ate the defendant's denial of the seduction, or do they go further, and defeat the plaintiff's right of recovery entirely, if the jury are satisfied that the female alleged to have been seduced was in the habit of seeking opportunities for criminal indulgence, not only with the defendant, but with various other persons, about the time of such alleged seduction?

In other words, can a woman who engages in criminal indulgence with her male acquaintances, as opportunities present themselves, and who will make opportunities for that purpose, be said to be seduced, within the true intent and meaning of the statute? Is such a woman drawn aside from the path of virtue, and overreached by the artifice, deception and cunning of the seducer? Unless these questions can be answered in the affirmative, it is not perceived that she was "seduced." To hold otherwise would be to break down all distinctions between the virtuous and vicious, and to place the common bawd on the same plane with the virtuous woman, whose life was pure and whose confidence had been betrayed by the heartless libertine.

Instruction No. 5, while it is subject to some verbal criticism, contained a correct legal proposition, as applied to the facts of this case, and the same ought to have been given to the jury.

No. 1 was misleading, and properly refused, for the reason that it required the jury to find "that the plaintiff's daughter was at and prior to the alleged seduction a chaste female," etc. At some period of her life prior to the al leged seduction she may have been unchaste, and then reformed. But this instruction would allow no reformation. It has already been shown that this is not the law.

3. The defendant's counsel asked one other instruction, as follows:

"The fact that the plaintiff's daughter was suffering at the time of her alleged seduction with a venereal disease, if you find such fact to exist, would, if not explained, in itself be sufficient evidence of unchastity to prevent a recovery in this action."

This instruction was properly refused, for the reason that it invades the province of the jury. It is the right of the jury, and not the court, to determine the effect of evidence, unless in particular cases, where its effect is declared by the Code.

It follows from what has been said that *the judgment must be reversed, and the cause remanded for a new trial.*

MINNESOTA SUPREME COURT.

Dexter A. ALLEN, *Appt.*,
v.
PIONEER PRESS CO., *Respt*

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

*1. **The subject of chapter 191, General Laws 1887,** entitled "An Act to Regulate Actions for Libel," is sufficiently expressed in its title.

2. **The Act is not invalid** as unequal or partial legislation because its provisions apply only to publishers of newspapers.

3. **Laws public** in their objects may be confined to a particular class of persons if they be general in their application equally to all of that class, and the distinction made between them and others is founded on some reason of public policy, and is not purely arbitrary.

4. **Neither is the Act invalid on the ground that it deprives a person** of "a certain remedy in the laws," for injuries or wrongs to his reputation, guarantied by section 8, article 1, of the Constitution of the State.
(Dickinson, J., dissents from foregoing.)

5. **Mere belief in the truth of the publication** is not necessarily enough to constitute "good faith" on part of the publisher there must have been an absence of negligence, as well as improper motives in making the publication. It must have been honestly made in the belief of its truth, and upon reasonable grounds for this belief, after the exercise of such means to verify its truth as would be taken by a man of ordinary prudence under like circumstances.

6. **Good faith.** *Held, also,* that upon the evidence in this case the question of good faith should have been submitted to the jury.

(January 30, 1889.)

*Head notes by MITCHELL, J.

3 L. R. A.

APPEAL by plaintiff, from an order of the District Court of Hennepin County, directing a verdict for defendant in an action to recover damages for the alleged publication of a libel. *Reversed.*

The questions raised sufficiently appear in the opinion.

Messrs. **Miller & Young,** *for appellant:*

At common law we also have a right of civil action for damages for defamation of character; and if the purpose and effect of this statute is to take from us that right, the law cannot be upheld.

See *Com.* v. *Duane*, 1 Binn. 601; *Cooley*, Const. Lim. §§ 420, 421, and cases cited; *Cass* v. *N. O. Times*, 27 La. Ann. 214.

The court below had not the right to weigh the proven facts and say that there was good faith in the publication of the libelous article. The presumption is that a publication libelous *per se* is made voluntarily and with a malicious motive.

Evening News Asso. v. *Tryon*, 42 Mich. 549; *Cass* v. *N. O. Times, supra.*

Bad faith and malice may be shown by the character of the publication itself, and by all the circumstances.

Hotchkiss v. *Porter*, 30 Conn. 414.

By Lord Campbell's Act (6 and 7 Vict. chap. 96) it was provided that defendant might retract and apologize, or offer to do so; but even there "the sufficiency or insufficiency of the apology was peculiarly a question for the jury.

Risk Allah Bey v. *Johnstone*, 18 L. T. N. S. 620.

"Where the only evidence sufficient upon an essential point is the testimony of the party in his own favor, or of a witness interested in his favor, it is error to refuse to submit the case to

the jury," and "to constitute an interested witness within this rule, it is not necessary that he should have a legal interest in the result of the litigation."

Kavanagh v. *Wilson*, 70 N. Y. 177, and cases cited; *Wohlfahrt* v. *Beckert*, 92 N. Y. 490, and cases cited.

Messrs. **Flandrau, Squires & Cutcheon,** for respondent:

The question of the adequacy or measure of the damages to be allowed is always within the control and discretion of the law-making power.

1 Sedgwick, Damages, 7th ed. pp. 2, 3; Cooley, Const. Lim. p. 349; Gen. Stat. 1878, chap. 75, §§ 45, 47, 50, 51.

If then, this Act has provided the person libeled with a remedy, and the measure of his damages is solely within the legislative discretion, no constitutional provision has been violated, although the law in certain cases limits his right of recovery to special damages of certain kinds, and the law must stand.

See *Moore* v. *Stevenson*, 27 Conn. 14, 25; *Hotchkiss* v. *Porter*, 30 Conn. 414, 419.

At common law the rule was that where the occasion is such as repels the presumption of malice, and the plaintiff gives no evidence of malice, the court must direct a verdict for the defendant.

See *Taylor* v. *Hawkins*, 16 Q. B. 308, 321.

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

The questions raised by this appeal involve: *first*, the validity, and *second*, the construction, of chapter 191, General Laws 1887, entitled "An Act to Regulate Actions for Libel."* The Act is claimed to be unconstitutional on three grounds:

1. The first is that the subject of the Act is not expressed in the title, as required by section 27, article 4, of the Constitution. This section has been before this court for construction in so many cases, beginning with *Ramsey County* v. *Heenan*, 2 Minn. 339 (Gil. 281), and ending with *Minnesota Loan & Trust Company* v. *Beebe*, 2 L. R. A. 418 (at the present term) that all that need be said on this point is that all the provisions of the Act relate and are germane to the subject expressed in the title, and proper to the full accomplishment of the object so indicated. *State* v. *Kinsella*, 14 Minn. 524 (Gil. 395); *State* v. *Cassidy*, 22 Minn. 322.

2. The second objection to the Act is that it is partial or class legislation, in that it gives to publishers of newspapers certain rights and immunities not given to other defendants in actions for libel. It does not follow that it is unconstitutional because its provisions are limited to the publishers of newspapers.

Laws public in their objects may be confined to a particular class of persons, if they be general in their application to the class to which they apply, provided the distinction is not arbitrary, but rests upon some reason of public policy growing out of the condition or business of such class. Such distinctions are being constantly made, as in the case of minors, married women, common carriers, railroad companies, and the like. This kind of legislation is not confined, as defendant seems to contend, to cases involving the exercise of what is termed the "police power" of the State. For example, it may be public policy to give to laborers a lien or other preference for the collection of their wages, not given to other creditors; or to give a lien to laborers in one business, while it would be neither practicable nor politic to give it to laborers in some other employment.

So long as a law applies equally to all engaged in that kind of business, treating them all alike, subjecting them to the same restrictions, and giving them the same privileges under similar conditions, then it is public in its character, and not subject to the objection of being partial or unequal legislation, provided, of course, as already stated, the distinction made by it is based on some reason of policy, and is not purely arbitrary. Cooley, Const. Lim. 481 *et seq.*

The Act under consideration applies alike to all publishers of newspapers. And in view of the nature of the business in which they are engaged, and the fact that newspapers are the channels to which the public look for general and important news, and that, even in the exercise of the greatest care and vigilance, and actuated by the best of motives, they are liable through honest and excusable mistake to publish what may afterwards prove to be false, we cannot say that it is either arbitrary or without reason of public policy to make such provisions as are made by this Act for the special protection of newspaper publishers when sued for libel.

3. The third, and by far the most serious, objection urged against this Act is that it conflicts with section 8, article 1, of the Constitution, which provides that "Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character."

It is contended that the Act in question is unconstitutional for the reason that it deprives a person of an adequate remedy for injuries to his reputation, because in certain cases it limits

*The Act is as follows:

Chapter 191.—An Act to Regulate Actions for Libel.

Be it enacted by the Legislature of the State of Minnesota:

Section 1.—Before any suit shall be brought for the publication of a libel in any newspaper in this State, the aggrieved party shall, at least three (3) days before filing or serving the complaint in such suit, serve notice on the publisher or publishers of said newspaper at their principal office of publication, specifying the statements in the said article which he or they allege to be false and defamatory, if it shall appear, on the trial of said action, that the said article was published in good faith, that its falsity was due to mistake or misapprehension of the facts, and that a full and fair retraction of any statement therein alleged to be erroneous was published in the next regular issue of such newspaper, or within three (3) days after such mistake or misapprehension was brought to the knowledge of such publisher or publishers, in as conspicuous a place and type in such newspaper as was the article complained of as libelous, then the plaintiff in such case shall recover only actual damages: *Provided, however*, That the provisions of this Act shall not apply to the case of any libel against any candidate for public office in this State, unless the retraction of the charge is made editorially in a conspicuous manner at least three (3) days before the action.

Sec. 2. The words "actual damage" in the foregoing section shall be construed to include all damages that the plaintiff may show he has suffered in respect to his property, business, trade, profession or occupation, and no other damages whatever. [Rep.]

his right of recovery to special damages of certain kinds, specified in the second section, and prohibits the recovery of general damages—that is, damages to character or reputation—which the law presumes, without proof, from the mere fact of the falsity of the publication; and hence, in such cases, if a person is unable to prove any special or pecuniary damages, there could be no recovery at all. The question is not without difficulty, nor free from doubt.

This Act undoubtedly assumes to introduce an important and radical charge in the law of libel, and, as legislation of the kind is comparatively new, judicial precedents are almost wanting. The parent Act for the protection of newspaper publishers when sued for libel seems to be chapter 96 of 6 and 7 Vict., known as "Lord Campbell's Act." But this merely provided that the defendant might plead that the libel was published without actual malice, and without gross negligence, and that before the commencement of the action, or at the earliest opportunity afterwards, he published in such newspaper a full apology, and that, at the same time he filed this plea, the defendant might pay into court a sum of money by way of amends for the injury. This plea was allowed in mitigation of damages, and the payment into court operated as a tender.

In Connecticut, in 1855, an Act was passed which, although not so limited by its terms, was evidently designed for the protection of newspaper publishers, and which provided that "In every action for libel the defendant may give proof of intention; and unless the plaintiff shall prove malice in fact he shall recover nothing but his actual damages proved and specially alleged in the declaration."

Although very different in form, it will be observed that, so far as the question now being considered is concerned, this statute is in effect much the same as ours, assuming that "actual damages," as defined in the second section, can be given a construction that will cover all special damages.

This Act has been twice before the Supreme Court of Connecticut, first in *Moore* v. *Stevenson*, 27 Conn. 14, and next in *Hotchkiss* v. *Porter*, 30 Conn. 414. While in both cases the construction, rather than the constitutionality, of the Act seems to have been the question presented to the court, yet in passing upon the first they seem to have had the latter in mind, and succeeded in giving it a construction which in their opinion would be consistent with its validity. They seem to have had some difficulty in doing this, and it is very evident that the Act did not commend itself very strongly to the favor of the judicial mind.

Our Act was copied from an Act passed in Michigan in 1885, except that the latter expressly excepted from its operation publications involving a criminal charge. This Act was recently before the Supreme Court of that State in the case of *Park* v. *Detroit Free Press*, 1 L. R. A. 599, in which it was held unconstitutional on the very ground here urged by plaintiff. While the views of that learned court, and especially of the eminent jurist who wrote the opinion in that case, are entitled to very great weight, yet we think they hardly have the authority of a decision of the question, because it was really not in the case, inasmuch as the court held that the publication involved a criminal charge, and hence was not within the operation of the statute. We are therefore compelled to consider the question mainly upon principle as *res integra*, which it certainly is in this State.

The guaranty of a certain remedy in the laws for all injuries to person, property or character, and other analogous provisions, such as those against exacting excessive bail, imposing excessive fines, inflicting cruel and inhuman punishments, and the like, inserted in our Bill of Rights, the equivalents of which are found in almost every Constitution in the United States, are but declaratory of general fundamental principles, founded in natural right and justice, and which would be equally the law of the land if not incorporated in the Constitution.

There is unquestionably a limit in these matters, beyond which, if the Legislature should go, the courts could and would declare their action invalid. But inside of that limit there is, and necessarily must be, a wide range left to the judgment and discretion of the Legislature, and within which the courts cannot set up their judgment against that of the legislative branch of the government. These constitutional declarations of general principles are not, and from the nature of the case cannot be, so certain and definite as to form rules for judicial decisions in all cases; but up to a certain point must be treated as guides to legislative judgment, rather than as absolute limitations of their power. And in determining whether in a given case a statute violates any of these fundamental principles incorporated in the Bill of Rights, it ought to be tested by the principles of natural justice, rather than by comparison with the rules of law, statute or common, previously in force.

Again, it must be remembered that what constitutes "an adequate remedy" or "a certain remedy" is not determined by any inflexible rule found in the Constitution, but is subject to variation and modification, as the state of society changes; hence, a wide latitude must, of necessity, be given to the Legislature in determining both the form and the measure of the remedy for a wrong.

Now, at common law the remedy allowed to a person injured by a libel was: *first*, special damages for every injury of a pecuniary nature resulting from the wrong, which he had to both plead and prove; and *second*, general damages; that is, damages to his standing and reputation, which the law presumed without proof from the fact of the publication of libel actionable *per se*. Moreover, malice was the gist of every action for libel; either malice in fact, consisting of improper and unjustifiable motives, or constructive malice, which the law presumed without proof from the fact of the falsity of the publication. Evidence of intention, that is, of the absence of malice in fact, was always admissible—where the communication was privileged, in justification, and where it was not privileged, in mitigation, of damages. A retraction of the libel was also always admissible in mitigation. In effect, this statute but extends this rule of evidence so as to permit evidence of intention—good faith—coupled with

a full retraction, not merely in mitigation of damages, but to prevent the recovery of general damages, as distinguished from special damages, for injuries of a pecuniary nature.

Now, in an action for libel, the object, so far at least as general damages is concerned, is not merely to obtain redress in the shape of pecuniary compensation, which is frequently but a secondary consideration, but also—which is usually of much greater importance—of vindicating the plaintiff's character by openly challenging his accusers to proof of their assertions, and of establishing their falsity, if they be false.

Now, as far as vindication of character or reputation is concerned, it stands to reason that a full and frank retraction of the false charge, especially if published as widely and substantially to the same readers as was the libel, is usually in fact a more complete redress than a judgment for damages. Indeed, where there has been perfect good faith, and an entire absence of improper motives, in the publication of a libel, and no special or pecuniary injury has resulted, an action for damages, brought after such a full and frank retraction and apology, is in a majority of cases purely speculative.

It may be said that a retraction is not a complete remedy for injury to reputation, because even retracted falsehood may be repeated without the retraction; but the same may be said of it even after the falsity of the charge is established by a judgment for damages. It is also true that a retraction is not the remedy in the law guaranteed by the Constitution; and, if the statute proposed to substitute it as a redress for pecuniary injuries, it could not be sustained. But if there was an entire absence of either negligence or improper and unjustifiable motives, but, on the contrary, perfect good faith on part of the publisher of the libel, and if he has done all that can reasonably be done in redressing the wrong, so far as it has affected a party's character, by publishing a full retraction, what principle of reason or natural justice is violated by limiting the recovery of pecuniary damages to the pecuniary injuries which he has sustained? Or, if good faith can be shown in mitigation of damages, what constitutional provision is violated by permitting it to be proven in connection with a retraction, so as to prevent altogether the recovery of money damages for the presumed injuries to reputation which are not all pecuniary in their nature, and which have already been redressed, as far as they can be, by the retraction?

A court ought not to declare invalid a solemn act of a co-ordinate branch of the government, except in a very clear case; and after all the consideration that we are able to give to the subject we are unable to say that the Legislature has transcended its constitutional powers in imposing these restrictions and limitations upon the legal remedy of plaintiffs in actions for libel, or that by doing so they have deprived anyone of "a certain remedy in the laws for injuries or wrongs received by him in his person, property or character," within the meaning of the Constitution.

We have assumed that under this Act a party is still allowed to recover pecuniary compensation for all injuries pecuniary in their nature which he may have sustained by the libel.

Section 2, in defining "actual damages," limits them to damages in respect to property, business, trade, profession or occupation. It may be suggested that there may be some cases of pecuniary injury which this would not reach; but we are of opinion that by a liberal but allowable construction the definition referred to may be made to cover all cases of special damages; and, if so, we ought to adopt such construction, rather than hold the Act invalid.

4. The next question is whether upon the evidence the question should have been submitted to the jury whether "the article was published in good faith; that its falsity was due to mistake or misapprehension of the facts." This depends upon what is meant by the expression "in good faith," as used in this connection.

We may assume that the Act was designed to protect honest and careful newspaper publishers. It is not to be presumed that the Legislature intended to make so radical a change in the law of libel as to make mere belief in the truth of the article the test of good faith. If so, they have introduced a very dangerous principle, which virtually places the good name and reputation of the citizen at the mercy of the credulity or indifference of every reckless or negligent reporter.

Good faith requires proper consideration for the character and reputation of the person whose character is likely to be injuriously affected by the publication. It requires of the publisher that he exercise the care and vigilance of a prudent and conscientious man, wielding, as he does, the great power of the public press. There must be an absence, not only of all improper motives, but of negligence, on his part. It is his duty to take all reasonable precautions to verify the truth of the statement, and to prevent untrue and injurious publications against others. The extent and nature of these precautions will depend upon and vary with the circumstances of each case, such as the nature of the charge, the previous known character and standing of the person whom it affects, the extent to which the report has already gained circulation and publicity. If it is a piece of news in which the public may be presumed to have a lawful interest, good faith might permit a line of action which would not be permissible in the case of an item of mere scandal, of no legitimate interest to the public.

If a publisher of a newspaper, for the sake of gratifying a depraved public taste, or for the sake of being considered newsy and "scooping" other newspapers, should recklessly or even negligently publish a piece of scandal about another, without taking such precautions to verify its truth as would be taken by a conscientious and prudent man under like circumstances, then he would not be acting in good faith, within the meaning of this statute, even although he may have a belief that the publication is true. Such conduct would not be a performance of his legal duty in guarding against wrongfully injuring the reputation of others. If, on the other hand, he take all such reasonable precautions, and has then a reasonable and well grounded belief in the truth of the statement, and then publishes it as

a matter of news, and it nevertheless proves to be false, he acts "in good faith." This is what we think the statute means, and is all that any honest and fair minded newspaper publisher will demand. See *Moore* v. *Stevenson*, *supra*.

In view of another trial of this action, it would be improper to discuss the evidence, or characterize the conduct of the reporter who transmitted this article to the defendant for publication. All that it is proper to say is that, applying the law, as we have construed it, to the evidence, we are of the opinion that the question of "good faith" in publishing the article should have been submitted to the jury.

Order reversed.

Dickinson, J., dissenting:

I am unable to concur in that part of this opinion presented in the third division, holding that the statute is not in conflict with section 8 of article 1 of the Constitution.

Gilfillan, *Ch. J.*, being absent during the argument, took no part.

PENNSYLVANIA SUPREME COURT.

APPEAL OF Frank HAUPT *et al.*

(....Pa.....)

1. **A borough,** under the Pennsylvania Act of April 3, 1851 (P. L. 320), has no power to carry any part of a water supply provided for the use of its inhabitants outside the borough for the inhabitants of another place or municipality.
2. **Dwellers in towns and villages** watered by a stream, as well as the riparian owners, may use the water, provided they have access to the stream by means of a public highway.
3. **A water company** organized under the Pennsylvania Act of 1874, for the alleged purpose of supplying a borough with water, has no right to apply the water to the use of another municipality or industries remote from that borough, as against riparian owners, or another borough which has lawfully acquired the right to use the water.

(April 8, 1889.)

APPEAL by defendants, from a decree of the Court of Common Pleas of Schuylkill County, enjoining them from obstructing the flow of water in the Little Mahanoy Creek and from taking the water therefrom. *Affirmed.*

The facts are fully stated in the opinion.

Mr. **Fergus G. Farquhar,** for appellants:

The grantor of the land now owned by the Borough of Ashland could ask the intervention of a court of equity to restrain the taking of water out of the creek for the use of Frackville, upon the allegation that such a taking would work a substantial injury to his riparian rights.

Phila. v. *Spring Garden*, 7 Pa. 348.

The State cannot directly or indirectly deprive persons who have lawful access to a stream from using the water of it for their natural or domestic purposes.

Phila. v. *Collins*, 68 Pa. 106; *Phila.* v. *Spring Garden*, *supra*.

This right to use water running in streams is a common right by the law of nature; it cannot be granted; no prescription runs against it.

Phila. v. *Spring Garden*, *supra*; *Hoy* v. *Sterrett*, 2 Watts, 327.

This is a right which anyone, having lawful access to a stream, may exercise, without incurring any liability to another.

Embrey v. *Owen*, 6 Exch. 353.

If, in the exercise of it, all the water in the stream be used up, it is *damnum absque injuria* to those below.

Pa. R. Co. v. *Miller*, 3 Cent. Rep. 126. 112 Pa. 34.

No riparian proprietor gains any privilege by mere priority of appropriation.

Hoy v. *Sterrett*, 2 Watts, 327.

"Anyone may reasonably use water who has a right of access to it; but no one can set up a claim to any exclusive right to the flow of all the water in its natural state."

Howard v. *Ingersoll*, 54 U. S. 13 How. 426 (14 L. ed. 189). See *Chasemore* v. *Richards*, 7 H. L. Cas. 349; *Wilts & B. Canal Nav. Co.* v. *Swindon Water Works Co.* L. R. 9 Ch. App. 451.

The Borough of Ashland never complied with the provisions of the law permitting it to acquire a right to the water of the creek.

Messrs. **W. A. Marr** and **John W. Ryan,** for appellee:

In *Wheatley* v. *Chrisman*, 24 Pa. 298, and *Pa. R. Co.* v. *Miller*, 3 Cent. Rep. 126, 112 Pa. 41, this court distinctly lays down and affirms the doctrine that governs the rights of riparian owners and that those rights are measured by the size and capacity of the stream.

A borough's authority to enter upon lands and appropriate streams of water for the use of its inhabitants is based upon its necessities, the common law and the Acts of Assembly under which it is chartered.

Purd. Dig. 294, pl. 67; 293, pl. 55; 1 Dillon, Mun. Corp. § 55, p. 173; 2 Dillon, Mun. Corp. § 455, p. 533.

Having exercised its rights as to a stream of water and appropriated the same to the use of its inhabitants, another party cannot subsequently divert the water of the stream to the injury of the party first appropriating the same.

Angell, Watercourses, 7th ed. p. 219 etc. § 131; 2 Bl. Com. p. 402; *Kelly* v. *Natoma Water Co.* 6 Cal. 105; *Maeris* v. *Bicknell*, 7 Cal. 261; *Davis* v. *Gale*, 32 Cal. 26; *Lincoln* v. *Chadbourne*, 56 Maine, 197; *Samuels* v. *Blanchard*, 25 Wis. 329; *Gould* v. *Boston Duck Co.* 13 Gray, 442; Washburn, Easements, 3d ed. pp. 292, 297, 278, 299, 300, 301.

