Rooney v. *Sewall & D. Cordage Co.* 161 Mass. 153, 36 N. E. 789.

Any person who allows a dangerous place to exist on his premises is responsible for an injury caused thereby to any other person who enters on the premises by his invitation or procurement, in the use of due care and without notice of the danger.

Coombs v. *New Bedford Cordage Co.* 102 Mass. 572, 3 Am. Rep. 506.

Assuming that the set screw was always there, in the dark and not seen or known by the plaintiff, the risk was not so obvious that the plaintiff must be taken to have assumed it.

Redmund v. *Butler*, 168 Mass. 367, 47 N. E. 108; *Ciriack* v. *Merchants' Woolen Co.* 151 Mass. 152, 6 L. R. A. 733, 23 N. E. 829; *Dolphin* v. *Plumley*, 167 Mass. 167, 45 N. E. 87; *McKee* v. *Tourtellotte*, 167 Mass. 69, 44 N. E. 1071.

The set screw was not there when plaintiff made his contract, and he did not know of its existence. He therefore did not assume the risk.

Rooney v. *Sewall & D. Cordage Co.* 161 Mass. 153, 36 N. E. 789.

If the set screw was there when the plaintiff was employed, he, being a laboring man, should have been informed of it and instructed; *a fortiori* if it was not there till long afterwards. In either case he should have been informed and instructed by the defendant.

De Costa v. *Hargraves Mills*, 170 Mass.

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no less imperative than his duty to remedy a defect in the machine itself. Homestake Min. Co. v. Fullerton (1895) 36 U. S. App. 32, 69 Fed. Rep. 923, 16 C. C. A. 545.

This humane and reasonable doctrine, which embodies the principle laid down by the Supreme Court of the United States, that conformity to the usage of other employers does not conclusively negative the existence of negligence (Wabash R. Co. v. McDaniels (1882) 107 U. S. 454, 27 L. ed. 605, 2 Sup. Ct. Rep. 932), was enunciated in refusing to uphold the contention of defendant's counsel that an employee might be held to assume the risk of bolts protruding from a coupling of a revolving shaft, notwithstanding a promise of the foreman to cover it, on the ground that such promise was, not to repair an existing defect in the machinery, but to supply a new or additional appliance which the employer is under no obligation to furnish.

The liability of the master was held to be for the jury to decide, the evidence being that the servant's clothing was caught upon protruding bolts of a coupling of a rapidly revolving shaft located in a narrow and dark tunnel, near a cross timber under which such employee was obliged to stoop or crawl while passing through the tunnel in the discharge of his duties. *Ibid.*

In Minnesota, also, it has been held that the question as to a master's negligence is for the jury, in an action for injuries to a servant whose coat sleeve was caught by a set screw on a revolving shaft as he was attempting to place a belt upon a pulley 2 inches therefrom, where it appears that the head of the screw was not protected or guarded in any way, that it was a cube ½ inch square and projected at least ⅝ of an inch from the shaft, which was revolving about 150 times to the minute, and that it was frequently necessary to adjust the belt upon the pulley. Pruke v. South Park Foundry & Mach. Co. (1897) 68 Minn. 305, 71 N. W. 276.

But in another case the same court took the rather refined distinction that even if the defendant was negligent in having a shaft with a set screw projecting so far as to be dangerous to a servant whose work required him to be in close proximity to it, there could be no liability for an injury received by a servant who was oiling the machinery at some distance away, where the chances of his falling against the shaft were so slight and remote that they could not reasonably have been anticipated. Groff v. Duluth Imperial Mill Co. (1894) 58 Minn. 333, 59 N. W. 1049.

The present writer ventures to think that the reference to the test of reasonable anticipation is, under such circumstances, wholly unwarrantable. That the duty to provide a safe place of work inures in favor of all servants who are rightfully at the particular point where the dangerous conditions which are alleged to import culpability are found, seems to be a necessary corollary from the principles which define the position of a person invited on premises, as contrasted with the position of one who is a mere licensee or trespasser. The only ground, it is submitted, upon which a servant injured by uncovered machinery should be debarred from recovery is that his presence at the spot where the accident occurred amounted to positive contributory negligence, and that this is the single case in which a master should be allowed to excuse himself by the plea of nonanticipation.

In Galveston Oil Co. v. Thompson (1890) 76 Tex. 235, 13 S. W. 60, the court seems to have regarded a shaft with protruding screws as an appliance the maintenance of which imported negligence, but the specific ground of recovery was that the plaintiff had been negligently ordered to perform a service not within the scope of his employment.

Whether a master can be held liable for omitting to instruct a servant as to the position of a set screw depends upon whether the servant was inexperienced to such a degree that he could not reasonably be expected to understand the danger arising from it, and the master knew or ought to have known of that inexperience. Ingerman v. Moore (1891) 90 Cal. 410, 27 Pac. 306.

A machinist and engineer is chargeable with knowledge that set screws are in constant use in machinery, and cannot hold a master liable for an omission to apprise him of the danger caused by one on a shaft which he is repairing. Goodnow v. Walpole Emery Mills (1888) 146 Mass. 261, 15 N. E. 576; Keats v. National Heeling Mach. Co. (1895) 21 U. S. App. 656, 65 Fed. Rep. 940, 13 C. C. A. 221.

As to the duty of instruction, see, generally, *note* to James v. Rapides Lumber Co. (1898; La.) 44 L. R. A. 33.

II. *Liability of master under statutes.*

Under the Massachusetts employers' liability act of 1887 it is held that a set screw on a machine used for reeling wire does not of itself constitute a defect in the ways, works, or machinery, where it is not out of order, and is a common device for the purpose for which it is used. Donahue v. Washburn & M. Mfg. Co. (1897) 169 Mass. 574, 48 N. E. 842.

But under the similar Ontario act, known as the workmen's compensation for injuries act (Ont. Rev. Stat. 1887, chap. 141), the conclusion arrived at has been that a verdict of a jury based on the theory that a set screw is a defect is justifiable. O'Connor v. Hamilton Bridge Co. (1894) 25 Ont. Rep. 12, 21 Ont. App. Rep. 596, 24 Can. S. C. 598.

Whether a set screw is a breach of a statute expressly requiring the covering of machinery

375, 49 N. E. 735; *La Fortune* v. *Jolly*, 167 Mass. 170, 45 N. E. 83; *Laplante* v. *Warren Cotton Mills*, 165 Mass. 487, 43 N. E. 294; *O'Connor* v. *Adams*, 120 Mass. 427.

Messrs. **Brooks & Hamilton**, for defendant:

There was no evidence of any breach of duty by the defendant to the plaintiff.

Rooney v. *Sewall & D. Cordage Co.* 161 Mass. 153, 36 N. E. 789; *Connelly* v. *Hamilton Woolen Co.* 163 Mass. 156, 39 N. E. 787; *Goodnow* v. *Walpole Emery Mills*, 146 Mass. 261, 15 N. E. 576; *Carey* v. *Boston & M. R. Co.* 158 Mass. 228, 33 N. E. 512; *Donahue* v. *Washburn & M. Mfg. Co.* 169 Mass. 574, 48 N. E. 842.

The evidence of custom in other factories was immaterial.

Rooney v. *Sewall & D. Cordage Co.* 161 Mass. 161, 36 N. E. 789; *Moynihan* v. *King's Windsor Cement Dry Mortar Co.* 168 Mass. 450, 47 N. E. 425; *Tenanty* v. *Boston Mfg. Co.* 170 Mass. 323, 49 N. E. 654.

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

This is an action by one of the defendant's workmen, brought under the statute and at common law, for personal injuries caused by being caught by a set screw fastening a collar near the end of a revolving shaft. According to the evidence for the plaintiff, the set screw had been put in since the beginning of his employment, and, although he had charge of the machinery in the room, and oiled the shaft and bearing, he never had seen this screw. It seems not to have been disputed that there were other similar set screws in the place. The shaft referred to was about 13 feet from the floor, and at the time of the accident the plaintiff was on a platform 3 feet lower than the shaft, trying to throw a belt off a pulley at the end of it, on the other side of the bearing, and 1 foot distant from the set screw. There was not must light. The presiding judge took the case from the jury, and it is here on report.

We are of opinion that the ruling was right, and that the case cannot be distinguished satisfactorily from the numerous other cases in this commonwealth already decided concerning set screws. *Donahue* v. *Washburn & M. Mfg. Co.* 169 Mass. 574, 48 N. E. 842, and cases cited. This case shows that a few years ago a set screw was a common device. There is no evidence that it has ceased to be one. In *Goodnow* v. *Walpole Emery Mills*, 146 Mass. 261, 267, 15

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seems to depend upon the terms in which it is expressed.

Thus, shafting and set screws in a factory, suspended 9 feet above the floor, are not within the provisions of N. Y. Laws 1892, chap. 63, § 8, requiring them to be "properly guarded." Glassheim v. New York Economical Printing Co. (1895) 13 Misc. 174, 34 N. Y. Supp. 69.

On the other hand, the maintenance of unprotected spindles with a projecting set screw has in Canada been regarded as a breach of the factories act (Ont. Rev. Stat. 1887), chap. 208, § 15, subsec. 1, by which the requirement is that "moving machinery shall be fenced." O'Connor v. Hamilton Bridge Co. (1894) 25 Ont. Rep. 12, 21 Ont. App. Rep. 596, 24 Can. S. C. 598.

III. *Defenses to assumption of risks and contributory negligence.*

An experienced workman not shown to have been under full age or of less than average understanding assumes the risk of his glove catching on the set screw of a machine used for reeling wire, while reaching in his hand to get the wire for the purpose of taking the reel from the block. Donahue v. Washburn & M. Mfg. Co. (1897) 169 Mass. 574, 48 N. E. 842.

It is for the jury to say whether the risk of crossing a revolving shaft with two set screws projecting therefrom was appreciated by a servant who had no knowledge of machinery, and who was performing such duties that he had nothing to do with the operation of the shaft. Roth v. Northern P. Lumbering Co. (1889) 18 Or. 205, 22 Pac. 842.

It is not a conclusion of law from the fact that the plaintiff was aware of the existence of a set screw, and sprightly for one of his years, that he was aware of the risk of passing over the shaft while in motion. Dowling v. Allen (1881) 74 Mo. 13, 41 Am. Rep. 298.

Whatever danger there is in the fact that a screw projects beyond the crank of a hand car, and that there is for this reason an increased probability that the clothes of a man turning the crank may be caught, is as well known and as obvious to one who has used the car for several days as it is to his employer. Carey v. Boston & M. R. Co. (1893) 158 Mass. 228, 33 N. E. 512.

An employee in a mill, who, acting within the scope of his duty, is ordered by the foreman to go up a ladder standing against a belt box into which a revolving shaft runs at right angles and nail a board on the box, in performing the service is injured by his apron and jacket catching on the shaft which is plainly visible and is seen by him, cannot recover from his employer. Russell v. Tillotson (1885) 140 Mass. 201, 4 N. E. 231.

A servant who drives a wagon along a particular way by the express direction of his master's representative, and is injured by the projecting bolts of a revolving shaft which, when it is too late, he finds himself unable to clear, while seated in the wagon, is not debarred from recovery by the rule that a servant must, at his peril, choose the safer of two alternative methods of doing his work. Such a direction is an implied statement that the way indicated is reasonably safe, and an instruction withdrawing the consideration of the direction from the jury is erroneous, when the question of the servant's exercise of due care is submitted to them. Hawkins v. Johnson (1886) 105 Ind. 29, 55 Am. Rep. 169, 4 N. E. 172.

The question as to contributory negligence of a servant injured by catching his coat sleeve upon a set screw upon a revolving shaft while he was attempting to adjust a belt upon a pulley on the shaft is for the jury, where it appears that he had often adjusted the pulley, and had never noticed the screw, and that other employees who had adjusted the belt in the same manner had not noticed it. Pruke v. South Park Foundry & Mach. Co. (1897) 68 Minn. 305, 71 N. W. 276.

In Dowling v. Allen (1881) 74 Mo. 13, 41 Am. Rep. 298, it was held that it was for the jury to determine whether a boy of seventeen, who was working in a foundry, was negligent, where he was ordered to stop an engine and to hurry, this not being a part of his regular duties, and in executing the order his trousers were caught by an uncovered set screw and collar on a revolving shaft over which he stepped.

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N. E. 578,—a case very like the present,—it was said that "there was no danger which, in view of the plaintiff's knowledge and capacity, must not have been well understood by and apparent to him, and there was, therefore, no negligence on the part of the defendant in exposing him to it." See also *Hale* v. *Cheney*, 159 Mass. 268, 271, 272, 34 N. E. 255. In *Rooney* v. *Sewall & D. Cordage Co.* 161 Mass. 153, 36 N. E. 789, it was held that an employer did not need to warn an adult workman of the presence and dangers of a set screw when employing him. As has been said or implied in other cases, where the danger is obviously great, as in the case of a revolving shaft, it is not necessary to give warning of elements which merely enhance the risk. *Carey* v. *Boston & M. R. Co.* 158 Mass. 228, 231, 33 N. E. 512. See also *Keats* v. *National Heeling Mach. Co.* 21 U. S. App. 656, 65 Fed. Rep. 940, 13 C. C. A. 221. The same considerations apply to the subsequent introduction of a set screw, when, as here, there is no pretense that the plaintiff remembered the alleged previous condition of the shaft, and was acting in reliance upon his former observation; and when, further, it was the plaintiff's especial business to take charge of the machinery, and therefore to inform himself of its construction.

The question "whether or not it is customary in factories to have a collar with a projecting set screw placed near a pulley where it is necessary for a person to go frequently to do something with reference to putting on a belt," etc., was properly excluded. See *Rooney* v. *Sewall & D. Cordage Co.* 161 Mass. 153, 161, 36 N. E. 789. The question in this highly specific form, supposing it to admit of an honest answer, must have been intended to furnish a pattern upon which the jury were to model the defendant's duty, and it was at least within the discretion of the judge to exclude evidence directed to that point. It would have been admissible, no doubt, to show that set screws were going out of use, and no longer were to be expected or looked out for without special warning. But that was not what the evidence meant.

Judgment for defendant.

NEW HAMPSHIRE SUPREME COURT.

STATE of New Hampshire
v.
Louis L. WELLS.

(.....N. H.....)

One who solicits orders for a firm having a permanent place of business in the state, without carrying any goods except those which have been previously ordered by his customers, or exposing any goods for sale, is not doing "business as a hawker or peddler," nor "exposing for sale or selling" goods, within the meaning of Laws 1897, chap. 76, requiring a license from peddlers.

(March 17, 1899.)

RESERVATION by the Belknap County Court for the opinion of the full bench of an indictment for selling goods without a license contrary to the provisions of the statute. *Judgment for defendant.*

Defendant resides in Laconia, and is employed to go from place to place within the county taking orders for certain kinds of groceries. The orders would be taken and filled from the employer's store in Concord, and delivered by defendant in about a week from the time when taken. He neither carried nor exposed for sale any goods, but confined himself to taking orders and delivering the goods to fill them.

Further facts appear in the opinion.

Mr. **F. M. Beckford,** for the State:

Chapter 76 of the Laws of 1897 was intended to protect local dealers in their locality, and also the public against the fraud too often imposed upon the people by hawkers and peddlers.

Graffty v. *Rushville*, 107 Ind. 502. 57 Am. Rep. 131, 8 N. E. 609; 3 Jacob, Law Dict. 1st Am. ed. 1811, p. 241; 10 Petersdorff, Abr. p. 206; 1 Bouvier, Law Dict. p. 631; 2 Bouvier, Law Dict. p. 306.

Going about taking orders constitutes a sale within the meaning of the law.

Graffty v. *Rushville*, 107 Ind. 502. 57 Am. Rep. 131, 8 N. E. 609; 9 Am. & Eng. Enc. Law, p. 307; *State* v. *Ascher*, 54 Conn. 299, 7 Atl. 822.

The question of where the goods were purchased by a hawker or peddler is of no consequence.

Laws 1897, chap. 46; *State* v. *Powell* (N. H.) 41 Atl. 171.

Messrs. **Streeter, Walker, & Hollis,** for defendant:

A peddler is one who carries about small commodities on his back or in a cart or wagon, and sells them.

Pegues v. *Ray*, 50 La. Ann. 574, 23 So. 904; *Kennedy* v. *People use of LaJunta*, 9 Colo. App. 490, 49 Pac. 373; *Com.* v. *Farnum*, 114 Mass. 270; *Com.* v. *Ober*, 12 Cush. 493; *Davenport* v. *Rice*, 75 Iowa, 74, 39 N. W. 191.

Neither taking the order, nor delivering the goods, constitutes one a peddler.

NOTE.—On the question, Who is a peddler?—see Com. v. Gardner (Pa.) 7 L. R. A. 666, and *note;* Wrought Iron Range Co. v. Johnson (Ga.) 8 L. R. A. 273, and *note;* Emmons v. Lewistown (Ill.) 8 L. R. A. 328; *Re* Wilson (D. C.) 12 L. R. A. 624; Stuart v. Cunningham (Iowa) 20 L. R. A. 430; Hewson v. Englewood (N. J.) 21 L. R. A. 736; State v. Morehead (S. C.) 26 L. R. A. 585; South Bend v. Martin (Ind.) 29 L. R. A. 531; and State v. Coop (S. C.) 41 L. R. A. 501.

Rex v. *M'Knight*, 10 Barn. & C. 734.

The fundamental idea contained in the definition of a peddler is that he is a person carrying his stock in trade with him in a pack or cart, and having the capacity to then and there close a bargain and consummate the sale by immediate delivery.

Com. v. *Ober*, 12 Cush. 493; *Graffty* v. *Rushville*, 107 Ind. 502, 57 Am. Rep. 128, 8 N. E. 609.

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

The indictment is for a violation of chapter 76, Laws 1897, entitled "An Act in Relation to Hawkers and Peddlers." Section 1 provides that "no person shall do any business as a hawker or peddler, or go about from town to town, or from place to place in the same town, exposing for sale or selling any goods, wares, or merchandise," except certain kinds of property therein named, without a license. It is apparent from the title of the act and from its terms that it was designed to affect hawkers and peddlers, and to regulate their business. The language used expresses the understanding of the legislature as to what acts constitute the business of a hawker or peddler. This definition is in accordance with the generally understood and accepted meaning of those terms.

The only question presented is whether the defendant, in doing what he did without a license, was guilty of a violation of the statute. "The leading primary idea of a hawker and peddler is that of an itinerant or traveling trader, who carries goods about in order to sell them, and who actually sells them, to purchasers, in contradistinction to a trader, who has goods for sale, and sells them, in a fixed place of business." *Com.* v. *Ober*, 12 Cush. 493, 495. The defendant did not carry any goods about with him for sale; neither did he expose any for that purpose. He solicited orders for his employers, a firm having a permanent place of business in this state, and subsequently delivered the goods thus ordered. He made no sales on his own account. The sales were made by the firm through the defendant, as their agent. The defendant, in what he did, was not doing "business as a hawker or peddler," nor was he "exposing for sale or selling" goods, within the meaning of the statute. *Com.* v. *Ober*, 12 Cush. 493; *Com.* v. *Farnum*, 114 Mass. 267; *Davenport* v. *Rice*, 75 Iowa, 74, 39 N. W. 191; *Stuart* v. *Cunningham*, 88 Iowa, 191, 20 L. R. A. 430, 55 N. W. 311; *Rex* v. *M'Knight*, 10 Barn. & C. 734. The acts of the defendant in taking the orders, and afterwards delivering the goods on those orders, for the company who employed him, were substantially the same as those of the employee of the ordinary retail grocery firm who takes orders and delivers goods. The only difference is that the grocer's clerk usually confines his operations to the town or city in which his firm is located, while the defendant extended his over a wider field. But no distinction can be made between the acts of the two on this ground, because the language of the statute makes it equally an offense for a person to go about "from place to place in the same town, exposing for sale or selling any goods," or for one to "go about from town to town" doing the same thing. It is plain that the legislature never intended to include the usual taking of orders and delivering of goods by the employee of a grocery store in the town where it is located within the prohibition of the statute, and to compel that class of persons to procure a license. Such a construction would defeat one of the most important objects of the statute, —the protection of local traders. When the only construction of the statute under which the defendant can be held leads to so absurd a result, it is evident the legislature never intended that acts like those of the defendant should be included within the operation of the statute.

Case discharged.

Kimball WEBSTER, Exr., etc., of James Ryan, Deceased,

v.

Mary SUGHROW *et al.*

(.....N. H.....)

1. **A will creating a trust for the saying of masses** may be upheld as a "charitable use," since the saying of mass in open church, where all who choose may be present and participate therein, is a solemn and impressive ritual, from which many may draw spiritual solace, guidance, and instruction, and the money expended therefor is of benefit to the clergy, thus accomplishing one of the cherished objects of religious uses.
2. **A separate fund for the care of a burial lot and another for the saying of masses** cannot be set aside by an executor under a will creating a trust "to pay the expense of keeping my burial lot in a proper and respectable condition and for having anniversary mass said annually," leaving it entirely to the executor's discretion to provide for the perpetuation of such services in any way he may deem proper, since the branches of the trust are to be administered together by the same trustee.

(July 29, 1898.)

RESERVATION by the Supreme Court for Hillsboro County for the opinion of the full court of a bill for instructions as to the proper construction of a will. *Case discharged.*

The property was given in trust, first to pay funeral expenses; "the remainder to be held by said executor at his sole discretion, the income of which, and, if necessary, the principal, to pay the expense of keeping my burial lot in a proper and respectable condition, and for having anniversary mass said annually from the date of my decease, for myself, my deceased wife, and for her de-

NOTE.—As to validity of bequest for masses, see Festorazzi v. St. Joseph Roman Catholic Church (Ala.) 23 L. R. A. 360, and *note;* and Sherman v. Baker (R. I.) 40 L. R. A. 717, and *note.*

ceased sister, Lizzie. And I hereby leave it entirely at the discretion of my said executor to provide in any way that he may deem proper for the continuation or perpetuation of said services, without any authority or interference of the probate court or any person whomsoever, either in regard to this, or to the first, section of this will." The executor sought instructions upon two questions: (1) Does this provision of the will create a charitable trust in the matter of annual masses? (2) If it does, can he exercise his discretion in setting apart two certain sums, —one for the fund for the burial lot, the other for the saying of masses,—and appoint trustees to carry into effect the provisions of the trust, and provide for securing perpetual succession thereof?

Mr. **George B. French,** for plaintiff:

The plaintiff entertains doubts as to whether this will create a religious or charitable trust in the matter of annual masses, so as to constitute an exception to the law against perpetuities.

The doctrine of superstitious uses does not prevail in this country, and perhaps a limited amount can be expended for present masses.

Edgerly v. *Barker*, 66 N. H. 434, 28 L. R. A. 328, 31 Atl. 900.

As to this being outside the exceptions to perpetuities, see—

Kent v. *Dunham*, 142 Mass. 216, 56 Am. Rep. 667, 7 N. E. 730; *Rhymer's Appeal*, 93 Pa. 142, 39 Am. Rep. 736, 738, and note; 2 Roper, Legacies, p. 138; *Schnorr's Appeal*, 67 Pa. 138, 5 Am. Rep. 415; 2 Perry, Tr. § 687; *Schouler, Petitioner*, 134 Mass. 426; *Jackson* v. *Phillips*, 14 Allen, 539; 3 Am. & Eng. Enc. Law, p. 130, note 4; Jarman, Wills, * 205, 208; *Old South Soc.* v. *Crocker*, 119 Mass. 1, 20 Am. Rep. 299; *Saltonstall* v. *Sanders*, 11 Allen, 446; Lewin, Trusts, (*523) p. 715, Am. ed. chap. 21; *Duke* v. *Fuller*, 9 N. H. 536, 32 Am. Dec. 392; 2 Wms. Exrs. p. 1118. 1055, note.

Mr. **Jeremiah J. Doyle** for defendants.

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

1. The statute of 43 Eliz. chap. 4 (1601), was the culmination of all prior legislation concerning charities. Since its passage, those objects are considered charitable that are named therein, and many others that are "not named, and not within the strict letter of the statute, but which come within its spirit, equity, and analogy." 2 Perry, Tr. § 692. Although the general principles of charitable trusts have been repeatedly recognized in this state (*Duke* v. *Fuller*, 9 N. H. 538, 32 Am. Dec. 392; *Chapin* v. *School Dist. No. Two*, 35 N. H. 454; *Second Cong. Soc.* v. *First Cong. Soc.* 14 N. H. 315; *Brown* v. *Concord*, 33 N. H. 285; *Atty. Gen. ex rel. Abbot* v. *Dublin*, 38 N. H. 459; *New Market* v. *Smart*, 45 N. H. 87), it "has not been judicially determined" whether this statute has been adopted. But concerning this it is not important to inquire, since "courts of equity have an original and an inherent jurisdiction over charities, independent of the statute." *Goodale* v. *Mooney*, 60 N. H. 528, 533, 49 Am. Rep. 334, 335; Pub. Stat. chap. 205, § 1. A charity, "in the legal sense, may be . . . defined as a gift to be applied, consistently with existing law, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature." *Jackson* v. *Phillips*, 14 Allen, 556. No question arises as to the testator's right to create a trust for the purpose of keeping the "burial lot in a proper and respectable condition." The state approves of the creation of such trusts, and provides a way for the appointment of trustees therefor whenever a vacancy exists. Pub. Stat. chap. 40, § 5; Id. chap. 51, § 8; Laws 1891, chap. 19, §§ 1, 2; Laws 1893, chap. 68, §§ 1, 2; Laws 1897, chap. 6, § 1. It is in relation to the creating of a trust for the saying of masses about which there is contention. "The doctrine of superstitious uses arising from the statute (1 Edw. VI., chap. 14) under which devises for procuring masses were held to be void, . . . has never obtained in the United States. In this country there is absolute religious equality, and no discrimination in law is made between different religious creeds or forms of worship." *Hoeffer* v. *Clogan*, 171 Ill. 462, 40 L. R. A. 730, 49 N. E. 527; U. S. Const. Amend. 1; Bill of Rights, art. 5; *Holland* v. *Alcock*, 108 N. Y. 312, 329, 16 N. E. 305; *Gass* v. *Wilhite*, 2 Dana, 170, 26 Am. Dec. 446; *Methodist Church* v. *Remington*, 1 Watts, 224, 26 Am. Rep. 61; *McHugh* v. *McCole*, 97 Wis. 166, 40 L. R. A. 724, 72 N. W. 631; *Rhymer's Appeal*, 93 Pa. 142, 39 Am. Rep. 736; *Schouler, Petitioner*, 134 Mass. 426. It remains to be considered whether the saying of masses can be upheld as a "charitable use." In *Seda* v. *Huble*, 75 Iowa, 429, 39 N. W. 685, a bequest in trust for the benefit of a Catholic church, with directions to "invest said money safely for the benefit of said church, and that services should be held in said church for his soul yearly," was held to be valid as a bequest to a charitable use. In *Schouler, Petitioner*, 134 Mass. 426, a bequest for "burial and funeral expenses, and the residue for charitable purposes, masses," etc., was held to be valid on the ground that "masses are religious ceremonials or observances of the church of which she [the testatrix] was a member, and come within the religious, pious uses which are upheld as public charities." In *Rhymer's Appeal*, 93 Pa. 142, 39 Am. Rep. 736, the testator, after certain legacies, bequeathed all the residue of his estate "to St. Mary's Catholic Church, to be expended in masses for the benefit and repose of" his soul; and it was held to be a religious use, but failed because of a statute of that state requiring all such bequests to be executed with due formality at least one cal-

endar month before the decease of the testator. The court said: "The testator has clearly declared the use or purpose to which his bequest shall be applied. It is to be expended in masses for the benefit and repose of his soul. While this may not be regarded as a charitable use, within the accepted meaning of the word, it is certainly in every proper sense of the term . . . a religious use. In the denomination with which the testator appears to have been identified, the mass is regarded as a prominent part of the religious service and worship. According to the Roman Catholic system of faith, there exists an intermediate state of the soul, after death and before final judgment, during which guilt incurred during life and unatoned for must be expiated; and the temporary punishments to which the souls of the penitent are thus subjected may be mitigated or arrested through the efficacy of the mass as a propitiatory sacrifice. Hence the practice of offering masses for the departed. It cannot be doubted that in obeying the injunction of the testator, and offering masses for the benefit and repose of his soul, the officiating priest would be performing a religious service; and none the less so because intercession would be specially invoked in behalf of the testator alone. The service is just the same in kind whether it be designed to promote the spiritual welfare of one or many. Prayer for the conversion of a single impenitent is as purely a religious act as a petition for the salvation of thousands. The services intended to be performed in carrying out the trust created by the testator's will, as well as the objects designed to be attained, are all essentially religious in their character." In harmony with this last case is the recent decision of *Hoeffer* v. *Clogan*, 171 Ill. 462, 40 L. R. A. 730, 49 N. E. 527, where the testator left to the Holy Family Church, its successors and assigns, real estate in trust to sell and expend the proceeds in saying masses for the repose of his soul and the souls of his deceased wife, mother-in-law, and brother-in-law, and a legacy in trust to be expended in saying masses for the repose of the souls of his father, mother, and sister. The devise and legacy were held to be charitable, and were not allowed to fail by want of a competent trustee. It is said in the opinion that, "while the testator may have a belief that it will benefit his soul or the souls of others doing penance for their sins, it is also a benefit to all others who may attend or participate in it. An act of public worship would certainly not be deprived of that character because it was also a special memorial of some person, or because special prayers should be included in the services for particular persons. Memorial services are often held in churches, but they are not less acts of worship because of their memorial character. . . . The mere fact that the bequest was given with the intention of obtaining some benefit, or from some personal motive, does not rob it of its character as charitable." The saying of mass is a ceremonial celebrated by the priest in open church, where all who choose may be present and participate therein. It is a solemn and impressive ritual, from which many draw spiritual solace, guidance, and instruction. It is religious in its form and in its teaching, and clearly comes within that class of trusts or uses denominated in law as charitable. And, while the effect of these services upon the members of this church is impressive and beneficial, the money expended for the celebrations thereof is of benefit to the clergy, and is upheld and maintained for this reason, as one of the cherished objects of religious uses. *Atty. Gen. ex rel. Abbot* v. *Dublin*, 38 N. H. 459; *Hoeffer* v. *Clogan*, 171 Ill. 462, 40 L. R. A. 730, 49 N. E. 527. The upholding of such trusts is in harmony with the principles of our law.

2. The executor is not empowered to set apart one sum for the care of the burial lot, and another for the saying of masses. The branches of the trust are to be administered together, and by the same trustee. The discretion with which the executor is invested extends only to the methods to be adopted in the performance of this duty. The whole trust is to be administered by him (*Brock* v. *Sawyer*, 39 N. H. 547), or by someone else appointed in his place by the probate court. Pub. Stat. chap. 198, § 6.

Case discharged.

All concur.

STATE of New Hampshire
v.
Michael KEAN.

(.....N. H. .....)

An indictable nuisance is created by a bay window which extends 4 feet and 7 inches over a street, at a point 8 feet above the ground, although it does not interfere with travel on the highway, where the statute declares that a building, structure, or fence shall be deemed a public nuisance if "erected or continued upon or over any highway so as to obstruct the same or lessen the full breadth thereof."

(March 12, 1897.)

RESERVATION by the Supreme Court for Hillsboro County for the opinion of the full court of an indictment charging defendant with erecting a nuisance consisting of a bay window in a public highway. *Judgment against defendant.*

The case sufficiently appears in the opinion.

NOTE.—For encroachment on street by awnings, bay windows, etc., see Augusta v. Burum (Ga.) 26 L. R. A. 340, and *note;* State v. Clarke (Conn.) 39 L. R. A. 670, with annotation commencing on page 667; and Hibbard v. Chicago (Ill.) 40 L. R. A. 621.

For provision in deed limiting projection of bay window, see Atty. Gen. v. Algonquin Club (Mass.) 11 L. R. A. 500.

For municipal power over buildings as nuisances in street, see *note* to Hagerstown v. Witmer (Md.) 39 L. R. A., beginning on page 662.

Mr. **James P. Tuttle,** for the State:

When this bay window was projected over the street and into the street 4 feet 7 inches, the condition of that street was changed.

The ruling in the present case is correct. *Hopkins* v. *Crombie*, 4 N. H. 524.

When land is taken for public use as a highway, the landowner is entitled to receive a sum in damages, which in theory of law is an indemnity for the use of the land taken. *Winchester* v. *Capron*, 63 N. H. 605, 56 Am. Rep. 554, 4 Atl. 795; *Makepeace* v. *Worden*, 1 N. H. 16.

Mr. **Oliver E. Branch,** for defendant:

It is not an indictable offense, to which there is no defense, to erect a building, structure, or fence of any kind upon or over a highway.

The rights of the public in a highway are in the nature of an easement or right of passage, and the soil and freehold belong to the owners of the land.

Morrison's Digest, p. 468, § 148; *Winship* v. *Enfield*, 42 N. H. 197; *Chamberlain* v. *Enfield*, 43 N. H. 356; *Cressey* v. *Northern R. Co.* 59 N. H. 564, 47 Am. Rep. 227.

Whether an obstruction of a highway constitutes a nuisance is a question of fact for the jury.

Graves v. *Shattuck*, 35 N. H. 257, 69 Am. Dec. 536; *State* v. *Hall*, 22 N. H. 384.

On petition for rehearing.

In the decision the court did not consider that the defendant, being under an indictment, is entitled to a jury trial on all the facts alleged and not admitted.

N. H. Const. pt. 1, art. 15.

The court did not consider that the offense for which the respondent was indicted is by statute made a public nuisance (Pub. Stat. chap. 77, § 8), and, being a public nuisance, the respondent has a constitutional right to a trial by jury.

State ex rel. Rhodes v. *Saunders*, 66 N. H. 39, 18 L. R. A. 646, 25 Atl. 588.

The court in the decision did not consider that upon the trial of the indictment the respondent would have been entitled, if no facts had been admitted, to instructions to the jury upon the following questions: (1) Is the bay window erected upon or over the highway? (2) If it is so erected, does it obstruct the same? (3) If it is so erected, does it lessen the full breadth of the highway?

A purpresture is not necessarily a public nuisance. A public nuisance must be something which subjects the public to some degree of inconvenience or annoyance; but a purpresture may exist without putting the public to any inconvenience whatever. Sections 1–6 inclusive, chap. 77, Pub. Stat., cover cases of "actual obstruction," and furnish a remedy for their prompt and immediate removal. But they must not be confounded with the subject-matter contained in § 8, under which the respondent was indicted.

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

"By the common law anyone may abate a nuisance to a highway." 1 Hawk. P. C. chap. 75, § 12; Id. chap. 76, § 61; 3 Bl. Com. *5. To justify such action, it must appear that the object removed was an obstruction to the public travel,—an actual nuisance. In such case, "whether any object permanently placed, temporarily left, or slowly moving in a public highway" unnecessarily obstructs public travel, and therefore is a common nuisance, is a question of fact to be determined by the jury from all the circumstances of each particular case. *Hopkins* v. *Crombie*, 4 N. H. 520, 525; *Graves* v. *Shattuck*, 35 N. H. 257, 69 Am. Dec. 536. "If any timber, lumber, stone, or other thing is upon a highway, encumbering it," a prompt remedy for the immediate removal of the obstruction is provided. Pub. Stat. chap. 77, §§ 1–6. In proceedings under this statute, whether the object complained of is an encumbrance, and its removal necessary for the public convenience, are questions of fact to be determined upon competent evidence. *Richardson* v. *Smith*, 59 N. H. 517. The public, however, is entitled to the full and free use of all the territory embraced within the limits of a highway, not only for actual passage, but for all purposes that are legitimately incident thereto. Every actual encroachment upon a highway by the erection of a building or fence thereon, or any other permanent or habitual occupation thereof, is an invasion of the public right, even though it does not operate as an actual obstruction to public travel. Wood, Nuisances, §§ 81, 250. "Where there is a house erected, or an inclosure made, upon any part of the King's demesnes, or of a highway, or common street, or public water, or such like public things, it is properly called a *purpresture*." 4 Bl. Com. *167. "'Pourpresture' cometh of the French word 'pourprise,' which signifieth a close, or enclosure; that is, where one encroacheth, or maketh several to himself that which ought to be common to many." Co. Litt. 277*b*; Co. Magna Charta, 38. 272. Any unauthorized erection over a highway is a purpresture. Wood, Nuisances, § 77; *Knox* v. *New York*, 55 Barb. 404; *Atty. Gen.* v. *Evart Booming Co.* 34 Mich. 462. Since the public right is coextensive with the limits of the highway, that the traveled part is not thereby impeded is no defense to an indictment charging the erection or maintenance of a building or other construction within the highway. Roscoe, Crim. Ev. 3d Am. ed. 567; *Com.* v. *Wilkinson*, 16 Pick. 175, 26 Am. Dec. 654; *Com.* v. *King*, 13 Met. 115; *Com.* v. *Blaisdell*, 107 Mass. 234; *Harrower* v. *Ritson*, 37 Barb. 303; *Dickey* v. *Maine Teleg. Co.* 46 Me. 483; *Wright* v. *Saunders*, 65 Barb. 214; *Queen* v. *United Kingdom Electric Teleg. Co.* 31 L. J. Q. B. N. S. 167; *Rex* v. *Wright*, 3 Barn. & Ad. 681; *Reimer's Appeal*, 100 Pa. 182, 45 Am. Rep. 373. This does not conflict with the adjoining owner's right to make any reasonable temporary use of the street which does not unnecessarily obstruct the public passage. 1 Hawk. P. C. chap. 76, § 49; Wood, Nuisances, §§ 256, 257; *Rex* v. *Cross*, 3 Campb. 224; *Rex* v. *Jones*, 3 Campb. 230; *Winchester* v. *Capron*,

63 N. H. 605, 4 Atl. 795; *Winship* v. *Enfield*, 42 N. H. 197, 216; *Chamberlain* v. *Enfield*, 43 N. H. 356, 360, 361; *Graves* v. *Shattuck*, 35 N. H. 257, 69 Am. Dec. 536; *Hopkins* v. *Crombie*, 4 N. H. 520; *Makepeace* v. *Worden*, 1 N. H. 16; *Avery* v. *Maxwell*, 4 N. H. 36; *Copp* v. *Neal*, 7 N. H. 275; *Baker* v. *Shephard*, 24 N. H. 208, 213.

The defendant is charged with erecting and continuing a bay window upon and over a public highway. The bay window is a projection from the defendant's building, which extends into and over the highway 4 feet and 7 inches, but does not extend downward within 8 feet of the surface of the way. The sole question reserved is whether, upon the admission of these facts as charged, there is any question for the jury. The defendant claims that these facts do not show such obstruction of the highway as is contemplated in § 8, chap. 77, Pub. Stat., because the bay window does not obstruct the traveled part of the highway, nor interfere with the travel upon the same, and that upon these facts it is a question for the jury whether they constitute an obstruction. The statute is: "If any building, structure, or fence is erected or continued upon or over any highway so as to obstruct the same or lessen the full breadth thereof, it shall be deemed a public nuisance, and any person erecting or continuing the same shall be fined not exceeding fifty dollars; and the court shall order such building, structure, or fence to be removed." The defendant's bay window is a "structure" erected and continued by him over the highway. It lessens the full breadth of the highway 4 feet and 7 inches at a point 8 feet above the ground. The only question is whether the statute is aimed at mere encroachments upon the limits reserved for public use, or has as its object only the removal of actual impediments to the passage. The statute has been the law of the state for nearly 200 years. Its title, when apparently first enacted, in 1714, was "An Act to Prevent Encroachment upon Highways." Laws 1696–1725, p. 32. The provincial act was reenacted with the same title, with slight verbal change, February 27, 1786. Laws 1797, p. 315; Laws 1805, p. 334; Laws 1830, p. 581. In the revision of 1842 the act appears with the same title, "Encroachments on Highways," but greatly condensed, and in substantially its present form (Rev. Stat. chap. 60), while the provision for the immediate removal of encumbrances is found in the preceding chapter, entitled "Encumbrances in Highways." The substance of the former act was also adopted February 27, 1786. It was not until 1867 that the two provisions were brought together, into one chapter under the present head. "Encumbrances and Encroachments on Highways." Gen. Stat. p. 151, chap. 70. The legislature understood encroachment and encumbrance to be different evils requiring different remedies. An object is not an encumbrance in a highway unless it obstructs the use of the way, while an encroachment is an unlawful gaining upon the right or possession of another; as where a man sets his fence beyond his line. Bouvier, Law Dict. Thus the title furnishes evidence that the object of the statute was the preservation of the limits of the public right, not the prevention of obstruction to travel. The less condensed form of expression of the early statute also gives aid as to its present meaning. Omitting needless repetition not applicable to the present case, it is: "No edifice, building, or fence whatever shall be raised, erected, built, or set up in, upon, over, or across any of the said highways, roads, streets, . . . or any part of them, whereby to stop them up or straighten the passage, or any ways lessen the full breadth of any such street." The three evils which might result from encroachment are described, and were: (1) Stopping up the street, actually preventing passage; (2) straightening, making narrow the path, and the passage difficult; (3) any ways lessening the full breadth of the street. In the modern revisions and re-enactments of the statute the first two are written as a single clause, "to obstruct," but no change has been made in the last,—"lessen the full breadth of the street." If a jury might find that the defendant's bay window did not stop up the street or straighten the passage, they could not find that, projecting 4 feet and 7 inches over the highway, it does not to some extent lessen its full breadth. That a building so projecting into the highway upon the surface, but not so as to obstruct travel, is in violation of the statute, was decided in 1829 in *Hopkins* v. *Crombie*, 4 N. H. 520. The case was trespass for breaking and entering the plaintiff's close and removing a house frame. The defense set up was that the house was within the limits of the highway, and under the statute was an obstruction and nuisance, wherefore the defendants, selectmen of the town, entered, and removed the same. The court,—Richardson, Ch. J., —said (p. 525): "This statute [February 27, 1786] was not, in our opinion, intended to make mere encroachments upon highways, where the passage was not obstructed, liable to be removed by individuals. The object was to prevent certain encroachments upon highways, and for this purpose they are declared to be common nuisances, and provision made for their removal and the punishment of the offender. Individuals are permitted to abate actual nuisances which obstruct the passage of highways, because the public convenience requires an immediate remedy, and cannot wait for the slow progress of the ordinary course of justice. But no such reason exists for the interference of individuals in this way, in the case of encroachments which do not obstruct the passage. The statute has not changed the nature of things, and made that an actual obstruction which was not so before its enactment." It was further held in the same case that the cellar and frame complained of, which extended 10 feet within the limits of the highway, but in no way impeded, or obstructed, or rendered less safe or convenient the traveled path, was clearly an encroachment, for the simple reason that it was within the limits of the highway. It

was said to be (p. 526) "clearly an illegal encroachment, which rendered the plaintiffs liable to be indicted and punished, and which might at any time, upon a conviction, have been legally taken down, demolished, and removed." For this reason, although, since the frame did not obstruct the travel, the defendants' acts in removing it were unlawful, the plaintiffs were allowed only nominal damages.

Under *Hopkins* v. *Crombie*, the only question remaining is whether the elevation of the projecting structure 8 feet above the highway surface raises any question of fact under the statute. If it does, it is only because at that elevation a jury might find it did not in fact obstruct the public in their use of the way. But if such a finding, which might, and probably must, have been found in *Hopkins* v. *Crombie*, does not excuse a building upon the surface of the way made because abundant space was left on one side of the structure for the public passage, the same finding cannot avail when based on the ground that there is abundant room beneath the structure. The finding being immaterial, a different ground upon which it might be based is equally unimportant. Further evidence of the understanding of the legislature is to be found in the section of the statute immediately following: "Signs and awnings put up in conformity with the police regulations in force in the town are excepted from the provisions of the preceding section." Pub. Stat. chap. 77, § 9. This exception appeared first in the Revised Statutes of 1842 (Rev. Stat. chap. 60, § 2), presumably considered necessary because in 1823 police officers were authorized to make regulations for the height and position of any awning, shade, or other fixture that may be erected or placed in any such street (Laws 1830, p. 271; Rev. Stat. chap. 114, § 7; Pub. Stat. chap. 249, § 5). The legislature understood that a sign or awning over a highway was within the statute. The projection of the roof and eaves of a house over and into a street is within the statute, and a building so constructed is a nuisance. *Garland* v. *Towne*, 55 N. H. 55, 20 Am. Rep. 164. "Whether the fee of the street be in the municipality in trust for the public use, or in the adjoining proprietor, it is in either case of the essence of the street that it is public, and hence . . . under the paramount control of the legislature as the representative of the public." 2 Dill. Mun. Corp. 2d ed. § 541. The reasonable and proper use which the adjoining owner may make of the way is subject to legislative regulation. Id. § 585; 3 Kent, Com. *433; *Allen* v. *Boston*, 159 Mass. 324, 335, 34 N. E. 519. Buildings projecting over a highway may make doubtful the true line of the street, as well as those erected upon the surface, and render the way dangerous to the public use. Whether any such use should be permitted is properly determinable by the legislature. Considering the common-law rule that any encroachment upon a highway is unlawful, the object of the statute, as disclosed by its title, the language used in the original and subsequent enactments of the section in question, the exceptions made by the legislature tending to establish the legislative understanding of the meaning of the section, the existence of another statute remedy for the removal of actual obstructions, and the previous interpretation that has been declared by the court, we entertain no doubt that the construction contended for by the defendant cannot be sustained. The facts agreed contain all the elements of the offense charged. There is no question for the jury.