It is a familiar exercise of the power of a court of chancery to prevent by injunction injuries to watercourses by diversion or pollution.

McCallum v. *Germantown Water Co.* 54 Pa.

NOTE.—See Land Log & L. Co. v. Brown, *ante*, 472.

3 L. R. A.

See also 21 L. R. A. 769; 38 L. R. A. 474.

57; Daniel's Ch. Pr. pp. 1638, 1639; *Shenandoah Water Co's App.* 2 W. N. C. 46, 47.

Paxson, *Ch. J.*, delivered the opinion of the court:

This was a bill filed by the Borough of Ashland (plaintiff below) to restrain the defendants, Frank Haupt and John Haupt, from interfering with the water supply of said borough. The facts of the case, so far as it is necessary to state them, are substantially as follows:

The Town of Ashland has a population of about 7,000 inhabitants, and was duly incorporated as a borough in the year 1857, under the laws of this Commonwealth. In the year 1876 the said borough purchased a tract of land containing ten acres and upwards, situate in Butler Township, about two miles below the head waters of the Little Mahanoy Creek, which flows through it; and in the same year constructed a large basin or reservoir on said tract of land, and appropriated the waters of said creek and its tributaries for the purpose of providing a supply of water for the use of the inhabitants of the said borough.

The water was conveyed by means of pipes from the reservoir, which is several miles distant, and is distributed to the inhabitants for private purposes, and such public purposes as are found needful. The cost of said works is stated and shown to be about $63,000.

About two miles above the dam is the Borough of Frackville, through which the Little Mahanoy Creek flows. This town, it is alleged, contains about seventeen hundred inhabitants. The creek aforesaid is its main source of water supply. There are but few wells and springs in the borough that do not at times become dry, and water has been hauled from the creek to different houses.

In 1882 the defendants, being property owners in the borough, in order to facilitate the supply of water to those inhabitants thereof who depended upon the Little Mahanoy Creek, determined to pump water from the creek into a reservoir, located on high ground, and from thence distribute it by pipes to those who might need it. Shortly after this work was commenced this bill was filed to restrain the defendants from obstructing the stream or diverting the water from its channel.

In April, 1883, the Mountain City Water Company was organized, and incorporated under the Act of 1874, for the alleged purpose of supplying the Borough of Frackville with water. It purchased from the defendants, Frank and John Haupt, their appliances and whatever right it could acquire from them to take water from the Little Mahanoy Creek.

In 1886 it presented its petition to the court below, asking to be permitted to come into this case as defendant, by way of supplemental bill or by amendment of the original bill, which was allowed. The case was referred to a master, who, after a large amount of testimony had been taken, submitted an elaborate report, sustaining the bill, and recommending an injunction, principally on the ground of the interference with the rights of the plaintiff as a riparian owner. Upon exceptions, the learned court below sustained the conclusions of the master, and made the injunction perpetual, but upon other grounds than the riparian rights of the plaintiff. The master found as a conclusion of law, from the facts, "That by reason of the ownership of said tract the borough (Ashland) acquired the rights of a riparian owner, and that the relationship of upper and lower riparian owners existed between the defendants and plaintiff in May, 1882, when the bill was filed."

To this and other propositions based upon the same view, the learned court below said: "Whilst not dissenting from the conclusions to which the master has come, I cannot but think that he has placed the rights of the Borough of Ashland upon entirely too narrow a foundation. It might work serious injury to the borough if it only acquired the rights of a riparian owner when it bought the tract of land and erected its waterworks at an expense of upwards of $60,000."

If the authority of the plaintiff were measured by its rights as riparian owner, it would be slender enough. It might indeed use the water for the domestic purposes incident to the said ten acres of land. If there was a tenant thereon, he could use it for watering his stock and for household purposes,—for any useful, necessary and proper purpose incident to the land itself, and essential to its enjoyment. But that the rights of a riparian owner would justify the plaintiff in carrying the water for miles out of its channel to supply the Borough of Ashland with water is a proposition so palpably erroneous that it would be a waste of time to discuss it.

Whatever right the plaintiff borough had to take the water from the stream for the use of its inhabitants must be found in the Act of April 3, 1851, P. L. 320, commonly known as the Borough Act, or it does not exist at all.

The second section of said Act authorizes boroughs "to provide a supply of water for the use of the inhabitants, to make all needful regulations for the protection of the pipes, lamps, reservoirs and other construction or apparatus, and to prevent the waste of water so supplied."

Power is also given in the same section "To enter upon the lands and premises of any person or persons for the purposes authorized by this Act, by themselves and their duly appointed officers and agents;" while the 27th section provides that "Private property shall not be taken for the use or purpose of the corporation without the consent of the owners, or until just compensation shall be made therefor according to the laws of this Commonwealth."

It will thus be seen that the Act of 1851 expressly authorizes boroughs to provide a supply of water for the inhabitants thereof; it clothes them with the right of eminent domain, by which they may enter upon the premises of any person or persons and appropriate a spring or stream of water to provide such supply, subject only to the constitutional mandate to make compensation for whatever is so taken. And under the present Constitution there can be no question as to its liability to make compensation for property injured or destroyed by the erection or construction of its works.

We have no doubt the plaintiff had the power under the Act of 1851 to construct its dam and carry this water by pipes to the Borough of Ashland and distribute it to and

among the inhabitants thereof. There, however, its right ceases. It would have no power to carry it outside the borough and supply any of the inhabitants of another place or municipality. This is because the Act of 1851 only authorizes it to be done for the inhabitants of the borough. It is true, where the water supply is abundant enough for everybody there would be no one to complain of its excessive use; but where it is limited, and other parties are deprived of the use of the water who are entitled to it, for the benefit of those who can show no authority therefor, we must expect the rights of the respective parties to be clearly and sharply defined and rigidly enforced.

We have nothing to do with the rights of the riparian owners below the plaintiff's dam. If they have been injured, they have their claim to compensation if it has not already been made. Our concern is with the upper riparian owners, whose right to use the waters of the Little Mahanoy Creek the defendants claim has been impaired by the decree of the court below.

I do not consider it necessary to consume time by an extended discussion of the rights of riparian owners. It is one of the most interesting branches of the law, but its principles are too well settled to need elaboration here. The law was well stated by *Justice* Thompson in *Philadelphia* v. *Collins*, 68 Pa. 116, as follows:

"Every individual residing upon the banks of a stream has a right to the use of the water to drink and for the ordinary uses of domestic life; and where large bodies of people live upon the banks of a stream, as they do in large cities, the collective body of the citizens has the same right, but, of course, in a greatly exaggerated degree."

And it was said by *Chief Justice* Gibson, in *Philadelphia* v. *Spring Garden*, 7 Pa. 363: "The inhabitants of the district might have lawfully dipped from the margin of the pool water enough for their several necessities; but instead of drawing it by hand they have combined their funds to produce a cheaper and better transportation," etc.

In each of these instances the learned Justice was speaking of a stream of water which is a public highway. To some extent the same principle may be applied to what may be called a private stream. In the case of a river or public highway, all the people of a State have access to it, may ride over it and use the water. Not so with a private stream. In such case, no one can use it or take the water except at a public crossing. There the traveler may stop, refresh himself and water his horse; the water has no owner, and he impairs no man's right. But except at public crossings, such as a road or a street, no one but a riparian owner can use the water, not because the latter has any ownership in it, but because the stranger has no right of access to it. There can be no such thing as ownership in flowing water; the riparian owner may use it as it flows; he may dip it up and become the owner by confining it in barrels or tanks, but so long as it flows it is as free to all as the light and the air.

It follows from what has been said that dwellers in towns and villages watered by a stream may use the water as well as the riparian owner, provided they have access to the stream by means of a public highway.

The Borough of Frackville, as before observed, is not a party to this proceeding; nor are the other *supra* riparian owners upon this stream. Their rights, therefore, cannot be determined now. We will not refer to them further than to say that whatever rights the inhabitants of Frackville, or the borough as representing their collective rights, had to the use of the water of the Little Mahanoy Creek at the time the plaintiff constructed its dam, they have still. I do not say that the plaintiff may not impair those rights in the exercise of its power of eminent domain; but I do say that they cannot be taken, injured or destroyed without compensation being first made as provided by the Constitution.

The plaintiff, however, disclaims all intention of interfering with the rights of the *supra* riparian owners, and particularly that it does not wish to deprive the inhabitants of the Borough of Frackville of their accustomed use of the water; that the said borough is not a defendant; that the defendants are merely attempting to shield themselves behind the supposed rights of the borough.

It is very true the borough is not erecting the works, nor is anyone doing so with its authority or as its agent. It appears to have authorized the defendants to lay their pipes through its streets. This, however, does not constitute the water company its agent, nor make the acts of said company the acts of the borough.

Were the latter erecting works under the Act of 1851 to supply its inhabitants with water, it would be confined to the terms designated in the Act, and could use the water only for the benefit of its own inhabitants; whereas, these defendants are affected by no such limitations, and if they may take the water at all, they may do so for the benefit of anyone outside of the Borough of Frackville; they could convert it to the use of another municipality, or apply it to the benefit of collieries and other industries remote from Frackville. This the defendants have no right to do, either against riparian owners or those who have lawfully acquired the right to use the water.

As the report of the Master clearly shows that the works of the defendants, if completed, will render the supply of water for the Borough of Ashland insufficient, this injunction must be continued.

The decree is affirmed, and the appeal dismissed, at the costs of the appellants.

MISSOURI SUPREME COURT.

Daniel R. WOLFE *et al.*, *Respts.*,
v.
MISSOURI PACIFIC R. CO., *Appt.*

(....Mo.....)

1. **Agents to whom goods were billed by their principals,** and who received them, and in their own firm name contracted for the delivery of the goods to themselves acting as factors, and having no pecuniary interest in the goods, beyond their lien for commissions, are entitled to maintain an action as trustees of an express trust, under Missouri Revised Statutes 1879, § 3493, for breach of the contract by the carrier.

2. **To justify a delivery by a carrier to the true owner,** contrary to or without the orders of the shipper, the carrier assumes the burden of proving the ownership at the time of such delivery.

3. **Where parties made a contract in their own names, with a carrier,** for the delivery of goods to themselves, any delivery by the carrier to a purchaser, before the shippers have parted with the right of possession, is at the carrier's own risk; it does not devolve on the carrier to decide whether, by the contract of purchase, the purchaser was entitled to the delivery.

4. **A conversation by telephone** between a witness and another person in the private office of a party is not inadmissible because the witness does not identify the voice of the other person as that of the party or his clerk.

(March 4, 1889.)

APPEAL by defendant from a judgment of the St. Louis City Circuit Court in favor of plaintiffs in an action to recover damages for an alleged breach of contact for the carriage and delivery of certain wire. *Affirmed.*

The case sufficiently appears in the opinion.

Messrs. **T. J. Portis, Bennett Pike** and **Henry G. Herbel,** for appellant:

Plaintiffs did not show such an interest in the wire as would authorize them to sue therefor.

The right of action is in the person who would suffer if the goods were lost, and at whose risk the goods are shipped.

Dicey, Parties, p. 87; Bliss, Code Pl. § 21 Hutchinson, Carriers, § 736; *Potter* v. *Lansing* 1 Johns. 223; *White* v. *Chouteau*, 10 Barb. 202; *Bedfield* v. *Middleton*, 7 Bosw. 649; *Swift* v. *Swift*, 46 Cal. 266; *Green* v. *Clarke*, 12 N. Y. 352.

To sustain a suit aginst a carrier for an injury to the goods carried, the goods must belong to the plaintiff at the time of the injury. *Law* v. *Hatcher*, 4 Blackf. 364.

As a general rule, the primary duty of a common carrier is to deliver to the consignee; but this duty may be superseded by certain contingencies, the occurrence of which operates as a legal rescission or discharge of the contract of bailment, *e. g.*, as in the case at bar, where the true owner of the goods demands their delivery to him, it is the duty of the carrier to deliver them to him.

Matheny v. *Mason*, 73 Mo. 683; *The "Idaho,"* 93 U. S. 575 (23 L. ed. 978); *Blizen* v. *Hudson River R. Co.* 36 N. Y. 403; *Sweetman* v. *Prince*, 26 N. Y. 232; *Bordewell* v. *Colie*, 1 Lans. 141; *King* v. *Richards*, 6 Whart. 418; Redfield, Railways, 5th ed. § 191.

This duty to deliver to the true owner is so absolute in its nature that it has been held that a delivery by a carrier to a person designated by an agent of the consignor in whose care the goods were shipped will not relieve the carrier from liability to the true owner where the carrier knew that the agent directing the delivery was merely a ministerial one of limited powers.

Claflin v. *Boston & L. R. Co.* 7 Allen, 344.

Even though a right of action may be adjudged to plaintiffs, its extent must be limited to the amount of their commissions, as the Cambria Iron Company by its contract, has precluded itself from asserting any such right against defendant.

Ober v. *Indianapolis & St. L. R. Co.* 13 Mo. App. 88.

Messrs. **Taylor & Pollard,** for respondents:

Plaintiffs, in their own name, contracted with defendant to carry the wire from the west end of the bridge to 14th and Gratiot Streets, and there to deliver it to them as consignees. This, under the statutes, authorized them to maintain this action, even if the wire belonged wholly to the Cambria Iron Company, because a party in whose name a contract is made for the benefit of another is a trustee of an express trust; and such a trustee may sue without joining the beneficial owner.

Rev. Stat. Mo. § 2463; Bliss, Code Pl. § 57; *Marquette, H. & O. R. Co.* v. *Kirkwood*, 45 Mich. 54; Pomeroy, Rem. & Rem. Rights, § 177; *Wright* v. *Tinsley*, 30 Mo. 389; *Harney* v. *Dutcher*, 15 Mo. 89; *Rogers* v. *Gosnell*, 51 Mo. 468; Perry, Tr. § 86; *Snider* v. *Adams Exp. Co.* 77 Mo. 523.

The plaintiffs as consignees of the wire had the legal title thereto, and as such could maintain this action.

Rev. Stat. Mo. 1879, § 559; Benjamin, Sales, 3d Am. ed. 813; *Berger* v. *R. R. Co.* 13 Mo. App. 500; *Turney* v. *Wilson*, 7 Yerg. 340; *East Tenn. & G. R. Co.* v. *Nelson*, 1 Cold. 278; 2 Rorer, Railroads, p. 1330, § 5; 2 Redfield, Railways, p. 189; Hutchinson, Carriers, § 130; Story, Agency, §§ 111, 112.

The contract of the Cambria Iron Company with Fuchs, and the invoices sent by plaintiffs to Fuchs, did not vest the title, with the right of immediate possession of the wire in question, in Fuchs. Neither the consignors nor the consignees (plaintiffs) so disposed of the *jus disponendi* as to vest it in Fuchs.

Benjamin, Sales, 3d Am. ed. §§ 382, 399; *Merchants Nat. Bank* v. *Bangs*, 102 Mass. 295; *First Nat. Bank* v. *Crocker*, 111 Mass. 167; *Dows* v. *National Exch. Bank*, 91 U. S. 630, 631 (23 L. ed. 218); *Chapman* v. *Kerr*, 80 Mo. 158; Hutchinson, Carriers, § 130.

Barclay, *J.*, delivered the opinion of the court:

Plaintiffs brought this action to recover damages for breach of a contract for the carriage and delivery of seven car loads of wire.

No questions arise requiring any special reference to the pleadings. They properly present the issues made by the facts hereafter discussed.

The cause was tried by Hon. Amos M. Thayer as Circuit Judge, a jury having been waived.

It appeared at the trial that Henry Fuchs, a barb-wire manufacturer in St. Louis, in April, 1884, made a written contract with the Cambria Iron Company of Johnstown, Pa., by which the iron company was to furnish said Fuchs with "twelve tons of wire per day for twenty-five business days, beginning April 30; and then eighteen tons per day for twenty-five business days," at certain named prices; settlements were to be monthly; "less two per cent discount for payment in ten days from date of shipment;" and that "The seller's responsibility for goods in transit should cease when they pass into the custody of the transporting company."

The iron company, in pursuance of this agreement, shipped ten car loads of wire for said Fuchs, but consigned the same to Wolfe & Good (the plaintiffs), their St. Louis agents, at East St. Louis.

On the arrival of the wire at East St. Louis, it was delivered to the St. Louis Bridge & Tunnel Company by the O. & M. Ry. (the terminal carrier) in obedience to Wolfe & Good's instructions, and was by the Bridge & Tunnel Company then delivered to defendant for transfer and delivery at Pope's Switch, 14th and Gratiot Streets in St. Louis.

No bill of lading was issued to Wolfe & Good, or to any other person, by either the Bridge & Tunnel Company or the defendant, for the hauling of this wire from East St. Louis to St. Louis.

There was a custom prevalent with roads terminating at East St. Louis and St. Louis, to designate the destination of cars thus transferred across the river, by tacking a card of a particular color on the car door, which indicated to the receiving carrier the particular depot, switch or side track on which the car was to be placed, different colored cards representing the several depots, switches and side tracks. The cars containing this wire were designated by blue cards, which indicated Pope's Switch as their destination. That was a private switch used by the Pope Iron & Metal Company and two or three other establishments, among them Fuchs' Wire Works.

The wire was shipped in three or four car load lots. Three car loads were received by defendant and delivered to Fuchs on written orders of Wolfe & Good. Prepayment of the purchase price of these three car loads was not exacted of Fuchs by Wolfe & Good.

The remaining seven cars were delivered by defendant to Fuchs, on his demand, at different dates in May, 1884. That delivery constitutes the gist of this action. Whether it was made with the consent of plaintiffs, Wolfe & Good, or without it, was the main issue of fact tried. The evidence conflicted on that point. The trial court found that the delivery was without their consent.

It further appeared in evidence that plaintiffs, as agents for the Cambria Iron Company, had no other pecuniary interest in the wire than for the payment of their commissions; and that immediately upon receipt of advices from the Cambria Iron Company of the shipment in controversy, Wolfe & Good had sent to Fuchs invoices, or bills of account, for the car loads in question, which he received several days before the wire arrived.

In the progress of the trial the court admitted testimony of alleged conversations by telephone connected with plaintiffs' office, though the witness did not identify the voice he heard at their instrument.

The court made the following declarations of law against defendant's objections, viz.:

"The court decides the law to be, that a person in whose name a contract is made for the benefit of another is a trustee of an express trust, and as such can maintain an action in his own name. If, therefore, the court finds from the evidence that the contract of the defendant to carry the goods in question from the place where it received the same to 14th and Gratiot Streets, was made in the name of plaintiffs, though for the benefit of the Cambria Iron Company, then the plaintiffs would have a standing in court and could recover if the delivery to Fuchs was wrongful.

"The court further declares the law to be that, if it finds from the evidence that on the arrival of the goods in question at East St. Louis the plaintiffs received said goods in pursuance of the bills of lading read in evidence; that thereafter plaintiffs ordered the St. Louis Bridge & Tunnel Railroad Company to have said goods delivered to 14th and Gratiot Streets; that the delivery of said goods included the hauling of said goods from the eastern terminus of defendant's railroad to said 14th and Gratiot Streets; that said defendant received said goods of said St. Louis Bridge & Tunnel Railroad Company and, in delivering said goods, defendant acted in law simply as agent of plaintiffs; and if the court further finds that such contract for delivering to defendant was made in the name of plaintiffs,—then said plaintiffs would stand in the relations of trustee of an express trust, and as such could sue defendant for the goods in question if wrongfully delivered.

"The court further declares the law to be that defendant had nothing to do with the contract between the Cambria Iron Company and Fuchs for the purchase of wire. The defendant could not constitute itself an arbitrator touching any matter of difference between the parties of said contract. It was the duty of the defendant to deliver the goods, in question to Wolfe & Good, the consignees, or else to such person as they might deliver the bills of lading to properly indorsed, or else such person as they might order said defendant to deliver the goods to."

The court then found for plaintiffs in the sum of $7,028.17, the value of the seven car loads of wire.

After moving for a new trial without avail, and duly saving exceptions, defendants appealed.

I. Plaintiffs' right to maintain this action was made an issue by the answer. It is naturally the first subject of consideration.

The goods in question were billed by the iron company to plaintiffs at East St. Louis.

They received them there and in their own firm name contracted for their delivery at Pope's Switch, in St. Louis, to themselves. They were acting as factors for the iron company in the transaction, having no pecuniary interest in the goods beyond their lien for commissions.

By our Code of Practice it is provided that every civil action must be prosecuted in the name of the real party in interest, with certain exceptions. Among these is a "trustee of an express trust," who may sue in his own name without joining the person for whose benefit the action is prosecuted. The statute explicitly declares that "A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another." Rev. Stat. 1879, § 3463.

Plaintiffs fairly come within this statutory definition.

In this regard the Code merely designed to preserve a right of action which existed by the modern common law of England on such facts as here appear. *Short* v. *Spackman* (1831), 2 Barn. & Ad. 962; *Drinkwater* v. *Goodwin*, Cowp. 256.

Our statute, above quoted, is the same as a section of the Code of New York. The uniform interpretation of it there has permitted such actions as this to be maintained. *Grinnell* v. *Schmidt* (1850) 2 Sandf. 706; *Considerant* v. *Brisbane* (1860) 22 N. Y. 389; *Ladd* v. *Arkell*, 37 N. Y. Super. Ct. [5 Jones & S.] 40; *Wetmore* v. *Hegeman* (1882) 88 N. Y. 72.

We are of opinion that the instructions correctly declared the law regarding plaintiffs' right to sue.

II. On the merits, the chief contention of defendant is that the facts here presented, explained by the terms of the contract between the iron company and Fuchs, justified the delivery of the wire in question to Fuchs.

On this branch of the case, the only facts that can properly be reviewed are those which now remain admitted or undisputed. An issue was determined in the trial court regarding this delivery to Fuchs, defendant asserting that plaintiffs consented to it and plaintiffs denying that assertion. On that issue the evidence was quite conflicting.

No sufficient reason has been assigned for disturbing the finding of *Judge* Thayer that plaintiffs did not assent to such delivery. That was evidently the chief point of difference in the case, and its decision had greatly narrowed the field of this controversy.

Defendant concedes its duty to carry and deliver the wire to Pope's Switch; but claims that, on the undisputed facts, Fuchs was the true owner, and that its delivery to him was therefore lawful. Undoubtedly a carrier, in some circumstances, may deliver goods to the true owner instead of to him who gave them into its charge for carriage.

Its contract (subject to certain exceptions not in consideration here) is to carry and deliver (according to shipper's orders) or to account for the goods. It would be a lawful accounting to show that they had been delivered to the real owner upon his demand. This principle is now so well established in the law that the mere statement of it will suffice for the purposes of this case. *The Idaho*, 93 U. S. 579 (23 L. ed. 979); *Western Transp. Co.* v. *Barber*, 56 N. Y. 544.

But to justify a delivery to the true owner contrary to or without the orders of the shipper, the carrier assumes the burden of proving the ownership at the time of such delivery.

Among other things it must establish the immediate right of possession in the person to whom such delivery is made.

Referring to the facts here before us, it may have been a breach of the contract (existing between Fuchs and the iron company) for the latter to refuse to deliver the wire to the former without prepayment of the price. But the carrier, engaged to convey the wire to the point of contemplated delivery, could not lawfully transfer to the purchaser the right of possession, if the shipper did not, in fact, part with that right.

Whether the seller retains the *jus disponendi* (as the text writers term it) is often a question of fact, depending on the intention of the parties to be gathered from their acts, as in this instance. The disposition of the bill of lading, which in the commercial world is recognized as the emblem of the property itself, frequently throws light on that intention.

Here the owner did not bill the wire to the purchaser, but consigned it to its own local agents, the plaintiffs. The latter, without transferring the bills of lading, made a further contract of their own, whereby defendant was to carry the goods to the place where delivery to the purchaser was expected to be made.

This last contract for carriage was evidenced by no writing, but its terms are not disputed. The wire was deliverable by defendant at Pope's Switch only to the order of plaintiffs, though such order might (in the circumstances) have been merely verbal. The invoices and contract of sale between Fuchs and the iron company were admitted in evidence as part of the *res gestæ*, explanatory of the acts of the parties; but the carrier was no party to the contract and had no right to act on its own interpretation of the duties which the parties owed to each other according to its terms.

Whether or not, under it, the shipper's agents should have delivered possession of the wire to the purchaser on its arrival at the switch was a question which it did not devolve on the carrier to decide. Until the shipper, whose goods it had in charge, parted with the right of possession, the intending purchaser did not become the owner. Until then any delivery by the carrier to him (on the facts here considered) was at its own risk.

There was ample testimony to support the finding of the trial court that the right of possession was not surrendered by the seller or its agents, the plaintiffs, and that the delivery by the carrier was without authority.

The instructions given by the trial court correctly stated these principles.

III. A question arose incidentally at the trial upon the admission in evidence of a conversation held through the telephone between some one at the instrument in plaintiff's private office and the witness. It was admitted, though the witness did not identify the voice of the speaker as that of either of the plaintiffs or their clerk.

The courts of justice do not ignore the great improvement in the means of intercommunication which the telephone has made. Its nature, operation and ordinary uses are facts of general scientific knowledge, of which the courts will take judicial notice as part of public contemporary history. When a person places himself in connection with the telephone system through an instrument in his office, he thereby invites communication, in relation to his business, through that channel. Conversations so held are as admissible in evidence as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business there carried on.

The fact that the voice at the telephone was not identified does not render the conversation inadmissible.

The ruling here announced is intended to determine merely the admissibility of such conversations in such circumstances; but not the effect of such evidence after its admission. It may be entitled, in each instance, to much or little weight in the estimation of the triers of fact, according to their views of its credibility, and of the other testimony in support, or in contradiction, of it.

Finding none of the assignments of error well taken, *we affirm the judgment*, all concurring.

Motion for rehearing overruled March 23, 1889.

MONTANA SUPREME COURT.

Joseph H. SAVILLE, *Respt.*,
v.
ÆTNA INSURANCE CO., *Appt.*

(....Mont....)

1. **An action brought, not upon insurance policies, but upon an adjustment** under accepted proofs of loss as a basis, cannot be sustained where the defendant has paid the amount agreed on in the adjustment and received a surrender of the policies and a receipt in full, merely because of an alleged error in the settlement, caused by a mistake of both parties in supposing that another insurer was liable for a portion of the loss. Plaintiff having made the adjustment a basis for his suit cannot avoid the effect of a defense arising therefrom by alleging error in the settlement.

2. **A policy, valid upon its face,** and in the hands of the insured at the time of a loss, which is not null and void but merely voidable at the option of the company because a subsequent policy from another insurer was taken without the consent of the first insurer, is to be treated as "other insurance" within the meaning of a clause in the later policy, providing that the insurer's liability on the policy shall be only in proportion to the whole amount of insurance.

(February 2, 1889.)

APPEAL by defendant, from a judgment of the District Court of Silver Bow County in favor of plaintiff in an action to recover the amount alleged to be due upon an adjustment of loss under certain policies of fire insurance. *Reversed.*

The facts are fully stated in the opinion.

Messrs. **F. T. McBride** and **George Haldorn** for appellant.

Messrs. **W. O. Speer** and **Patrick Talent,** for respondent:

When a prior policy exists upon property containing a condition against other insurance, and a subsequent policy is procured without notice, the first policy is thereby invalidated and the second stands.

Duclos v. *Citizens Mut. Ins. Co.* 23 La. Ann. 332; *Dafoe* v. *Johnstown Dist. Mut. Ins. Co.* 7 Up. Can. C. P. 55; *Healey* v. *Imperial F. Ins. Co.* 5 Nev. 268; *Carpenter* v. *Providence Washington Ins. Co.* 41 U. S. 16 Pet. 495 (10 L. ed. 1044); *S. C.* in Eq. 45 U. S. 4 How. 185 (11 L. ed. 931); *Burt* v. *People's Mut. F. Ins. Co.* 3 Gray, 397; *Gilbert* v. *Phœnix Ins. Co.* 36 Barb. 372; *Deitz* v. *Mound City Mut. F. & L. Ins. Co.* 38 Mo. 85; *Manhattan Ins. Co.* v. *Stein*, 5 Bush, 652.

In the proofs of loss, an honest though erroneous statement will not defeat the insurer's liability.

Wood, Fire Ins. § 418; *Rohrbach* v. *Ætna Ins. Co.* 62 N. Y. 613; *City Five Cents Sav. Bank* v. *Pa. F. Ins. Co.* 122 Mass. 165.

The proofs of loss are not conclusive upon the insured.

Lebanon Mut. Ins. Co. v. *Kepler*, 106 Pa. 28; *Maghan* v. *Hartford F. Ins. Co.* 24 Hun, 58; *Waldeck* v. *Springfield F. & M. Ins. Co.* 53 Wis. 129; *McMaster* v. *Ins. Co. of N. A.* 55 N. Y. 222.

The fact of the assured stating in his proofs of loss that there was other insurance on the property and giving the form of other policies and presenting it in a sworn statement does not affect other valid insurance if as a matter of fact the insurance so stated in proofs of loss did not exist at the time.

Cummins v. *Agricult. Ins. Co.* 67 N. Y. 260.

If the appellant is entitled to a contribution from the Agricultural Insurance Company it is incumbent upon it to show that fact.

Thomas v. *Builders Mut. F. Ins. Co.* 119 Mass. 121, 20 Am. Rep. 317, and notes.

The adjustment of a loss merely amounts to an admission that the sum agreed upon is due subject to the terms and conditions of all the policies upon the risk.

Whipple v. *North British & M. F. Ins. Co.* 11 R. I. 139; *Fire Asso. of London* v. *Blum*, 63 Tex. 282.

Where, upon payment of a portion of an undisputed account, the creditor gives a receipt in full, he is not excluded thereby from recovering the balance although the receipt was given with knowledge and there was no error or fraud.

Ryan v. *Ward*, 48 N. Y. 206; *Redfield* v. *Holland Purchase Ins. Co.* 56 N. Y. 358.

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

In August, 1885, the plaintiff insured his

building for $1,500 in the Agricultural Insurance Company of San Francisco, Cal., and received a policy containing the condition that it should be null and void in event of other insurance being effected on the same property, without the written consent of the home office being first obtained. Being desirous of obtaining other insurance upon his property, and having obtained the written consent of the local agent of the Agricultural Company, the plaintiff, in October following, took out two policies for $1,000 each on the same property—one in the defendant company, and the other in the London & Lancashire Fire Insurance Company.

In January of the next year, and without obtaining the consent of the Agricultural Company, the plaintiff increased his insurance on the same property by taking two policies from the defendant and the London & Lancashire, each for $1,000; thus making his total insurance amount to $5,500.

The two policies issued by the defendant contained the condition that in event of any other insurance upon the same property, whether issued prior or subsequent to the date of the defendant's policies, the insured shall be entitled to recover of the company no greater proportion of the loss sustained than the sum hereby insured bears to the whole amount insured thereon.

There was also an agreement that the loss should be estimated at the actual cash value of the property at the time of destruction, and the further condition that the policy should be null and void in case of overvaluation.

Other conditions and agreements, usually contained in such contracts, are found in the policy; but we deem it unnecessary to mention them, inasmuch as they do not come within the issues to be examined and decided.

When the building was destroyed, in the month of February, 1886, the plaintiff, in compliance with the rules of the company, made out written proofs of his loss, under oath, for each policy. These proofs were accepted by the company—the actual cash value of the property being therein ascertained to be $3,810.50; and in each statement of his loss the plaintiff set forth "that in addition to the sum insured by said policy on the said property, there was other insurance made thereon to the amount of $4,500, as particularly specified in Schedule A, hereto attached."

The schedule referred to set forth the dates and amounts of the various policies—five in number—and the particular sums due thereon, to wit: two policies by the Ætna Insurance Company, two by the London & Lancashire Company, and one by the Agricultural Insurance Company. The loss—$3,810.50—was apportioned by him among the above companies in the following proportion: $1,385.04 to be paid by the Ætna, $1,381.65 by the London & Lancashire, and $1,039.25 by the Agricultural. There is no dispute that this adjustment was accepted by the defendant, and the amount therein agreed upon was paid over to the plaintiff.

On the 22d of February, 1886, the policies were surrendered, and a receipt in full for all demands arising thereunder was duly executed and delivered to the company. It was some time after this adjustment that the plaintiff made demand on the Agricultural Insurance Company for its payment of its proportion of the loss, but was promptly informed by the officers thereof that the company repudiates any liability under its policy on account of other insurance having been obtained upon the same property without the written consent of the company.

No other effort, it seems, was made to collect this policy from the Agricultural Insurance Company; and it appears to be conceded that the policy was all regular upon its face, and that the company might repudiate any liability thereunder for the reasons assigned by its officers. When this condition of things dawned upon the plaintiff, he instituted the present suit, making the adjustment under the accepted proof of loss—$3,810.50—the basis of his action.

The suit is not upon the insurance policies, but is distinctly stated to be upon the ascertained and agreed value of the property insured. No mention is made in the complaint of any policy having issued by other companies than those of the defendant and the London & Lancashire Insurance Company, between whom the loss is divided in equal portions. A credit is given the defendant for the amount heretofore paid, and a judgment is prayed for $519.60, being the sum necessary to make one half of the whole loss.

It is well to remark that the complaint contains no allegation of any error or fraud having been practiced upon the insured in the settlement and adjustment heretofore referred to.

For answer to this complaint the defendant set up the acceptance of the proof of loss, the condition in the policy limiting their liability to their proportion of the loss divided among the three companies; the adjustment thereunder; the payment and receipt in full, according to the terms of the contract; and the nullity of the policies by reason of the overvaluation of the insured property. The replication of the plaintiff is a complete admission of all these facts: but he seeks to avoid them by alleging that there was error in the adjustment, for the reason that both plaintiff and defendant were mistaken as to the validity of the policy in the Agricultural Insurance Company at the time they apportioned the loss between the three companies.

At the trial the plaintiff established all the facts which went to show the adjustment, and introduced some evidence over the objection of the defendant, going to prove that after the adjustment the Agricultural Insurance Company repudiated any liability under its policy for the reason heretofore stated, and that both parties were mistaken, believing this policy to have been valid and subsisting at the time of settlement.

When the plaintiff rested his case, the defendant moved the court for a judgment of nonsuit, and upon its denial proceeded with the trial of the cause, which resulted in a judgment for the plaintiff. From an order denying its motion for a new trial, as well as from the judgment, the defendant appeals.

Several grounds are relied on to reverse the ruling of the court; but we do not deem it necessary to consider more than one of them, to wit, the error in denying the motion for the nonsuit. In this connection the evidence which

the plaintiff introduced to sustain his case showed an adjustment between the parties, which could not be disturbed without allegations and proof of error or fraud; and furthermore, that by the terms and conditions of the policies the plaintiff could not recover of the defendant any more than its proportion of the loss divided among the three companies.

It is too well settled for comment that the plaintiff had his option of two actions—one upon the policies, the other upon the adjustment. The adjustment of the loss, accompanied by a promise to pay, creates a new liability, and may be made, as in this instance, the basis of a suit at law. 2 Wood, Ins. 1049, and authorities there cited.

The effects of an adjustment and payment thereunder, when the amount of the loss is much less than that insured, and is accompanied, as in this instance, by abandonment of the demands or rights of the company, which exist under the terms of the policy, to have it declared null in event of overvaluation, has all the essential elements of a compromise, or accord and satisfaction, as defined by Mr. Story in his work on Contracts (Vol. 2, § 1354), and 2 Wood on Insurance, § 482.

We are not to be understood as denying the right to avoid a contract for error or fraud; but when a loss has been adjusted, and the demands paid in full, the adjustment cannot be attacked in a collateral way. *Potter* v. *Monmouth Mut. F. Ins. Co.* 63 Maine, 440.

Nor do we intend to deny to the plaintiff his right to institute a suit upon the policies, thus leaving to the defendant its rights to avoid the demands, by pleading the adjustment and conditions of the policy, and giving the plaintiff the right to show mistake or fraud as to the adjustment.

But in the case under consideration the plaintiff, after making the loss agreed on in the adjustment a basis for his suit, seeks to avoid the effect of the defenses arising therefrom by alleging error in the settlement. The two positions are clearly inconsistent, as well as contradictory; for, until set aside by proper suit, the executed adjustment must remain the law between the parties.

And just here it is well to remember that in the plaintiff's proofs of loss he rated the insurance policies which existed upon the property, and prorated the loss among the companies; so that when the defendant accepted the proofs he did so with reference to the amount demanded of him. *Non constat* that he would have either accepted the proofs of loss, or waived his rights to have the nullity of the contract declared on account of overvaluation, if his liability had not been fixed by the insured, as set forth in his proofs. There never was any promise on the part of the defendant to pay the loss at $3,810.50, except as set forth and demanded in the accompanying schedule marked "A," and referred to in the proof of loss.

This view of the rights and liabilities of the parties is most equitable. Nor can it be doubted that the insurance company is now bound by the terms of the adjustment, and could not recover back the money paid, and avoid the policies, except upon allegations and proof of fraud in making the adjustment.

When the plaintiff had rested his case, he had proved the loss of the property, its insurance in the three companies, the present cash value of the property, his adjustment of the loss between himself and the defendant, and the payment of the amount claimed as due thereunder; and any evidence which had been introduced tending to show error in the adjustment was inadmissible under the allegations in the complaint, and the objections thereto should have been sustained. There can be no doubt that as between the plaintiff and the defendant the contract existed to prorate the loss among the companies interested in the risk. At the time the policies were taken out in the Ætna and the London & Lancashire, the defendant, as well as the plaintiff, believed that he had insurance in the Agricultural Insurance Company to the extent of $1,500; and, indeed, such was the case.

It was never the intention of the plaintiff that the defendant should be bound, or of the defendant to bind itself, for more than its proportion of the loss, divided among the three companies. That this was the view of the parties at that time, and that it so remained fixed in their minds up to and at the date of the settlement, is manifest; for in the plaintiff's schedule he makes the statement that he has other insurance in the Agricultural Insurance Company to the extent of $1,500, and figures out the proportion of the loss which each company is to pay him.

This is the construction which the parties have placed upon their contract, and should not be disturbed by the courts. When we consider the course of the defendant in adjusting his loss and settling with the defendant, it clearly indicates that he never contemplated that the defendant owed him more than was paid under the adjustment; and therefore that his demands in the present suit were the result of an afterthought, originating from the refusal of the Agricultural Insurance Company to acknowledge their liability under the contract.

It will be remembered that the policy of the Ætna contained a proviso that in case of any other insurance on the same property, prior or subsequent to the date of their policy, the loss was to be prorated; while the Agricultural policy contained a condition that it should be void in the event of other insurance being obtained on the property, without obtaining the consent of the company.

An important question to determine is whether the Agricultural policy is other insurance, within the meaning of such contracts; for, if it is, then the plaintiff cannot recover, because, according to his own proof, the contract has been completely executed by the defendant in paying over its proportion of the loss. These insurance policies, which provide for the nullity of contracts in event of other insurance being effected on the same property without the assent of the company, have never been held to be absolutely null, when the contract was all regular upon its face, but merely voidable, at the option of the insurer. The object of such clauses in an insurance policy is to prevent overinsurance, and the consequent temptation to burn, or lessen the precautions against fire.

However, we have nothing to do with the policy or reason for such a condition, but only

with the contract when so written. In event of other insurance, is such a contract a nullity, or is it merely voidable?

On reflection we have decided to follow the view of the Supreme Court of the United States in the case of *Carpenter* v. *Providence Washington Ins. Co.* 41 U. S. 16 Pet. 508 [10 L. ed. 1044]. The case has been much criticised, and in some of the States the rule laid down has not been accepted; but we have no hesitation in following a decision from such an eminent court and jurist. For in speaking of policies containing such conditions, *Mr. Justice* Story says:

"It is not true that because a policy is procured by misrepresentation of material facts it is therefore to be treated in the sense of the law as utterly void *ab initio*. It is merely voidable, and may be avoided by the underwriters upon due proof of the facts; but until so avoided, it must be treated for all practical purposes as a subsisting policy."

Continuing, he says: "But the question is not how the policy may now be treated by the parties, but how was it treated by them at the time when the policy declared on was made." And this doctrine is followed by the Supreme Court of New York in the case of *Bigler* v. *N. Y. Central Insurance Company*, 22 N. Y. 402.

We reach the conclusion that the policy in the Agricultural Insurance Company, valid upon its face, and in the hands of the insured at the time of the loss, was not null and void, but merely voidable, at the option of the company; and to all intents and purposes it was to be treated as "other insurance," within the meaning of the clause in the defendant's policies, which provides that the company's liability should be in the proportion which the sum insured bore to the whole amount insured thereon. And aside from the contract, this is the general rule governing the settlement of a loss covered by several policies in different companies. See 2 Wood, Ins. § 476.

If the plaintiff has suffered a loss, he has no one to blame but himself; for he believed at the time of taking out his policies in the defendant's company that he had a valid policy in the Agricultural Insurance Company; and he was of the same opinion, together with the defendant, when he made his proof of loss, and adjusted the matter with them.

The motion for a nonsuit should have been sustained; and *the judgment of the lower court must therefore be reversed, and the cause remanded for that purpose, respondent paying costs for this appeal.*

McConnell, *Ch. J.*, and **Bach**, *J.*, concur.

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF TENNESSEE,

W. G. HUSKINS
v.
CINCINNATI, NEW ORLEANS & TEXAS PACIFIC R. CO.

(37 Fed. Rep. 504.)

1. An amendment to a complaint in a state court, changing the amount of damages claimed from a sum less than the amount necessary to authorize a removal to a federal court to an amount *greater than* that sum, is the beginning of a new suit so far as relates to the time within which an application for removal can be made.

2. An application for the removal of a cause on the ground of prejudice or local influence may be made at any time before the final hearing of the case.

3. A petition for the removal of a cause

NOTE.—*Removal of cause, for prejudice or local influence.*

By the Act of March 3, 1875, section 639 of the Revised Statutes was repealed, except subsection 3 thereof. The last two clauses of the section, regulating the manner of removal, were also held to remain in force for the purpose of removals under said subsection, the same not being provided for in the Act of 1875. Baltimore & O. R. Co. v. Bates, 119 U. S. 467 (30 L. ed. 438).

The Act of March 3, 1887, purports to be amendatory of that of 1875, "and for other purposes." Fisk v. Henarie, 32 Fed. Rep. 420.

The provisions of the Act of Congress of 1867 were repealed by the provisions of the Act of Congress of March 3, 1887, even though express words of repeal were not used. *Short* v. Chicago, M. & St. P. R. Co. 33 Fed. Rep. 114.

The prejudice and local influence mentioned in the statute is not merely a prejudice or influence primarily existing against the party seeking a removal. It includes as well that prejudice in favor of his adversary which may arise from the fact that he is long resident and favorably known in the community. The element of local influence implies that in a controversy between a stranger and resident parties having the power to direct or aid in the direction of political parties, and control the selection of public officers, the former may be at a great disadvantage, if not powerless to assert his right. Neale v. Foster, 31 Fed. Rep. 55.

Citizenship of parties must be diverse.

There can be no removal on the ground of prejudice or local influence, under subdivision 3, § 639, Revised Statutes, unless all the parties on one side are citizens of different States from those on the other. The provision of subdivision 2, as to separable controversies, does not apply. Cambria Iron Co. v. Ashburn, 113 U. S. 54 (30 L. ed. 60); Hancock v. Holbrook, 119 U. S. 586 (30 L. ed. 538); Whelan v. N. Y. L. E. & W. R. Co. 1 L. R. A. 65, 35 Fed. Rep. 849; Myers v. Swann, 107 U. S. 546 (27 L. ed. 583); Grover & B. S. M. Co. v. Florence S. M. Co. 85 U. S. 18 Wall. 553 (21 L. ed. 914); Vannevar v. Bryant, 88 U. S. 21 Wall. 41 (22 L. ed. 476); American Bible Society v. Price, 110 U. S. 61 (28 L. ed. 70); Jefferson v. Driver, 117 U. S. 272 (29 L. ed. 897).

Who may and who may not obtain a removal.

Suits cannot be removed unless the party opposed to him who petitions for the removal is a citizen of the State in which the suit is brought. American Bible Society v. Grove, 101 U. S. 610 (25 L. ed. 847).

Any defendant sued, not in a court of his own State, but in the state court of the plaintiff, may remove, by compliance with the procedure devised for that purpose. If sued in a court of his own

See also 3 L. R. A. 455.

and an affidavit in its support.—both averring in positive terms that from prejudice or local influence defendant will not be able to obtain justice in the state court, or in any other state court to which he might remove the cause, under the laws of the State—entitle him to the removal of the cause without further proof of such facts.

(January 21, 1889.)

ACTION to recover damages for personal injuries. On motion to remand to the state court. *Overruled.*

Plaintiff, to sustain his motion, relied upon the following facts which he claimed appeared from the record:

Suit was brought by Huskins against defendant to recover $2,000 as damages, returnable to April Term of the State Circuit Court, 1888. The terms of the state court began on the first Mondays of April, August and December. Plaintiff at first or return term, on April 4, 1888, filed his declaration. On the same day defendant filed plea of not guilty. The case then stood for trial at August Term, 1888. At August Term, on August 10, defendant, by leave of court, filed another plea, relying on the Statute of Limitations. On the same day, but after the new plea, plaintiff, by leave of court, amended his declaration, laying his damages at $10,000. Both these motions and additional pleadings were made in open court. By the Code of Tennessee, sections 3573, 3579, it was in the discretion of the state court to allow said amended pleadings and hold the parties to trial at the same term. This was done and plaintiff was compelled to continue the case on special application, after it was called for trial. In the absence of an order of the court abridging or extending the time to reply to a new pleading, by the state statute, the defendant had two days, after the amendment to the declaration, to file a new plea (Code of Tennessee, sections 5011, 5012); and defendant's time to plead expired with August 13. On October 18, 1888, defendant filed its petition in the state court for removal because of diverse citizenship.

Messrs. **Washburn & Templeton,** for plaintiff for the motion:

The petition was clearly too late.

See Act 1887, § 2; Speer, Removal, 55.

Under the Act of 1875, the petition was required to be filed in the state court before or "at the term" at which the cause stood for trial, if the parties had taken the usual steps.

Baltimore & O. R. Co. v. *Burns*, 124 U. S. 168 (31 L. ed. 334); *Babbitt* v. *Clark*, 103 U. S. 606 (26 L. ed. 507); *Pullman Palace Car Co.* v. *Speck*, 113 U. S. 87 (28 L. ed. 926); *Gregory* v. *Hartley*, 113 U. S. 742 (28 L. ed. 1150); *Laidly* v. *Huntington*, 121 U. S. 180 (30 L. ed. 883); *Alley* v. *Nott*, 111 U. S. 472 (28 L. ed. 491).