Trees by the side of the roadway (*Graves* v. *Shattuck*, 35 N. H. 270, 69 Am. Dec. 536), are not within the terms of this statute, and are recognized and protected by law. Pub. Stat. chap. 266, § 19. While the suggestion of the defendant's brief that the omission of the clause, "so as to obstruct the same, or lessen the full breadth thereof," would leave the statute with precisely the meaning given to it is undoubtedly true, yet we do not think the insertion of this clause authorizes the position that there may be a structure upon or over a highway which does not either obstruct it or lessen its full breadth. Such a structure is plainly inconceivable, and the proposition is self-contradictory. If the structure is upon or over the highway, it must either obstruct it or lessen its full breadth. If it does neither, it is neither upon nor over the highway. The origin of the clause is to be found in the excessive particularity of the original draftsman in the effort, by a superabundance of words, to exclude the possibility of failure to embrace within the terms of the statute every variety of encroachment. The clause is in fact a recital of evils guarded against, and not the insertion of a condition to be found as a fact. The original laying of the street is conclusive that the whole space is necessary for the public use, either for passage, or the necessary incidents thereto. Whether the space reserved can, consistently with safety to the public, be permanently encroached upon by structures overhanging the same, other than signs and awnings, is purely a legislative question. As the case and the law now stand, the defendant's window is an illegal encroachment upon the street. The legislature has not left it to the court to decide whether, as a purpresture merely, it should be allowed to remain. Wood, Nuisances, § 80. The statute declares it a nuisance, and orders its removal. Further proceedings in accordance with these views and the stipulations of the reserved case will be had at the trial term.

Case discharged.

All concur.

Rehearing denied.

NEW JERSEY SUPREME COURT.

Claus DETTMERING, *Plff. in Err.*,
v.
Richard ENGLISH.

(.....N. J.....)

*1. **Plaintiff received an injury from the fall of a wall** which was being constructed by workmen of the defendant. Plaintiff was lawfully on the premises where the wall was being constructed. *Held*, that defendant owed plaintiff a duty to take reasonable care that the wall should be so constructed as not to fall.

2. **At the close of the whole evidence the trial judge directed a verdict** for the defendant on the ground that the single question presented was whether the wall in question should have been braced, and that upon the evidence it appeared that bracing was unnecessary. *Held*, that, under the circumstances appearing in the case, there was a question for the jury, and it was error to withdraw it from them by a direction.

(November 13, 1899.)

ERROR to the Circuit Court for Hudson County to review a judgment in favor of defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Mr. **Flavel McGee** for plaintiff in error.

Messrs. **Corbin & Corbin,** for defendant in error:

Plaintiff cannot avail himself of grounds of negligence not pleaded. He must set out the facts showing negligence.

Race v. *Easton & A. R. Co.* 62 N. J. L. 533, 41 Atl. 710.

The absence of braces on the south side was not evidence of negligence.

Usage is the test of ordinary care.

McGrell v. *Buffalo Office Bldg. Co.* 153 N. Y. 265, 47 N. E. 305.

It is a mistake for one to take his stand after an accident, and to impute responsibility from a view thus obtained. It is nearly always easy, after an accident has happened, to see how it could have been avoided.

Burke v. *Witherbee*, 98 N. Y. 562; *Frobisher* v. *Fifth Ave. Transp. Co.* 151 N. Y. 431, 45 N. E. 839.

The mere falling of the wall does not prove negligence; the plaintiff must not stop with bare proof of the accident.

Bahr v. *Lombard*, 53 N. J. L. 233, 21 Atl. 190, 23 Atl. 167; *Cadwell* v. *Arnheim*, 152 N. Y. 182, 46 N. E. 310.

The only competent expert evidence was for witnesses having experience in wall construction to describe what was the proper mode.

Crane v. *Northfield*, 33 Vt. 126; *Bliss* v. *Wilbraham*, 8 Allen, 564.

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

Dettmering brought this action against English to recover damages for an injury received by him by the fall of a portion of a wall which was being constructed by English for the city hall of Jersey City. English had contracted with the city for the mason and iron work of the city hall, and had subcontracted the iron work to the Fagin Iron Works, in the employ of which Dettmering was working on the building. The occurrence is the same which was before the court of errors in *Jansen* v. *Jersey City*, 61 N. J. L. 243, 39 Atl. 1025. On the authority of that case, the employees of English in building the wall which fell were not fellow servants of Dettmering.

The bills of exception show that at the close of plaintiff's case a motion for nonsuit was interposed on the ground that there was a failure of proof of any negligence on the part of English, or of any negligence which was chargeable to him. The trial judge reserved decision on motion, and proceeded to hear the evidence of the defendant. At the close of the whole case defendant asked for a direction for a verdict in his favor upon the same ground upon which he had moved for the nonsuit. This motion was granted; the trial judge giving as a reason that the only question in the case was whether the wall that fell should have been braced, and that it then appeared to him, on the evidence, that bracing was not necessary. Exception was allowed to the direction of a verdict, and plaintiff's main contention is directed to it as erroneous. The bill of exceptions presenting this question contains the whole evidence adduced at the trial. It appears therefrom that Dettmering was lawfully upon the premises, engaged in his duty to his employer in performing the work which the Fagin Iron Works had contracted with English to do. It follows that English owed to Dettmering a duty to take reasonable care that the wall in question should be so constructed as not to fall upon and injure him while thus lawfully on the premises. If, upon the evidence, a reasonable inference of failure to perform that duty could be drawn by the jury, it was obviously erroneous to withdraw the case from the jury by the direction for a verdict. Such a course could only be justified by the total lack of evidence from which such an inference could properly be drawn. It appears from the evidence that the wall in question was about 80 feet long, and had been built of a width of 16 inches to a height of about 60 feet, and had been allowed to dry and settle for some days. Then the workmen of English commenced to

*Headnotes by MAGIE, Ch. J.

NOTE.—As to liability for injury by fall of wall, see Anderson v. East (Ind.) 2 L. R. A. 712, and *note*; Factors & T. Ins. Co. v. Werlein (La.) 11 L. R. A. 361, and *note*.

As to dangerous chimney, see, with respect to landlord's liability, *note* to Lee v. McLaughlin (Me.) 26 L. R. A. on page 200; see also Cork v. Blossom (Mass.) 26 L. R. A. 256.

build thereon a wall of 12 inches in width, and within two days had completed it for the whole length to the additional height of 18 or 20 feet, when it, or part of it just erected, fell upon the plaintiff. It is evident that the trial judge conceived that the sole question was whether the duty of English required him to brace the wall then in course of construction, and, upon his finding that such bracing was unnecessary, his direction for the verdict was grounded. It is at least open to doubt whether the view taken by the trial judge was not too narrow. The wall was of brick, and it is a matter of common knowledge that when such cubes are laid one upon another, with care to keep the wall plumb, it will stand by virtue of the law of gravity; and a fall of a wall of brick would indicate either that it had been improperly laid, or that the fall had been caused by some force from without. Under such circumstances it may well be that the maxim, *Res ipsa loquitur*, would be applicable, and one who constructed a wall which thus fell might be required to show the cause of the fall, and that it was not the result of negligent construction. That would justify a resort to evidence such as was adduced by English, of a sudden and violent gust of wind occurring at the time the wall fell. Whether that was sufficient to account for the fall, or whether the probability of such an occurrence was within the contemplation of a prudent man engaged in the erection of a wall at such a height, and whether such probability required some protection by bracing or otherwise, would then be questions for a jury. Again, it might be open to question whether a jury might not be permitted to infer a lack of duty on English's part in erecting this part of the wall in haste, and without giving time for drying and settling. But, looking at the evidence as the trial judge did, I have reached the conclusion that it was erroneous to withdraw the case from the jury. On the part of Dettmering there was evidence offered, which was rejected by the court below, which, it is claimed, tended to show that, in the customary mode of erecting such walls, bracing was resorted to as a protection against falling. If the evidence offered was adapted to show the ordinary and customary mode of erection, it may have been admissible; but the questions asked, and excluded by the court, called for the observation of witnesses in isolated cases, and, if answered, would not have tended to prove any general custom. It may be that the evidence would have been admissible in rebuttal of defendant's proof that bracing was not customary or possible under the circumstances, but the questions asked and rejected in plaintiff's original case were not renewed in rebuttal. The evidence, however, clearly shows that bracing was provided for by the plans. There was a wall of the building already erected, and parallel to that which fell, and 8 or 9 feet distant from it. Iron beams were designed to be fastened or anchored at the top of that wall, and to extend to, and be masoned in, the wall that fell. There was evidence that such beams were provided, and were masoned in the wall in question. There was evidence, however, that the ends of some of them, at least, were not fastened or anchored in the parallel wall. It is true that the evidence on that subject was controverted, but it was for the jury to judge the weight of evidence, and the credit to be given to witnesses from whom it was drawn; for such beams were obviously intended as braces, and, if they were left unfastened to the parallel wall, it raised a question as to the performance by English of his duty in constructing this wall. It was not for the court to pronounce such bracing unnecessary.

The result is that *the judgment founded upon the verdict so erroneously directed must be reversed* for a *venire de novo*.

NEW YORK COURT OF APPEALS.

BUFFALO GERMAN INSURANCE COMPANY, *Appt.*,
v.
THIRD NATIONAL BANK OF BUFFALO, *Respt.*

(162 N. Y. 163.)

1. **A statement to a bank by a borrower**, that stock in his safe may be considered as collateral for his loans, is executory in its nature so long as the stock remains in his possession and until it is in fact pledged to the bank by a delivery.
2. **An equitable lien, in favor of a national bank, upon its shares of stock, cannot be asserted** against a third person by virtue of a loan to a stockholder on the security of the shares, under a by-law providing that any liability of the stockholder should be a lien upon the stock, which by-law is printed on the face of the certificate of stock so as to be notice to all persons dealing therein, since such by-law is in conflict with the provisions of the national banking act of 1864, § 35, prohibiting any loan by such bank on the security of its own shares of stock.
3. **The invalidity of a lien on shares of stock in a national bank** under a by-law in conflict with the national banking act of Congress can be asserted by a bona fide transferee of the stock, and the right to raise the

NOTE.—As to the lien of a corporation on stock for debt of stockholder, see also Jennings v. Bank of California (Cal.) 5 L. R. A. 233; Birmingham Trust & Sav. Co. v. Louisiana Nat. Bank (Ala.) 20 L. R. A. 600; Craig v. Hesperia Land & Water Co. (Cal.) 35 L. R. A. 306; Aldine Mfg. Co. v. Phillips (Mich.) 42 L. R. A. 531.

As to the effect of transfer of shares of stock upon liability for unpaid subscription, see Rochester & K. Falls Land Co. v. Raymond (N. Y.) 47 L. R. A. 246, and *note*.

question of its invalidity is not restricted to the Federal government.

(February 27, 1900.)

APPEAL by plaintiff from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of an Equity Term for Erie County in favor of defendant in a proceeding brought to compel the transfer of stock upon the books of the defendant corporation. *Reversed.*

Statement by **Gray, J.:**

This action was brought to obtain a judgment directing the defendant to transfer upon its books to the plaintiff 450 shares of its capital stock. All of these shares stood in the name of Emanuel Levi, who had, some years previously, pledged the same with, and delivered the certificates thereof to, the plaintiff, to secure the payment of his promissory notes for moneys loaned. At the time that he so pledged the shares of stock, he executed and delivered to it an assignment of the same in the usual form, by which he assigned and transferred to it, by name, the shares of defendant's capital stock standing in his name on the books, and constituted one of the officers of the plaintiff his attorney to effect the transfer thereof, etc. He at the same time executed and delivered to the plaintiff a receipt for the moneys loaned to him, which stated the rate of interest the loan should carry, the assignment of collateral security for its payment, and that the plaintiff was authorized, in case of default in payment of the principal and interest of the loan, to sell the securities at public or private sale, etc. Levi having died, a demand was made upon his executors for payment of the notes, with notice that, in the event the same were not paid, and the stock redeemed, on or before a certain date, the stock would be sold at public auction, and the proceeds applied in liquidation of the indebtedness of their testator. On June 30, 1896, a public sale was regularly had, at which the stock was purchased by the plaintiff. Thereafter, a demand of the plaintiff upon the defendant to transfer the stock so purchased upon its books was refused. The defendant claims a lien upon the stock by force of a statement printed upon the face of the certificates, in the following language: "This is to certify that Emanuel Levi is the owner of ——— shares of one hundred dollars each of the capital stock of the Third National Bank of Buffalo, subject to the lien referred to in section 15 of the by-laws of said bank in the following words: 'No transfer of the stock of this association shall be made without the consent of the board of directors by any stockholder who shall be liable to the association, either as principal debtor or otherwise, which liability shall be a lien upon the said stock and all profits thereof and dividends.' And that the said stock is transferable only upon the books of the bank by him or his attorney on the surrender and cancelation of this certificate and on compliance with said by-law." Levi had been a director of the defendant, and at the time he pledged his stock to the plaintiff he was under an indebtedness to the defendant. The trial judge made this finding with respect to it: "That at the time of the sale of the stock in question to, and its purchase by, the plaintiff, the estate of Emanuel Levi was largely indebted to the defendant, and the defendant then had and now has a right to a lien upon said certificates and stock as security for the payment thereof; that Levi's indebtedness to the defendant accrued prior to the pledge of any of said certificates to the plaintiff; that no tender or offer to pay said indebtedness by the plaintiff, or by any other person or party, has ever been made; that the plaintiff was notified of the defendant's claim before the sale of June 30, 1896, and the defendant forbade such sale except subject to the defendant's claims, demands, and liens." The defendant at no time had possession of Levi's certificates of stock, and its claim is of an equitable lien upon the same for all the indebtedness owing by him as its stockholder, by reason of the statement upon the certificates. It is also claimed that he orally stated to the defendant's president that "he had a large amount of stock in the bank, and that was security for his loans," and that, though "it was in the safe-deposit vault," the bank "could consider it there as delivered as collateral to its loan." The trial court made no finding as to these facts, nor otherwise upon the subject than the finding above given. The conclusion reached by the trial court upon the facts was, in substance, that the defendant had a lien upon the stock for the amount of the indebtedness existing against the estate of Levi, when the certificates were purchased by the plaintiff, and that the latter's right to a transfer to itself of the stock was subject to the lien of the former. Judgment was entered dismissing the complaint upon the merits, upon the sole ground that the plaintiff is entitled to a transfer of the stock in question by the defendant, and to have new certificates issued to it in place of those to be surrendered and canceled, when, but not until, it should pay to the defendant an amount sufficient to satisfy its lien for the indebtedness to it owing by Levi's estate. This judgment was affirmed in the appellate division by a divided court, and the plaintiff has appealed to this court.

Messrs. **Hickman & Palmer,** for appellant:

There is no authority in the law for the enactment of a by-law containing the provisions of § 15 in this bank's by-laws, and there is an express provision prohibiting any such by-law in the act of Congress, which prohibits the bank from loaning on the security of its own stock.

First Nat. Bank v. *Lanier*, 11 Wall. 369, 20 L. ed. 172; *Bullard* v. *National Eagle Bank*, 18 Wall. 589, 21 L. ed. 923; *Second Nat. Bank* v. *National State Bank*, 10 Bush, 367.

The statement contained in the certificate

of stock, that the indebtedness of the stockholders should be a lien upon the stock, does not affect the right of the plaintiff, the insurance company.

Conklin v. *Second Nat. Bank*, 45 N. Y. 655; *Driscoll* v. *West Bradley & C. Mfg. Co.* 59 N. Y. 96; *Evansville Nat. Bank* v. *Metropolitan Nat. Bank*, 2 Biss. 527, Fed. Cas. No. 4,573; *Feckheimer* v. *National Exch. Bank*, 79 Va. 80; *Continental Nat. Bank* v. *Eliot Nat. Bank*, 7 Fed. Rep. 376; *New Orleans Nat. Bkg. Asso.* v. *Wiltz*, 10 Fed. Rep. 330; Cook, Stock & Stockholders, 3d ed. (1894) § 533; Jones, Liens, 1894, 2d ed. § 384; 2 Thomp. Corp. 1894 ed. § 2319; 16 Am. & Eng. Enc. Law, p. 201, § 14; Paine, Banking Laws, p. 533; *Bullard* v. *National Eagle Bank*, 18 Wall. 597, 21 L. ed. 926; *First Nat. Bank* v. *Lanier*, 11 Wall. 369, 20 L. ed. 172; *Johnston* v. *Lang*, 103 U. S. 803, 26 L. ed. 534; *Sargent* v. *Franklin Ins. Co.* 8 Pick. 90, 19 Am. Dec. 306; *Bundy* v. *Jackson*, 24 Fed. Rep. 628; *Johnson* v. *Laflin*, 5 Dill. 65, Fed. Cas. No. 7,393; *Delaware, L. & W. R. Co.* v. *Oxford Iron Co.* 38 N. J. Eq. 340; *Feckheimer* v. *National Exch. Bank*, 79 Va. 80.

The defendant had no actual pledge of the stock in suit as collateral for any indebtedness which Levi might have owed it.

To make a valid pledge there must be delivery, actual or constructive, of the pledge by the pledgeor or his agent, into the possession of the pledgee or his agent, in order to pass any right of property in the thing pledged.

Cortelyou v. *Lansing*, 2 Cai. Cas. 200; *Garlick* v. *James*, 12 Johns. 146; *Wilson* v. *Little*, 2 N. Y. 443, 51 Am. Dec. 307; 18 Am. & Eng. Enc. Law, pp. 595–598.

A pledgee can only retain his lien by retaining possession. When he delivers up possession, his lien ceases.

Black v. *Bogert*, 65 N. Y. 601; *Macomber* v. *Parker*, 14 Pick. 497.

The verbal agreement supplemented by the by-law did not give the national bank a lien on its stock.

Delaware, L. & W. R. Co. v. *Oxford Iron Co.* 38 N. J. Eq. 340.

The taking of stock can alone be justified when it is done in compromising a debt due to the bank, or a claim against it.

First Nat. Bank v. *National Exch. Bank*, 92 U. S. 122, 23 L. ed. 679.

If the defendant ever had any lien upon the stock in question, either actual or constructive, it waived that lien by a failure to enforce it.

The taking of other security by the defendant for its debt from Levi was a waiver of any lien, implied or otherwise.

Barrett v. *Goddard*, 3 Mason, 107, Fed. Cas. No. 1,046; *Gilman* v. *Brown*, 1 Mason, 191, Fed. Cas. No. 5,441; 4 Wheat. 255, 4 L. ed. 564.

Mr. **Adelbert Moot**, with *Messrs.* **Lewis & Lewis**, for respondent:

As the defendant secured an equitable lien upon the stock in question before the plaintiff secured a lien thereon, the lien of the defendant is prior in time and prior in right, and the plaintiff having taken the stock of the defendant, with notice of the defendant's rights therein, because the stock contains a notice thereof, it follows that the plaintiff acquired its lien subject to the lien of the defendant, and the plaintiff cannot compel the defendant to transfer the stock upon its books until the plaintiff has redeemed the stock from the lien of the defendant thereon.

National Bank v. *Whitney*, 103 U. S. 99, 26 L. ed. 443; *Thompson* v. *Saint Nicholas Nat. Bank*, 146 U. S. 240, 36 L. ed. 956, 13 Sup. Ct. Rep. 66.

Defendant's answer to this equitable suit of the plaintiff is a perfect answer upon the undisputed facts in this case, because the plaintiff cannot maintain this suit if the Levi estate could not maintain this suit.

The plaintiff put this stock in evidence as a part of its evidence, and therefore the recital of this document put in evidence by plaintiff, and transferred to plaintiff, raises a presumption of the fact recited, unless plaintiff overcomes that recital by evidence that it is untrue.

1 Greenl. Ev. 14th ed. § 23.

The by-law of the defendant, made a part of its stock certificate, is not void, and is not repugnant to the statute; but it is part of the very stock and contract with Levi, of which plaintiff claims the benefit as the privy and assignee of Levi; hence plaintiff is a party thereto, and is estopped from claiming it does not bind plaintiff as a part of such contract and collateral.

The by-law and the stock itself, and the arrangement made with Levi when the loan was made, together, give the defendant an equitable lien upon the stock.