On the filing of plaintiff's sworn answer and tender of proof, the defendant declining to offer proof, the cause should be remanded.

See *Short* v. *Chicago, & M. St. P. R. Co.* 33 Fed. Rep. 114; 35 Fed. Rep. 625.

Mr. **Lewis Shepherd** for defendant, *contra.*

Key, J., delivered the following opinion:

The plaintiff began an action in the state court for personal injuries against the defendant.

The cause was removed to this court, and, while the judge was charging the jury upon its trial, plaintiff's counsel were permitted to take a nonsuit. Soon thereafter plaintiff instituted another suit against the defendant in the state court for the same cause of action.

In this last suit he laid his damages at $2,000. The cause was returnable to the April Term, 1888, at which time, under the laws of the State, the pleadings should be made up and issue joined. The first trial term of the cause

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State, he cannot remove at all. Gavin v. Vance, 33 Fed. Rep. 85.

A party who has brought an action in the court of his own State against a citizen of another State cannot remove the action to the United States Circuit Court, under the Act of March 2, 1867. Hurst v. Western & A. R. Co. 93 U. S. 71 (23 L. ed. 805).

The party in whom a cause of action is vested as a trustee is the one whose citizenship is to be regarded, instead of those beneficially interested. Knapp v. Troy & B. R. Co. 87 U. S. 20 Wall. 117 (22 L. ed. 328).

Where the plaintiff is a citizen of Minnesota, and the defendant is a corporation of Wisconsin, doing business in Minnesota, the Circuit Court for the District of Minnesota has, under the Act of Congress of 1887, original jurisdiction of the controversy, when that question depends solely on the fact of the diverse citizenship of the parties; and the defendant may remove the case on the ground of local prejudice. Fales v. Chicago, M. & St. P. R. Co. 32 Fed. Rep. 673, overruling Yuba Co. v. Pioneer Gold Min. Co. 32 Fed. Rep. 183; Short v. Chicago, M. & St. P. R. Co. 34 Fed. Rep. 225.

Right cannot be taken away by subsequent amendment.

If the right has once become perfect, it cannot be taken away by subsequent amendment. Kanouse v. Martin, 56 U. S. 15 How. 198 (14 L. ed. 660). 1 Blatchf. 149; Akerly v. Vilas, 1 Abb. U. S. 284, 2 Biss. 110; Hatch v. Chicago, R. I. & P. R. Co. 6 Blatchf. 105; Fisk v. Union Pac. R. Co. 6 Blatchf. 362, 8 Blatchf. 243; Muns v. Dupont, 2 Wash. C. C. 463; Ladd v. Tudor, 3 Wood. & M. 325; Green v. Custard, 64 U. S. 23 How. 484 (16 L. ed. 471); Roberts v. Nelson, 8 Blatchf. 74; Wright v. Wells, 1 Pet. C. Ct. 220; Desty, Rem. Causes, 88.

Application; when to be made.

An application, under the Acts of 1866 and 1867, must be made before trial or hearing, notwithstanding an amendment of the declaration on which issue was not joined at the time the petition was filed. Vannevar v. Bryant, 88 U. S. 21 Wall. 41 (22 L. ed. 476); Desty, Rem. Causes, p. 151.

The proper mode of controverting the application is by a dilatory plea in the nature of a plea to the jurisdiction, on which the question may be submitted to a jury for determination. McDonald v. Salem Capital Flour Mills Co. 31 Fed. Rep. 578; Susquehanna & W. V. R. & Coal Co. v. Blatchford, 78 U. S. 11 Wall. 177 (20 L. ed. 181); Fisk v. Henarie, 32 Fed. Rep. 421.

Petition for removal.

A petition is a request in writing in contradistinction to a motion which may be made viva voce. Shaft v. Phœnix Mut. L. Ins. Co. 67 N. Y. 544, Desty, Rem. Causes, 137.

The office of the petition is to set on foot proceedings to obtain a removal. It must contain such averments as entitle to relief. DeCamp v. N. J. Mut. L. Ins. Co. 2 Sweeney, 481.

The petition must set forth the jurisdictional facts (Smith v. Horton, 7 Fed. Rep. 270), and state such facts as show to the court that the case falls

was August, 1888. At that term the defendant had permission to file an additional plea. After this was done, and on the last day of the term, plaintiff, by permission of the court, increased his claim for damages to $10,000, and *continued the cause to the next term.* Before the next term of the court the defendant filed its petition for the removal of the cause to this court, and presented it for action to the state court, at its next session, December, 1888.

This petition asked for removal upon two grounds: (1) the adverse citizenship of the parties; (2) upon the existence of local prejudice and influence.

The state court ordered the removal upon the first ground, and has made no reference to the second ground. The defendant, upon the *first day of the present term* of this court, presented its petition, and along with it an affidavit in its support, both averring in positive terms that "From prejudice or local influence defendant will not be able to obtain justice in the state court, or in *any other state court* to which the defendant might remove the cause under the laws of the State, because of prejudice or local influence."

Defendant asks the court to remove the cause from the state court to this court, under the provisions of the fourth clause, section 2, of the Act of March 3, 1887. Plaintiff has filed an answer to this petition, denying the truth of its allegations and averments as to local prejudice, and has accompanied this answer with a considerable number of affidavits of *intelligent and respectable persons strongly* sustaining this answer. Plaintiff moves to remand the suit to the state court: *first*, because the application for removal upon the ground of diverse citizenship came too late; and *second*, because it is shown that the local prejudice or influence on account of which a removal is asked does not exist.

There is no question but that the application for removal came after the term of the court at which by the state law and rule of the court the defendant was required to answer or plead to the declaration or complaint of the plaintiff. Up to the close of the term at which the cause could first have been tried, the defendant had no right or power to remove the cause for diverse citizenship, because the plaintiff did not claim more than $2,000.

The question is, Can a plaintiff prevent, under the law, the jurisdiction of the Circuit Court of the United States, by commencing his suit, claiming $2,000 or less, joining issue at the return term with his adversary, and at the trial term, or some later period, amend his writ by *increasing his claim to a sum within* the jurisdiction of the federal court? The plaintiff is a citizen of this State; the defendant, of Ohio.

The language of the Act of 1887 is clear in regard to the time when the removal must be made for this character of *citizenship*. "He may make and file a petition in such suit in *such state* court at the time or any time before the defendant is required by the laws of the State or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff."

There is no room for construction here. All is clear and unambiguous. But what was the suit in this case? The damages—the money plaintiff seeks to recover—is the *gravamen*, the heart, the soul of his suit. The suit he began was a suit for $2,000, and *such a suit it remained* until the closing hour of the first term at which it could have been tried, when the plaintiff went into court and converted his suit for $2,000 into a suit for $10,000. The $2,000 suit disappeared. It merged into and was swallowed up by a suit for $10,000. The life of the *new suit began* at the *moment* the first suit expired. Plaintiff's complaint was no longer for $2,000, but it became a complaint for five times that sum.

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within the category of removable causes. *Ex parte* Anderson, 3 Woods, 124; McMurdy v. Conn. Gen. L. Ins. Co. 4 W. N. C. 18; Tunstall v. Madison Parish, 30 La. Ann. 471; Lalor v. Dunning, 56 How. Pr. 209.

The facts upon which the petitioner bases his right must be made to appear, but *no particular mode* is prescribed. It may be by admission of parties, by affidavit, or by the testimony of witnesses (People v. Chicago Superior Ct. 34 Ill. 356); and such as are positive and express the facts on which it depends and *not argumentative*. Brown v. Keene, 33 U. S. 8 Pet. 112 (8 L. ed. 885)—citing Bingham v. Cabbot, 3 U. S. 3 Dall. 19, 382 (1 L. ed. 491, 646); Abercrombie v. Dupuis, 5 U. S. 1 Cranch, 343 (2 L. ed. 129); Wood v. Wagnon, 6 U. S. 2 Cranch, 9 (2 L. ed. 191); Capron v. Van Noorden, 6 U. S. 2 Cranch, 126 (2 L. ed. 229).

It should point out what the question is, and how and where it will arise. Trafton v. Nougues, 4 Sawy. 173.

If a petition be defective, it may be amended, as a matter of right; and if not verified, a verified petition may be filed. Delaware R. Constr. Co. v. Davenport & St. P. R. Co. 46 Iowa, 406; Houser v. Clayton, 3 Woods, 273.

When filed it cannot be contradicted or controverted. Stewart v. Mordecai, 40 Ga. 1.

Affidavit for removal.

Under section 2, Act of 1887, a mere formal affidavit by the defendant that he *believes that he* cannot obtain justice because of prejudice or local influence is not sufficient; but the fact that such prejudice or *local influence exists must be shown* to the circuit court by oral testimony or by affidavit. Short v. Chicago, M. & St. P. R. Co. 33 Fed. Rep. 114.

The affidavit must be in substantial accordance with the words of the statute. Baltimore, P. & C. R. Co. v. New Albany & S. R. Co. 53 Ind. 597. See Bowen v. Chase, 7 Blatchf. 255; Desty, Rem. Causes, 101.

But it is not generally necessary to *state the reasons* or facts showing the local prejudice or influence. Sands v. Smith, 1 Dill. 298, note; Meadow Valley Min. Co. v. Dodds, 7 Nev. 143; Quigley v. Cent. Pac. R. Co. 11 Nev. 350.

An affidavit "to the best of his knowledge and belief" is sufficient. Stoker v. Leavenworth, 7 La. 390; De Camp v. N. J. Mut. L. Ins. Co. 2 Sweeney, 481.

That he had reason to *believe*, and *did believe*, that by reason of prejudice and local influence he would not be able to obtain justice in that forum is sufficient. Short v. Chicago, M. & St. P. R. Co. *supra*.

It is sufficient that defendants have made oath that they so believe, without setting forth the facts or circumstances on which such belief is founded. Meadow Valley Min. Co. v. Dodds, *supra*. See also Bowen v. Chase, *supra*; Fisk v. Henarie, 32 Fed. Rep. 421.

But if made on his belief alone, it is insufficient. Cooper v. Condon, 15 Kan. 572; Tunstall v. Madison Parish, 30 La. Ann. 471; Baltimore, P. & C. R. Co. v. New Albany & S. R. Co. 53 Ind. 597.

The reason why the party applying does not make

Under the laws of Tennessee process issued upon a suit instituted must be executed at least five days before the time for the meeting of the court, so as to be issuable at that term. If such process be executed at a later day it is not issuable until the next succeeding term.

The suit for $10,000 did not begin until the last day of the August Term, 1888, of the court; and the suit, according to the letter and spirit of the Act of 1887, would not be returnable at the shortest before the next term of the court, and defendant's petition was filed before that time. In general phrase, and in most respects, the amendment increasing the damages did not create a new suit; but so far as the jurisdiction of this court is concerned it was new, and a liberal interpretation will be allowed to prevent the flagrant and intentional defeat of its jurisdiction. "If the defendant have a right to the removal, he cannot be deprived of it by the allowance by the state court of an amendment reducing the sum claimed after the right of removal is complete." Speer, Rem. Causes, 81; *Kanouse* v. *Martin*, 56 U. S. 15 How. 198 [14 L. ed. 660].

This being true, is not the converse of the proposition true: that is, that a person not entitled to a removal, who becomes entitled to it, so far as the jurisdictional amount is concerned, by reason of an amendment allowed by the state court after the time had elapsed within which his removal of the suit might have been made, shall not be deprived of his right to remove the suit?

The reasons why the removal of the cause should not be defeated in one case apply with equal cogency to the other. Had the defendant filed its petition and bond for removal the moment after the amendment was made increasing the damages claimed, his attitude in the case would have been in no wise changed from that which it occupies. But suppose the position taken in regard to the removal ordered by the state court be wrong, how stands the case with regard to the application made to this court for removal on account of local prejudice or influence?

In *Lookout Mountain Railroad Company* v. *Houston*, 32 Fed. Rep. 711, in which there was an application for removal because of local prejudice or influence, it was held that an application in such a case must be filed at the return term of the cause, or before. If that be correct, the application in this suit would be in time, if the positions assumed upon the first ground of removal be tenable.

The weight of opinion, however, so far as cases have been adjudged, is that such removal may be made at any time before the final hearing of the case. *Judge* Deady, an excellent authority, so holds in *Fisk* v. *Henarie*, 32 Fed. Rep. 417. And so does that eminent jurist, *Judge* Jackson, of this circuit, in *Whelan* v. *New York Railroad Company*, 35 Fed. Rep. 849–866.

A very able, clear and well considered opinion has been rendered by him in this case; and the case decided by *Judge* Jackson is identical with the case in hand in most of the points of contention raised for determination. The opinion of the Circuit Judge will be accepted as the law of this case, not only because of the authority of the decision as a judicial exposition, but also for the sake of the harmony and agreement that should prevail, if practicable, in the administration of the law by different judges presiding over the same court.

In passing, it may be observed that the words "local prejudice or influence" are used. They are connected disjunctively. If there be local

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the affidavit should be given. Cooper v. Condon, 15 Kan. 572.

But that "Plaintiff had reason to and does believe that from prejudice he will not be able to obtain justice in the state court," is not sufficient without facts showing the reasonableness of his belief. Sands v. Smith, 1 Dill. 298, note; Goodrich v. Hunton, 29 La. Ann. 372.

The omission of the words "and does believe" is fatal. Baltimore, P. & C. R. Co. v. New Albany & S. R. Co. 53 Ind. 597.

By whom to be made.

Under the prejudice and local influence clause, the affidavit in the case of a petition for removal by a natural person must be made by the party in question. A removal cannot be had upon an affidavit made by his attorney, agent or any other person on his behalf. Duff v. Duff, 31 Fed. Rep. 772.

The want of an affidavit appearing on the face of the record, the mere filing of a petition and affidavit of some person, other than the party, does not work a removal under the statute. *Ibid.*

It may be made by an agent or attorney. Dennis v. Alachua Co. 3 Woods, 683; Kain v. Texas Pac. R. Co. 22 Int. Rev. Rec. 46, 3 Cent. L. J. 12; *contra*, Miller v. Finn, 1 Neb. 254.

When the petitioner is a corporation, the petition may be signed, and the affidavit be made by some person authorized to represent the corporation. But the authority of any person assuming to represent it must appear. Mahone v. Manchester & L. R. Corp. 111 Mass. 75; Duff v. Duff, *supra*.

How taken and certified.

The affidavit must be taken and certified in accordance with the laws of the State, and must be authenticated according to such laws. Bowen v. Chase, 7 Blatchf. 255; Florance v. Butler, 9 Abb. Pr. N. S. 63.

And if out of the State by a commissioner, it must be certified to by the Secretary of the State. Florance v. Butler, *supra*.

The affidavit may be filed in the state court, and a certified copy thereof sent up to the circuit court. Short v. Chicago, M. & St. P. R. Co. 33 Fed. Rep. 114.

Practice and procedure in circuit court.

The Act of 1867 invests the circuit court with jurisdiction to determine the suit, although that court could not have taken original cognizance of the case. Gaines v. Fuentes, 92 U. S. 10 (23 L. ed. 524).

The provision of the Act of 1887, authorizing the court to examine under the truth of an affidavit for removal of a case from a state court, applies only to cases removed before the passage of said Act on the application of the plaintiff; otherwise, such affidavit being only a condition imposed on the party seeking the removal, it cannot be questioned or contradicted; nor is it necessary that the affiant should state the grounds of his belief. Fisk v. Henarie, 32 Fed. Rep. 417.

The Act of 1887 does not change the practice as it formerly existed, so far as concerns defendants seeking to remove from state to federal courts on the ground of prejudice or local influence. It is the duty of the circuit court, on the application of the other party, to examine into the truth of the affidavit. Hills v. Richmond & D. R. Co. 33 Fed. Rep. 81.

prejudice, the cause may be removed, or if no local prejudice exists, and there be local influence so powerful and operative as to prevent the defendant from obtaining justice, he may remove. *If there* be prejudice against the defendant, or if the influence and power of the plaintiff or any other local influence dominate the public mind at the place where the suit is instituted, so that he cannot have justice, the cause may be removed.

The fourth clause of section 2, Act of March 3, 1887, is wide reaching in its changes of the law previously existing. It enlarges its scope in almost every direction but one. It does not allow a plaintiff to remove his suit. It embraces all controversies between citizens of different States without regard to amount. It permits or authorizes removal, though some of the defendants may be residents, or citizens rather, of the State in which the plaintiff resides. Any defendant, being a nonresident, may remove the suit. "It extends to all controversies, without regard to amount; to all suits, whether they can be estimated in dollars and cents." Speer, Rem. Causes, 62; *Fales* v. *Chicago, M. & St. P. R. Co.* 32 Fed. Rep. 673; *Whelan* v. *New York, L. E. & W. R. Co. supra.*

The Act under consideration provides for the removal of the cause by this court, instead of by the state court. It must be made to appear to this court that the cause is removable, and it removes it. How it shall be made to appear that it is removable is, to some extent, an unsettled question.

In *Short* v. *Chicago, M. & St. P. Railway Company*, 33 Fed. Rep. 114, *Judge* Brewer held that a petition and affidavit such as have been filed by the defendant in this case are not such steps as will authorize a removal; that it must appear to the court in some method that may enable it to determine the fact as to whether there is prejudice. If this be a correct decision of the law, this case should not be removed.

The decision of *Judge* Jackson, in the *Whelan Case, supra*, however, makes a different determination; and his conclusions have been reached after a wide range of examination, and after deliberate and careful consideration, and it has already been announced that his opinion will be followed in this case. *Judge* Jackson says:

"In conferring upon the Circuit Court of the United States the authority to act upon the application for removal of suits from state courts, Congress certainly never intended to make the question as to the existence or nonexistence of prejudice or local influence, which would prevent a nonresident citizen defendant from obtaining justice in the local courts, a jurisdictional fact, such as would entitle the side opposing the removal to dispute its truth and put the matter in issue for formal trial." 35 Fed. Rep. 862.

In the same connection it is held that a petition and affidavit such as have been made in this case made it appear that the cause should be removed. This decision on this point concurs with that of *Judge* Deady in *Fisk* v. *Henarie*, 32 Fed. Rep. 417–421, and is sustained in Speer on Removal of Causes, 63. *Judge* Speer in his work on Removals under the Act of March 3, 1887, page 62, says:

"It is quite possible that in this far reaching statute Congress intended to correct the mischief pointed out in *Kurtz* v. *Moffitt*, 115 U. S. 498 [29 L. ed. 460]. There it was held that before the suit could be removed it must have the money value fixed by the statute. Now, if local prejudice is a ground of removal from the local court in any controversy between citizens of different States, there is no reason why it should not have the same effect in all controversies. Undeniably there is often much local excitement and prejudice on the trial of proceedings for divorce, *habeas corpus*, or other suits where the matter in dispute cannot be estimated and ascertained in money. The federal courts are not courts where nonresidents have an undue advantage, and it is no injustice to residents to require them to litigate therein their controversies with citizens of other States."

If this suit has not already been removed to this court by the order made by the state court, it should be removed under the application to this court.

The order for removal is made, and plaintiff's motion to remand is overruled.

DISTRICT OF COLUMBIA SUPREME COURT.

Charles R. MONROE & Co.
v.
Edward J. HANNAN *et al.*, *Appts.*

(....Mackey....)

A lien in favor of "the contractor, subcontractor, material man, etc.," under the Act of Congress of 1884, chapter 143,* relating to the District of Columbia, does not extend to a subcontractor under a subcontractor.

(April 8, 1889.)

APPEAL by defendants, from an order of the Special Term of the Supreme Court (Cox, *J.*), refusing to dismiss the bill, and from

*The section of the Act giving a mechanics' lien in the District of Columbia which designates the parties entitled thereto is as follows:

Be it enacted, By the Senate and House of Representatives of the United States of America in Congress assembled, That every building hereafter erected or repaired by the owner or his agent in the District of Columbia, and the lot or lots of *ground of the* owner upon which the same is being erected or repaired, shall be subject to a lien in favor of the contractor, subcontractor, material man, journeyman and laborer respectively for the payment for work done or materials contracted for or furnished for or *about the erection*, construction or repairing of such building, and also for any engine, machinery or other thing placed in said building or connected therewith so as to be a fixture: *Provided*, That the person claiming the lien shall file the notice prescribed in the second section of this Act; *Provided, further*, That the said lien shall not exceed or be enforced for a greater sum than the amount of the *original contract* for the erection or repair of said building or buildings.

a decree for plaintiffs in a suit in equity to enforce a mechanics' lien. *Bill dismissed.*

The facts are fully stated in the opinion.

Before Hagner, James and Bradley, *JJ.*

Mr. **Samuel Maddox,** for defendants, appellants:

The Law of Illinois, 1869, provides that every subcontractor, mechanic, workman, or other person who shall, in conformity with the terms of the contract between the owner of the land and the original contractor, perform any labor or furnish any material in building the house, etc., shall have a lien for the value of the work or material.

The laborer employed under a subcontractor is not protected by this statute.

Rothgerber v. *Dupuy*, 64 Ill. 452.

This law does not extend the lien of mechanics and material men beyond the first subcontractor.

Ahern v. *Evans*, 66 Ill. 125.

The party furnishing materials to a subcontractor is not entitled to a lien.

Newhall v. *Kustens*, 70 Ill. 156; *Smith Bridge Co.* v. *Louisville, N. A. & St. L. R. Co.* 72 Ill. 506.

In Wisconsin, where the law is very similar, a like construction was given to it.

Kirby v. *McGarry*, 16 Wis. 68.

Under the law of Pennsylvania it has been uniformly held that there must be privity between the owner and the subcontractor to enable the latter to charge the building with the lien for the lumber he purchases of others in order to fill his own contract.

Duff v. *Hoffman*, 63 Pa. 191.

Materials furnished a subcontractor will not give a lien.

Harlan v. *Rand*, 27 Pa. 511; *Smith* v. *Stokes*, 10 W. N. C. 6.

A late law of that State, intended to extend the provisions of the Laws of 1836 and 1845 so as to give a right of lien to the contractors and employés under a subcontractor has recently been declared unconstitutional and void.

Titusville Iron Works v. *Keystone Oil Co.* 122 Pa. 627, 1 L. R. A. 361, 22 W. N. C. 435.

Messrs. **James Hoban** and **Woodbury Wheeler,** for C. R. Monroe & Co., appellees:

The Lien Law gave Monroe & Company a right to furnish the bricks and to be paid for them the amount as ascertained by the court.

Spalding v. *Dodge* (D. C.). 16 Washington Law Rep. —, 11 Cent. Rep. 715.

The law is liberally construed in favor of the lienor.

Flagstaff S. Min. Co. v. *Cullins*, 104 U. S. 176 (26 L. ed. 704).

The defendants having filed a bond under the statute and obtained a release of their property are estopped from questioning the constitutionality of the law.

Daniels v. *Tearney*, 102 U. S. 415 (26 L. ed. 187); *U. S.* v. *Hudson*, 77 U. S. 10 Wall. 395 (19 L. ed. 937); *Phila., W. & B. R. Co.* v. *Howard*, 54 U. S. 13 How. 307 (14 L. ed. 157).

Monroe's liability is to be strictly construed.

McMicken v. *Webb*, 47 U. S. 6 How. 292 (12 L. ed. 443); *Miller* v. *Stewart*, 22 U. S. 9 Wheat. 680 (6 L. ed. 189); *Sprigg* v. *Bank of Mt. Pleasant*, 39 U. S. 14 Pet. 201 (10 L. ed. 419).

Even if liable beyond the terms of the bond, the change in the contract released him.

Martin v. *Thomas*, 65 U. S. 24 How. 315 (16 L. ed. 689); *Reese* v. *U. S.* 76 U. S. 9 Wall. 13 (19 L. ed. 541); 39 Minn. 439.

In no event could Monroe be liable beyond the penalty of the bond, viz., $500.

McGill v. *Bank of U. S.* 25 U. S. 12 Wheat. 511 (6 L. ed. 711); *Humphreys* v. *Leggett*, 50 U. S. 9 How. 297 (13 L. ed. 145).

Hagner, *J.*, *delivered the opinion of the court:*

This bill was filed by C. R. Monroe & Co. to enforce a mechanics' lien against Edward J. Hannan. Hannan, the proprietor of sundry lots, in February, 1888, entered into a contract with Goodwin under which the latter undertook to build eleven houses on these lots for $13,683. In the same month Ward & Mockabee made an offer to Goodwin to do the brick work under his contract on the buildings, in these words:

"Mr. Goodwin: We will agree to furnish material and to build and complete the brick work on eleven houses on the corner of Tenth and G Streets, southeast, according to plans and specifications, for $4,481. Ward & Mockabee."

Goodwin, not being acquainted with these parties, required them to execute a bond to secure the owner; and on the 15th of February Ward & Mockabee entered into a bond with Monroe, one of the plaintiffs, as their surety, with this condition:

"Whereas, the said Ward & Mockabee on the 15th day of February, 1888, have agreed to build all the brick work on eleven houses on the corner of Tenth and G Streets, southeast, in Washington, D. C., for the sum of $4,481 in a complete and workmanlike manner; Now, if the said Ward & Mockabee shall well and truly keep and perform all and each of the covenants herein contained, then this obligation to be null and void; otherwise, to be and remain in full force, effect and virtue in law."

The buildings were commenced, and the work proceeded until early in April, when some differences about payment occurring between Hannan and Ward & Mockabee, the latter, according to Hannan's statement, declared they had abandoned the job and proceeded to tear down the scaffolding and throw down the ladders.

Hannan appeared on the ground and asked for an explanation of their conduct; whereupon Ward declared they did not intend to do another particle of work there; and he was actually engaged in throwing down the poles, etc., when Hannan interfered and Ward was then put off the buildings.

Hannan further testified that he went at once and informed Monroe that Ward & Mockabee had thrown up the contract, and called upon him as surety in the bond to complete the buildings; and declared that in default he would hold him on the bond.

Monroe & Co. had previously made a subcontract with Ward & Mockabee to supply all the brick which were to be placed in the buildings, and had furnished a considerable amount up to that time. After Hannan's visit Monroe

went to the buildings and assumed charge of them, and placed O'Neal, who had been the foreman of Ward & Mockabee, in control of the work. The houses were finished in due course of time; payments for bricks being made to Monroe during the progress of the work, of considerable amounts by Goodwin, and also by Hannan.

Many of these allegations of Hannan are controverted by the plaintiffs. They deny that they voluntarily abandoned the work, but insist that Hannan wrongfully discharged them. They also insist that Monroe completed the work under a special employment by Hannan, after Ward & Mockabee left the buildings, and not in his character as surety on the bond. There is a considerable mass of testimony on these points, but we have no hesitation in saying that the weight of the evidence is decidedly in support of the statement of Hannan upon each of the controverted points.

After the work was completed the complainants made out their bill for $1,184.66 as the balance due them, after giving the proper credits; with the heading "Ward & Mockabee to C. R. Monroe & Co., Dr.," and Monroe & Co. brought suit upon the account and recovered a judgment against Ward & Mockabee for this amount. Hannan alleged in his answer that he had paid all of the $4,481, stipulated to be paid for all the brick work, excepting the sum of $200. Afterwards he said that on a recast of the account it appeared he owed but $83, and that amount he then deposited in court. At a later period, after he and Goodwin had re-examined the accounts, it was testified that only $53 was due.

But it is plainly proved that Hannan has paid all of the $4,481 except a small sum, and that no such amount as $1,184 remains unpaid by him on the contract with Ward & Mockabee.

If Hannan were decreed to pay the complainants' claim, it would not be because he has not paid all he contracted to pay, and the full value of the work, but because the claimants have secured a legal advantage by force of the statute, that would compel him to pay again a part of what he has once paid.

The bill presents the important question whether the subcontractors under subcontractors have the right to invoke the provisions of the Act of 1884, which gives a lien upon the property of the house owner to the contractor, subcontractors, material man, journeymen and laborers, for work done and materials furnished.

It is one that concerns a large class of people in this community, and its proper decision is a matter of general interest. No such claim could have been entertained in this District, prior to the passage of the Act of 1884, although laws to secure mechanics' liens have been in operation here for a longer time perhaps than in any other jurisdiction.

Mr. Sergeant in his work on Mechanics' Liens, claims that the earliest legislation in this country or in England, securing a lien to mechanics, was the Pennsylvania Law of 1806. But the Maryland Act of 1791, chapter 45, designed to apply to the future federal city, in the Territory of Columbia, as it was then called, allowed a lien for work on houses in Washington to be performed under a written contract with the owner, by bricklayers, carpenters, joiners or other workingmen, fifteen years before the Pennsylvania Law. But that Act only protected those who had made written contracts directly with the land owner.

In 1833 Congress passed a law which was almost identical in terms with the Pennsylvania Acts of 1806 and 1808. But those Acts were uniformly construed by the courts of that State as not embracing the case of a subcontractor; and the Act of 1833 could admit of no wider construction. Indeed, it received a still narrower interpretation by the Supreme Court in the case of *Winder* v. *Caldwell*, 55 U. S. 14 How. 434 [14 L. ed. 487].

The Act enumerated the classes of persons who should have the benefit of the lien; and although in one part of the Act the word *contractor* is mentioned, yet, as this word did not appear in that enumeration, it was held that a contractor was excluded from its benefits.

Then came the Act of 1857, which constituted the whole of chapter 20 of the Revised Statutes relating to the District of Columbia, excepting the last two sections, which are taken from the Act of 1870. Under neither of these Acts had the subcontractor any lien. By the Act of 1870 the word *subcontractor* was introduced for the first time into our law; but that Act only gave to the subcontractor the right to claim from the owner after due notice the value of services rendered; but gave no lien against the property.

The Act of 1884, chapter 143, for the first time gave a lien to the subcontractor.

The first section of this Act declares "That every building hereafter erected or repaired by the owner, or his agent in the District of Columbia, and the lot or lots of ground of the owner upon which the same is being erected or repaired, shall be subject to a lien in favor of the contractor, subcontractor, material man, journeyman and laborer respectively; for the payment for work or materials contracted for or about the erection, construction or repairing of such building, and also for any engine, machinery or other thing placed in said building or connected therewith, so as to be a fixture, etc.; *Provided*, The person claiming the lien shall file the notice prescribed by the second section of the Act; and *Provided, further*, That the lien shall not exceed or be enforced for a greater sum than the amount of the original contract for the erection or repair of said building or buildings."

The 12th section declares "That any person who shall furnish, at the request of the owner or his agent, materials to do any work on, or labor in, filling up any lot or in erecting or constructing any wharf thereon, etc., shall be entitled to enforce a lien therefor upon the lots or wharves."

And the 13th section provides that any mechanic or artisan who shall make, alter or repair any article of personal property, at the request of the owner, shall have a lien thereon for his just and reasonable charges, for his work done and materials furnished, etc.

The only persons protected by the last two sections are such as deal directly with the owner or his agent; of course no subcontractor not directly in privity with the owner could claim any benefit of their provisions.

If we are to construe this word *subcontractor* in the first section as including the first subcontractor under a subcontractor, which is the position held by Monroe & Co., there can be no legal reason why we must not go still further and include a subcontractor under the subcontractor; for such subcontractor in the second degree is still a "subcontractor," although a more remote one; and the same reasoning would give a similar lien to the subcontractor in the third, or still more remote, degree.

The Act of 1870 placed the "subcontractor" in association with the journeymen, laborers and material men, as constituting the classes who were thereby authorized to maintain an action against the owner. The same enumeration of classes, is adopted in the Act of 1884; and it would seem as though the lawgiver had taken the Act of 1870 as his guide, and intended to include only the same classes of persons who had been comprehended in that Act; while enlarging the privilege already given them by that Act, so as to give them also a lien against the property of the owner; and we think Congress has by the Act of 1884 only enlarged the rights previously given by the Act of 1870; and has not added to the number of the classes to be benefited by the new law.

We must assume that Congress was aware of the course of the prior adjudications, which had consistently excluded the claims of any class of employés not distinctly included in the enumerations in the different statutes. Especially was this the case in Pennsylvania, the decisions in which State were cited with approval by *Mr. Justice* Grier in 14 Howard.

In that State it had been repeatedly decided that a subcontractor had no lien under the statute which gave the right to a contractor, although a subcontractor is in fact a "contractor," in the largest sense of the term, quite as much as the subcontractor of a subcontractor is the "subcontractor" referred to in the Act of 1884. Nevertheless, courts refused to recognize claims of the subcontractor, because that class was not distinctly enumerated in the statute.

In view of these uniform rulings, if Congress had intended to add a new class, or to change the rule of construction thus uniformly placed upon such laws, it seems highly probable it would have taken care to manifest its purpose by some unequivocal language.

We think this construction is supported by reason as well as authority.

The establishment of a claim against a person who had made no contract with the claimant is a very unusual stretch of power, and especially when the law fixes against his property a lien, without any previous knowledge on his part of the particulars of the services rendered or of the person presenting the claim.

The lien thus given by the statute is not dependent upon any principle of morals, but rests only upon positive enactment inconsistent with the common law; and being a creature of statute it cannot be extended beyond the terms of the Act.

"The party seeking to avail himself of its privileges must clearly show that he is of the class protected by its terms. There is no equity in the labor he has performed, or materials he has contributed to the improvement of the estate, that will enable the courts to extend to a party the benefits conferred upon those less meritorious. With these considerations they have no concern. It is a matter exclusively with the legislative will to determine who shall possess the right to enforce the lien." Phillips, Mechanics' Liens, §§ 36, 49.

"Although the subcontractor and material man have been secured in many of the States either a lien on the property or a right of action against the owner to recover any balance due the contractor on his contract, yet these privileges have been more rarely extended to subcontractors in the second and third degree. The plainest expression of law must be adduced to entitle them to the remedy. Statutes which are opposed to common right, and confer special privileges upon one class of community not enjoyed by others, should receive a strict construction, and parties claiming their benefits must bring themselves clearly within their provisions.

"Thus where the law made every building subject to the payment of debts contracted for or by any bricklayer, stonecutter, mason, carpenter, etc., and provided that no claim of any subcontractor shall be a lien, except so far as the owner may be indebted to the contractor at the time of giving notice, these provisions were said to be not unlimited in extending the privilege of the lien to any person who furnishes materials used in the construction of the building to any degree, and however remote from the first contractor. To allow the right of lien to a subcontractor in the third and fourth degree or beyond would be impracticable, as well as imposing hardship which would follow in many supposable cases. If the right to the lien can be extended indefinitely, then it is very obvious there would be no safety in contracting for the erection of a building, and no prudent man would do it." *Kirby* v. *McGarry*, 16 Wis. 70.

"A law, therefore, which extends the lien to a subcontractor does not take in a party who stands to the owner in the position of a subcontractor in the second degree." *Harbeck* v. *Southwell*, 18 Wis. 418.

The Mechanics' Lien Law of Illinois provided "That every subcontractor, mechanic or workingman or other person, who shall, in conformity with the terms of the contract between the owner of the land and the original contractor, perform any labor or furnish any materials in building the house, etc., shall have a lien for the value of said labor, etc., upon said house."

In *Rothberger* v. *Dupuy*, 64 Ill. 454, the court, construing this Act, said: "The question presented and urged is whether the provisions of this statute can be extended to the subcontractor of a subcontractor. He is not enumerated or embraced in the terms of the statute, but it is urged that he falls within the spirit of the enactment. This class of statutes is opposed to common right. They confer special privileges and rights upon one class of the community not enjoyed by others; and courts, in construing such statutes, confine them to the provisions of the law, and require that the case shall be brought clearly within their provisions before relief will be granted. Such laws are not extended by liberal construction to embrace cases not in the language of the statute.

"We can therefore only apply the statute to subcontractors, and cannot extend it indefinitely to successive subcontractors."

And such is the language of several other decisions in that same State. *Ahern* v. *Evans*, 66 Ill. 125; *Newhall* v. *Eastens*, 70 Ill. 156; *Smith Bridge Co.* v. *Louisville, N. A. & St. L. R. Co.* 72 Ill. 506.

The word *subcontractor* has a definite signification in the law, and means a person who contracts directly with the primary contractor; as the word *contractor* signifies one who contracts directly with the owner; and in our opinion the only person intended to be described by the expression *subcontractor*, in the Act, is the party who directly contracts with the primary contractor, and thereby becomes, to the extent of his subcontract, the principal of the branch of the trade he undertakes to conduct.

It is insisted that these statutes should be liberally construed. This is true, after the court has found that the statute plainly includes the class claiming a special privilege in contravention of the common law. But the court cannot import into the law a class not distinctly included by the statute.

In the opinion of the Supreme Court in *Flagstaff Mining Company* v. *Cullins*, 104 U. S. 176 [26 L. ed. 704], referred to by the plaintiffs as favoring such liberal construction, several decisions are cited with approbation in which courts had excluded certain claimants from the benefit of Lien Laws because they were not clearly included within their terms. This is quite consistent with giving a useful construction to the statute in favor of those who are found to be distinctly included.

The complainants refer to certain expressions used by this court in *Spalding* v. *Dodge*, 11 Cent. Rep. 715, decided March 5, 1888, as sustaining the right of a subcontractor in the second degree to a lien under the Act of 1884. But no such question was before the court in that case, as the claimant was a subcontractor under the original contractor; and the language of the opinion bears no such meaning, and the court had no purpose of deciding the proposition here advanced by the complainants. The court there said:

"But we think it is not within the contemplation of the statute that there should be any privity of contract between the subcontractor the material man and laborer on the one hand and the owner of the property on the other. It is sufficient to give them a status to sue that there has been a contract by the owner with somebody to improve the property, and that the party claiming a lien should either have furnished materials under a contract with the principal contractor, or be a subcontractor for the doing of some of the work, or be simply a laborer employed either by the contractor or subcontractor. The purpose of the statute evidently is to put the contractor, the subcontractor, the material man and the laborer upon an equality with reference to a lien upon the property, each having an equal right to claim and to enforce it, upon showing that he comes within the definition of the statute, either as a contractor, subcontractor, material man or laborer."

The counsel for Monroe & Co. were asked whether they had been able to find any reported case sustaining their contention, and they frankly responded in the negative. After the argument they referred us to the case of *Lumbard* v. *Syracuse Railway Company*, 64 Barb. 609, as in point. But the court was there considering the provisions of a statute only applicable to the County of Onondaga, the language of which was broad enough to include the subcontractor in the second degree; and that decision is not an authority on the construction of any statute less broad than the Act there under consideration.

There is therefore no authority, so far as we have been able to find, which could possibly justify us in adding to this statute a feature that the Legislature has declined to ingraft upon it.

The argument *ab inconvenienti* cannot be invoked by a court to nullify the plain terms of a statute. Where distinct words are used, the only duty of the court is to obey them. But where the language is doubtful and a necessity for construction arises, the court may well consider whether the Legislature could have intended a construction that would be highly injurious to the public, rather than one beneficial or harmless. We can easily conceive of very injurious consequences, if the construction of this Act were carried to the extent it must reach if the complainants are correct in their contention. The contractor for houses may give a subcontract to parties of whom the owner might never have heard, and who may never have seen the owner during the progress of the whole work. Yet such subcontractor would have a perfect right to sublet his subcontract; and that subcontractor in turn would have a right to enter into subsidiary contracts to obtain some of the material from one man, and some from another, who in their turn would have the right to sublet their subcontracts.

The subcontractor in the second or successive degrees might have obtained the clay or the fuel to burn the brick, from new subcontractors; and the men who subcontracted to make the brick or to burn or handle them, might imitate their predecessors, and join in the interminable litigation that would result.

The mere costs of the strife might prove ruinous to the owner of the property, who in entire ignorance of these accruing claims might find his land overlaid by successive strata of liens, in favor of persons whose names he had never heard before. Such a construction would "add a new terror" to the existing risks of house building, which ought not to be increased in this jurisdiction.

We cannot conceive that Congress with a supposed knowledge of the previous legislation, and decisions, could have had the intention to ingraft so hurtful a feature on our system; and being clearly of the opinion that such was not its intention, and that subcontractors of subcontractors, under circumstances like the present are not entitled to hold a lien upon the owner's property, *we shall sign a decree directing that the bill be dismissed.*

UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF IOWA.

STATE OF IOWA v. CHICAGO, BURLINGTON & QUINCY R. CO.

(37 Fed. Rep. 497.)

1. **The nature of the action, and not its form,** determines the question whether it is "any suit of a civil nature at law or in equity" within the *meaning of the Act of Congress authorizing* a removal from a state to a federal court.
2. **An action, although civil in form,** brought by a State to collect a penalty for violating the criminal laws of the State, where no individual right is asserted, and no private injury is to be compensated or redressed, is not a "suit of a civil nature," which can be removed to a federal court.

(January 22, 1889.)

ACTION to recover penalties alleged to have been incurred under the provisions of an Iowa Act entitled "An Act to Regulate Railroad Corporations," etc. On motion to remand to the state court. *Sustained.*

The case sufficiently appears in the opinion.

Messrs. **A. J. Baker,** *Atty-Gen.*, and **C. E. Nourse,** for plaintiff for the motion:

There is no provision in the Judiciary Acts for the removal of a suit to the federal court "where is drawn in question the validity of a statute," etc.

See *N. O. M. & T. R. Co.* v. *Miss.* 102 U. S. 135 (26 L. ed. 96); *Southern Pac. R. Co.* v. *Cal.* 118 U. S. 109 (30 L. ed. 103); *Little York Gold Washing & W. Co.* v. *Keyes*, 96 U. S. 199 (24 L. ed. 656); *Gibbs* v. *Crandall*, 120 U. S. 105 (30 L. ed. 590).

In *Hambleton* v. *Duham*, 22 Fed. Rep. 465, 10 Sawy. 489, it was held that a petition for removal is insufficient unless it states: (1) facts showing that some particular disputed question of construction of the statute will arise; and (2) how it will arise, so that the court can determine for itself from the stated facts that the decision will turn upon a disputed construction of the statute, citing—

Trafton v. *Nougues*, 4 Sawy. 179; *Dowell* v. *Griswold*, 5 Sawy. 39; *Little York Gold Washing & W. Co.* v. *Keyes*, 96 U. S. 199 (24 L. ed. 656); *Holland* v. *Ryan*, 17 Fed. Rep. 1. See further *Central R. Co.* v. *Mills*, 113 U. S. 249 (28 L. ed. 949).

In *Carson* v. *Dunham*, 121 U. S. 421 (30 L. ed. 992), Waite, *Ch. J.*, says: "For the purpose of a removal the Constitution, or some law or treaty of the United States, must be directly involved," etc.

See *Provident Sav. L. Assur. Society* v. *Ford*, 114 U. S. 635 (29 L. ed. 261); *State* v. *Chicago M. & St. P. R. Co.* 33 Fed. Rep. 393.

Until it is made an issue by the pleading, as it was in *New Orleans Railroad Company* v. *Mississippi*, *supra*; *Ames* v. *Kansas*, 111 U. S. 449 (28 L. ed. 482); *Kansas Pacific Railroad Company* v. *Atchison Railroad Company*, 112 U. S. 414 (28 L. ed. 794); *Southern Pacific Railway Company* v. *California*, 118 U. S. 109 (30 L. ed. 103),—there is no means by which the court can determine whether such question will necessarily arise in the cause.

Defendant had no right to remove these causes to the United States Circuit Court, for the reason that said court did not have original jurisdiction, and the cause could not have been brought there originally by the State.

Act March 3, 1887, § 2.

The suit could not be brought by the State in the United State Courts, for the reason that as brought it discloses no question wherein it could be said that it was an action or a suit arising under the Constitution of the United States or the laws thereof.

See *Yuba Co.* v. *Pioneer Gold Min. Co.* 32 Fed. Rep. 183; *Fales* v. *Chicago M. & St. P. R. Co.* 32 Fed. Rep. 673; *Gavin* v. *Vance*, 33 Fed. Rep. 84.

These suits are not suits of a civil nature.

Actions may be, and often are, civil in form

NOTE.—*Suits not removable.*

A suit will not be removed unless the circuit court has jurisdiction of the subject matter and the power to do substantial justice between the parties. Rogers v. Rogers, 1 Paige, 183; Goodrich v. Hunton, 29 La. Ann. 372; Watson v. Bondurant, 30 La. Ann. 1; Denniston v. Potts, 11 Smedes & M. 36.

If the circuit court has no jurisdiction over a single count of the declaration the case is not removable. Gale v. Babcock, 4 Wash. C. Ct. 344.

Ancillary suits are not removable. Claflin v. McDermott, 12 Fed. Rep. 375; Cortes Co. v. Taunhauser, 9 Fed. Rep. 228; Providence Rubber Co. v. Goodyear, 76 U. S. 9 Wall. 809 (19 L. ed. 589); Cross v. De Valle, 68 U. S. 1 Wall. 5 (17 L. ed. 515); Field v. Schieffelin, 7 Johns. Ch. 252.

So the claim of a garnishee is ancillary and is not removable. Weeks v. Billings, 55 N. H. 371; Pratt v. Albright, 9 Fed. Rep. 636.

Matters auxiliary to the cause of action set forth in the orignal libel or bill may be included in the cross suit and no others; as the cross suit is, in general, incidental to and dependent upon the original suit. The Mayflower v. The Dove, 91 U. S. 385 (23 L. ed. 355); Ayres v. Carver, 58 U. S. 17 How. 595 (15 L. ed. 180); Shields v. Barrow, 58 U. S. 17 How. 145 (15 L. ed. 158).

The filing of a cross bill is not the commencement of a new suit, but a mode of defense; and the relief sought is that to which the party became entitled upon the filing of the bill and relates back to the commencement of that suit. Pierce v. Chace, 108 Mass. 260; Cartwright v. Clark, 4 Met. 104; White v. Buloid, 2 Paige, 164.

A cross bill is inseparable from the original suit, both together constituting one cause. Eve v. Louis, 91 Ind. 470; Hall Lumber Co. v. Gustin, 54 Mich. 624; Cartwright v. Clark, 4 Met. 104; Kemp v. Mackrell, 3 Atk. 812; Donohoe v. Mariposa Land & Min. Co. 6 Cent. L. J. 487, 5 Sawy. 163; Galatian v. Erwin, Hopk. Ch. 59; Ayres v. Carver, 58 U. S. 17 How. 595 (15 L. ed. 180); Slason v. Wright, 14 Vt. 210.

Suits in equity, in which the only effective relief sought is an injunction to stay proceedings in an action pending in the state court and prevent the levying of an execution issuing therefrom, are not removable to the Circuit Court of the United States on petition of the plaintiff in the action at law before injunction issued. Edwards Mfg. Co. v. Sprague, 76 Maine, 69.

but criminal in their nature. The test of the nature of the action is not the form, but the object sought to be attained. If it is for a penalty which is designed and intended as a punishment for a wrong which affects the community at large, it is criminal in its nature, no matter what the form may be.