3 Pom. Eq. Jur. § 1233.

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

The decision of the question in this case turns upon provisions of the national banking act, passed by Congress in 1864, and the construction which they should receive in the light of opinions of the Supreme Court of the United States. The original act for the incorporation of national banks, which was passed in 1863, contained, in § 36, the provision that the capital stock "shall be assignable on the books of the association in such manner as its by-laws shall prescribe, but no shareholder in any association under this act shall have power to sell or transfer any share held in his own right so long as he shall be liable, either as principal debtor, surety, or otherwise, to the association for any debt which shall have become due and remain unpaid; . . . and no stock shall be transferred without the consent of a majority of the directors while the holder thereof is thus indebted to the association." In 1864 the act of 1863 was repealed by a new enactment as to national banking associations, whereby it was provided, in § 35, "that no association shall make any loan or discount on the security of the shares of its own capital stock, nor be purchaser or holder of any such shares, unless

such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith," etc. 13 Stat. at L. 110, chap. 106. The act of 1864 did not reenact any of the provisions which were contained in § 36 of the act of 1863, and the section, therefore, was expressly repealed. *Bullard* v. *National Eagle Bank*, 18 Wall. 594, 21 L. ed. 923. The defendant was organized under the act of 1864, and there was not only no authority in the act for the by-law referred to and embodied in the language of the certificates of stock, but such a by-law would be inconsistent therewith. *Bullard* v. *National Eagle Bank*, 18 Wall. 594, 21 L. ed. 923. The restrictions imposed by § 36 of the act of 1863 upon the shareholders had been removed, and banking associations were prohibited from permitting any indebtedness on the part of their stockholders upon the security of the shares of their own capital stock. It would seem, therefore, that a by-law seeking to impose restrictions upon transfers of stock by declaring a lien upon the stock to the extent of any liability of the stockholder to the bank would be quite inoperative to accomplish such a purpose, and, equally so, any statement upon the certificate of stock based upon the existence of such a by-law. The bank being prohibited from loaning moneys upon the security of its own shares of capital stock, it is difficult to understand upon what legal principle it could claim the right to an equitable lien. The appellate division, in an opinion which was concurred in by the majority of the justices of that court, thought that, as the question was one which arose under a Federal law, it should be governed in its determination by the decisions of the Supreme Federal Court, and that the more recent ones had established a controlling doctrine that a contract made in contravention of any provision of the national banking act is not, in the absence of any declaration to that effect, void, or incapable of enforcement. Under the authority of certain cases in the United States Supreme Court, which are considered in the opinion, it was pointed out that the validity of certain transactions by national banks with their debtors was held to be a question only for the government to raise, and that the effect of their violation of the statute was, not to invalidate the transaction itself, but to subject them to charter proceedings on the part of the government. *Union Nat. Bank* v. *Mattheus*, 98 U. S. 621, 25 L. ed. 188; *National Bank* v. *Whitney*, 103 U. S. 99, 26 L. ed. 443; *Thompson* v. *Saint Nicholas Nat. Bank*, 146 U. S. 240, 36 L. ed. 956, 13 Sup. Ct. Rep. 66. Hence it was deemed to follow that in the present case the bank's claim to be entitled to an equitable lien, though against a purchaser for value, and in good faith, of its shares in the market, must be allowed, and any offense against the banking act involved must be left to governmental cognizance. I believe this conclusion to be fallacious, and that the reasoning of the learned justices below is without regard to the distinction which exists between those cases in their facts and in the principle underlying their decision, and the earlier cases which construed the national banking acts, and declared the doctrine that loans by banking associations to their stockholders do not give a lien to the bank upon their stock. *First Nat. Bank* v. *Lanier*, 11 Wall. 369, 20 L. ed. 172; *Bullard* v. *National Eagle Bank*, 18 Wall. 589, 21 L. ed. 923. I am quite unable to agree in the view that these earlier cases have been overruled, or their doctrine refused credit, by the later cases which are relied upon for the defendant. If we assume the existence of a contract between the defendant bank and Levi (and all we know of it is the testimony of the president of the defendant as to a conversation with Levi, in which he said the bank could consider the stock in his safe as collateral for his loans), it was executory in its nature as long as the stock remained in his possession, and until it was in fact pledged to the bank by a delivery. Possession is of the essence of a pledge, in order to raise a privilege against third persons. *Casey* v. *Cavaroc*, 96 U. S. 467, 24 L. ed. 779; *Wilson* v. *Little*, 2 N. Y. 443, 51 Am. Dec. 307.

The defendant is asking the court to declare an equitable lien in its favor upon the shares of stock against a third person, and in that respect the case is unlike those cases where the Federal court has held that a national bank might enforce a security which it had taken and held, notwithstanding the claim of the borrower that the transaction was in violation of some express provision of the law. The defendant never had possession of the stock, and, being under the prohibition of the banking act as to a transaction of a loan upon the security of its own shares of stock, it is compelled to take the position that, having dealt with Levi upon the faith that his ownership of the stock would be an added security for the performance of his promise to pay his loans, and the certificates of stock carrying notice to persons dealing with Levi with respect to them that any transfer thereof would be subject to a lien in favor of the bank for any liability of the stockholder, it should be allowed an equitable lien thereon, superior to any right of the plaintiff thereto. I should say that there was a marked difference between any such claim of the bank, which slights a provision of the banking law, intended to negative the right to a lien and to confer the valuable character of transferability upon national bank shares, in the public interests, and a claim which a borrower or his representative asserts against the right of a national bank, as his creditor, to realize its debt upon securities which have been held by it in pledge, though not within the class of those it was authorized to hold. The demand of the bank is to have the court declare an equitable lien upon its outstanding stock by virtue of a by-law and of notice thereof on the certificates, when the banking act prohibited loans by it upon the security of its own shares, and thereby rendered any by-law in contravention of the act,

or any notice based thereon, wholly inoperative.

In *First Nat. Bank* v. *Lanier*, 11 Wall. 369, 20 L. ed. 172, the certificate of stock declared that the shares were transferable on the books of the bank only on surrender of the certificates. This limitation was imposed by the by-laws, which further provided that the stock of the bank should be assignable, subject to the provisions and restrictions of the 36th section of the act of 1863. Lanier and Handy purchased the stock of Culver, to whom it had been issued, and, their request for a transfer being refused, an action was brought against the bank to obtain pecuniary satisfaction. The bank defended upon the ground that it had a lien upon the stock for Culver's indebtedness to it, by virtue of the provisions of the 36th section of the act of 1863, which remained in operation, notwithstanding its repeal in 1864, by means of a by-law, adopted while the section was in force, declaring that the stock should be transferable subject to the provisions and restrictions of the act of Congress aforesaid. It appeared that the bank had sold and transferred the Culver shares upon its books to a third person, and had applied the proceeds of the sale upon the indebtedness, before Culver assigned the certificates to Lanier and Handy. It was held that the provisions of the act of 1864 governed the conduct of banking associations, whether they were organized before or after it became a law, and that the prohibition upon the making of loans on the security of the shares of their own capital stock applied. The object of the new act was stated to be to make national banks subserve public purposes, and to place shareholders, in their pecuniary dealings with the bank, on the same footing with other customers. It was a change in the policy of the government, and, as the restrictions of the act of 1863 fell, "so did that part of the bank's by-law relating to the subject fall with them." The judgment against the bank was affirmed.

In *Bullard* v. *National Eagle Bank*, 18 Wall. 594, 21 L. ed. 923, the defendant was organized under the national banking act of 1864, and issued to one Clapp certain shares of its capital stock. He borrowed moneys from the bank on his notes, and subsequently was adjudged a bankrupt. The plaintiff, as his trustee in bankruptcy, demanded a transfer of the stock to him as part of the bankrupt's assets; but the bank refused, claiming a lien upon it, by force of its by-law, to the extent of the notes held by it. The action was then brought against the bank for refusing to allow the transfer asked for, and the questions certified for determination were whether a national bank could acquire a valid lien upon the shares of its stockholders by its articles or by-laws, and whether the bank was entitled to hold the interest of Clapp in the stock by way of lien, or security for all or any of the notes. It was held, on the authority of the *Lanier Case*, 11 Wall. 369, 20 L. ed. 172, that these questions must be answered in the negative.

48 L. R. A.

Mr. Justice Strong, who delivered the opinion of the court, observed that the repeal of the 36th section of the act of 1863 by the substituted act of 1864, "was a manifestation of a purpose to withhold from banking associations a lien upon the stock of their debtors," and that a by-law founded upon the 36th section of the act of 1863 was "a regulation inconsistent with the new currency act, the policy of which was to permit no liens in favor of a bank upon the stock of its debtors." It was there argued for the bank that, though the act of Congress does not itself create a lien on a debtor's stock (as did the act of 1863), it does, by its 5th section, authorize the creation of such a lien by the articles of association and by by-laws made under them. But it was answered that the words of the 5th section would bear no such meaning, and that a by-law giving to the bank a lien upon its stock, as against indebted stockholders, ought not to be considered as one of those regulations of the business of the bank, or for the conduct of its affairs, which it was authorized to adopt, and that Congress evidently did not understand the section as extending to the subject of stock transfers, because in another part of the statute express provision was made for them.

The doctrine of *First Nat. Bank* v. *Lanier*, was followed in this court in *Conklin* v. *Second Nat. Bank*, 45 N. Y. 655, where the stock certificates contained the statement that the stock was not transferable "until all liabilities of the stockholder to the bank were paid." The rule of the *Lanier Case* was held applicable to the transaction between the bank and the plaintiff's assignor, and it was held, against the claim of the bank to a lien upon the stock for moneys due from the stockholder, that "when the statute has prohibited all express agreements between a bank and its stockholders or a lien in favor of the former upon the stock of the latter to secure any debts or liabilities of the stockholders to the bank, that no such lien can be created by a mere by-law of the bank is too clear to require discussion."

Do the cases which are cited and relied upon below as establishing a new doctrine apply to the present case, and come to the support of the defendant's position? They are *Union Nat. Bank* v. *Matthews*, 98 U. S. 621, 25 L. ed. 188, and *National Bank* v. *Whitney*, 103 U. S. 99, 26 L. ed. 443. The national banking law authorizes a national banking association to loan money on personal security, and then declares that "it may purchase, hold, and convey real estate for the following purposes, and no others: First, such as may be necessary for its immediate accommodation in the transaction of its business; second, such as shall be mortgaged to it in good faith by way of security for debts previously contracted; third, such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings; fourth, such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts to it." In the case of *Union*

Nat. Bank v. *Matthews*, Matthews and another person had given their joint note to a mercantile company, and secured it by a deed of trust, covering certain real property, executed by Matthews alone. Subsequently the company assigned the note and deed of trust to the defendant bank to secure a loan made at the time. The loan was not paid, and the bank directed the trustee to sell. In the state courts Matthews obtained a perpetual injunction against the sale, upon the ground that the loan was made upon real-estate security, which was forbidden by the statute, and the deed of trust was therefore void. The case was taken by writ of error to the United States Supreme Court, where the decree of the state court was reversed, and the cause remanded, with direction to the court below to dismiss the bill. It was held that the prohibitory clause of the national banking law did not vitiate real-estate securities taken for loans, and that a disregard of the law only laid the association open to proceedings by the government. Justice Swayne remarked that "the impending danger of a judgment of ouster and dissolution was, we think, the check, and none other, contemplated by Congress." The guiding principle of the decision, however, was that it would be inequitable that a borrower should be rewarded by giving success to his defense of the invalidity of the bank's act in taking a prohibited security for its loan, and that, as a punishment was prescribed for the violation of its charter, it was for the government to object. See p. 629, L. ed. p. 190. In *National Bank* v. *Whitney*, Whitney had executed a mortgage to the bank, which declared that it was made as collateral security for the payment of all notes which the bank held at the time against him, and for his other indebtedness then due or thereafter to become due. The question for determination was stated to be whether the mortgage was valid so far as it applied to future advances to him. The question was regarded as determined by the decision in *Union Nat. Bank* v. *Matthews*, which was reviewed in the opinion. It was observed that, "whatever objection there may be to it, as security for such advances, from the prohibitory provisions of statute, the objection can only be urged by the government." In both these cases the bank held the trust deed or mortgage, and was endeavoring to enforce the security which it actually had taken from its debtor.

In *First Nat. Bank* v. *Stewart*, 107 U. S. 676, 27 L. ed. 592, 2 Sup. Ct. Rep. 778, the bank had taken, as security for a debt due from the stockholder, thirty shares of its own stock, and upon default in payment had sold the same, and applied the proceeds in payment of the debt. The action was brought to recover back the proceeds of sale upon the ground that the bank had no right to take the security. The right to recover was denied upon the ground that "the contract has been executed, the security sold, and the proceeds applied to the payment of the debt." and that "both bank and borrower are, in such case, equally the objects of legal censure, and they will be left by the courts where they have placed themselves." By suing for the proceeds of the sale, it was observed, the plaintiffs had affirmed the sale, and the moneys loaned were an offset to the proceeds.

In *Thompson* v. *Saint Nicholas Nat. Bank*, 146 U. S. 240, 36 L. ed. 956, 13 Sup. Ct. Rep. 66, the question arose upon the overcertification of a check, in violation of the United States statute which made it "unlawful for any officer, clerk, or agent of any national bank to certify any check drawn upon said bank, unless the person or company drawing said check shall have on deposit in said bank, at the time such check is certified, an amount of money equal to the amount specified in such check." The statute further provided that any check so certified shall be a good and valid obligation against said bank, but that any officer, etc., violating the provisions of the act, would subject the bank to proceedings on the part of the comptroller for the appointment of a receiver to wind up the affairs of the association. 13 Stat. at L. 114, chap. 106. The action was brought to recover the possession of certain railroad bonds, which the bank was charged with having become illegally possessed of. The bank answered that the bonds had been pledged to it as collateral security for call loans or advances, and that, the pledgeors having failed to pay their indebtedness, the bonds had been sold under an agreement permitting the bank to do so upon the pledgeor's default. The question was whether, inasmuch as the defendant had certified checks without having on deposit an equivalent amount of money to meet them, it became a bona fide holder of the bonds. Upon the authority of the cases of *Union Nat. Bank* v. *Matthews* and *National Bank* v. *Whitney*, it was held that, "where the provisions of the national banking act prohibit certain acts by banks, or their officers, without imposing any penalty or forfeiture applicable to particular transactions which have been executed, their validity can be questioned only by the United States, and not by private parties." This clause from the opinion is quoted below in the present case, but I fail to perceive its precise applicability. The transaction, as in *First Nat. Bank* v. *Stewart*, had been executed. *Union Nat. Bank* v. *Matthews* and *National Bank* v. *Whitney*, only, of these cases, might be claimed to have a bearing upon the discussion; but their analogy is not apparent. I do not think that the United States Supreme Court intended to announce any new rule, for they simply applied a doctrine established as early as in the case of *Fleckner* v. *Bank of United States*, 8 Wheat. 339, 5 L. ed. 631. That the *Matthews* and *Whitney Cases* have not overruled the doctrine of the *Lanier* and *Bullard Cases* or of the *Conklin Case* in this court, with respect to the enforceability of such a by-law as the bank had in this case, is the general understanding of text writers, and it has been so understood by courts. Cook, Stock, Stockholders, & Corp. Law, 3d ed. § 533; Jones, Liens, 2d ed. § 384; 2 Thomp. Corp. ed. 1894, § 2319; Paine, Banking Laws, p. 533; 16 Am.

& Eng. Enc. Law, p. 201, §§ 14, 15; *Evansville Nat. Bank* v. *Metropolitan Nat. Bank*, 2 Biss. 527, Fed. Cas. No. 4,573; *Continental Nat. Bank* v. *Eliot Nat. Bank*, 7 Fed. Rep. 376; *New Orleans Nat. Bkg. Asso.* v. *Wiltz*, 10 Fed. Rep. 330; *Feckheimer* v. *National Exch. Bank*, 79 Va. 80.

I do not understand that by virtue of any rule established in the *Matthews* and *Whitney Cases*, a national banking association is enabled, by force of a by-law, or by a notice upon certificates, to restrict the transferability of its stock by imposing a lien thereon for any liability owing to it by its stockholder. How can it reserve to itself a right to a lien upon shares of its own stock, in contravention of the provisions of the national banking act, and become entitled to demand of the courts to enforce it as against a purchaser of the shares, whose title thereto is acquired bona fide, and for value? If the defendant bank can successfully insist upon the right to an equitable lien, which the courts must enforce in the face of the statutory prohibition, then I do not see that certificates of capital stock in national banking associations will possess that marketable character which has been considered to give them a greater value as investments. The transferability of the stock is one of the most valuable franchises conferred by Congress upon banking associations as it was said by Mr. Justice Davis in the *Lanier Case*. The learned judge further remarked, in that case: "It is no less the interest of the shareholder than the public that the certificate representing his stock should be in a form to secure public confidence, for without this he could not negotiate it to any advantage." Nor can it be said that this plaintiff, when offered by Levi the certificates of stock as collateral security for a loan of money, was chargeable with notice of any lien of the bank thereon. The certificates were in his possession, and were delivered to the plaintiff; and the printed matter thereon was of no importance, inasmuch as the public law, under which the bank was organized, prohibited it from making any loan or discount on the security of the shares of its own capital stock. The plaintiff could not be bound by notice of something which the law prohibited. The plaintiff, in the language of Justice Davis in the *Lanier Case*, was "told, under the seal of the corporation, that the shareholder is entitled to so much stock, which can be transferred on the books of the corporation, in person or by attorney, when the certificates are surrendered, but not otherwise. This is a notification to all persons interested to know that whoever in good faith buys the stock, and produces to the corporation the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred to him. And the notification goes further, for it assures the holder that the corporation will not transfer the stock to anyone not in possession of the certificates." If the case had been one where the bank, not regarding the prohibition of the banking act, had taken from Levi his certificates of stock as collateral security for the payment of any indebtedness which he had incurred or might incur, and had realized upon them for application upon his debt, it might well be that it would not lie in his mouth, or anyone claiming under him, to assert the illegality of the transaction. The case would then resemble more the cases of *Union Nat. Bank* v. *Matthews* or *First Nat. Bank* v. *Stewart*. If the bank had violated the law, it laid itself open to proceedings on the part of the government, and the courts might leave the parties where they were, and might decline to interfere to benefit the borrower to the prejudice of the stockholders and creditors. There is no conflict between the *Lanier* and *Bullard Cases* and the *Matthews* and *Whitney Cases*. Each class is distinct, and its doctrine is controlling where the principle involved is the same. It is one thing if the contract has been executed, and to avoid it would be to deplete the assets of the bank to the amount represented by the contract. It is quite another thing where the bank is seeking to create a lien upon an implied executory contract, or a security where it has none, and where it admits it has none, in the face of the statute which provides that it shall not have such a lien or take such a security.

The conclusion I reach is that the cases relied upon in the court below in the decision of this case do not control it. They do not authorize the assertion of an equitable lien by the bank upon the shares of its own capital stock; and the plaintiff, having acquired the certificates from Levi, the stockholder, for value, and in good faith, was entitled to have the same absolutely transferred into its name upon the books of the corporation.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

Parker, Ch. J., and **Bartlett, Martin, Vann, Cullen**, and **Werner**, JJ., concur.

PEOPLE of the State of New York *ex rel.* Elizabeth CISCO, *Appt.*,
v.
SCHOOL BOARD OF THE BOROUGH OF QUEENS, New York City, *Respt.*

(161 N. Y. 598.)

1. **The right of colored children to attend any school** they or their parents may choose, instead of being restricted to the separate schools established for colored children, is not conferred by Pen. Code, § 383, which makes it a misdemeanor for teachers or officers of schools to exclude any citizen from the equal enjoyment of any accommodation or privilege, if the schools for colored children furnish facilities and accommodations equal to those which are furnished by the other schools.

NOTE.—As to the rights of colored children in schools, see cases in *note* to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. (Ky.) 14 L. R. A. on page 581.

2. The constitutional requirement of the maintenance and support of a system of free common schools wherein all the children of the state may be educated does not require a school board to admit to any school under its control all the children who may desire to attend that particular school, or prevent the legislature from exercising its discretion as to the best method of educating the different classes of children in the state, whether those classes are determined by nationality, color, or ability, so long as it provides for all alike in the character and extent of the education furnished and facilities for its acquirement.

(February 6, 1900.)

APPEAL by relator from an order of the Appellate Division of the Supreme Court, Second Department, affirming an order of a Special Term for Queens County denying a writ of mandamus to compel defendant to admit relator's children into one of the public schools. *Affirmed.*

The facts are stated in the opinion.

Mr. **George Wallace,** for appellant:

The court of appeals, in its latest deliverance on the subject, holds that there can be no distinction on account of color in the admission of persons to places of amusement, to common schools, or their bodies to the cemetery.

People v. *King*, 110 N. Y. 418, 1 L. R. A. 293, 18 N. E. 245.

Messrs. **William J. Carr** and **John Whalen,** for respondent:

The school board had the power to organize a separate school for the instruction of children of African descent, and to assign thereto the children of the relator.

People ex rel. King v. *Gallagher*, 93 N. Y. 438, 45 Am. Rep. 232; *Ward* v. *Flood*, 48 Cal. 36, 17 Am. Rep. 405; *Cory* v. *Carter*, 48 Ind. 327, 17 Am. Rep. 738; *Roberts* v. *Boston*, 5 Cush. 198; *Lehew* v. *Brummell*, 103 Mo. 546, 11 L. R. A. 828, 15 S. W. 765; *McMillan* v. *School Committee*, 107 N. C. 609, 10 L. R. A. 823, 12 S. E. 330; *Louisville, N. O. & T. R. Co.* v. *Mississippi*, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348.

Equality of rights does not involve the necessity of educating white and colored persons in the same school, any more than it does that of educating children of both sexes in the same school, or that different grades of scholars must be kept in the same school. Any classification which preserves substantially equal school advantages is not prohibited by either the state or the Federal Constitution, nor would it contravene the provisions of either.

State ex rel. Garnes v. *McCann*, 21 Ohio St. 211.

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

The single question in this case is whether the school board of the borough of Queens is authorized to maintain separate schools for the education of the colored children within the borough, and to exclude them from the other schools therein, it having made the same provisions for their education as are made for others, so far as the nature, extent, and character of the education and facilities for obtaining it are concerned. In *People ex rel. King* v. *Gallagher*, 93 N. Y. 438, the statute of 1864, which was the common school act, chapter 143, Laws 1850, and chapter 863, Laws 1873, which related to the public schools of the city of Brooklyn, were under consideration. They authorized the establishment of separate schools for the education of the colored race in cities and villages of the state, and in the city of Brooklyn. In that case it was held that they were valid, that they did not deprive children of African descent from the full and equal enjoyment of any accommodation, advantage, facility, or privilege accorded to them by law, and that they in no way discriminated against colored children. It was also held that the 14th Amendment of the Federal Constitution only required that such children should have the same privilege of obtaining an education with equal facilities as are enjoyed by others, without regard to race or color, and that the requirement that they should be educated in separate schools did not impair or interfere with their rights under the Constitution, or with any other legal rights of colored pupils. The consolidated school law (Laws 1894, chap. 556, title 15, § 28) contains the same provisions relating to this subject as were contained in the statute of 1864. Thus, the same statutory authority for the maintenance of such separate schools now exists as existed when the *King Case* was decided. Therefore, as this question has already been decided, it is not an open one in this court.

But it is insisted by the appellant that, as the Penal Code (§ 383) makes it a misdemeanor for teachers or officers of common schools and public institutions of learning to exclude any citizen from the equal enjoyment of any accommodation or privilege, it in effect confers upon colored children the right to attend any school they or their parents may choose, and that the school board had no authority to establish separate schools and deny them the right to attend elsewhere. The first answer to this insistence is that the Penal Code was in existence at the time of the decision of the *King Case*, and must be regarded as having been considered in that case. Moreover, independently of that decision, we do not see how that statute changes the effect of the conclusion reached in the case referred to, provided the facilities and accommodations which were furnished in the separate schools were equal to those furnished in the other schools of the borough. It is equal school facilities and accommodations that are required to be furnished, and not equal social opportunities. The case of *People* v. *King*, 110 N. Y. 418, 1 L. R. A. 293, 18 N. E. 245, is relied upon as modifying or overruling *People ex rel. King* v. *Gallagher*. We do not think such is its effect. In the former case a colored person was excluded from a place of public amusement controlled by the defendant, and it was there held that the latter was guilty of a misdemeanor. In

that case there was a total denial of the complainant's right to attend or to participate in the enjoyment of the entertainment. There no other accommodation or facility was furnished by the defendant. Not so here. In this case the colored children were given the same facilities and accommodations as others. We are of the opinion that the case of *People* v. *King* neither modifies nor affects the principle of the decision in *People ex rel. King* v. *Gallagher*, so far as it applies to the question under consideration.

Again, it is said that the present Constitution requires the legislature to provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated, and therefore the school board was required to admit to any school under its control all the children who desired to attend that particular school. Such a construction of the Constitution would not only render the school system utterly impracticable, but no such purpose was ever intended. There is nothing in that provision of the Constitution which justifies any such claim. The most that the Constitution requires the legislature to do is to furnish a system of common schools where each and every child may be educated,—not that all must be educated in any one school, but that it shall provide or furnish a school or schools where each and all may have the advantages guaranteed by that instrument. If the legislature determined that it was wise for one class of pupils to be educated by themselves, there is nothing in the Constitution to deprive it of the right to so provide. It was the facilities for and the advantages of an education that it was required to furnish to all the children, and not that it should provide for them any particular class of associates while such education was being obtained. In this case, there is no claim that the relator's children were excluded from the common schools of the borough, but the claim is that they were excluded from one or more particular schools which they desired to attend, and that they possessed the legal right to attend those schools, although they were given equal accommodations and advantages in another and separate school. We find nothing in the Constitution which deprived the school board of the proper management of the schools in its charge, or from determining where different classes of pupils should be educated, always providing, however, that the accommodations and facilities were equal for all. Nor is there anything in this provision of the Constitution which prevented the legislature from exercising its discretion as to the best method of educating the different classes of children in the state, whether it relates to separate classes, as determined by nationality, color, or ability, so long as it provides for all alike in the character and extent of the education which it furnished and the facilities for its acquirement.

The order should be affirmed, with costs.

Parker, Ch. J., and **Gray, O'Brien, Bartlett,** and **Haight, JJ.**, concur. **Vann**, J., not voting.

48 L. R. A.

William J. TRIMBLE, Assignee, etc., of Eugene T. Curtis *et al.*, *Respt.*,

v.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, *Appt.*

(162 N. Y. 84.)

1. **All controverted facts, and all inferences therefrom, must be deemed conclusively established** in favor of the party for whom judgment is rendered, when both parties are in the position of having asked for the direction of a verdict.
2. **A railroad company is liable for the loss of a sample trunk** on a contract for its transportation as freight, where it was checked without any misrepresentation, and without any release of liability or any request therefor, on payment of a charge for excess baggage, which was the same for sample trunks as for ordinary baggage, and the baggageman had constructive notice of the character of the trunk from its appearance and from other circumstances, although there was a rule of the company prohibiting the checking of sample trunks without a release of liability.
3. **Both parties are deemed to have asked for the direction of a verdict,** where defendant's counsel, after moving unsuccessfully for a nonsuit, replied to an inquiry from the court, that he did not care to have any question submitted to the jury, and, after a request by plaintiff's counsel for the direction of a verdict, stated that he desired to stand on his motion for a nonsuit, while neither party asked to have any question of fact submitted to the jury.

(*Parker, Ch. J., and O'Brien and Landon, JJ., dissent.*)

(February 27, 1900.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, Fourth Department, affirming a judgment of a Trial Term for Monroe County in favor of plaintiff in an action brought to recover damages for the destruction of a trunk while in defendant's possession for transportation. *Affirmed.*

The facts are stated in the opinions.

Messrs. **Harris & Harris**, for appellant:

The defendant was not liable for the loss of these samples, and the plaintiff should have been nonsuited.

Talcott v. *Wabash R. Co.* 159 N. Y. 461, 54 N. E. 1; *Cattaraugus Cutlery Co.* v. *Buffalo, R. & P. R. Co.* 24 App. Div. 267, 48 N. Y. Supp. 451; *Gurney* v. *Grand Trunk R. Co.* 37 N. Y. S. R. 155, 14 N. Y. Supp. 321, Affirmed in 138 N. Y. 638, 34 N. E. 512; *Cahill* v. *London & N. W. R. Co.* 10 C. B. N. S. 154, 13 C. B. N. S. 818; *Becher* v. *Great Eastern R. Co.* L. R. 5 Q. B. 241; *Great Northern R. Co.* v. *Shepherd*, 8 Exch. 30; *Belfast & B. R. Co.* v. *Keys*, 9 H. L. Cas. 555; *Lee* v. *Grand Trunk R. Co.* 36 U. C. Q. B. 350; *Macrow* v. *Great Western R. Co.* L. R. 6 Q. B. 612; *Blumantle* v. *Fitchburg R. Co.*

NOTE.—As to liability of passenger carrier in transporting merchandise intrusted to it by a passenger, see also Kansas City, M. & B. R. Co. v. Higdon (Ala.) 14 L. R. A. 525, and *note*.

127 Mass. 322, 34 Am. Rep. 376; *Alling* v. *Boston & A. R. Co.* 126 Mass. 121, 30 Am. Rep. 667; 5 Am. & Eng. Enc. Law, 2d ed. p. 534; *Humphreys* v. *Perry*, 148 U. S. 627, 37 L. ed. 587, 13 Sup. Ct. Rep. 711; *Toledo & O. C. R. Co.* v. *Dages*, 57 Ohio St. 38, 47 N. E. 1039; Hutchinson, Carr. 2d ed. pp. 822, 823; Thomas, Neg. p. 333.

Under the contract for passage the defendant is not liable for damage to this trunk.

Gurney v. *Grand Trunk R. Co.* 37 N. Y. S. R. 155, 14 N. Y. Supp. 321, Affirmed in 138 N. Y. 638, 34 N. E. 512; *Orange County Bank* v. *Brown*, 9 Wend. 116.

Mr. **David Hays**, for respondent:

At common law the carrier of goods was responsible for all losses not occasioned by the act of God or of the public enemy.

Story, Bailm. § 491.

The right of a passenger to take with him as baggage such articles as may be reasonably necessary for his convenience on the journey has always been accorded by carriers of persons to attract travelers.

Merrill v. *Grinnell*, 30 N. Y. 594.

The term "baggage" was limited to such personal effects as were ordinarily taken by travelers for their personal use and convenience. The rule defining the general meaning of the word "baggage" has varied from time to time, according to changes in the customs of carriers and travelers.

Lawson, Bailm. § 273.

During the past quarter of a century a large and lucrative part of the passenger business of railroad companies has consisted in carrying traveling salesmen and their samples.

It has inured greatly to the profit of the railroads to have the system of the sale of goods on the road by commercial travelers substituted in place of the former custom of merchants making their purchases at the manufacturing centers. In order to promote the change it was necessary for the railroad companies to permit the sample trunks of the traveling salesmen to be carried on passenger trains with them.

The fact that merchandise so accepted by the carrier does not come within the definition of personal baggage cannot relieve the carrier from all liability respecting it.

Schouler, Bailm. § 673; 4 Elliott, Railroads, § 1649.

The defendant having received the trunk with notice that it contained property other than the personal baggage of the passenger, and having charged extra compensation for its transportation, it is liable for its loss.

Each party having clothed the court with the functions of the jury, the verdict for the plaintiff stands as would the finding of a jury. All the controverted facts and all inferable facts in support of the judgment will be deemed conclusively established in favor of the plaintiff.

Smith v. *Weston*, 159 N. Y. 194, 54 N. E. 38; *Adams* v. *Roscoe Lumber Co.* 159 N. Y. 176, 53 N. E. 805.

The judgment is conclusive with respect to the following facts:

1. That the defendant had notice that the trunk contained property other than Taylor's baggage.

2. That the defendant had notice that the trunk and its contents were not Taylor's property.

3. That it was the defendant's custom to check trunks of commercial travelers containing samples of merchandise in the same manner, and for the same compensation, and for transportation on the same trains, as ordinary baggage.

4. That the defendant's servants in its baggage room were authorized to check sample trunks of commercial travelers as baggage.

The plaintiff's right of action does not depend upon proof of all the foregoing facts, but they are all in the case, and strengthen his position.

Sloman v. *Great Western R. Co.* 67 N. Y. 208; *Talcott* v. *Wabash R. Co.* 159 N. Y. 461, 54 N. E. 1.

The regulation of the defendant, unknown to the passenger, requiring its baggage agent to exact a release, cannot relieve the defendant from its responsibility.

Talcott v. *Wabash R. Co.* 159 N. Y. 461, 54 N. E. 1; 4 Elliott, Railroads, § 1649; Hutchinson, Carr. § 269; Lawson, Bailm. § 284.

Even if it had been the custom of the defendant to exact releases, and Taylor knew it, the defendant would, nevertheless, be liable in this case, having waived the condition.

Rathbone v. *New York C. & H. R. R. Co.* 140 N. Y. 48, 35 N. E. 418; *Lake Shore & M. S. R. Co.* v. *Foster*, 104 Ind. 293, 54 Am. Rep. 319, 4 N. E. 20.

The defendant is liable on the ground of negligence.

The plaintiff having proved delivery of the property to the defendant in good condition, and the defendant having assumed to carry it, and the owner having demanded it at the place of destination, where the defendant produced it in a ruined condition, the damage is presumed to have been due to defendant's negligence.

Fairfax v. *New York C. & H. R. R. Co.* 67 N. Y. 11, 73 N. Y. 167, 29 Am. Rep. 119; *Canfield* v. *Baltimore & O. R. Co.* 93 N. Y. 532, 45 Am. Rep. 268.

The facts set forth in the complaint constitute a cause of action for negligence, as well as for breach of contract.

Catlin v. *Adirondack Co.* 11 Abb. N. C. 377; *Curtis* v. *Delaware, L. & W. R. Co.* 74 N. Y. 116, 30 Am. Rep. 271.

The limitation contained in the passenger ticket does not affect the plaintiff's right to recover.

The ticket is a mere token or voucher, and a notice on it does not bind a passenger as by contract.

Perkins v. *New York C. R. Co.* 24 N. Y. 196, 82 Am. Dec. 281; *Blossom* v. *Dodd*, 43 N. Y. 264, 3 Am. Rep. 701.

Assuming the notice on the ticket to have

any force, it might excuse the defendant from its common-law liability as insurer, but it would not excuse it from liability for negligence, as it does not expressly exempt from such liability.

Mynard v. *Syracuse, B. & N. Y. R. Co.* 71 N. Y. 180, 27 Am. Rep. 28; *Rathbone* v. *New York C. & H. R. R. Co.* 140 N. Y. 48, 35 N. E. 418.

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

This action is brought to recover the value of a trunk and its contents destroyed while in the possession of the defendant, to which it had been delivered by the plaintiff's assignors for transportation from Rochester to New York on the evening of October 23, 1897. Curtis & Wheeler were manufacturers of shoes in the city of Rochester, and Joseph E. Taylor acted as their traveling salesman on the 23d day of October, 1897, and had been in their employ in that capacity for a period of nine years. On the evening in question, Taylor, acting for his employers, went from Rochester to New York on business. Before starting he arranged with the baggageman of the defendant for the transportation of a trunk and an article called a "telescope." The trunk and its contents, consisting of samples of shoes, belonged to Curtis & Wheeler, except a few articles of wearing apparel, the property of Taylor, for which no claim is made. The telescope contained the wearing apparel of Taylor. For the trunk Taylor received from the baggageman a card known as "Excess Baggage Check," for which he paid 35 cents excess of baggage. For the telescope he received the ordinary metallic check. Taylor described the trunk, when a witness at the trial, as a regular sample trunk, made of wood and covered with canvas, about 32 or 34 inches in height, 36 to 38 inches in length, and 22 to 24 inches in width. The "number taker" of the Rochester baggageroom was sworn, and stated that he took a record of the baggage in and out. He produced a sheet containing a record covering October 23, 1897, which showed the description of plaintiff's baggage as a sample trunk. He further testified that he so designated it from its appearance. Taylor testified that he had been in the habit of leaving Rochester with his samples on an average of four, six, or eight times a year for about twelve years. The night checkman was sworn for defendant, and stated that he did not know what the contents of the trunk were, and that nothing was said to him as to the contents. He was asked on cross-examination if he remembered anything about this particular trunk, or its appearance. He answered, "I couldn't just now; no." It is to be observed that this witness was not asked by defendant's counsel whether he recognized this piece of baggage as a sample trunk from its external appearance. He does not contradict the number taker as to the external appearance of the baggage showing it was a sample trunk. The defendant does not question receiving the trunk, or the failure to deliver it, but insists it is not liable for its loss, with contents, for the reason that Taylor, when paying for excess of baggage on the trunk, failed to inform the checkman that it contained samples. The learned counsel for the defendant very frankly states in his brief that it is true the trunk was what is commonly known as a "sample trunk," and had the appearance of one, but nevertheless argues that the plaintiff should have been nonsuited.

The liability of common carriers for the loss of sample trunks carried by commercial travelers in the transaction of their business has been frequently considered by the courts of this and other jurisdictions during the last twenty-five years, and, while the decisions are conflicting, many of them are distinguishable in their facts from the case at bar. The law relating to this subject has been in a state of evolution, and certain rules have finally been laid down in this state, calculated to protect the rights of both parties, in view of the fact that a vast amount of the wholesale business of the country is transacted through commercial travelers, to the great profit of the railroad companies and convenience of merchants. As this case is in the position where each party is to be regarded as having requested the direction of a verdict (a point we will discuss later), and the trial judge having directed a verdict for the plaintiff, all the controverted facts, and all inferences in support of the judgment, will be deemed conclusively established in his favor.

The defendant read in evidence certain rules of the company which provide, in brief, that baggage consists only of necessary wearing apparel, limited to 150 pounds in weight; that sample baggage, of not more than 150 pounds, will be checked free for one person, regardless of the number or kind of tickets presented. Rule 4 reads as follows: "Small cases or trunks containing merchandise will be carried as an accommodation to commercial travelers, and may be checked when release of liability, Form 220, is signed in consideration of its transportation on passenger trains as baggage. In case personal baggage and samples are contained in same trunk, a release must be signed for samples, and agents will refuse to check the same unless this is done." The release referred to absolves the company from all liability for loss, detention, or damage to the trunk or its contents. It is urged on behalf of the defendant that rule 4 limited the authority of the baggageman, and that he was unauthorized to check a sample trunk without exacting the release. This court has held that the baggage agent stands in the place of the railroad company. *Talcott* v. *Wabash R. Co.* 159 N. Y. 471, 54 N. E. 1. And the record in the case before us shows that no release was exacted, nor was plaintiff's agent aware of the rule. The plaintiff's agent testified that he had on a number of occasions signed this release when he desired to stop at several stations between Rochester and New York, as he could settle for excess of bag-

gage through to New York for less than to pay this excess from each station at which he stopped. On cross-examination he was asked:

Q. I ask you if you did not know the fact that when the baggagemaster knew that your trunk contained samples, or any other traveling man's trunk contained samples, that this release of liability was executed?

A. No, sir; I had no knowledge of that. I knew that I had from time to time executed those releases on my sample baggage.

On re-direct examination he was asked:

Q. When you say that you had executed those releases, you refer to the releases which you described before, in order to save paying excess of baggage from each place when you departed?

A. Yes, sir; no release was presented to me, nor did I sign any release, nor was I asked to, when I checked this trunk in controversy.

The defendant's checkman or baggagemaster does not deny this statement.

This case presents the question whether the baggageman of the defendant, who checked the lost trunk and collected excess of baggage thereon, knew that it was a commercial traveler's trunk, from surrounding facts and circumstances, and defendant was thus chargeable with notice. This court has held that notice may be given to the common carrier by other means than the direct statement of the owner that he is a commercial traveler, and that his trunk contains samples. In *Sloman* v. *Great Western R. Co.* 67 N. Y. 208, plaintiff's son, a lad of eighteen years of age, was employed by him as traveling agent to sell goods by sample. He had two large trunks containing the samples, different from ordinary traveling trunks, and had a valise for his personal baggage. He delivered the trunks to a baggagemaster at a railroad depot, and, when asked to which station he wished them checked, replied that he did not then know, as he had sent a despatch to a customer at a certain place to know if he wanted any goods. If not, he desired them to go to a certain other place, where he expected to meet customers. Soon after he checked his baggage, and paid $2 for extra weight. Judge Rapallo, in his opinion, said: "It does not appear that it was stated, in terms, to the baggagemaster what the trunks contained, but the jury had the right to consider the sourrounding circumstances, the appearance of the passenger and of the articles, the conversation between the passenger and the baggagemaster, and the dealing between them, and, if they indicated that the trunks were not ordinary baggage, or received or treated as such, the jury had the right to draw the inference of notice, and that they were received as freight." In *Talcott* v. *Wabash R. Co.* 159 N. Y. 461, 54 N. E. 1, it appeared that when weighing the trunks the agent of the company observed "they weighed light," and the traveler replied, "Yes; they contain samples of underwear." Judge Vann, referring to this incident in the opinion of the court, at page 471, 159 N. Y., and page 4, 54 N. E., said: "The number and appearance of the trunks was some evidence that they contained merchandise, and the agent was expressly told that they contained samples. In view of the custom proved, that commercial travelers generally carry samples belonging to their employers in their trunks, this warranted the inference that the baggage agent knew the exact facts." In the case at bar there were facts warranting the submission of the question to the jury, or the trial judge, as to whether defendant was charged with knowledge of the character of the trunk, through its agent; the external appearance of a regular sample trunk; the readiness with which it was recognized as such by the official "number taker;" the fact that defendant was constantly checking sample trunks on all of its passenger trains except the Empire State Express; the further fact that for about twelve years plaintiff's agent had been traveling on defendant's road with a sample trunk, and leaving Rochester six or eight times a year; the fact that sample trunks were checked for the same compensation as ordinary baggage,—these and any other relevant facts were properly considered when the verdict was directed, and the facts warranted by the evidence stand conclusively established in favor of the plaintiff. While it is doubtless the better practice, as suggested by defendant's counsel, that a traveler in charge of a sample trunk should state to the baggage agent the fact when he seeks to check it, yet if, in the haste of transacting such business, or where, by many repetitions of the act, much is taken for granted, this is not done, it would be a harsh and unreasonable rule that precluded the plaintiff from submitting to the jury the facts surrounding the transaction. The recovery in this case was not on the contract of passage entered into when the plaintiff's agent purchased his ticket, but on an independent agreement for the transportation of the sample trunk as freight. In *Sloman* v. *Great Western R. Co.* 67 N. Y. at page 214, Judge Rapallo said: "From all the circumstances, the jury were, we think, authorized to draw the inference that the baggagemaster understood that the agent was traveling for the purpose of selling goods, and that these trunks contained his wares; that he was not entitled to have them carried as his ordinary baggage, and therefore, the extra charge was made, and they were carried as freight." In *Talcott* v. *Wabash R. Co.* 159 N. Y., at page 470, 54 N. E. 3, this case was cited and followed. The *Sloman Case* also authorizes a recovery by a plaintiff where this independent contract is made by his salesman as agent. 67 N. Y. 212.

There remains to be considered one other question. The learned appellate division in its opinion stated, in substance, that, as neither counsel raised the point that there were

any questions of fact to be submitted to the jury, the effect was to establish the facts, if any there were, in favor of the plaintiff. As the correctness of the practice at the trial is challenged, we will consider the question. At the conclusion of the evidence the defendant's counsel moved for a nonsuit upon various grounds stated by him, which motion was denied. He then asked the court, "What question will your honor submit to the jury?" To this the court inquired, "What question do you desire to submit to the jury?" To which the defendant's counsel answered, "I do not desire to have any question submitted to the jury." Thereupon the plaintiff's counsel stated that he was willing to leave it to the court, to which the defendant's counsel answered, "I stand on my motion for a nonsuit, of course." The plaintiff's counsel then asked for a direction of a verdict, which was objected to by the defendant's counsel, but was granted by the court. A verdict was directed, and an exception taken by the defendant. Neither party asked to have any question of fact submitted to the jury. In the case of *Adams v. Roscoe Lumber Co.* 159 N. Y. 176, 53 N. E. 805, O'Brien, J., in delivering the opinion of the court, says: "The court directed a verdict in favor of the plaintiffs for the value of the lumber, with damages for its detention, and the defendant excepted. The request by both parties for the direction of a verdict amounted to a submission of the whole case to the trial judge, and his decision upon the facts has the same effect as if the jury had found a verdict in the plaintiff's favor after submitting the case to them. Under these circumstances, the judgment is conclusive with respect to the two facts upon which the right of action depended." To the same effect are the cases of *Smith v. Weston*, 159 N. Y. 194, 54 N. E. 38; *Thompson v. Simpson*, 128 N. Y. 270, 283, 28 N. E. 627; *Koehler v. Adler*, 78 N. Y. 287.