See 4 Bl. p. 5; Rapalje & L. Law Dict. p. 21; Burrill, Law Dict. 294; 3 Bl. Com. 2, 116; Bouvier, Law Dict. 317; Cro. Jac. 4157; *Beals* v. *Thurlow*, 63 Maine, 9; *Illinois* v. *Ill. Cent. R. Co.* 33 Fed. Rep. 726-729; *People* v. *Shaw*, 13 Ill. 581; *Ensminger* v. *People*, 47 Ill. 387; *People* v. *Holtz*, 92 Ill. 428; *Ames* v. *Kansas*, 111 U. S. 460 (28 L. ed. 487); *Dow* v. *Norris*, 4 N. H. 19; *Ward* v. *People*, 13 Ill. 635; *Boyd* v. *U. S.* 116 U. S. 616 (29 L. ed. 746); *U. S.* v. *McKee*, 4 Dill. 128; *Herriman* v. *Burlington C. R. & N. R. Co.* 57 Iowa, 187; *State* v. *Manchester & L. R. Co.* 52 N. H. 528; *State* v. *Grand Trunk R. Co.* 3 Fed. Rep. 887; *Wis.* v. *Pelican Ins. Co.* 127 U. S. 265 (32 L. ed. 239).

Messrs. **Dester, Herrick & Allen, N. M. Hubbard and Thos. S. Wright,** for defendant, *contra:*

This is a suit of a civil nature within the meaning of the Act of Congress.

The word *civil*, as applied to an action or suit, is always used in contradistinction to the term *criminal*.

Livingston v. *Story*, 34 U. S. 9 Pet. 656 (9 L. ed. 255); *U. S.* v. *10,000 Cigars*, 1 Woolw. 124; *Rison* v. *Cribbs*, 1 Dill. 184; *U. S.* v. *Block 121*, 3 Biss. 214; *Landers* v. *Staten Island R. Co.* 14 Abb. Pr. N. S. 353; *Tomlinson* v. *Hammond*, 8 Iowa, 40.

An action at law to recover a penalty, also called a penal action, is a civil action.

Atcheson v. *Everitt*, Cowp. 391, 392; *Wilson* v. *Rastall*, 4 T. R. 415, *758; *Atty-Gen.* v. *Bowman*, 2 Bos. & P. 532, note (*a*); *U. S.* v. *Mann*, 1 Gall. 179; *Matthews* v. *Offley*, 3 Sumn. 120; *Jacob* v. *U. S.* 1 Brock. 525; *U. S.* v. *La Vengeance*, 3 U. S. 3 Dall. 301 (1 L. ed. 610); *Stearns* v. *U. S.* 2 Paine, 311; *U. S.* v. *10,000 Cigars*, 1 Woolw. 125; *Day* v. *State*, 7 Gill, 321, 326; *State* v. *Mace*, 5 Md. 349; *Hitchcock* v. *Munger*, 15 N. H. 102-105; *People* v. *Hoffman*, 3 Mich. 250; *Martin* v. *McNight*, 1 Overton (Tenn.) 332; *Brophy* v. *Perth Amboy*, 44 N. J. L. 219; *Campbell* v. *Board of Pharmacy*, 45 N. J. L. 243; *Ives* v. *Jefferson Co.* 18 Wis. 168; *State* v. *Ives*, 15 Wis. 445; *State* v. *Hayden*, 32 Wis. 668; *Canfield* v. *Mitchell*, 43 Conn. 171.

That the fact that the proceeding involves a punishment for an offense, is not the test in determining whether it is "a suit of a civil nature," is shown by *State* v. *Ill. Cent. R. Co.* 33 Fed. Rep. 721.

In determining whether a suit brought under a state law is "of a civil nature," within the meaning of the Act of Congress, the character given to it by the state statute is always important, and if clear should be controlling.

Washington Improvement Co. v. *Kan. Pac. R. Co.* 5 Dill. 489; *Ames* v. *Kan.* 111 U. S. 460 (28 L. ed. 487).

That a suit to recover a statutory penalty is "a suit of a civil nature" is further confirmed by the fact that a removal of a penal action was sustained on full argument in the following cases:

Ill. v. *Chicago, B. & Q. R. Co.* 16 Fed. Rep. 707; *Malone* v. *Richmond & D. R. Co.* 35 Fed. Rep. ——; *Shelton* v. *Chicago, B. & Q. R. Co.* not erported.

Mr. **J. W. Blythe,** also for defendant:

A suit arises under the Constitution of the United States whenever the title or right set up by a party may be defeated by one construction of law of the United States and sustained by the opposite construction; and it is quite immaterial whether the right be relied upon as a ground of recovery or defense.

Cohens v. *Va.* 19 U. S. 6 Wheat. 379 (5 L. ed. 257); *Osborn* v. *Bank of U. S.* 22 U. S. 9 Wheat. 892 (6 L. ed. 204); *Nashville* v. *Cooper*, 73 U. S. 6 Wall. 247 (18 L. ed. 851); *N. O. M. & T. R. Co.* v. *Miss.* 102 U. S. 141 (26 L. ed. 98); *Ames* v. *Kan.* 111 U. S. 449 (28 L. ed. 482); *Southern Pac. R. Co.* v. *Cal.* 118 U. S. 110 (30 L. ed. 103).

The federal question may be made to appear by the petition for removal if it does not otherwise appear in the record.

Little York Gold Washing & W. Co. v. *Keyes*, 96 U. S. 199 (24 L. ed. 656); *Carson* v. *Dunham*, 121 U. S. 426 (30 L. ed. 993); *N O. M. & T. R. Co.* v. *Miss.* 102 U. S. 141 (26 L. ed. 98).

It is not relevant, upon the motion to remand, to inquire into the validity of the defense, the only question being upon this motion as to whether we have brought the case within the jurisdiction of this court by raising for its consideration certain federal questions which, as we claim, constitute defenses to the action.

Kessinger v. *Hinkhouse*, 27 Fed. Rep. 883; *Mahin* v. *Pfeiffer*, 27 Fed. Rep. 893; *Ill.* v. *Chicago, B. & Q. R. Co.* 16 Fed. Rep. 707; *Southern Pac. R. Co.* v. *Cal.* 118 U. S. 112 (30 L. ed. 104); *N. J. Cent. R. Co.* v. *Mills*, 113 U. S. 257 (28 L. ed. 951).

The limitation of the right of removal to cases of which the circuit court is given original jurisdiction by the first section of the Act of 1887 is intended to be merely descriptive of the class of cases which may be removed, and not to limit the right of removal to cases which might originally have been brought in the circuit courts.

Fales v. *Chicago, M. & St. P. R. Co.* 32 Fed. Rep. 673; *Loomis* v. *N. Y. & C. Gas Coal Co.* 33 Fed. Rep. 353; *St. Louis, V. & T. H. R. Co.* v. *Terre Haute & I. R. Co.* 33 Fed. Rep. 385; *State* v. *Ill. Cent. R. Co.* 33 Fed. Rep. 721; *Wilson* v. *W. U. Teleg. Co.* 34 Fed. Rep. 561; *Short* v. *Chicago, M. & St. P. R. Co.* 33 Fed. Rep. 114; *Gavin* v. *Vance*, 33 Fed. Rep. 84; *Swane* v. *Ins. Co.* 35 Fed. Rep. 1; *R. Co.* v. *Ford*, 35 Fed. Rep. 170; *Coley* v. *McArthur*, 35 Fed. Rep. 372; *County Court* v. *R. Co.* 35 Fed. Rep. 121; *Malone* v. *Richmond & D. R. Co.* 35 Fed. Rep. 625; *Tiffany* v. *Wilce* (Mich.) 34 Fed. Rep. 230.

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

This is one of several actions brought in the state court against the defendant and other railroad companies to recover penalties alleged to have been incurred under section 27 of an Act of the Legislature of Iowa entitled "An Act to Regulate Railroad Corporations," etc., approved April 5, 1888.

The defendants filed answers and at the same time filed petitions for removal to the Circuit Court of the United States, on the ground that

the cases were cases arising under the Constitution of the United States.

Transcripts of the records were filed in this court in apt time; and a motion has been made by the plaintiff to remand the cases to the state court.

In support of this motion it is contended: (1) that the cases are not "suits arising under the Constitution of the United States" within the meaning of the Act of Congress; (2) that they are not suits "of a civil nature;" (3) that they are not cases of which the circuit court is "given original jurisdiction" by section 1 of the Act, and are not, therefore, removable.

Noticing the second question, it is provided by section 2 of the Removal Act, March 3, 1887, "that any suit of a civil nature at law or in equity," etc., may be removed; and it is insisted that this is not a suit of a civil nature.

By the Act of April 5, *supra*, certain acts are declared to be extortion.

Section 26 declares that "Any such railroad corporation guilty of extortion . . . shall, upon conviction thereof, be fined in any sum not less than $1,000 nor more than $5,000 . . . such fine to be imposed in a criminal prosecution by indictment, or shall be subject to the liability prescribed in the next succeeding section, to be recovered as therein provided."

This next succeeding section provides:

"Section 27. Any such railroad corporation guilty of extortion . . . shall forfeit and pay to the State of Iowa not less than $1,000 nor more than $5,000 . . . to be recovered in a civil action by ordinary proceedings instituted in the name of the State of Iowa."

It will be observed that section 27 defines the action as a civil action; and, in fact, the one before us is in the ordinary form of an action of debt. But while the form is civil, is it of a civil or criminal nature? For obviously not the form, but the nature of the action determines the question.

The right to remove is given by Act of Congress which prescribed both the limits and the conditions, and it cannot be that after Congress has thus legislated, the right of removal can be defeated by any legislation of the State, changing the mere form in which litigation is to be carried on. Otherwise, the will of Congress could be defeated by any State.

Would it for a moment be tolerated that litigation as to the collection of a note could be held in the state and withheld from the federal court by any Act of the State Legislature providing that such collection should be by indictment instead of the usual form of a civil action? *Colorado Midland R. Co.* v. *Jones* (Colo.) 29 Fed. Rep. 193.

The question therefore is, What is the nature of the action provided for by section 27? The distinction between matters of a civil and those of a criminal nature is clear and of frequent mention in the books.

Blackstone says, Vol. 4, p. 5: "The distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this: that private wrongs or civil injuries are an infringement or privation of civil rights which belong to individuals; public wrongs or crimes and misdemeanors are a breach or violation of public rights or duties due to the whole community, considered as a community in its social aggregate capacity."

Rapalje & Lawrence, at page 21 of their Law Dictionary, say: "An action is civil when it lies to enforce a private right, or redress a private wrong. It is criminal when instituted on behalf of the sovereign to vindicate the law by the punishment of a public offense."

Burrill, in his Law Dictionary, 294, says: "A civil action is an action brought to recover some civil right, or to obtain redress for some wrong not being a crime or misdemeanor." See 3 Bl. Com. 2, 116.

He also defines a civil right as "The right of a citizen; the right of an individual as a citizen; a right due from one citizen to another, the privation of which is a civil injury for which redress may be sought in a civil action." Burrill, Law Dict. 296.

Bouvier says a civil action is "A personal action which is instituted to compel payment or the doing of something which is purely civil." "At common law: An action which has for its object the recovery of private or civil rights or compensation for their infraction." Bouvier, Law Dict. 317.

"Penal statutes or laws," say Rapalje & Lawrence, "are of three kinds: *Pœna pecuniaria, pœna corporalis, pœna exilii.*" See also Cro. Jac. 4157.

The same authorities define penal statutes to be "Those which impose penalties, or punishment for offenses committed." Rapalje & Lawrence, Law Dict. 945.

And further, penalty is a sum of money payable as an equivalent or punishment for an injury. *Id.*

Burrill defines penalty as "A punishment imposed by statute as the consequence of the commission of a certain specific offense; a pecuniary punishment; a sum of money imposed by statute to be paid as a punishment for the commission of a certain act." Burrill, Law Dict. 286.

He defines a penal action as "An action upon a penal statute; an action for the recovery of a penalty given by statute."

In distinguishing between cases which are civil and those which are criminal in their nature, the Supreme Court of Maine, in *Beals* v. *Thurlow*, 63 Maine, 9, says: "The plaintiff does not sue to compel payment of any debt due to himself or for the redress of any wrong done to himself, but simply to enforce a pecuniary penalty against a wrong doer."

That a suit may be criminal in form and yet civil in its nature, or *vice versa*, is fully discussed by *Mr. Justice* Harlan in *Illinois* v. *Illinois Central Railway Company*, 33 Fed. Rep. 726-729.

The action in that case was an information in the nature of *quo warranto*, instituted by the Attorney-General of Illinois, demanding of the Illinois Central Railroad by what warrant it claimed to have, use and enjoy the powers, liberties, privileges and franchises exercised by it, in and over certain submerged portions of the lake front in the City of Chicago, and of constructing, operating, using, etc., docks, wharves and piers, in and upon said submerged lands.

This action was commenced in the Criminal

Court of Cook County and was in form a criminal proceeding.

In considering this *Mr. Justice* Harlan cites approvingly, and quotes from, *People* v. *Shaw*, 13 Ill. 581, and from *Ensminger* v. *People*, 47 Ill. 387.

People v. *Shaw* was an information in the nature of *quo warranto* against certain persons for usurping the office of bridge commissioners; and the question arose upon the claim of right to a change of venue as provided for in a civil case. Caton, *J.*, speaking for the Supreme Court of Illinois, uses this language, as quoted by *Mr. Justice* Harlan:

"In form this is a criminal proceeding, but it is only so in form. In substance it is for the protection of the private and individual rights of the relator and others in the precinct similarly situated.

It is the nature of the rights asserted and maintained to which we should look rather than to the form in which the party may be obliged to proceed to assert those rights in giving a just interpretation to the statute."

The learned Justice further cites and quotes from *Ensminger* v. *People*, *supra*; *People* v. *Holtz*, 93 Ill. 428, and from *Ames* v. *Kansas*, 111 U. S. 460 [28 L. ed. 487], to the effect that the information in *quo warranto* has long since ceased to be criminal in its nature; and concludes by saying: "The decision in *Ames* v. *Kansas* was distinctly to the effect that the nature of the right asserted and at issue . . . furnished the test whether a proceeding was of a civil or criminal nature."

That a case may partake something of the nature of both is as might be expected; and naturally it is not always clear which element predominates. Thus, in a civil action for damages for a tort punitive damages are sometimes awarded.

There is, therefore, present the double element of a redress of a private injury and the punishment of a public wrong; but inasmuch as the full recovery goes to the injured party, as he controls the whole proceeding and the form of the action is civil, it may well be inferred that the civil element predominates and the action may be considered one of a civil nature.

So there are *qui tam* actions brought to recover a penalty in which part of the recovery goes to the informer. In some of these actions the informer has suffered a private injury which is compensated by the recovery, and sometimes his interest is only that of an informer. And there are actions in which the recovery is, by direction of the Legislature, increased above the actual compensation, and the increase is by way of penalty.

Obviously in all these there are elements of a civil as well as a criminal nature.

The case of *Herriman* v. *Burlington Railroad Company*, 57 Iowa, 187, is a good illustration. In that case the plaintiff had been overcharged and brought his action against the company under the statute for five times the overcharge.

The court held that this was a penal action and barred by the Statute of Limitations applicable thereto. Commenting on the statute it uses this language:

"This to our minds shows very clearly that the essential object of the provision was not to afford the aggrieved individual an adequate remedy, but to protect the public by deterring railroads from committing a misdemeanor which a violation of the Act was declared to be. The provision then is essentially criminal, rather than remedial. This is sufficient to enable us to determine to what the Statute of Limitations applies."

And it also contrasts this case with an earlier case under a different statute and a different penalty, in which the judgment of the court had been that the action was of a civil and remedial, rather than a criminal, nature.

Another case which well illustrates this is the recent case of *Boyd* v. *United States*, 116 U. S. 616 [29 L. ed. 746]. In this an information had been filed by the District Attorney for the seizure of certain property under the Revenue Law. The statute provided for punishment by fine and imprisonment, and also for the forfeiture of the goods. The latter was all that was sought in this action, which in form was confessedly civil. Advantage was sought to be taken of a section of the federal statutes compelling the defendant in effect to furnish testimony. The court held that that proceeding could not be sustained on the ground that the action was one of a criminal nature, and that under the Fifth Amendment no person in a criminal case could be compelled to be a witness against himself. Speaking for the court *Mr. Justice* Bradley used this language:

"We are clearly of the opinion that proceedings instituted for the purpose of declaring a forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal. In this very case the ground of forfeiture as declared in the 12th section of the Act of 1874, on which the information is based, consists of certain acts of fraud committed against the public revenue in relation to imported merchandise, which are made criminal by the statute. And it is declared that the offender shall be fined not exceeding $5,000 nor less than $50, or be imprisoned not exceeding two years, or both; and in addition to such fine such merchandise shall be forfeited. These are the penalties affixed to the criminal acts; the forfeiture sought by this suit being one of them.

"If an indictment had been presented against the claimants, upon conviction, a forfeiture of the goods would have been included in the judgment. If the government prosecutor elects to waive an indictment and to file a civil information against the claimants (that is, civil in form), can he, by this device, take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them the production of their private papers, or, as an alternative, a confession of guilt? This cannot be. An information, though technically a civil proceeding, is in substance and effect a criminal one. As showing the close relation between a civil and a criminal proceeding on the same statute in such cases, we may refer to the recent case of *Coffey* v. *United States*, 116 U. S. 436 [29 L. ed. 684], in which we decided that an acquittal on a criminal information was a good plea in bar to a civil information for the forfeiture of goods arising upon

the same acts. As, therefore, suits for penalties and forfeitures incurred by the commission of offenses against law are of this quasi criminal nature, we think they are within the reason of criminal proceedings for all the purposes of the Fourth Amendment to the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself."

And in a separate opinion Miller, *J.*, says:

"I am of opinion that this is a criminal case within the meaning of . . . the Fifth Amendment to the Constitution of the United States."

These cases and considerations disclose the difference between matters of a civil and of a criminal nature, and also affirm the proposition that not the form, but the nature, of the action determines the question of removal. From them we pass to inquire, What is the nature of the action? The party plaintiff is the State; it controls the litigation; it receives all the proceeds.

The action proceeds from no contractual obligation of the State; it is not to enforce any rights of it as an individual; it is purely governmental in its nature; its aim is to punish for a violation of the criminal laws of the State. The Act defines extortion and declares it to be a misdemeanor. Both sections 26 and 27 provide simply for punishment. The form of the action prescribed in the two sections is different, but the purpose of each is the same —to compel obedience to the laws of the State by punishment for a violation thereof. There is no individual right to be asserted, no private injury to be compensated or redressed; the proceeding under each section is by the State in its governmental capacity to compel obedience to its laws. The language in each section is "the party guilty"—language apt for criminal purposes and not for civil.

The State, under section 27, sues not to recover for goods sold, for work done on account of contract broken, or any private obligation of the defendant to the State, but simply and solely to impose punishment for violation of law. Can there be a doubt, under the distinctions heretofore adverted to, that this is an action of a criminal rather than of a civil nature?

If it be said that many courts have held and that the Statutes of Iowa provide that a civil action may be brought to recover a penalty or forfeiture, it must also be observed that thereby only the form of the action is determined, but not its purpose or nature.

I shall not attempt to notice the multitude of authorities which are cited, simply observing that many of them consider only the question of the form of the action and not its nature, while those that do discuss the nature of the action must be considered as overruled by the later enunciations of the supreme court.

If Congress had intended that the mere form of the action determined the right of removal, apt language would have been "actions civil in form," or perhaps the more general expression "civil actions;" but when the language is "of a civil nature," it discloses an intent as affirmed by the cases of *Ames* v. *Kansas*, 111 U. S. 460 [28 L. ed. 487], and *Illinois* v. *Illinois Central Railroad Company*, 33 Fed. Rep. 726, that the court should always look beyond the matter of form to the purpose, object, nature of the action.

Nor is it strange that this language was selected. While it may be within the power of Congress to transfer to the federal court all actions to enforce the penal laws of the State in which questions of a federal nature may arise, yet a due regard for the dignity of the State and a proper harmony between the State and Federal Governments doubtless prompted Congress to leave to the state courts the primary decision of all such actions, preferring that if a party thought any such rights were denied in the state courts he should seek relief through the appellate jurisdiction of the Supreme Court of the United States.

That such is a fitting mode of procedure may be conceded, and that such was the intent of Congress is indicated by the language that is used.

It is said that in the cases of *Mugler* v. *Kansas* and *Kansas* v. *Ziebold*, 123 U. S. 623 [31 L. ed. 205], the supreme court impliedly recognized the right to remove a bill in equity filed to enjoin the operation of a brewery, which, though in form civil in its nature, was clearly an action to enforce the penal laws of the State.

In reply to this it may be said that in *Schmidt* v. *Cobb*, 119 U. S. 286 [30 L. ed. 321], an order remanding a similar case was affirmed in the supreme court by a divided vote; that the cases of *Mugler* and *Ziebold* were considered and decided together; that the *Mugler Case* was an appeal from the Supreme Court of Kansas, and that in the *Ziebold Case* counsel preferred to discuss and have determined the absolute rights of the parties rather than any question of form or removal, so that the question of removal seems not to have been considered by the court.

And now it becomes necessary to notice the last utterance of the supreme court in the case of *Wisconsin* v. *Pelican Insurance Company*, 127 U. S. 265 [32 L. ed. 239]. That case was this:

The State of Wisconsin brought an action in one of her own courts, against the defendant, to recover a penalty prescribed by the statutes for a transaction of insurance business in the State without a license. The action was a civil action in form, to wit: an action of debt. The statutes provided that one half of the penalty should go to the State and one half to the insurance department, to cover expenses, etc. Judgment was recovered in that action for the amount of the penalty. The defendant was a citizen of the State of Louisiana. Thereupon the State of Wisconsin brought an original action in the Supreme Court of the United States against the defendant, a citizen of another State, on that judgment. It will be seen that that action is somewhat removed from this in that, not being an original action to recover a penalty, it was to recover on a judgment in a civil action for a penalty.

By the Constitution of the United States the supreme court has original jurisdiction of controversies between a State and a citizen of another State. Yet, notwithstanding this general jurisdiction of the supreme court, it held that

it had no jurisdiction of this action. Several lines of argument were followed by the court in reaching its conclusion. It held that that grant of jurisdiction was of judicial power, and was not intended to confer upon the courts of the United States jurisdiction of a suit or prosecution by the one State of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other State at all; that the enforcement of the criminal laws of a State was by such principles limited exclusively to the courts of the State whose laws were charged to have been violated, and that the form of the action prescribed was immaterial—courts ever looking to the substance, nature and purpose of the action; and that in the case at bar, although the form of the action was civil, being an action of debt to recover on a judgment in an action of debt for a penalty, it was in substance of a criminal nature and an effort upon the part of the State to enforce its criminal laws. The language of the court is as follows:

"The Statute of Wisconsin, under which the State recovered in one of her own courts the judgment now and here sued on, was in the strictest sense a penal statute, imposing a penalty upon any insurance company of another State doing business in the State of Wisconsin without having deposited with the proper officer of the State a full statement of its property and business during the previous year. Wis. Rev. Stat. 1920. The cause of action was not any private injury, but solely the offense committed against the State by violating her law. The prosecution was in the name of the State, and the whole penalty when recovered would accrue to the State and be paid, one half into her treasury and the other half to her insurance commissioner, who pays all expenses of prosecuting for and collecting such forfeitures. Wis. Stat. 1885, chap. 395. The real nature of the case is not affected by the forms provided by the law of the State for the punishment of the offense. It is immaterial whether, by the law of Wisconsin, the prosecution must be by indictment or by action, or whether, under that law, a judgment there obtained for the penalty might be enforced by execution by *scire facias*, or by a new suit. In whatever form the State pursues her right to punish the offense against her sovereignty, every step of the proceeding tends to one end, the compelling the offender to pay a pecuniary fine by way of punishment for the offense."