It is contended, however, that as the defendant asked for a nonsuit, instead of a directed verdict, the foregoing cases have no application. It must be borne in mind that in this case, after the denial of his motion for a nonsuit, the defendant's counsel asked the court what question his honor would submit to the jury, and that the court then inquired of him what question he wanted submitted, and he answered that he did not desire any question submitted to the jury. In the case of *Barnes v. Perine*, 12 N. Y. 18, after the evidence had closed, the counsel for the defendant moved for a nonsuit. The motion was denied, and the defendant excepted. The court thereupon, at the request of the plaintiff, directed a verdict in his favor. Allen, J., in delivering the opinion of the court, said: "If the defendant supposed that there was a disputed question of fact, material to the issue between the parties, he should have made a distinct request that it should be submitted to the jury. But having treated the questions as purely legal, and acquiesced in the disposal of them by the court as such, he cannot now be heard to object that facts were involved which should have been decided by the jury." In *Winchell v. Hicks*, 18 N. Y. 558, the motion was also for a nonsuit at the conclusion of the evidence, which was denied, and a verdict directed in favor of the plaintiff. In that case it was held that the defendant, moving at the conclusion of the evidence for a nonsuit, which is denied, if he desires that questions of fact be submitted to the jury, must distinctly request it, and cannot upon appeal make the point under a general exception to the judge's direction of a verdict. In the case of *O'Neill v. James*, 43 N. Y. 84, there was a motion for a nonsuit, which was denied, and the jury directed to find a verdict in favor of the plaintiff for the amount of the damages sustained. It was held that where a party, upon the trial, rests his case upon certain positions which he calls upon the court to rule in his favor as questions of law arising upon undisputed facts, if he also desires that any question of fact in the case be submitted to the jury, he must make a motion to that effect. In the absence of this, his mere exception to the ruling of the judge that there is no question for the jury is unavailing. See also *Ormes v. Dauchy*, 82 N. Y. 443, 37 Am. Rep. 583; *Dillon v. Cockcroft*, 90 N. Y. 649. In the case of *Stone v. Flower*, 47 N. Y. 566, the trial court directed the jury to find a verdict for the defendant. The plaintiff, however, had not waived his right to have the questions of fact involved in the case submitted to the jury by any motion on his part for such a direction, and it was held that he was entitled to have his exception taken to the direction of a verdict reviewed; but Grover, J., in delivering the opinion of the court, refers with approval to *Barnes v. Perine*, *Winchell v. Hicks*, and *O'Neill v. James*, above cited, and distinguishes the case under consideration by him from the rule adopted in those cases. In *Clemence v. Auburn*, 66 N. Y. 334, and in *Pratt v. Dwelling House Mut. F. Ins. Co.* 130 N. Y. 212, 29 N. E. 117, relied upon as supporting a different rule, there was no waiver by the appellant, by motion to direct a verdict or for a nonsuit. The cases cited, of *Dwight v. Germania L. Ins. Co.* 103 N. Y. 341, 57 Am. Rep. 729, 8 N. E. 654; *Bagley v. Bowe*, 105 N. Y. 171, 59 Am. Rep. 488, 11 N. E. 386, and *Bulger v. Rosa*, 119 N. Y. 459, 24 N. E. 853,—have no application to the case at bar, as here the proceedings at the close of the trial were, in legal effect, a request by both counsel for a directed verdict.

The judgment and order appealed from should be affirmed, with costs.

Haight, Martin, and Vann, JJ., concur.

O'Brien, J., dissenting:

This was an action by the assignee of a commercial firm for the loss of a trunk which was carried by the traveling salesman of the firm, and was lost by the defendant. This trunk contained sample merchandise of the character in which the firm dealt, and was put upon one of the defendant's trains by direction of the salesman, who was a passen-

ger from Rochester to New York, on the 23d day of October, 1897. The salesman purchased a passage ticket on the defendant's road from Rochester to New York, which contained the following limitation: "In consideration of extended time within which journey may be begun, holder hereof releases R. R. Co. from all liability as to baggage, except for wearing apparel, not exceeding in value one hundred dollars." The salesman procured the trunk to be delivered at the railroad station, and checked as baggage, paying 85 cents for excessive weight. By the defendant's rules a passenger is entitled to have carried free 150 pounds of personal baggage, and by this rule baggage consists only of wearing apparel and such personal effects as may be necessary for the use and comfort of the passenger while traveling. Baggage in excess of that amount was to be paid for. The rule also provides that sample cases or trunks containing merchandise will be carried as an accommodation to commercial travelers, and may be checked when a release from liability is signed in consideration of its transportation on passenger trains as baggage; and, in case personal baggage and samples of merchandise are contained in the same trunk, a release must be signed for the samples, and agents are directed to refuse to check the same unless this is done. The baggagemen by this rule are directed to refuse to check baggage that does not consist strictly of personal effects unless this release is properly filled out and signed by the owner, or the agent of the owner. The form of this release appears in this case, and by its terms the company is discharged from all liability for baggage, whether the same arises from carelessness or negligence, however gross, on the part of the company, or its agents or servants, or from any cause whatever. It appears that the salesman who had the trunk in question had on previous occasions signed these releases, though he stated that he never read them, but that there was no release signed on the occasion of the delivery of the trunk in question, nor did he make known to any of the servants of the company its contents; and there is no evidence in the case to show that the defendant, or any of its servants, on this or any other occasion knew the fact that the trunk carried by this salesman contained merchandise, except as that fact was to be inferred from its appearance. It appears that the salesman had been in the employ of the firm for about twelve years, and during that time had been a passenger upon the defendant's road, but whether the trunk in question had ever been seen prior to the occasion in question by any of the defendant's agents or servants at Rochester does not appear. The claim for damages for the loss of the trunk was assigned by the firm to the plaintiff. These are the undisputed facts that appear in the record, and the question is whether the plaintiff was entitled to recover.

At the close of the proofs the defendant's counsel made a motion for a nonsuit on the ground, among others, that there was no evidence that the defendant had any knowledge that the trunk contained merchandise, and that there was no proof of a contract to carry a trunk containing merchandise on a passenger train, and that, inasmuch as the trunk did not contain baggage, there could be no recovery. The motion was denied, and the defendant excepted. The defendant's counsel then asked the court what question he proposed to submit to the jury. The court then asked the defendant's counsel what question he desired to submit to the jury, and the counsel replied that he did not desire to have any question submitted. The plaintiff's counsel then stated that he proposed to leave the case to the court, if the defendant's counsel was willing. The defendant's counsel did not accept this offer, but stated explicitly that he proposed to stand on his motion for a nonsuit. The plaintiff's counsel then asked the court to direct a verdict in his favor for the value of the trunk and contents, being $542.10, and $35 interest. The defendant's counsel objected to the direction of a verdict for the plaintiff, and made a special objection to the allowance of interest, but these objections were overruled. The court then directed a verdict in favor of the plaintiff for $577.10, and to this direction the defendant's counsel excepted. The questions of law presented by the record are therefore before this court for review.

The plaintiff cannot recover in this case unless he established a contract, express or implied, on the part of the defendant to carry merchandise for the salesman on a passenger train. It is not, and cannot be, claimed that there was any express contract creating the relations of a common carrier of goods between the salesman and the defendant. The only express contract made is represented by the passenger ticket sold to the salesman, and that was a contract to carry him as a passenger, with his personal baggage. But it turned out that what he had in the trunk was goods, and not baggage, which, under the defendant's rules, it did not carry on passenger trains, except in cases where the owner or passenger signed a release for any claim for damages in case of loss from any cause whatever. So that the salesman caused the trunk in question to be placed on a passenger train without any express contract on the part of the defendant to carry or be responsible for it. Moreover, the defendant contends that the salesman caused the trunk to be placed upon the defendant's passenger train, against its rules, as baggage, when in fact it was not baggage, but goods. There is but one ground upon which the defendant can lawfully be required to respond for the loss of the trunk and its contents, and that is in case it received and checked the same upon the train with knowledge of the fact that it contained goods instead of baggage. When a passenger who desires to have goods carried with him on a passenger train gives notice of that fact to the carrier, and the latter has notice of the fact in any way, and

then receives and checks the trunk containing the goods, the relation of carrier and shipper is created by the transaction, with all its duties and responsibilities. *Sloman* v. *Great Western R. Co.* 67 N. Y. 208; *Stoneman* v. *Erie R. Co.* 52 N. Y. 429. But, in the absence of proof showing or tending to show knowledge of the contents of the trunk or package by the carrier in such cases, there can be no recovery, and such knowledge cannot be inferred from the appearance of the trunk or package containing the goods. *Humphreys* v. *Perry*, 148 U. S. 627, 37 L. ed. 587, 13 Sup. Ct. Rep. 711; *Gurney* v. *Grand Trunk R. Co.* 37 N. Y. S. R. 155, 14 N. Y. Supp. 321, Affirmed on opinion below in 138 N. Y. 638, 34 N. E. 512; *Cahill* v. *London & N. W. R. Co.* 10 C. B. N. S. 154, Affirmed in 13 C. B. N. S. 818; *Blumantel* v. *Fitchburg R. Co.* 127 Mass. 322, 34 Am. Rep. 376; *Alling* v. *Boston & A. R. Co.* 126 Mass. 121, 30 Am. Rep. 667.

The case, therefore, is solved by a very simple inquiry, and that is whether there is in the record anything showing or tending to show that the defendant had knowledge of the contents of the trunk in question when it received and checked it upon the train on the 23d of October, 1897, other than the appearance of the same, which, it is held, is no evidence of knowledge at all. I confess I am unable to find any. It is said that the salesman was traveling as such for twelve years, but it does not appear that at any time he notified the defendant of the contents of the trunk, or that the defendant at any time acquired the knowledge in any other way, so that the case stands upon the transaction when the trunk was shipped for the last time. A fact or circumstance that in itself proves nothing is not made any stronger when multiplied by twelve or any larger number. In my opinion, there was no proof in the case to warrant a finding that the defendant had notice or any knowledge of the fact that the trunk in question contained goods instead of baggage. But the learned trial judge evidently thought otherwise, and it distinctly appears from the opinion of the learned court below that reviewed the case on appeal that it held that whether the defendant had or had not such notice or knowledge was a disputed question of fact. Grant, for the sake of the argument, that this view is correct, still the disputed fact was not found by the jury, and the action was one at law, triable by jury. Either party had the constitutional right to have the facts determined by the jury. The learned court below held that the disputed fact necessary to support the plaintiff's case was found by the court without the aid of the jury, and that it had the right to take the question from the jury and decide it itself. This is an obvious error, since the doctrine upon which it is based would go far to destroy the right of trial by jury altogether. If sustained by this court, all that will be necessary hereafter, when the plaintiff in an action at law has given proof of some fact or circumstance which no one claims is conclusive in support of an issue of fact, is to request the trial judge to direct a verdict in his favor; and, if such a direction is given against the defendant's objection and exception, still the disputed and necessary fact is to be deemed found by the court. The defendant could not be deprived of the right of a jury trial without its consent. It gave no such consent, nor did its counsel in any way waive the right. He moved for a nonsuit, and excepted to the denial of his motion. He told the court that he had no question to submit to the jury, and obviously he had none, from his view of the case, since he had just contended in his motion for a nonsuit that there was no case for the jury, as there was no proof that the defendant had knowledge of the contents of the trunk. He told the court that he stood upon his motion for a nonsuit, and objected and excepted to the direction. How, under such circumstances, he consented to have the facts found by the court, or waived his rights to have them found by the jury, it is impossible to conceive. The defendant's counsel did not need any finding, and did not want any finding. All he asked was that his client should be left alone. When his motion for a nonsuit was denied, and he concluded to stand upon that, he had no interest in anything else that took place. But it was quite different with the plaintiff. Before he could have judgment in his favor, it was necessary that the important fact in dispute should be found in his favor, and it was his business to procure the finding in the proper way. The defendant's counsel could remain silent, and let the plaintiff try his side of the case. The plaintiff's counsel should then have gone to the jury, and asked them to find the disputed fact, which was an essential part of his case, and which the other side was not interested in at all. When he asked and accepted the direction of a verdict in his favor by the court, he asked and accepted what he was not entitled to. The learned counsel for the plaintiff cites two cases to show that this practice is correct. *Smith* v. *Weston*, 159 N. Y. 104, 54 N. E. 38; *Adams* v. *Roscoe Lumber Co.* 159 N. Y. 176, 53 N. E. 805. They have no application to the question here, since it appears that they are cases where both sides asked the court to direct a verdict. All the parties may by such a request clothe the court with power to decide all the questions in the case, but it has never been held that one party could do it against the protest of the other. It is safe to say that no authority can be found to justify the practice followed in this case, and it has been often condemned in this court. The rule that governs the question has been thus stated in this court more than once: "In a case triable by a jury, the direction of a verdict is only justified where the evidence conclusively establishes the right of the party in whose favor it is made." *Bulger* v. *Rosa*, 119 N. Y. 459, 24 N. E. 853; *Bagley* v. *Bowe*, 105 N. Y. 171, 59 Am. Rep. 488, 11 N. E. 836; *Dwight* v. *Germania L. Ins. Co.* 103 N. Y. 341, 57 Am. Rep. 729, 8 N. E. 654. It is not necessary for the party

against whom a verdict is directed upon evidence not conclusive to show that he requested to have the case sent to the jury. *Stone* v. *Flower*, 47 N. Y. 566; *Clemence* v. *Auburn*, 66 N. Y. 334; *Pratt* v. *Dwelling House Mut. F. Ins. Co.* 130 N. Y. 212, 29 N. E. 117. It would indeed be a rule of practice bordering on the absurd that would require a defendant in a case where a fact is in dispute, in order to preserve his right to have the fact found by the jury, to assert by such a request that there is evidence tending to prove the plaintiff's case, when, upon a motion for a nonsuit just denied, he contended that there was no evidence whatever. He may preserve his rights by an exception to the direction of a verdict, and without taking two positions before the court so manifestly inconsistent. It is only necessary to add that, if there is in this record any evidence at all of knowledge by the defendant of the contents of the trunk, no one ventures to assert that it was conclusive. The judgment should be reversed, and a new trial granted; costs to abide the event.

Parker, Ch. J., concurs.

Landon, J., dissents upon the ground that defendant having, notwithstanding the denial of its motion for a nonsuit, objected to a direction of a verdict, the court should have submitted the facts to the jury.

Miles M. O'BRIEN *et al.*, Receivers of Madison Square Bank, *Respts.*,
v.
EAST RIVER BRIDGE COMPANY, *Appt.*

(161 N. Y. 539.)

1. **A statement in an order of the appellate division,** that it reverses the judgment of the trial court "upon the law and the facts," will not prevent a review by the court of appeals if the only question is whether the transaction as disclosed by the facts was forbidden by a statute.
2. **A withdrawal of the funds of a corporation from a bank** that is about to fail, upon a check signed by the president of the corporation, although he was also a director of the bank and his knowledge of its condition was acquired by him as such director, does not violate the stock corporation law, § 48, which prohibits any transfer of assets or payment by the bank or any officer, director, or stockholder thereof, with intent to prefer any creditor, when the bank is insolvent or its insolvency imminent.
3. **A communication by a director of a bank of his knowledge that it is about to fail,** though made to a depositor which is a corporation of which he is president, does not violate the stock corporation law, § 48, which prohibits a bank which is insolvent, or the insolvency of which is imminent, or any officer or director thereof, from giving a preference to any particular creditor by transfer of assets, payment, suffering judgment, the creation of a lien, or the giving of security.

(Bartlett, Haight, and Vann, JJ., dissent.)

(February 6, 1900.)

APPEAL by defendant from a judgment of the Appellate Division of the Supreme Court, First Department, reversing a judgment entered in the office of the clerk of New York County upon the report of the referee in its favor in an action brought to compel repayment of money withdrawn from a bank upon the eve of its insolvency. *Reversed.*

The facts are stated in the opinion.

Messrs. **Edward Lauterbach** and **Eugene Treadwell**, for appellant:

There was no transfer by anyone prohibited by the statute.

The act forbidden must be by an officer, director, or stockholder acting in the interest of, on the part of, or for, the insolvent corporation, and no disability is imposed upon action in any other capacity by the coincidence of holding one of such positions.

The statute only restricted Mr. Uhlman's action as director for the bank, and did not impose any disability upon his performance of his duty as president of the bridge company.

Varnum v. *Hart*, 119 N. Y. 101, 23 N. E. 183; *French* v. *Andrews*, 145 N. Y. 444, 40 N. E. 214; *Milbank* v. *De Riesthal*, 82 Hun, 537, 31 N. Y. Supp. 522; *Cummings* v. *American Gear & Spring Co.* 87 Hun, 598, 34 N. Y. Supp. 541; *Ridgway* v. *Symons*, 4 App. Div. 98, 38 N. Y. Supp. 895; *Spellman* v. *Looschen*, 31 App. Div. 96, 52 N. Y. Supp. 543; *Dickson* v. *Mayer*, 26 Abb. N. C. 257, 12 N. Y. Supp. 651; *Dickson* v. *Mayer*, 58 Hun, 609, 12 N. Y. Supp. 359.

The check was drawn by the defendant corporation for its own benefit.

Under such circumstances it is immaterial that the president of the defendant corporation was a director in the Madison Square Bank.

Kingsley v. *First Nat. Bank*, 31 Hun, 329.

A director is not prohibited from transferring his own claim, even where it results in the transferee collecting from the insolvent company.

Jefferson County Nat. Bank v. *Townley*, 159 N. Y. 490, 54 N. E. 74.

In the absence of clear provision, the prohibition will not be extended by construction so as to affect or disable the creditor.

Tompkins v. *Hunter*, 149 N. Y. 117, 43 N. E. 532; *Blakey* v. *Booneville Nat. Bank*, 95 Fed. Rep. 267.

The defendant was not restricted by knowledge of the insolvency of the Madison Square Bank.

Uhlman was responsible to the defendant company for the same degree of care and

NOTE.—For exceptions to the prohibition of preferences by insolvent national bank, see Elmira Sav. Bank v. Davis (N. Y.) 25 L. R. A. 546.

For unlawful preference by insolvent banks, see also Yardley v. Philler (C. C. A. 3d C.) 25 L. R. A. 824, Reversed in 42 L. ed. U. S. 192; and O'Brien v. Grant (N. Y.) 28 L. R. A. 361.

prudence that men prompted by self-interest ordinarily exercise in their own affairs.

Hun v. *Cary*, 82 N. Y. 65, 37 Am. Rep. 546.

If Uhlman had had a personal-deposit account with the bank, he could have transferred it for value to an assignee who might have collected the same exactly as the East River Bridge Company's check was collected.

Jefferson County Nat. Bank v. *Townley*, 159 N. Y. 490, 54 N. E. 74.

No payment with intent to prefer was shown.

Dutcher v. *Importers & T. Nat. Bank*, 59 N. Y. 5; *Paulding* v. *Chrome Steel Co.* 94 N. Y. 334.

Constructive payment, or payment by ratification, though sufficient to support an ordinary action on contract, is not the payment prohibited by the statute.

The officers of the corporation are not bound to oppose affirmative action to a just claim.

Varnum v. *Hart*, 119 N. Y. 101, 23 N. E. 183; *French* v. *Andrews*, 145 N. Y. 444, 40 N. E. 214; *Milbank* v. *De Riesthal*, 82 Hun, 537, 31 N. Y. Supp. 522; *Cummings* v. *American Gear & Spring Co.* 87 Hun, 598, 34 N. Y. Supp. 541; *Ridgway* v. *Symons*, 4 App. Div. 98, 38 N. Y. Supp. 895; *Spellman* v. *Looschen*, 31 App. Div. 96, 52 N. Y. Supp. 543.

Messrs. **Samuel Untermyer** and **Louis Marshall**, for respondents:

The payment to the East River Bridge Company of the proceeds of the $50,000 check drawn by Uhlman,—a director of the Madison Square Bank, at a time when he knew that the bank was insolvent, was under the conceded facts a violation of § 48 of the stock corporation law.

Effect must be given to every part and phrase of a statute; the legislature is not to be deemed to have spoken in vain, and its language is not to be arbitrarily declared to be meaningless and unnecessary.

Ex parte New York & B. Bridge Co. 72 N. Y. 527; *People ex rel. Freligh* v. *Matsell*, 94 N. Y. 179.

Remedial acts are to be liberally interpreted, and not strictly.

Hudler v. *Golden*, 36 N. Y. 446; *Sharp* v. *New York*, 31 Barb. 572.

Where there is a concurrence of these elements (a) any form of transfer of corporate property, (b) by any agency, (c) corporate insolvency or its imminence, (d) the intent of giving a preference,—the courts will intervene to set aside the transfer.

Whatever knowledge Uhlman acquired on the evening of August 8 as a director of the Madison Square Bank, relative to its condition, he also had on that evening as the representative of the East River Bridge Company. The knowledge which he possessed came to him while engaged in the very transaction which resulted in the preference to the corporation of which he was the president.

Holden v. *New York & E. Bank*, 72 N. Y. 286; *Craigie* v. *Hadley*, 99 N. Y. 131, 1 N. E. 537; *Bank of United States* v. *Davis*, 2 Hill, 451.

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

The plaintiffs, as receivers of the Madison Square Bank, brought this action to compel the defendant to account and pay over to them $50,000 which the defendant had deposited in the bank, but drew out by check on the day the bank closed. The cause was tried before a referee, who dismissed the complaint, but this judgment has been reversed by the appellate division. The facts upon which the judgment depends are undisputed. They are fully stated in the learned opinion below, and that statement can be very safely adopted as it there appears: "On the 8th of August, 1893, the defendant was a depositor in the Madison Square Bank, and it had standing to its credit on the books of the bank on that day the sum of $50,000. As to that amount, the ordinary relation of debtor and creditor, and no other, existed between the bank and the depositor. On the night of the 8th of August, 1893, it became known to Frederick Uhlman, a director of the Madison Square Bank, and also the president of the East River Bridge Company, that the bank was insolvent, or in imminent danger of insolvency, and that it would be closed the following day. Frederick Uhlman also knew that the St. Nicholas Bank was the agent at the clearing house of the Madison Square Bank, and that on the 8th of August, 1893, the St. Nicholas Bank had in its possession a large amount of securities belonging to the Madison Square Bank, and that it held such securities as collateral for any and all obligations as agent of the Madison Square Bank. He also knew that the St. Nicholas Bank had notified the clearing house that it would cease to act for the Madison Square Bank, and that the St. Nicholas Bank, by the rules and regulations of the clearing house, was responsible for all checks of the Madison Square Bank that would be presented at the clearing house in the exchanges on the morning of the 9th of August. All this knowledge was acquired by Frederick Uhlman as a director of the Madison Square Bank. On the night of August 8, Simon Uhlman, who was largely interested in the stock of the East River Bridge Company, learned of the imminency of insolvency of the Madison Square Bank, and that it would probably be closed the following morning. Thereupon he caused a check to be filled up, drawn upon the Madison Square Bank, for $50,000, and took it to the treasurer of the defendant at Brooklyn, where it was signed by such treasurer at about eleven o'clock at night. That being done, Simon Uhlman returned to New York city with the check, and handed it to Frederick Uhlman, who also signed it, as president of the East River Bridge Company, and retained it in his possession over night. Early on the morning of the 9th of August, Frederick Uhlman took the check to the Hanover National Bank, and instructed the authorities of that bank to have it presented at the clearing house that morning, so that it might be paid by the St. Nicholas Bank in the exchanges of that morning, and thus be credited to the East River Bridge Company,

and a withdrawal effected of so much from the funds and moneys or securities of the Madison Square Bank under the control of the St. Nicholas Bank. The check was presented at, and passed through, the clearing house. The East River Bridge Company received a credit with the Hanover Bank, and thus the transfer of the $50,000 was completely made from the Madison Square Bank to the defendant. The Madison Square Bank was closed on the morning of the 9th of August, or, more properly speaking, was never opened for business after the 8th, and went into insolvency."