Though this case is not precisely in point, yet the thought underlying it, the principle which controlled the decision, is applicable here; and it must be adjudged that in the opinion of the Supreme Court of the United States, the ultimate authority on questions of this kind, an action to enforce a penalty, whatever may be its form, is one of a criminal nature. As such, within the Removal Act, it is not a removable case.

My conclusion, therefore, is that this action is not one that can be removed to the federal courts; and the motion to remand must be sustained.

I have given this subject long and patient examination in view of the vast interest and the importance of the question, and, against my first impressions, I have been forced to the conclusion I have thus announced. I appreciate fully what counsel urge of the difficulties which, as they say, such a construction will place in the way of their reliance upon the protection of the Federal Constitution; but notwithstanding these difficulties, back of all the statutes and all the litigation in the State stands that high tribunal, the Federal Supreme Court, which will ultimately determine and fully protect all rights guaranteed to the defendant by the Federal Constitution.

The motion to remand will be sustained. The same order will be entered in all the cases of a similar nature now pending in this court.

Judge **Shiras** concurs in the foregoing opinion. *Judge* **Love** gives no opinion.

NEW YORK COURT OF APPEALS.

Mary Jane HUSSEY, Admrx., etc., *Respt.*,
v.
John J. COGER, *Appt.*

(112 N. Y. 614.)

1. **In respect to such work as properly belongs to a servant** to do, a superintendent is, while performing it, discharging the duty of a servant, for whose negligence and carelessness the master is not responsible to coservants.

2. **Where the superintendent of repairs to a ship** directed assistants to be sent up from the hold to open a hatchway on the main deck, and when two men arrived for that purpose, and with another employé approached the hatchway,

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NOTE.—*Fellow servants; who are.*

All servants employed in a common service are fellow servants, whatever may be their grade or rank. Authorities cited. Rogers v. Ludlow Mfg. Co. 3 New Eng. Rep. 924, 144 Mass. 198.

The scope of the duties of an employé is to be defined by what he was employed to do and what he actually did, rather than by the verbal designation of his position. Rummell v. Dilworth, 1 Cent. Rep. 905, 111 Pa. 343.

To constitute fellow servants, it is sufficient if the employés are in the service of the same master, engaged in the same common work, and performing services for the same general purpose. 3 L. R. A. Lewis v. Seifert, 9 Cent. Rep. 755, 116 Pa. 628, 20 W. N. C. 145.

The servants of the same master, to be coemployés, so as to exempt the master from liability on account of injuries sustained by one resulting from the negligence of the other, shall be directly co-operating with each other in a particular business, in the same line of employment; or their usual duties shall bring them habitually together, so that they may exercise a mutual influence upon each other promotive of proper caution. Chicago & N. W. R. Co. v. Snyder, 5 West. Rep. 166, 117 Ill. 376; Chicago & A. R. Co. v. Hoyt, 9 West. Rep. 785, 122 Ill. 369.

Fellow servants need not be engaged in the same

called out to one of the men by name, saying "Take off that hatch," and the man addressed, supposing one of the others had hold of the other end, took hold of the hatch and pulled the opposite end from its resting place before anyone else got hold of it, and the hatch fell through the opening, injuring another workman under it, in the hold, the master was not liable for the injuries received in consequence, whether the customary caution was or was not given to those at work below. The superintendent, whether he undertook to perform the work of removing hatches, or ordered it to be done by others, was, in either case, engaged in performing the duty of a workman.

(March 5, 1889.)

APPEAL by defendant, from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of the Circuit in favor of plaintiff in an action to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts sufficiently appear in the opinion.

Mr. **Charles W. Dayton,** for appellant: Upon the undisputed facts, it is difficult to conceive how defendant can be held liable for the unfortunate injuries to plaintiff's intestate under the law laid down in—

Pantzar v. *Tilly Foster Iron Min. Co.* 99 N. Y. 368, and *Corcoran* v. *Holbrook*, 59 N. Y. 517. Gray's acts were done in the range of the common employment, for which defendant is not liable.

McCosker v. *Long Island R. Co.* 84 N. Y. 77; *Loughlin* v. *State*, 7 Cent. Rep. 70, 105 N. Y. 159; *Neubauer* v. *N. Y. L. E. & W. R. Co.* 3 Cent. Rep. 66, 101 N. Y. 607; *Crispin* v. *Babbitt*, 81 N. Y. 516.

Mr. **Frank E. Blackwell,** for respondent: The defendant is liable for Gray's negligence. *Pantzar* v. *Tilly Foster Iron Min. Co.* 99 N. Y. 373; *Corcoran* v. *Holbrook*, 59 N. Y. 517.

The omission of Gray to provide enough men to remove the hatch was an omission of the defendant, for which he is responsible. *Flike* v. *Boston & A. R. Co.* 53 N. Y. 549; *Booth* v. *Boston & A. R. Co.* 73 N. Y. 38; *Reiner* v. *Heuvelman*, 8 N. Y. Week. Dig. 17; *Slater* v. *Jewett*, 85 N. Y. 72; *Sheehan* v. *N. Y. C. & H. R. R. Co.* 91 N. Y. 333.

The omission of Gray to give warning, or cause it to be given, was an omission of the defendant, for which he is responsible. *Sheehan* v. *N. N. C. & H. R. R. Co.* and *Corcoran* v. *Holbrook*, *supra*; *Dana* v. *N. Y. C. & H. R. R. Co.* 92 N. Y. 639.

Ruger, *Ch. J.*, delivered the opinion of the court:

This action was instituted by a servant of the defendant to recover damages for an injury received in the course of his employment. After

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particular work. It is sufficient if they are engaged in the same common work, although some may be inferior in grade and subject to the control of superiors. N. Y. L. E. & W. R. Co. v. Bell, 3 Cent. Rep. 579, 112 Pa. 400.

The foreman of a gang of laborers employed by a contractor is a fellow servant of one of the gang. Anderson v. Winston, 31 Fed. Rep. 528.

A laborer in a grain elevator, directed by the foreman to assist in fastening a vessel to the pier of the elevator, and the captain of such tug, also in the employ of the defendant, and by reason of whose neglect in not properly bracing the yards of the vessel, in consequence of which they struck the building, and knocked off some slating which fell and struck the plaintiff.—*held*, fellow servants. Baltimore Elevator Co. v. Neal, 3 Cent. Rep. 856, 65 Md. 438.

Master not liable for negligence of fellow servant.

A master is not generally liable for the negligence of a fellow servant in the course of a common employment. This rule applies to a volunteer. Barstow v. Old Colony R. Co. 3 New Eng. Rep. 746, 143 Mass. 535. See Stringham v. Stewart, 1 L. R. A. 483, 111 N. Y. 188.

It is only when the master or superior places the entire charge of his business, or a distinct branch of it, in the hands of an agent or subordinate, and exercises no discretion or oversight of his own, that the master is liable for the negligence of such agent or subordinate. N. Y. L. E. & W. R. Co. v. Bell, 3 Cent. Rep. 580, 112 Pa. 400.

Where an employé receives injury through the negligence of a fellow servant engaged in the same general employment, the master is not liable. Capper v. Louisville, E. & St. L. R. Co. 1 West. Rep. 287, 103 Ind. 305.

This rule applies to a volunteer. Barstow v. Old Colony R. Co. 3 New Eng. Rep. 746, 143 Mass. 535. See Stringham v. Stewart, 1 L. R. A. 484, note 111 N. Y. 188; Muhlman v. Union Pac. R. Co. 2 L. R. A. 192.

A master is not responsible for injury to an employé through negligence of a mining boss, a fellow servant. Reese v. Biddle, 2 Cent. Rep. 799, 112 Pa. 72.

So a city is not liable because of the negligence of an overseer employed by it, his relation to the injured person being that of a fellow servant. Conley v. Portland, 1 New Eng. Rep. 797, 78 Maine, 217.

A gang boss in shops for repairing and manufacturing purposes, in charge of a master mechanic, is a fellow servant with those under his charge; and for an injury received by one of the latter by being struck by a pipe which had been constructed by plaintiff and others in a negligent manner, cannot recover against the owner of such shops. N. Y. L. E. & W. R. Co. v. Bell, *supra*.

For an injury sustained by claimant from the negligence of the captain of the state boat, who, at the time, was engaged with several employés, including claimant, in digging clay from a bank and loading it on to the boat, which negligence consisted in setting the claimant to work under the bank after the captain had loosened the overhanging earth, so that it fell upon and injured the plaintiff, the State is not liable, because the captain was in this matter a coservant with the plaintiff. Loughlin v. State, 7 Cent Rep. 70, 105 N. Y. 159.

The foreman of a gang of men, to whom a stevedore delegates the entire management of the work of unloading a vessel, with full discretion to control and supervise it, is not a fellow servant with his subordinate employés; and if, in the performance of the work, death or injury results to such an employé through the negligence of the foreman, the stevedore is liable, although he exercised due care in the selection of the foreman. Brown v. Sennett, 68 Cal. 225.

A master is not liable for criminal acts or willful trespass of the servant. Jackson v. St. Louis, I. M. & S. R. Co. 3 West. Rep. 236, 87 Mo. 422.

A master sued for the trespass of his servant is not liable for exemplary damages, however evil the motive of the servant, if he is himself without malice. Lombard v. Batchelder, 2 New Eng. Rep. 789, 58 Vt. 558.

a verdict the servant died and the action was revived by his administratrix, who was substituted as plaintiff to defend an appeal.

While there was much controversy on the trial as to some of the collateral facts of the case, there was none as to the controlling circumstances which, in our judgment, determine the nonliability of the defendant. We are of the opinion that there was no evidence upon which a charge of negligence can justly be imputed to the defendant. The claim of liability is based upon the alleged negligence of the defendant in the performance of some duty which he, as master, owed to those in his employ and which resulted in the accident from which the servant received his injury.

The defendant was a carpenter and contractor engaged in the business of altering and repairing the interior of vessels lying in the Port of New York for whomsoever might need his services. He had entered into contract with the owners to make repairs upon The Wyoming, an ocean steamer employed, among other things, in the transportation of fresh meat, and needing alterations in the hold to accommodate the traffic in which she was engaged. The defendant had employed for the performance of the work a superintendent who had general charge of the job and authority to engage all workmen under him, necessary to perform the contract. The plaintiff's intestate was a shipjoiner and was one of the men so employed.

The defendant exercised no personal supervision over the work, but devolved its whole management and control upon the superintendent, who was authorized to employ and discharge workmen; to regulate and direct the manner of their work; to provide the means and appliances necessary to its prosecution, and determine the time and place of its performance.

The superintendent was employed by the master as his servant; but was delegated with the discharge of all those duties which, in the conduct of such work, rested upon the master to perform in respect to the persons employed thereon. So far as this action is concerned, he may therefore be regarded as standing in the place of master to the persons employed in the work. *Corcoran* v. *Holbrook*, 59 N. Y. 520; *Pantzar* v. *Tilly Foster Iron Min. Co.* 99 N. Y. 373.

It is not, however, every act of a superintendent for which a master is liable; for notwithstanding his general supervisory power he is still a servant and, in respect to such work as properly belongs to a servant to do, is, while performing it, discharging the duty of a servant for whose negligence and carelessness the master is not responsible to coservants. *Crispin* v. *Babbitt*, 81 N. Y. 516.

It was said in the *Crispin Case* that "The liability of the master does not depend upon the grade or rank of the employé whose negligence causes the injury. A superintendent of a factory, although having power to employ men, or represent the master in other respects, is, in the management of the machinery, a fellow servant of the other operatives . . . The liability of the master is thus made to depend upon the character of the act in the performance of which the injury arises, without regard to the rank of the employé performing it. If it is one pertaining to the duty the master owes to his servants, he is responsible to them for the manner of its performance. The converse of the proposition necessarily follows. If the act is one which pertains only to the duty of an operative, the employé performing it is a mere servant; and the master, although liable to strangers, is not liable to a fellow servant for its improper performance."

In that case while the plaintiff was engaged in lifting the fly-wheel of an engine off its center, the superintendent carelessly let the steam on and started the wheel, throwing the plaintiff on to the gearing wheels, and thus occasioned the injuries complained of.

There is no question in this case but that the superintendent employed was a fit and competent person to have charge of the work to be done, or but that he was a skillful and experienced workman; and the sole question in the case is whether the special work in which he was engaged at the time of the accident belonged to the class which pertained to the duty of a master to perform or not.

In considering this question, it is not necessary to limit or restrict the rules defining the general duties and obligations of masters, engaged in mechanical employments, to their servants; for, under the broadest definition laid down in the authorities, we think the respondent fails to bring this case within the rule imposing liability upon masters.

The case of *Pantzar* v. *Tilly Foster Iron Mining Company*, *supra*, is referred to by the respondent as sustaining the recovery, and the question may therefore be tested by the rule there laid down without doing injustice to the plaintiff. It was there said that "The master owes the duty to his servant of furnishing adequate and suitable tools and implements for his use, a safe and proper place in which to promote his work, and, when they are needed, the employment of skillful and competent workmen to direct his labor and assist in the performance of his duties."

In that case the servant had been assigned to labor under an overhanging ledge in a mine, which had become disintegrated and cracked, to the knowledge of the master, and threatened to fall upon and injure those working beneath it. We held that the master was charged with the duty of exercising care and prudence in the protection of his servants from the known and inherent dangers of the situation, and, having failed to perform that duty, was liable to his servants for an injury arising from an omission to do so.

The proof in this case does not show that the master omitted the performance of any such duty. He had provided a skilled and competent man to superintend and direct the work; a sufficient force, with all necessary and proper means and appliances, to perform it, and a safe place, free from any inherent dangers, in which to carry it on. He was not chargeable with the consequences of a place for work made dangerous only by the carelessness and neglect of fellow servants, or for the negligent manner in which they used the tools or materials furnished to them for their work.

The plaintiff's intestate at the time of the

accident was engaged in the hold of the vessel, repairing a bulkhead situated near the hatchway. Three decks extended above him, having corresponding openings, constituting hatchways, and were ordinarily covered by hatches; but, when uncovered, presented an open space some twelve or fifteen feet square, reaching from the hold, where the plaintiff's intestate was employed, through all of the decks to the spar deck, some twenty-five feet above him. This vessel was constructed in the usual and ordinary mode of such steamers, and there was nothing about the arrangement of the hatchways, their appliances, or the various decks of the vessel, which presented any danger, if used in their usual and customary manner, to those employed about them.

Upon the occasion in question the superintendent stood on the spar deck, near the hatchway, and had occasion to cause a water tank to be let down from the main deck to the hold. In order to do this it was necessary to uncover the hatchway on the main deck. He directed the foreman of the men in the hold to send up assistants to do this work, and two men, viz., Holbrook and Torrey, were sent on this service. The men usually worked in pairs, and Torrey was Holbrook's assistant.

These hatches were quite heavy, and the work of removing them was considered dangerous, and two men were invariably employed in its performance. The hatches consisted of thick plank about six feet long and two and a half broad, and having holes cut in the corners at the respective ends, diagonally opposite, to enable the men handling them to secure a firm hold. When Holbrook and Torrey arrived at the hatchway they advanced on opposite sides towards it, and Rouse, another employé, had also approached it on the side opposite Holbrook in a position to assist him, when the superintendent called out to Holbrook and said: "Holbrook, take off that hatch." Holbrook thereupon seized one end of the hatch, and, supposing either Rouse or Torrey had hold of the other end, lifted it up and pulled the opposite end from its resting place.

Torrey and Rouse, each waiting for the other, did not in fact get hold of the hatch, or, if they did, they let go, and it went through the hatchway, twisting itself by its weight out of Holbrook's hands, and, after striking the steerage deck, bounded off and fell into the hold, striking the plaintiff's intestate on the leg, breaking it in several places. It appeared that the decedent left the place where he was at work, and comparatively safe, and had advanced under the hatchway to obtain some nails, to use in his work, from a keg placed there by some one, but by whom does not appear. While thus engaged he was struck by the hatch.

There is no reasonable ground for claiming that Gray, by calling upon Holbrook to remove the hatches, intended that he should do so alone, or to exclude others, whom he had called there expressly to assist in the work, from co-operating with him. Holbrook and Torrey both understood that they were both required to remove the hatches, and would have co-operated but for the fortuitous presence of Rouse in the place where he stood.

It was a usual and customary practice for men engaged in the work of removing hatches on shipboard to give notice to persons below, by calling out to them to stand from under, or similar words, importing a caution to such persons. This custom was known to all of the persons engaged in removing the hatches, and, as testified to by several witnesses, in various parts of the vessel, was complied with on this occasion. Other witnesses, however, among whom was plaintiff's intestate, testified that they did not hear the caution.

Assuming that this evidence presented a question of fact for the jury, and that it might properly find that no signal was given, yet the duty of giving the caution necessarily belonged to those engaged in executing the work, and not to the master. It pertained purely to the mode of execution, and rested upon those who were engaged in its performance and were well informed of the customary usage in respect thereto. It was no part of the duty of the master to remove hatches or direct the particular mode of doing so, any more than to direct workmen in the use of the tools with which they performed their work. There were customary and established modes of performing such services, and each employé was expected to do his work in the manner and style to which he was accustomed, without special directions in respect thereto.

It was entirely immaterial whether the superintendent undertook to perform the work of removing hatches or ordered it to be done by others; he was in either case engaged in performing the duty of a workman. The master had furnished abundant help to do the work and had done all that was required of him; and it was the fault of the servants that a sufficient number did not co-operate to perform it safely, or do it in the manner prescribed by custom.

It would be extending the liability of a master beyond any established rule to require him to oversee and supervise the execution and detail of all mechanical work carried on under his employment, and there is no rule of law which authorizes it.

The risks arising to employés from the negligence and carelessness of fellow workmen are incident to the service in all mechanical employments, and must be borne by the servant; and even with this limitation the field of the master's liability is sufficiently broad to impose upon him most onerous obligations in the conduct of industrial enterprises. He is not the insurer of the lives and safety of those in his employ, and, after he has performed the duties which the law enjoins upon him, is exempt from liability for injuries arising from accidents occurring in the ordinary and usual mode of prosecuting work.

The judgments of the Courts below should be reversed and a new trial ordered, with costs to abide the event.

All concur.

James S. COX *et al.*, *Respts.*,
v.
Edgar O. PEARCE *et al.*, *Appts.*

(112 N. Y. 637.)

1. **The failure of an agent to communicate to his principal** information acquired by him in the course and within the scope of his agency, is a breach of duty to his principal; but as notice to the principal it has the same effect as to third persons as though his duty had been faithfully performed.

2. **If a person gives notice of his withdrawal** from a firm, to an agent with authority to receive orders for an article, when the latter seeks from him, as a supposed partner, an order from the firm for such article, it is of no consequence so far as the effect of the notice is concerned, that on a subsequent sale to a new firm of the same name, the agent had forgotten the notice.

3. **Notice to a party, actual or constructive, in a particular transaction,** of a fact which exempts another from liability in that transaction, is notice in all subsequent transactions of the same character between the same parties.

4. **Notice to a special representative** for procuring orders for coal from a firm who acts exclusively in the interest of certain dealers, and who has previously procured orders from the firm, on soliciting another order, that one of the former members of the firm had withdrawn, constitutes notice to the dealers whom he represents.

(March 5, 1889.)

APPEAL by the executors of defendant, Hosea O. Pearce, deceased, from a judgment of the General Term of the Supreme Court, Second Department, granting plaintiffs' motion for judgment on a verdict directed in their favor by the Kings Circuit subject to the opinion of the General Term, in an action to recover the price of certain coal. *Reversed.*

Previously to November 1, 1878, Hosea O. Pearce was a member of the firm of Pearce & Hall. On that day such firm was dissolved by the withdrawal therefrom of said Pearce. During the years 1877 and 1878, prior to such withdrawal of Pearce, the firm of Cox & Boyce sold coal on credit to the firm of Pearce & Hall, through one George Marriott, a coal broker. Subsequently to Pearce's retirement from the firm he informed Marriott, when the latter approached him for an order for coal, that he had withdrawn from the firm. Marriott did not communicate this information to Cox & Boyce. After that sales continued from time to time up to May or June, 1884, when coal was sold to recover the value of which this suit was brought against the firm of Pearce & Hall and Hosea O. Pearce was made a party defendant.

Other material facts appear in the opinion.

Mr. **Albert G. McDonald,** for appellants:

The actual notice of his retirement, given in 1878 by Hosea O. Pearce to George Marriott, the customary representative of Cox & Boyce, at the very time that Marriott was endeavoring to effect another sale of coal for Cox & Boyce, and in immediate relation to his duties to them in the premises, was notice to Cox & Boyce, and his knowledge then obtained was in legal effect the knowledge of plaintiff Cox. This result is not affected by the consideration whether Marriott then fulfilled his duty and communicated the fact to his principal, Cox, or neglected his duty by failing to so communicate it.

See *Bank of U. S.* v. *Davis*, 2 Hill, 451; Story, Agency, 8th ed. § 140; Ewell's Evans, Agency, *164; Edwards, Brokers & Factors, § 83; *Hier* v. *Odell*, 18 Hun, 314; *Sutton* v. *Dillaye*, 3 Barb. 529; *Page* v. *Brant*, 18 Ill. 37; *Ingalls* v. *Morgan*, 10 N. Y. 184.

Messrs. **Leavitt & Keith,** for respondents:

An outgoing partner of a firm must take his name out with him, for if he leaves it behind him he is to be considered as still holding himself out as a partner, whatever may be his real relation.

Vernon v. *Manhattan Co.* 22 Wend. 183; see Senator Verplanck's opinion at p. 193, approved by this court, in *City Bank* v. *McChesney*, 20 N. Y. 243; Story, Partn. § 160.

Marriott's knowledge gained in a prior transaction cannot be imputed to the principal, unless it is shown to have been present in the agent's mind at the time of the transaction in question.

The Distilled Spirits, 78 U. S. 11 Wall. 356 (20 L. ed. 167); *Chouteau* v. *Allen*, 70 Mo. 341; *Yerger* v. *Barz*, 56 Iowa, 81; *Lebanon Sav. Bank* v. *Hollenbeck*, 29 Minn. 322; *Fairfield Sav. Bank* v. *Chase*, 72 Maine, 226, 39 Am. Rep. 319 and notes, 322-331.

Marriott's knowledge cannot be imputed to Cox & Boyce.

Fairfield Sav. Bank v. *Chase*, 72 Maine, 226; notes to *S. C.* 39 Am. Rep. 322-331.

If an outgoing partner relies on notice to an agent he must show that the agent was an agent for such a purpose, that it was fairly within the scope of his agency.

Wade, Notice, § 502; Abb. Trial Ev. 224. See also *Weisser* v. *Denison*, 10 N. Y. 77; *Stewart* v. *Sonneborn*, 49 Ala. 178.

A broker is not an agent except in a most limited way.

Dos Passos, Stock Brokers, chap. 1; *Touro* v. *Cassin*, 1 Nott & McC. 173; *Coddington* v. *Goddard*, 16 Gray, 436.

Can it be possible that such a person is an agent for the purpose of receiving notices of dissolution? In answer we invoke the principles of the following cases:

Fulton Bank v. *N. Y. & S. Canal Co.* 4 Paige, 127; *Powles* v. *Page*, 3 C. B. 16; *Atlantic State Bank* v. *Savery*, 82 N. Y. 291; *Roach* v. *Karr*, 18 Kan. 529; *Davis I. W. Wagon Wheel Co.* v. *Davis W. Wagon Co.* 20 Fed. Rep. 699; *Brown* v. *Bankers & B. Teleg. Co.* 30 Md. 39; *Barnes* v. *Trenton Gas Light Co.* 27 N. J. Eq. 33; *De Kay* v. *Hackensack Water Co.* 38 N. J. Eq. 158; *Ford* v. *French*, 72 Mo. 250; *Templeman* v. *Hamilton*, 37 La. Ann. 754; 16 Am. Law Reg. N. S. 1.