There is no dispute about these facts, nor are they open to different inferences. The only question is with respect to the law, or, in other words, whether the transaction was forbidden by the statute. Hence the judgment is reviewable in this court, notwithstanding the statement in the order that the reversal was upon the law and the facts.

The only authority claimed in behalf of the plaintiffs to sustain the judgment is § 48 of the stock corporation law, which reads as follows: "No corporation which shall have refused to pay any of its notes or other obligations when due, in lawful money of the United States, nor any of its officers or directors, shall transfer any of its property to any of its officers, directors, or stockholders, directly or indirectly, for the payment of any debt, or upon any other consideration than the full value of the property paid in cash. No conveyance, assignment, or transfer of any property of any such corporation by it or by any officer, director, or stockholder thereof, nor any payment made, judgment suffered, lien created, or security given by it or by any officer, director, or stockholder when the corporation is insolvent or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation, shall be valid. Every person receiving by means of any such prohibited act or deed any property of the corporation shall be bound to account therefor to its creditors or stockholders or other trustees. No stockholder of any such corporation shall make any transfer or assignment of his stock therein to any person in contemplation of its insolvency. Every transfer or assignment or other act done in violation of the foregoing provisions of this section shall be void." It will be seen that the money drawn from the failing bank belonged to the defendant, and the check drawn against the deposit was the check of the defendant. The defendant's president, being also a director in the failing bank, owed certain duties to the defendant and its shareholders and creditors, as well as to the bank, its shareholders and creditors. It is obvious that the judgment of reversal cannot be sustained without holding that the two following propositions are law: (1) That the statute quoted forbids a director in a bank, who has knowledge of its insolvency, from communicating this knowledge to a depositor, even though the depositor happens to be a corporation in which the director is interested, and of which he is president; (2) that the statute forbids a corporation having money on deposit in a bank about to fail from drawing its check against the deposits, on learning that the bank was about to fail, from a director of the bank, who was also president of the corporation and communicated the knowledge to the latter with the intent that it should draw out the money. The language of the statute does not support either of these propositions, and it would be judicial legislation, simply, to hold that they are within the intention and purpose of the law. We must not only produce by judicial construction a new law, but a law which could not have been within the intention of the legislature. The statute is in derogation of the common law, and should not be construed so as to include cases not fairly within its terms. We do not mean to say that it is one of those statutes that must receive a very strict construction, but, when given a fair construction, the plaintiffs can claim nothing more. No one can safely assert that there is any law that requires a director of an insolvent bank, or a bank about to become insolvent, to conceal the fact from anyone. No one can claim that there is any law that forbids a director of such a bank from disclosing the fact to a depositor, even though the depositor should be a corporation in which the bank director is interested, and of which he is president. So long as he confines himself to the truth with respect to the condition of the bank, he violates no law, and is guilty of no moral wrong. Indeed, it is not very difficult to conceive of cases where, in the forum of morals, at least, he would be bound to speak. A bank director, with such knowledge, who would look on and see his neighbors depositing their money where it would be likely to be lost, without giving to them any hint or warning of the danger, might very well be rated as a man whose moral standing was not very high. We may go further, and look at the actual transaction in this case. The defendant's president was a director of the bank. The defendant was dealing with the bank, making deposits of money in large sums, and had then to its credit the entire sum which the plaintiffs seek to recover. Assume that the director of the bank and president of the defendant advised the board of directors of the latter to make no more deposits, as the bank was about to fail; he would not violate any law, but, on the contrary, would be performing a duty which he owed to the defendant, to save it from loss. Such a suggestion would, no doubt, result in a withdrawal of the moneys already deposited, which is all that the plaintiffs complain of; but it would be difficult, if not impossible, to show that under such circumstances any law was violated, or any wrong done. In the present case we must assume that the defendant's president not only advised the withdrawal of the deposit, but signed the check for that purpose, and had it deposited to the defendant's credit in another bank, for the very purpose of having it paid by the bank that was the clearing-house agent of the bank on which it was drawn,

and in which he was a director, knowing all the time that it was about to fail. What the statute forbids is that the director shall not, under such circumstances, draw out his own money. The case has been decided in the court below precisely as if such was the fact. Suppose the director of the bank, knowing all about its condition, concealed it from his associate officers and directors in the defendant, and by this course the $50,000 was lost; it might then be difficult to show that the president of the defendant had discharged the duty imposed upon him by his trust to its creditors or shareholders. If the law had not placed some injunction of secrecy upon him with respect to the real condition of the bank, it is very difficult to see how he could be guilty of any legal or moral wrong in participating with the other officers and directors of the defendant in saving it from a great pecuniary loss.

There is no law that forbids a depositor in a bank, who is not an officer or director, from drawing a check against the deposit whenever the money is needed, or even when it is thought the bank is liable to fail. The act by means of which the money was withdrawn in this case was the corporate act of the defendant, and not the individual act of the president. The money on deposit belonged to the defendant, and it was subject to check. The circumstance that the defendant in its corporate capacity was induced to exercise its right by information of the condition of the bank communicated by the president, who was also a director of the bank, cannot change the case, so long as the right to withdraw the money existed. The defendant cannot be compelled to restore the money simply because it made use of knowledge possessed by one of its own officers. In the care and management of its finances, a corporation is entitled to the benefit of all the knowledge upon that subject that any of its officers may possess, and to their best judgment. The act by which the deposit was transferred from the failing bank to the defendant was not in any proper sense the act of the bank or any of its officers or directors. It was not a transfer prohibited by any law. It is true that one of the bank directors participated in it, but not as such director or as an individual, but as an officer of the defendant, acting in its interest. Whatever he did to withdraw the moneys is to be imputed to the defendant, and, of course, is imputed to it by the judgment below. But the question is, Did the defendant, in drawing its check against the deposit, violate any law or perpetrate any wrong? If it did not, then the participation of one of the bank directors in the transaction cannot change the situation. It would, I think, be an unwarranted construction of the statute to hold that a depositor in a bank, who has withdrawn the deposit on learning that the bank was about to close, is liable to be sued for the money, whenever it can be shown that he acted upon information given to him by a director of the bank; and yet the judgment now under review cannot very well be sustained without such a construction, or that in substance.

The learned court below has, I think, recast the statute, and applied it to a state of facts not fairly within it, and to which it was never applied before. The language of the statute is not very concise or clear, and the phraseology is somewhat involved. When carefully read, however, the things that are prohibited may be stated in very few words: (1) It prohibits officers and directors of an insolvent corporation, or of one about to become insolvent, from using their knowledge of its condition, and their dominant position, for their individual benefit, in collecting their own claims, either through a voluntary payment, or through collusive and preferential liens, to the prejudice of other creditors not so favorably situated; (2) it prohibits a preferential general assignment by a corporation, though it does not forbid assignments without preferences; (3) it prohibits a transfer of any of the corporate assets to an officer, director, or stockholder upon any other consideration than the payment of the full value of the property in cash. When we attempt to carry the statute beyond these restrictions, we must rely largely upon speculation with respect to some intent on the part of the lawmakers which is not expressed. It is quite clear, I think, that the statute does not forbid any act disclosed by the facts of this case. The trend of recent decisions of this court has not been in the direction of extending this statute to cases that do not come fairly within its terms. It will be quite sufficient now to refer to two of them. In *Jefferson County Nat. Bank* v. *Townley*, 159 N. Y. 490, 54 N. E. 74, we held that an officer or director of an insolvent corporation, while forbidden by the statute from enforcing his claim, as it was in that case, could assign it, and the assignee could enforce it in the same way as any other creditor, and the fact that the assignee was the wife of the officer did not change the case, so long as the assignment was in good faith, and not merely colorable. Much of the reasoning in that case applies to this. In *French* v. *Andrews*, 145 N. Y. 441, 40 N. E. 214, a creditor of an insolvent corporation had a large note, not due, and was permitted by the officers of the company to surrender it and take in its place eleven small ones, payable on demand, for the purpose of enabling him to bring suit upon them in a local court. The suits were brought, and judgments recovered by default, and the receiver brought suit to set aside the lien; but this court held that there was no violation of the statute. The defendant in this case was neither an officer, director, nor stockholder of the bank. It was a depositor, merely, and did nothing except withdraw the deposit in order to save itself from loss. The fact that it was moved to do this by a director of the bank, who happened to be its own president, does not bring the case within the statute. The statute, in terms, seems to apply only to corporations "which shall have refused to pay any of its notes or other obligations when

due, in lawful money of the United States." It is not claimed that prior to the presentation of the check for the $50,000 at another bank, and its payment, the bank which the plaintiffs represent had refused to pay any of its notes or obligations. There is much difficulty, without such a finding, in applying this statute even to a case where the payment was made to an officer or director, but we prefer to rest our decision upon the larger question already discussed. Neither the bank nor any of its officers or directors made any transfer of the assets to the defendant with a view to give a preference, or in violation of the statute.

The judgment appealed from should be reversed, and that entered on the report of the referee affirmed, with costs.

Parker, Ch. J., and **Gray** and **Martin**, JJ., concur.

Bartlett, Haight, and **Vann**, JJ., dissent.

Re Final Judicial Settlement of Annual Accounts of Samuel N. HOYT *et al.*, *Respts.*, As Trustees for Mary Irene HOYT, *Appt.*, Under the Will of Jesse Hoyt, Deceased.

(160 N. Y. 607.)

1. **A premium on bonds paid on investing trust funds** the income of which, under a will, is to be paid to testator's daughter for life, with remainder to certain nephews and nieces, cannot be charged to the daughter and the amount thereof deducted from her income, so as to restore the principal of the trust fund in order that it may be turned over unimpaired at the termination of the life estate, where testator has expressly declared his intention to provide for his daughter in the "most bounteous and liberal manner as to expenditure," and obviously intended to devote to her use the entire income of the fund, making the disposition of the principal after her death a secondary consideration.

2. **Failure of a life tenant to challenge a deduction of interest**, on an annual accounting by a trustee, from her income, does not prevent her from raising the question thereafter as to the distribution of moneys then in the hands of the trustee.

(Parker, Ch. J., and Gray and Haight, JJ., dissent.)

(November 21, 1899.)

APPEAL by Mary Irene Hoyt from an order of the Appellate Division of the Supreme Court, First Department, reversing a decree of the New York County Surrogate's Court settling the accounts of the trustees under the will of her deceased father and refusing to permit them to create a sinking fund out of income to provide for the wearing away of the principal by the approach of investment bonds towards maturity. *Reversed.*

Statement by **Bartlett**, J.:

Appeal from an order of the appellate division of the supreme court in the first judicial department, entered April 23, 1898, reversing a decree of the surrogate's court of the county of New York, finally judicially settling and allowing the annual accounts of the trustees for Mary Irene Hoyt, under the last will and testament of her father, Jesse Hoyt, deceased. The accounts involved cover the period from the 14th day of August, 1894, to 14th day of August, 1895.

On the 14th day of August, 1882, Jesse Hoyt, a resident of the city of New York, died possessed of a large estate. He left a last will and testament, dated the 26th day of June, 1882, the fourth and eleventh subdivisions of which are particularly involved in this controversy. "Fourth. It is my will, and I hereby direct, that the sum of one million two hundred and fifty thousand dollars shall be appropriated and received from my estate, real and personal, wheresoever situated, or from the proceeds thereof, by such of my executors hereinafter named as reside or do business in the state of New York, or to whom letters testamentary on this, my will, shall be granted by any surrogate in said state of New York, and as soon as it can or shall be realized or received by such executors and held in trust by them, and the survivors and survivor of them, and their successor or successors to the trust, to and for the use and benefit of my daughter, Mary Irene Hoyt, for and during her natural life; and in the meantime, during such her life, to invest and reinvest, and keep the same invested, and to collect and receive the interest, dividends, and income therefrom, and from each and every part thereof, and to apply to her use, for and during her natural life, in the most bounteous and liberal manner, as to expenditure, and so as to promote her convenience and comfort, and gratify her reasonable desires, the said interest, dividends, and income so to be collected and received, as the same shall be required for her use and benefit. And it is my further will that the said sum of money hereinabove in this article directed to be appropriated and held in trust for and during the natural life of my daughter, Mary Irene, and for her use, as above herein provided, as to the interest, dividends, and income therefrom, or the securities in which the same shall be invested, and any surplus of income therefrom, if any, which shall not have been applied to her use during her natural life, shall, on the death of my said daughter, go and be distributed to and among my nephews and nieces, children of my brothers Alfred M. Hoyt, Reuben Hoyt, and James H. Hoyt, who shall be living at the time of the decease of my said daughter, in equal portions, if all of them shall be living, or if any of them shall have died without leaving issue living at the time of the decease of my said daughter. If any of my said nephews or nieces shall have died, at or before the decease of my said

NOTE.—As to charging premiums paid for bonds to life tenant, see also Hite v. Hite (Ky.) 19 L. R. A. 173.

As to decrease in value of bonds by wearing away of premium, see McLouth v. Hunt (N. Y.) 39 L. R. A. 230.

daughter, leaving a child or children living at the time of the decease of my said daughter, then the division is to be made in equal portions between those who shall be living and the child or children of any such deceased nephew or niece, such child or children taking the portion of its or their deceased parent, and in equal portions thereof, if more than one." "Eleventh. I hereby order or direct my said executors hereinabove appointed, and the survivors and survivor of them, to distribute or retain, without a sale, all such stocks or securities as I may have at the time of my decease, which my said executors shall think it expedient to hold, with a view to and in expectation of appreciation, and to distribute or retain any stocks or securities which I may hold at the time of my decease as an investment, which my executors may think it best to retain as a permanent investment, the choicest, and those having longest to run, to be set apart for my wife's use, as hereinabove directed. But my said executors are not to make any new or other investments; excepting only in the first-mortgage bonds and mortgages on unencumbered real estate held in fee simple, or in the public stocks or bonds of the United States, or state stocks or bonds, first-mortgage railroad bonds, and city bonds, in either of which they may make investments in their discretion, having regard to the best interest of my estate. And I hereby vest all the rights and title, power, authority, control, or direction and discretion conferred upon any of my said executors and trustees in the survivors and survivor of them, and in any administrators and administrator with the will annexed, to whom letters may be granted, or to any trustee or trustees who may be appointed by the competent court on the death of my said executors hereinabove named, and the survivors and survivor of them, or on any other contingency by which my said executors, and the survivors and survivor of them, shall become incapable of acting or cease to act."

The other facts in the case appear in the opinion.

Messrs. **William D. Guthrie** and **William F. Moore**, for appellant:

McLouth v. *Hunt*, 154 N. Y. 179, 39 L. R. A. 230, 48 N. E. 548, must be deemed controlling unless distinguished on some really substantial ground.

In cases of doubt or ambiguity the law presumes in favor of a child, as against the claims of collateral relatives.

As between life tenant and remainderman, any increase in value is wholly for the benefit of the remainderman, and any shrinkage or depreciation must, in turn, be borne by him, and not made good at the expense of the life tenant.

Re Gerry, 103 N. Y. 445, 9 N. E. 235.

When providing for his only daughter, testator intended that the means bequeathed for her support should not be diminished in order to provide a sinking fund for the benefit of the remaindermen.

Johnson v. *Brasington*, 156 N. Y. 181, 50 N. E. 859.

People ex rel. Cornell University v. *Davenport*, 117 N. Y. 549, 23 N. E. 664, is an authority on construction directly in point.

The court decided that under the language used the whole of the interest received should be paid by the comptroller, and no part of it should be set apart for the purpose of making good the charge of the comptroller against the income of the fund.

Re New York Life Ins. & T. Co. 24 Misc. 71, 53 N. Y. Supp. 320.

The weight of decisions in the inferior tribunals is clearly in favor of the life tenant.

Bergen v. *Valentine*, 63 How. Pr. 221; *Whittemore* v. *Beckman*, 2 Dem. 275; *Re Pollock*, 3 Redf. 100; *Re Hutchinson*, N. Y. L. J. Feb. 29, 1892; *New York Life Ins. & T. Co.* v. *Kane*, 17 App. Div. 542, 45 N. Y. Supp. 543; *Re New York Life Ins. & T. Co.* 24 Misc. 71, 53 N. Y. Supp. 382.

Outside of New York the weight of authority is equally in favor of the life tenant.

Hemenway v. *Hemenway*, 134 Mass. 446; *New England Trust Co.* v. *Eaton*, 140 Mass. 532, 4 N. E. 69; *Shaw* v. *Cordis*, 143 Mass. 443, 9 N. E. 794; *Furness's Estate*, 12 Phila. 130; *Hite* v. *Hite*, 93 Ky. 257, 19 L. R. A. 173, 20 S. W. 778.

Mr. **William H. Rand, Jr.**, with *Messrs.* **Alexander T. Mason** and **Henry R. Hoyt**, for respondents:

The actual income derived from a fund invested in securities purchased at a premium is what the fund earns, remaining itself intact, and not the entire interest received annually from the securities.

So much only of the moneys received annually on bonds purchased at a premium must be treated as income, as, according to computations, the investment is found to produce; the residue belongs to the principal.

Farwell v. *Tweddle*, 10 Abb. N. C. 94; *People ex rel. Cornell University* v. *Davenport*, 30 Hun, 177; *New York Life Ins. & T. Co.* v. *Kane*, 17 App. Div. 542, 45 N. Y. Supp. 543; *Wright* v. *White*, 136 Mass. 470.

It was the intention of Jesse Hoyt to bequeath over to his nephews and nieces, upon the death of Mary Irene Hoyt, the specific sum of $1,250,000, or its equivalent in securities, and to give his daughter during her life no more than the net income actually earned by that sum.

The usual purpose of a testator in providing for a beneficial interest in a trust estate is that the net income only shall be applicable, and that the *corpus* or capital of the trust estate shall remain intact until the trust shall have determined.

Re Albertson, 113 N. Y. 434, 21 N. E. 117; *Reynal* v. *Thebaud*, 54 N. Y. S. R. 144, 23 N. Y. Supp. 615; *New York Life Ins. & T. Co.* v. *Kane*, 17 App. Div. 542, 45 N. Y. Supp. 543.

The trustees were authorized to establish and maintain the sinking fund, and to make the reservations of interest.

It is the duty of the trustees to keep the *corpus* of the trust fund intact as far as possible, and for this purpose they have the right to establish and maintain a sinking

fund from that portion of the moneys received by them annually on securities purchased at a premium, which is not annual income earned by the investment, to make good the premiums paid for such securities, and to cover the deficiency in the principal of the trust fund, which will necessarily occur when the securities are paid off at their maturity.

Farwell v. *Tweddle*, 10 Abb. N. C. 94; *Reynal* v. *Thebaud*, 54 N. Y. S. R. 144, 23 N. Y. Supp. 615; *New England Trust Co.* v. *Eaton*, 140 Mass. 532, 4 N. E. 69; *Stevens* v. *Melcher*, 152 N. Y. 551, 46 N. E. 965; *New York Life Ins. & T. Co.* v. *Kane*, 17 App. Div. 542, 45 N. Y. Supp. 543.

The appellant is barred and equitably estopped, by the decrees entered upon the several accountings of the trustees heretofore had, from raising or litigating the questions which she has presented upon this accounting as to the right of the accountants to make the reservation of interest moneys.

The decree of a surrogate having jurisdiction, until opened and set aside, has the same conclusive effect as a judgment of any other court.

Re Hood, 90 N. Y. 512.

The judgment or decree of a court possessing competent jurisdiction is final and conclusive upon the same parties, not only as to the subject-matter thereby actually determined, but as to every other matter which the parties might have litigated in the cause, and which they might have had decided.

Embury v. *Conner*, 3 N. Y. 511, 53 Am. Dec. 325; *Le Guen* v. *Gouverneur*, 1 Johns. Cas. 436, 1 Am. Dec. 121; *Blair* v. *Bartlett*, 75 N. Y. 150, 31 Am. Rep. 455; *Newton* v. *Hook*, 48 N. Y. 676; *Goebel* v. *Iffla*, 111 N. Y. 170, 18 N. E. 649.

If the determination of a question is necessarily involved in the judgment, it is immaterial whether it was actually litigated or not.

Lorillard v. *Clyde*, 122 N. Y. 41, 25 N. E. 232; *Jordan* v. *Van Epps*, 85 N. Y. 427; *Smith* v. *Smith*, 79 N. Y. 634; Freeman, Judgm. § 248; Wells, Res Adjudicata, 248–251.

The estoppel of a former judgment extends to every material matter within the issues, which was expressly litigated and determined, and also to those matters which, although not expressly determined, are comprehended and involved in the thing expressly stated and decided, and whether they were or were not actually litigated or considered.

Pray v. *Hegeman*, 98 N. Y. 351; *Campbell Printing Press & Mfg. Co.* v. *Walker*, 114 N. Y. 7, 20 N. E. 625; *Griffin* v. *Long Island R. Co.* 102 N. Y. 449, 7 N. E. 735.

The general principles of the law of waiver and estoppel apply to the administration of trusts, and control both the beneficiary and the trustee.

27 Am. & Eng. Enc. Law, p. 270; *Graves* v. *Graves*, 2 Paige, 62; *Jordan* v. *Van Epps*, 85 N. Y. 427.

Mr. **P. Tecumseh Sherman**, also for respondents:

The action of the trustees in establishing and maintaining the sinking fund, and in making the payments thereto as in the account herein set forth, was legal and proper because in accordance with the intention of the testator.

McLouth v. *Hunt*, 154 N. Y. 179, 39 L. R. A. 230, 48 N. E. 548; *New England Trust Co.* v. *Eaton*, 140 Mass. 534, 4 N. E. 69.

The life tenant is equitably estopped from claiming the interest and income paid into the sinking fund.

Dezell v. *Odell*, 3 Hill, 215, 38 Am. Dec. 628; *Welland Canal Co.* v. *Hathaway*, 8 Wend. 483, 24 Am. Dec. 51; *Plumb* v. *Cattaraugus County Mut. Ins. Co.* 18 N. Y. 392, 72 Am. Dec. 526.

A false representation, or a concealment of a material fact, or a design to mislead, is not necessary.

Brookhaven v. *Smith*, 118 N. Y. 640, 7 L. R. A. 755, 23 N. E. 1002; *Continental Nat. Bank* v. *National Bank*, 50 N. Y. 575; *Blair* v. *Wait*, 69 N. Y. 113; *New York Rubber Co.* v. *Rothery*, 107 N. Y. 316, 14 N. E. 269.

Where a party assented to a change or variation from a contract, he must be presumed to have known that the other party or parties relied upon his consent, and he is estopped from withdrawing his consent to their harm or detriment.

Thomson v. *Poor*, 147 N. Y. 402, 42 N. E. 13.

The life tenant is barred, by the previous decrees of the surrogate's court, from objecting to all payments made into the trust fund prior to the date of objecting.

Re Perkins, 75 Hun, 129, 62 N. Y. Supp. 958, Affirmed in 145 N. Y. 599, 40 N. E. 165; *Garlock* v. *Vandevort*, 128 N. Y. 374, 28 N. E. 599.

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

The principal question submitted for our determination relates to the premium on bonds in which the trust estate has been invested. It is insisted on behalf of the appellant, Mary Irene Hoyt, that she is entitled to the entire income earned by the trust fund. The trustees claim that there should be deducted from this income a certain sum each year to meet the "wearing away" of the premium as the bonds approach the date of falling due, in order that the remaindermen may be protected, and the principal of the trust fund turned over to them, at the falling in of the life estate, unimpaired. This matter was originally sent to a referee, who decided in favor of the trustees. The surrogate's court of the county of New York reversed this decision, holding in favor of the life tenant. The appellate division reversed the decree of the surrogate's court.

In order to determine the question presented by this appeal, it is necessary to consider the facts surrounding the execution of the will. The testator was a man of very large wealth, estimated at from six to eight millions of dollars, nearly the entire amount of which he bequeathed to his brothers and their children. For some reason that is not disclosed by this record, but which we must

assume was sufficient, the testator made a very peculiar will, so far as his only child and daughter was concerned. By the fourth clause thereof he directed that the sum of $1,250,000 should be appropriated from his estate and held in trust for the use and benefit of his daughter during her life. The trustees were directed to collect and receive the interest, dividends, and income therefrom, and from each and every part thereof, and to apply to her use, for and during her natural life, in the most bounteous and liberal manner as to expenditure, and so as to promote her convenience and comfort and gratify her reasonable desires. The testator further provided that the principal sum, or the securities in which the same shall be invested, and any surplus of income therefrom, should, upon his daughter's death, go to certain nephews and nieces. It will thus be observed that the daughter, while entitled to receive the interest upon a very considerable sum in order to meet most lavish annual expenses, was not given outright any portion of the millions constituting her father's estate. In the light of these facts, we are called upon to determine the intention of the testator when drafting the fourth clause of his will.

It is insisted by the trustees that it was the intention of Jesse Hoyt to bequeath over to his nephews and nieces, upon the death of Mary Irene Hoyt, the specific sum of $1,250,000, or its equivalent in securities, and to give his daughter during her life no more than the net income actually earned by that sum. It is urged by the daughter's counsel that not only was it testator's intention to give the entire income, but that, in case of doubt or ambiguity the law presumes in favor of the child as against the claims of collateral relatives; or, in other words, that, if the probabilities and indications are equal on each side as against the other, the just inclination of the courts will favor the child. By the eleventh subdivision of the will, the testator directed his executors to distribute or retain, without a sale, all such stocks or securities as he might have at the time of his decease, which they thought expedient to hold, but that they should not make any new or other investments, excepting only in first-mortgage bonds and mortgages on unencumbered real estate, or in the public stocks or bonds of the United States, or state stocks or bonds, first-mortgage railroad bonds, and city bonds. In creating this trust fund for the daughter, it appears that the trustees decided not to set apart any of the securities held by the testator at the time of his decease, but took the sum of $1,250,000 in cash, and invested it chiefly in government 4 per cent bonds and railroad bonds at a high premium. This premium in two purchases reached 29 per cent for the government bonds, and 33½ per cent for some of the railroad bonds. The result was that nearly $245,000 was absorbed by the premium. The trustees decided that the life tenant ought to bear the entire loss thus imposed upon the fund, and, under expert computation, have kept back annually from the income the sum of $8,039 as a sinking fund to make good the premium that will have worn away when the bonds fall due.

The courts of our own state, of other states, and of England have discussed this question in various phases as to the rights of the life tenant and the remainderman, and some of the decisions are conflicting, and not to be reconciled. This court, in the recent case of *McLouth* v. *Hunt*, 154 N. Y. 179, 39 L. R. A. 230, 48 N. E. 548, had occasion to examine this question in one aspect of it, Judge O'Brien writing the opinion. He then said: "Notwithstanding the conflict of authority to which I have referred, there is one principle or rule applicable to this case, with respect to which the parties are all at agreement, and that is that the questions are not to be determined by any arbitrary rule, but by ascertaining, when that can be done, the meaning and intention of the testatrix, to be derived from the language employed in the creation of the trust, from the relations of the parties to each other, their condition, and all the surrounding facts and circumstances of the case."

In considering the surrounding facts and circumstances in the case at bar, to which we have already alluded, it is reasonable to infer that the testator intended in this sole provision for his daughter that she should receive, as he expressed it in the fourth subdivision of the will, "the interest, dividends, and income therefrom, and from each and every part thereof," referring to the trust fund. He expresses his desire, in clear and unmistakable language, to provide for her in the "most bounteous and liberal manner as to expenditure, and so as to promote her convenience and comfort and gratify her reasonable desires." He directs that upon the death of his daughter all moneys set apart for her use, "or the securities in which the same shall be invested," shall be disposed of in a certain manner.

It seems quite apparent that the testator contemplated that the trust fund, or a portion of it, might be loaned out on bond and mortgage, and thus not lose its identity as a cash sum; while, on the other hand, a part of it might be placed in securities at a premium, in which event the remaindermen were to take the fund as invested. It is fair to assume that the testator, who was a man of rare business sagacity, understood all the details of investing large sums of money, and that, if he had intended to impose upon the income of his daughter's trust fund the burden of the high premium incident to the class of securities to which he restricted his trustees, he would have expressed himself in clear language to that effect. It seems to us very obvious that the testator intended to devote to his daughter's use the entire income of the fund which he set apart for that purpose, if necessary, and that the disposition of the principal after her death was a secondary consideration. The remaindermen, nephews, and nieces were made very wealthy by other provisions of the will. If it proved necessary to promote his daughter's convenience and comfort and gratify

her reasonable desires, the testator seems to have employed language that cannot be misconstrued in this connection, and dedicated the entire income to that purpose. It is true that he has provided that, if there should be any surplus of the income, it, together with the moneys constituting the trust fund, or the securities in which the same shall be invested, are to be disposed of in a certain manner. It seems quite impossible, in giving to the language of the fourth subdivision of the will its plain and ordinary meaning, to spell out an intention on the part of the testator to provide a sinking fund, to be deducted from the income, in order to make good the premium paid in purchasing the securities. The testator evidently regarded a surplus of income as a mere possibility, and, as a matter of precaution, provided for the disposition of the same. He also seemed to anticipate that the principal of the trust fund would pass to the residuary legatees either as money or its equivalent, or in the form of investment then existing. There is no language, fairly construed, that can be considered as imposing upon the trustees the duty of turning over to nephews and nieces the full sum of $1,250,000 in cash or its equivalent.

The argument of the trustees seems to go to this extent: That if they had seen fit to constitute a trust fund for the daughter out of the investments held by the testator at the time of his death, or to have invested cash in the form of specific mortgage investment on real estate, where it would not lose its identity, the income of the daughter would be subjected to no diminution on account of premium; but if they chose to take the entire trust fund in cash, and invest it, as they actually did, it would be subjected to a loss of $8,000 and more a year. If we are right in the conclusion reached, that it was the intention of the testator to impose the loss of premium upon the remaindermen, the question of conflict of authority in the cases cited in the briefs here and the opinion below is unimportant.

As we have before pointed out, the decision in the *McLouth Case*, 154 N. Y. 179, 39 L. R. A. 230, 48 N. E. 548, rested wholly upon the intention of the testator, as derived from the face of the will and the surrounding circumstances. We take the same course in the case before us, and decide it upon the special facts presented. The appellate division placed their decision upon the intention of the testator, and reached a conclusion contrary to that which has been arrived at by this court. In the case at bar the loss involved in the payment of this heavy premium is necessarily apportioned between the life tenant and the remaindermen to this extent: The life tenant, for a long series of years, receives interest on a largely reduced principal sum, and the remainderman at the end of that period loses the amount of the premium paid. This loss of the remainderman may, however, be reduced if the life estate falls in before the bonds mature, and while they are still quoted at a large premium. The manner in which the loss shall be borne, occasioned by the payment of premiums on investing the principal of a trust fund, in the absence of any expressed intention of the testator, is a question not presented by this record, and we refrain from discussing it.

An additional point is taken by the respondents to the effect that, in several annual accountings prior to the one now before the court, the testator's daughter allowed the reservation of a portion of the interest money by the trustees to make good the amount paid from the principal trust fund for premium to pass unchallenged, and consequently the decrees therein are *res judicata* in this proceeding, and prevent her from raising the question at this time. We are of opinion that this point is not well taken. The decrees in the former accountings are binding upon the daughter of the testator as to the amounts therein involved, and will not be affected by our decision herein, but this does not prevent her from raising the question now as to the distribution of the money in the hands of the trustees. *Bourditch* v. *Ayrault*, 138 N. Y. 222, 231, 34 N. E. 514.

The order of the Appellate Division appealed from should be reversed, and the decree of the surrogate's court of the county of New York affirmed, with costs to the appellant in all the courts.

All concur, except **Parker**, Ch. J., and **Gray** and **Haight**, JJ., dissenting.

TENNESSEE SUPREME COURT.

Hugh MARTIN *et al.*, *Appts.*,
v.
William H. STOVALL, Exr., etc., of Ferreba A. Hall, Deceased.

(.....Tenn.....)

1. The probate in common form of a will under statutes making it an exercise of judicial power, and the judgment conclusive as to all matters properly cognizant in the probate proceedings, and as to the property covered by the will, is, so far as regards personalty, within the provision of the United States Constitution requiring full faith and credit to be given in each state to the judicial proceedings of every other state.

NOTE.—*Effect of probate of a will in another state.*

I. *As to personal property.*
II. *Wills of real estate.*
III. *Presumption.*
IV. *As to full faith and credit.*
V. *Conclusiveness of decree of probate from another state.*
a. *Generally.*
b. *After filing for record.*
VI. *Classification by states.*

even as against persons not made parties to the proceeding.

2. **Courts will not refuse to give effect to statutes** providing for the recording of foreign wills, and giving them the same effect as if made and proved in the state, because such effect is not given to foreign wills by the state from which the record comes.

3. **That promissory notes bequeathed by will are secured by mortgage** on real estate does not deprive them of the character of personal property so as to prevent their passing by a foreign will duly probated at testator's domicil, and recorded in the state where the land is situated, as provided by the laws of the latter state.

(April Term, 1899.)

APPEAL by contestants from a decree of the Probate Court for Shelby County refusing to certify to the Circuit Court proceedings resulting in the filing of the will of Ferreba A. Hall, which had been probated in the state of Mississippi, in order to give petitioners an opportunity to contest the will. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Pierson & Ewing** for appellants.

Mr. **J. M. Gregory** for appellee.

McFarland, Special Judge, delivered the opinion of the court:

This case involves the question whether a will executed and probated in another state, where the testatrix was domiciled, and afterwards certified under the act of Congress, and filed and recorded in this state, is subject to the contest here, under our statute. Mrs. Ferreba A. Hall died during the month of August, 1898, in Coahoma county, Mississippi, where she was domiciled, leaving what

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I. *As to personal property.*

In MARTIN v. STOVALL, where a testator was domiciled in Mississippi, and his will was duly probated there, and an authenticated copy of the proceedings recorded in Tennessee, and an heir brought an action to contest the same in Tennessee, the petition was dismissed. It was held that the action of the probate court in Mississippi was final and conclusive as to personal property, and was a judicial proceeding under U. S. Const. art. 4, § 1, providing that full faith and credit, etc. Miss. Const. § 159, giving chancery courts jurisdiction of matters testamentary, and Miss. Code, § 1813, providing for probating wills in the chancery court in the county in which the testator resided, have been construed to the effect that the probate of a will is an exercise of the judicial power. Miss. Code 1892, § 1821, provides that all parties interested shall be made parties, and those made parties will be concluded, and § 1822 provides that if not contested within two years the probate will be conclusive. The court said: 'Again, probate proceedings 'are proceedings *in rem,*' and the judgments bind all persons, whether parties in the record or not;" and that the probate could not be opened under Shannon's Tenn. Code, §§ 3916-3918, providing for recording wills upon authenticated copies.

This decision is in accord with the general rule that a decree of probate from another state where the testator was domiciled is conclusive in regard to personal property. As to "full faith and credit," etc., see that subdivision.

A will of personal property must be valid by the law of the testator's domicil, to be effective. Varner v. Bevil, 17 Ala. 286; Brock v. Frank, 51 Ala. 85; Goodman v. Winter, 64 Ala. 410, 38 Am. Rep. 13; St. James's Church v. Walker, 1 Del. Ch. 284; Latine v. Clements, 3 Ga. 426; Knight v. Wheedon, 104 Ga. 309, 30 S. E. 794; Alexander's Will, 1 Tucker, 114 (see N. Y. Code, subd. *Classification by States—New York*); Manuel v. Manuel, 13 Ohio St. 458; Holman v. Hopkins, 27 Tex. 38; Ford v. Ford, 70 Wis. 19, 33 N. W. 188.

So, a decree of probate from another state is of no force as to personalty if the testator's domicil is here. Sturdivant v. Neill, 27 Miss. 157; Wells v. Wells, 35 Miss. 638; Wallace v. Wallace, 3 N. J. Eq. 618.

And such decree is of no effect if the will is not made according to the law of this state, and the domicil is here. Nat v. Coons, 10 Mo. 543; Stewart v. Pettus, 10 Mo. 755.

And a decree of probate in another state is not effective until filed and recorded in the proper court of this state. Olney v. Angell, 5 R. I. 198, 73 Am. Dec. 62.

In Varner v. Bevil, 17 Ala. 286, it was said: "Our statute, which provides for the prooate in our courts of authenticated copies of foreign wills which have been proved according to the laws of any of the United States, or of any country out of the limits of the United States, was not designed to deny to our courts jurisdiction over the probate of the original will made in a foreign country, but disposing of property situated here. It but enlarges the jurisdiction of the court, enabling the parties to make the contest upon an authenticated copy of a foreign will, proved according to the law of the domicil, in the same manner they might have done upon the original."

In Brock v. Frank, 51 Ala. 85, it was said that Ala. Stat. 1806, Clay's Dig. 598, § 12, providing for the probate in this state of wills proved in other states, and providing that such wills shall be liable to be contested and controverted in the same manner as the original might have been, was construed in Varner v. Bevil, 17 Ala. 286, as enlarging the jurisdiction of Alabama courts of probate so as to contest a will of a testator domiciled abroad; but this provision was omitted from the Code although providing for its probate.

A will of personal property, made in Pennsylvania, although the property may be in Delaware, must operate according to the laws of Pennsylvania. But the probate of a nuncupative will in Pennsylvania is not sufficient to give it any effect in Delaware, and until probate is made in that state the will cannot be considered to pass any property there. St. James's Church v. Walker, 1 Del. Ch. 284. In this case the court said that upon the principle that personal property must follow the domicil of the testator, if this will was made according to the laws of the state in which the testator was domiciled at his decease, even though all the formalities required by our act of assembly were not observed, it is sufficient to pass personal estate; but in order to give it effect, the probate must be made in New Castle county where such property is situated, not, indeed, according to the requisites of our statute, but according to the proof required by the law of the domicil of the testator.

Where a testator domiciled in Ohio made a will of personalty in the olographic form in Louisiana, valid in that state, while he was there for business purposes, and died in Ohio,

purported to be a last will and testament, which was duly probated in common form as such on the 22d day of August, 1898, in the chancery court of Coahoma county, Mississippi. The defendant, William H. Stovall, was named as the executor of said will, and on September 7, 1898, he filed the same in the probate court of Shelby county, Tennessee, for record, and the same was ordered filed, and letters of administration were by said court ordered to be issued to him as executor. On October 19, 1898, Hugh Martin and wife, Sallie C. Martin, R. J. Cook, a minor, suing by his next friend, Hugh Martin, Paul Cook, Walter Cotter, and his wife Mary Cotter, filed their original petition in said probate court of Shelby county, Tennessee, in which they set out the facts hereinbefore stated in reference to the alleged will of Mrs. Ferreba A. Hall, and further stated that they were the only heirs at law and distributees of the said Mrs. Hall, and, as such, entitled, in the absence of a will, to the whole of her estate, under the laws of the states of Tennessee and Mississippi. It further alleged that the paper purporting to be the last will and testament as aforesaid was not valid, because Mrs. Hall, at the time of the alleged execution thereof, was insane, and, by reason of said insanity, incapable of making a will, and that she was unduly influenced to make said will by the said William H. Stovall, who is named as executor therein, and by Mary Ann Sparks and her husband, J. H. Sparks, acting in collusion with said William H. Stovall. The petition prayed that the said paper alleged to be the last will and testament of Mrs. Hall be certified, as by law provided, to the circuit court of Shelby county, where the same might be contested as the law

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an authenticated copy of the will and probate in Louisiana should not have been admitted to record in Ohio as a will of personalty. In order to be valid, it should have been executed according to the laws of the testator's domicil at the time of his death. It was held that Ohio act 1840, § 28, providing that authenticated copies of wills executed and proved according to the laws of any state relative to any property in this state may be admitted to record in any county where any property is situated, and authenticated copies so recorded shall have the same validity as wills made in this state in conformity to the laws thereof are declared to have, did not authorize the record of such will. Manuel v. Manuel, 13 Ohio St. 458.

And the validity of a bequest or disposition of personal property by last will and testament must be governed by the law of the testator's domicil at the time of his death, and this includes, not only the form and mode of the execution of the will, but also the lawful power and authority of the testator to make such disposition. Ford v. Ford, 70 Wis. 19, 33 N. W. 188.

And under N. J. act March 6, 1823, Harrison, 195, authorizing the granting of letters testamentary, on certificate of probate of foreign wills, and giving them the same effect as if the will had been proved by the subscribing witnesses in the usual manner under the laws of this state, a will made in New Jersey, where the testator lived at the time of his death, cannot be probated here on a probate made in Pennsylvania, as the act has reference to foreign wills only. Wallace v. Wallace, 3 N. J. Eq. 618. In this case the court said: "If the will were a will of personalty, where would be the opportunity of contesting it or examining into the sanity of the testator? And, even if it were a will of lands, the privilege of contestation in the civil-law courts would be taken away. It is no answer to say that cases of fraud or collusion might be inquired into."

And a testamentary disposition of movable property must, to be valid anywhere, be made according to the local law of the testator's domicil at the time of his death. Barnes v. Brashear, 2 B. Mon. 380.

In Goodman v. Winter, 64 Ala. 410, 38 Am. Rep. 13, it was said that Clay's (Ala.) Dig. 598, § 12, which was the law prior to 1852, providing that the validity of a will probated in other states was subject to be contested and controverted as the original might have been, manifestly modified the general principle of law applicable to the probate of wills of personal property, that the sentence of a tribunal of competent jurisdiction is binding and conclusive everywhere.

A decree of probate from another state is not open to contest where a will of personal property is probated at the domicil. MARTIN v. STOVALL; Williams v. Saunders, 5 Coldw. 60; Nelson v. Potter, 50 N. J. L. 324, 15 Atl. 375; Alexander's Will, 1 Tucker, 114; Dickey v. Vann, 81 Ala. 425, 8 So. 195; Helme v. Sanders, 10 N. C. (3 Hawks) 566.

And where the court in another state had jurisdiction of the probate of a will of real or personal property, such probate is a judgment *in rem*, and, in the absence of statutory provisions, is conclusive in Alabama as to the capacity of the testator and the due execution and validity of the will. Brock v. Frank, 51 Ala. 89.

So in regard to personal property. Goodman v. Winter, 64 Ala. 410, 38 Am. Rep. 13.

Where a duly certified copy of a will probated in Pennsylvania is offered for record in the county court of Tennessee, it is not necessary to prove the same as an original will in the state of Tennessee as a will of personal property, and it is error to refuse to admit the certified copy to record. Williams v. Saunders, 5 Coldw. 60.

This is on the ground that Tenn. Code, §§ 2182–2185, providing that where any foreign will has been proved according to the laws of this state in a court of the United States, any person interested may present a copy duly authenticated to the county court of any county in the state where the land or estate disposed of by will is situated, and thereupon such court may order the same to be filed and recorded, and said copy, when so recorded, shall have the same force and effect as if the original had been executed, proved, and allowed in this state; and § 2190, providing that persons interested to contest the validity of such will may do so in the same manner as though it had been originally presented for probate in said court,—were construed to mean that so far as the will disposes of personal property the probate court of the domicil of the testatrix has the exclusive jurisdiction to decide upon the validity or invalidity as a will of personal property, and as such it is not open for contest in the courts of Tennessee. The right to contest the validity of wills probated in a foreign state is limited to wills of real or immovable property. It is further held that where the county judge in Tennessee found all the facts necessary to a judgment or decree, that the entering up of the judgment ordering the probate to record was mis-