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

The notice given in 1878, by Hosea O. Pearce to Marriott, on the occasion of the application of Marriott to him for an order from Pearce &

Hall, for another cargo of coal, that he had retired from that firm, was, we think, notice to Cox & Boyce. It is conceded that Hosea O. Pearce withdrew from the firm of Pearce & Hall November 1, 1878, and that the business was continued thereafter, under the same firm name, by one of the partners in the original firm, and two new members associated with him.

The only serious question upon the effect of the notice given to Marriott, arises upon the point whether he was, in law, the agent of Cox & Boyce, and received the notice in that capacity, so that knowledge of the dissolution communicated to him by the retiring partner of the firm of Pearce & Hall was imputable to Cox & Boyce.

If the knowledge of Marriott was acquired in the course of his agency, and while engaged in a transaction for Cox & Boyce, which made the disclosure to him suitable, and the receiving of such notice was within the scope of his agency, it was in law notice to his principals, although never communicated to them.

The failure of Marriott to communicate the information constituted, on the assumption stated, a breach of duty to his principals; but as to Pearce, the notice had the same effect as though the duty had been faithfully performed. *Ingalls* v. *Morgan*, 10 N. Y. 178; Story, Agency, § 140, and cases cited.

So, also, on the assumption that Marriott was the agent of Cox & Boyce, to receive the notice, it is of no consequence that in 1884, when the sale was made which is the subject of this action, he had forgotten it, and it was not present in his mind or recollection.

If in 1878 Cox & Boyce had actual or constructive notice that Hosea O. Pearce had withdrawn from the firm, it operated, once for all, as a revocation, from that time, of any authority to deal with the new firm on the credit of his name; and he could only be bound by new transactions on proof of a fresh authority.

The doctrine that notice to an agent before his employment as agent, or notice not acquired in the very transaction which is the subject of investigation, does not bind the principal as a constructive notice, except under certain limitations, is a generally accepted principle in the law of agency. *The Distilled Spirits*, 78 U. S. 11 Wall. 356 [20 L. ed. 167]; *Fairfield Sav. Bank* v. *Chase*, 72 Maine, 226.

But if the principal already had notice, actual or constructive, of a fact material to the new transaction, the new dealing must be judged, and the rights of the parties must be determined, on the assumption that the fact of which he had prior notice, actual or constructive, was then known to him.

In other words, notice to a party, actual or constructive, in a particular transaction, of a fact which exempts a defendant from liability in that transaction, is notice in all subsequent transactions of the same character between the same parties.

The case in the aspect we are now considering, comes to the question whether Marriott, when he was notified by Pearce, in 1878, that he had withdrawn from the firm, was the agent of Cox & Boyce, in such a sense that notice to him was notice to his principals. Cox & Boyce were coal dealers, and Marriott was a coal broker. But while he was not a salesman for, nor an employé of Cox & Boyce in the usual sense, he nevertheless was their special representative in procuring orders from Pearce & Hall for coal. The orders were frequent.

All the sales made by Cox & Boyce to Pearce & Hall were made through Marriott, and the purchasers, in giving the orders, understood that they related to coal of Cox & Boyce. Cox & Boyce paid Marriott his commissions, and they employed him to carry the coal sold from their wharf to the factory of Pearce & Hall, and paid him for his service. The bills were sent by mail. But, in most instances, Marriott received the checks of Pearce & Hall, and receipted the bills in the name of Cox & Boyce, "per George Marriott." It is stated in the case that he received the checks and receipted the bills without previous authority. But he delivered the checks to Cox & Boyce, who received them without objection.

Marriott was accustomed to call at the factory of Pearce & Hall from time to time to solicit orders upon Cox & Boyce.

Soon after November 1, 1878, he called for that purpose, and then saw Hosea O. Pearce, and stated to him "that he wanted to know if Pearce & Hall were ready for another cargo of coal." Pearce replied "that he had retired from the concern, and should do no more buying," and referred him to his son, one of the new partners.

Marriott, on the same visit, saw the son, and pursuant to a conversation then had with him, Cox & Boyce subsequently delivered a cargo of coal. The sale for which this action was brought was made in 1884, six years after, through Marriott.

We are of opinion that the relation of Marriott to Cox & Boyce was such as to charge that firm with the notice given to Marriott in 1878, by Hosea O. Pearce, of his withdrawal from the firm of Pearce & Hall.

The notice was material to the very negotiation in which Marriott was then engaged, and it was his duty to inform Cox & Boyce of the information he received, because it was a material fact bearing upon the question whether they should fill the order then made.

Marriott, in his dealings with Pearce & Hall, was not acting simply as a broker in the general sense. In receiving orders from Pearce & Hall, he was acting exclusively in the interest of Cox & Boyce, and it was so understood by the vendor and purchaser. Cox & Boyce permitted him to exercise powers, limited, it is true, but such as are usually exercised by agents.

The occasion called for the notification given by Pearce to Marriott. The application for another order was made to the former, according to the course of business prior to that time, and good faith required Pearce to make the disclosure; and we think he had a right to assume that it was within the scope of Marriott's agency, to receive it in behalf of his principals.

These views lead to *a reversal of the order. Judgment reversed and judgment absolute ordered for the defendants, with costs.*

All concur.

TEXAS SUPREME COURT.

TRINITY & SABINE R. CO., *Appt.*,
v.
A. F. MEADOWS.

(....Tex.....)

1. **A railroad company which has carefully and skillfully constructed its road,** under lawful authority, is not liable for an injury to a water mill by the clogging of its wheel and a partial filling of its reservoir and a stream of water by sand which was loosened by the construction of the road and washed into the stream and pond by heavy rains.

2. **The constitutional provision that "No person's property can be taken,** damaged or destroyed for, or applied to, a public use without adequate compensation," does not give an action against those constructing public works, for acts which, if done by persons in pursuit of a private enterprise, would not have been actionable.

(February 16, 1889.)

APPEAL by defendant, from a judgment of the District Court of Tyler County in favor of plaintiff in an action to recover damages alleged to have resulted to plaintiff's property because of the construction of defendant's railroad. *Reversed.*

The facts are sufficiently stated in the opinion.

Messrs. **Sam. T. Robb** and **J. P. Stevenson,** for appellant:

If appellant's roadbed was improperly constructed, but subsequently to the construction thereof some new cause has intervened, of itself sufficient to stand as the cause of the misfortune, the former must be considered as too remote; and the original wrongful or negligent act will not be regarded as the proximate cause, when any new agency not within the reasonable contemplation of the wrong doer has intervened to bring about the injury.

La. Mut. Ins. Co. v. *Tweed,* 74 U. S. 7 Wall. 52 (19 L. ed. 67); *Brandon* v. *Gulf City C. P. & Mfg. Co.* 51 Tex. 121; *Houston & G. N. R. Co.* v. *Parker,* 50 Tex. 347.

A railway company is not liable at common law for consequential damages sustained by a neighboring land owner from the manner in which its road has been constructed, if the company has built it in a skillful manner, and within the exercise of the power granted to the company. It is entitled to do the things within its location necessary and useful for the construction, maintenance and working of its road, and is not responsible, except under statute, for damages suffered in the reasonable exercise of this right.

5 Wait, Act. & Def. p. 302; Pierce, Railroads, pp. 197, 262–264; *Moyer* v. *N. Y. Cent. & H. R. R. Co.* 88 N. Y. 351, 8 Am. & Eng. R. R. Cas. 534, 535.

If defendant, in the construction of its road, constructed and built it at the points complained of by plaintiff, in a skillful and proper manner, and has maintained it and kept it up in the usual and customary manner, it is not liable in this action.

7 Wait, Act. & Def. pp. 262, 263, § 20; *Athens Mfg. Co.* v. *Rucker* (Ga.) 4 S. E. Rep. 885; *Houston Water Works Co.* v. *Kennedy* (Tex.) 8 S. W. Rep. 36.

Messrs. **West & Chester, S. B. Cooper** and **E. G. Geisendorff,** for appellee:

If appellant constructed its road in a skillful manner for ordinary railway purposes, but in such a manner that the wash from the same would damage plaintiff's property, knowing, or when by the exercise of reasonable care and prudence it might have known, that it would so damage his property, then it would be liable to appellee for any damages resulting from such construction.

Gulf, C. & S. F. R. Co. v. *Eddins,* 60 Tex. 656; Art. 1, § 17, Const. 1876; *International & G. N. R. Co* v. *Timmermann,* 61 Tex. 660; *International & G. N. R. Co.* v. *Pape,* 62 Tex. 313; *Gulf, C. & S. F. R. Co.* v. *Fuller,* 63 Tex. 467; Sedgwick, Damages, p. 284; Pierce, Railways, pp. 266, 267.

The measure of damages, in cases of this character, is the difference between the value of the property immediately before and immediately after the injury.

Sabine & E. T. R. Co. v. *Joachimi,* 58 Tex. 457; White & Wilson, Court of Appeals, § 445; Sedgwick, Damages, p. 267, note *c.*

NOTE.—*Injury to abutting lands by railroad construction.*

A railroad company is given a very large discretion in determining all questions relating to the equipment and operation of its road. Courts, as a general rule, will not interfere with the management of railways in these respects, except where the act sought to be enforced is specific, and the right to its performance in the manner proposed is clear and undoubted. Ohio & M. R. Co. v. People, 120 Ill. 200, 9 West. Rep. 167.

A railroad company is not liable for incidental damages to land abutting near a track, the road being run in all respects with care and skill. Beseman v. Pa. R. Co. 11 Cent. Rep. 563, 50 N. J. L. 235.

In the absence of the actual taking of property, consequential damages to abutting owners from the construction of a road upon the land of another affords no right of recovery. Ind. B. & W. R. Co. v. Eberle, 9 West. Rep. 211, 110 Ind. 542.

The right of a railroad company to exercise the right of eminent domain cannot be denied, on the ground that the company has erected a nuisance damaging other lands of the same owner. *Re* N. Y. W. S. & B. R. Co. 3 Cent. Rep. 196, 101 N. Y. 685.

In a suit against a railroad company for damages for injury to property caused by its construction work, proof that the injury was common to all adjacent property is not a bar to recovery. Texas & N. O. R. Co. v. Goldberg, 63 Tex. 685.

The Nebraska Compiled Statutes, chap. 16, § 95, providing for the ascertainment of damages, applies only to cases where private property is taken for public use, and not where it is simply damaged. Omaha Horse R. Co. v. Cable Tramway Co. 32 Fed. Rep. 727.

To entitle a land owner in Wisconsin to compensation for consequential injury resulting to his land from the location and operation of a railroad, there must be an actual taking of, or physical interference with, some portion of his property, in the strict sense of the term. Heiss v. Milwaukee & L. W. R. Co. 69 Wis. 555.

3 L. R. A.

See also 4 L. R. A. 735; 14 L. R. A. 133.

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

This suit was brought below by appellee against appellant to recover damages for an alleged injury to a water mill. It is averred in the petition that appellant constructed its railroad near and parallel to the stream on which the mill was situated, and that, as an effect of heavy rains, the land which was loosened by the construction was carried into the stream, and filled its channel as well as the pond which retained the water that was to furnish the motive power of the machinery.

The stream which supplied the pond was formed by two tributaries running in a general direction east and west, and forming a junction a few hundred yards above the mill. The railroad was constructed on the south side of the south fork. There were several smaller streams which flowed northwest into the south fork, and crossed by the line of the railroad.

The evidence showed that after the road was constructed sand was washed into the south prong, and measurably filled its channel, and was deposited on the bottom of the mill pond to the depth of several feet. The effect was to clog the water wheel of the mill with sand, and to diminish the retaining capacity of the reservoir. The defendant company introduced as a witness an engineer who testified that the road was carefully and skillfully constructed; and there was no testimony which tended to show that this was not true.

There was also testimony conducing to prove that the surface of the land over which the road was built, and which was drained by the small tributaries of the south fork of the mill creek above mentioned, was composed of loose sand, and that after the road was constructed the trees on it had been taken off for ties, and numerous roads made over it in hauling out the ties and timber. This testimony also tended to show that the filling up of the plaintiff's pond was caused by sand from this source.

The defendant company asked a special charge to the effect that, if the railroad was constructed in a skillful and proper manner, the defendant would not be responsible to plaintiff for any damage that may have resulted from the washing of the sand thrown out in its construction into the mill pond of the plaintiff. The refusal to give this is assigned as error. The question presented by this assignment is also raised by another, in which it is claimed that the court erred in overruling a motion for a new trial, on the ground of the insufficiency of the evidence to show any liability on the part of the defendant. If the railroad was properly constructed, can the plaintiff recover for the damages which he claims to have accrued to him in this case?

Our Constitution provides that "No person's property can be taken, damaged or destroyed for, or applied to, a public use without adequate compensation being made." Art. 1, § 17.

Under the provisions of other Constitutions which merely provide compensation to the owner for property taken for public use, it had been a question whether or not one whose property was immediately and directly damaged by a public improvement, though no part of it was appropriated, could recover for such damage; and in some cases it was held that when the result of the public work amounted to a practical appropriation, though no part was directly used, a compensation was to be allowed.

The insertion of the words *damaged or destroyed* in the section quoted was doubtless intended to obviate this question, and to afford protection to the owner of property, by allowing him compensation, when by the construction of a public work his property was directly damaged or destroyed, although no part of it was actually appropriated. But we do not think that provision was intended to apply to such consequential damages as are claimed in this case.

In Mills on Eminent Domain, § 183, it is said that "If land is injured, and in consequence of an act which would have been the subject of an action at common law but for the statute, compensation may be required and awarded;" citing *Chamberlain* v. *West End of London & C. P. R. Co.* 31 L. J. N. S. Q. B. 201.

It may be doubted if our Constitution intended to extend the recovery of compensation beyond the rule here indicated; that is to say, if a railroad company, condemned or otherwise, acquired for its purposes a right of way over land, and in constructing its road did an act injurious to an adjacent neighboring proprietor, for which, if done by the original owner, he would have been responsible at common law, the company should be liable to compensate the proprietor so injured.

We do not understand that it was intended to give an action against those constructing public works, for acts which if done by persons in pursuit of a private enterprise would not have been actionable.

Admitting, for the argument's sake, that the road was skillfully constructed, does the plaintiff show any cause of action in this case? We think not. Our statute provides that railroads must be so constructed as not to interfere with the natural flow of the water (Rev. Stat. art. 4171), and we have numerous cases in which parties have been permitted to recover against railroad companies for failure to comply with this law. But there the cause of action is predicated upon the failure to construct the railroad in the proper manner so as to permit the natural flow of the water.

In the present case, neither the living water nor the surface water has been interrupted or diverted. The defendant has properly constructed its roadbed, and in so doing has displaced from its original position considerable quantities of sand, which, as plaintiff claims, has flowed into his pond, and obstructed the operation of his mill.

If the owners of the sand hills which constitute the water shed from which the waters flowed into the stream from its south side had cleared and plowed them for purposes of cultivation, it would seem probable that the same result from the washing of the sand would have occurred if the railroad had never been built. Would the land owners have been responsible for the damages resulting in such a case? We think not.

If the owner of the land for his private use had constructed a tram or other road, and had thereby loosened the soil by cuts and fills, and the sand so filled had been carried by water flowing in its natural channels into plaintiff's

pond, and had filled it, would such owner have been responsible for the consequences?

This question must also be answered in the negative. We see no reason why a corporation constructing a railroad for public uses should be held to a different rule of liability. The cases cited by appellee do not support a different rule.

In *Gulf Railway Company* v. *Eddins*, 60 Tex. 656, and *Gulf Railway Company* v. *Fuller*, 63 Tex. 467, each of the appellees (who were plaintiffs below) was the owner of the property fronting on a street which was diminished in value by the construction of the railroad along the street. They had an easement in the street, and so far as the construction and operation of the railroad interrupted that easement, and interfered with that right, it was a direct injury to their property.

International Railway Company v. *Timmermann*, 61 Tex. 660, was a case in which damages were sought to be recovered for the destruction of property by fire communicated by the sparks of a passing engine. The opinion recognizes the doctrine that if there had been no proof of negligence in permitting the escape of the sparks, there could be no recovery.

In *Gulf Railway Company* v. *Holliday*, 65 Tex. 512, the foundation of the action was the alleged failure of the company to provide sufficient waterways. This was a failure of a statutory duty, and was clearly negligence.

In *International Railway Company* v. *Pape*, 62 Tex. 313, the ground of action was similar to that in the *Holliday Case*.

Crawford v. *Rambo*, 44 Ohio St. 279, 4 West. Rep. 445, was a suit to restrain an interference with the natural flow of water in a stream.

It is apparent that none of these cases sustain the contention that where a railroad is properly and skillfully constructed, and the flow of the water across the track is not diverted, the company can be held liable for damages resulting from the sand which has been loosened by its construction being carried by freshets upon the land of another proprietor. If a corporation does an act which it acquires a right to do by virtue of its franchise granted for a public use, and if a person having no franchise could not have done the act lawfully, and the property of another is directly damaged, then we understand that the constitutional provision requires that, notwithstanding the franchise, the corporation shall be liable. In other words, the Constitution prohibits the grant of franchise to a corporation, which will carry with it immunity for damages which may proximately result to property from the exercise of the privileges.

We may recur to the cases of *Gulf Railway Company* v. *Eddins*, and *Gulf Railway Company* v. *Fuller*, above cited, for an illustration of the principle. There, but for the franchise granted by its charter, the railroad company could not have constructed and operated its line of road along the streets of cities through which it might run. Property fronting upon the streets was damaged by reason of the exercise of the powers granted by the charter, and the company was properly held liable to make compensation.

In the present case the act done was lawful for any owner of the land to do, without authority from the Legislature; and hence, as to the company, it was not an act unlawful, but for the franchise granted to it. The owners of lands may make such excavations upon them as they see fit, without liability for such damages as are claimed to have resulted in this case, provided they are not negligently or wantonly made. The act of the defendant company was an act lawful for any proprietor to do, and not an act merely made lawful by the grant of a franchise.

We, therefore, think the court erred in refusing the charge above mentioned, and in overruling the defendant's motion for a new trial. This renders it unnecessary to discuss several other questions that are presented in the briefs. We will remark, however, that if it had been shown that the capacity of the pond could have been restored at a less expense than the deterioration in the value of the mill as it stood, the measure of damages would have been the cost of restoring it.

There was evidence that the damages could have been repaired by raising the dam, but the cost of this work was not shown. If this had been shown, and the cost was less than the depreciation in the value of the mill as it stood, to it should have been added the value of the use of the mill during the time it necessarily remained idle.

For the error of the court in overruling the motion for a new trial, and refusing the charge above referred to, *the judgment is reversed, and the cause remanded.*

EAST LINE & RED RIVER R. CO.,
Appt.,
v.
Mary L. CULBERSON.

(....Tex.....)

1. **The servant of a railway company operating a railroad belonging to another corporation,** under a lease made without statutory authority, cannot recover against the owner of the road for injuries sustained by the negligence of his employer or of its officers or agents.
2. **Bringing in one of the beneficiaries who is a necessary party** in an action for causing the death of a person, after the expiration of the time allowed for bringing the suit, obviates an objection for nonjoinder of a necessary party, although the action as to such party is dismissed on a plea of the Statute of Limitations.
3. **A suit in behalf of some of the beneficiaries** under a statute giving a right of action for the death of a person, does not affect the running of the statute against another who is not joined with them.
4. **Affidavits to show that a bill of exceptions was improperly allowed** and signed by the trial judge, are not admissible in an appellate court, when it was allowed, signed, and filed as a part of the record during term time. The record cannot be attacked in that way.

(December —, 1888.)

APPEAL by defendant, from a judgment of the District Court of Camp County in

See also 4 L. R. A. 151; 7 L. R. A. 345.

favor of plaintiff in an action to recover damages for the death of her husband, alleged to have occurred on defendant's road. *Reversed.*

The facts are fully stated in the opinion.

Messrs. **Todd & Hudgins,** for appellant:

This action could not be prosecuted without the joinder of Mrs. C. Y. Culberson as an actual or beneficial party plaintiff, and therefore this suit was not commenced and prosecuted within the meaning of the statute until she was brought before the court in plaintiff's second amended original petition.

East Line & R. R. R. Co. v. *Culberson*, 68 Tex. 667; Rev. Stat. art. 3202.

The filing and prosecution of a suit to which Mrs. C. Y. Culberson was a stranger did not stop the running of the Statute of Limitations, against any claim for damages she might have had; and therefore the limitation demurrer as to that portion of the petition praying damages for her use and benefit ought to have been sustained.

Rev. Stat. art. 3202; *Henderson* v. *Griffin*, 30 U. S. 5 Pet. 157 (8 L. ed. 79).

The evidence in the case discloses no negligence chargeable to the appellant by reason of which it can legally be held liable for damages in this case.

Dallas v. *Gulf, C. & S. F. R. Co.* 61 Tex. 196; *Robinson* v. *Houston & T. C. R. Co.* 46 Tex. 541; *Texas & P. R. Co.* v. *Harrington*, 62 Tex. 597; 2 Wood, Railway Law, p. 1251 *et seq.*; 3 Wood, Railway Law, pp. 1494 *et seq.*, 1501–1510.

Whether Culberson brought his master's train upon the track, where he was injured, with or without authority of law, if his injury occurred by reason of defects in the instrumentalities furnished for his use by such master, no one but the master is responsible.

Augusta & K. R. Co. v. *Killian* (Ga.) 4 S. E. Rep. 165. See *Sawyer* v. *Minneapolis & St. L. R. Co.* 38 Minn. 103, 33 Am. & Eng. R. Cas. 894; *Winterbottom* v. *Wright*, 10 Mees. & W. 109; *Loop* v. *Litchfield*, 42 N. Y. 358.

Messrs. **Moore & Hart, Sheppard & Thompson, J. M. Pouns** and **C. A. Culberson,** for appellee:

The evidence offered with reference to the operation and management of the road by other companies than appellant was properly excluded. The mere fact of operation and management was insufficient. The authority of the Legislature must have been previously shown and the exceptions provided for in the Constitution shown to exist in this case.

Const. art. 10; *R. R. Co.* v. *Rushing*, 69 Tex. 308.

This action is wholly statutory and is expressly authorized only upon proof of tort. That there may have been no privity of contract between the deceased and appellant, in a strictly legal sense, is immaterial.

Re Merrill, 11 Am. & Eng. R. Cas. 680; Rev. Stat. arts. 2899, 2900; *Nugent* v. *Boston, C. & M. R. Co.* 5 New Eng. Rep. 865, 80 Maine, 62; *Campbell* v. *Portland Sugar Co.* 62 Maine, 552; Broom, Com. Law, 673–675.

It was the duty of appellant, under its charter and under the law, to operate its road, to provide a safe roadbed, to furnish necessary and safe machinery for its operation, and to put in charge thereof a sufficient number of capable and efficient operatives.

If it saw proper in a lawless manner to evade these duties and intrust their performance to others it did so at its peril. It is fully responsible for the proper exercise of all the duties devolving upon it as such corporation; and any negligence upon the part of those to whom it illegally confided these duties is chargeable against it.

Houston & G. N. R. Co. v. *Meador*, 50 Tex. 85; *Mo. Pac. R. Co.* v. *Watts*, 63 Tex. 549; Wood, Master & Servant, §§ 305, 308, 316, 321, 438, p. 625 and note 8; *Balsley* v. *St. Louis, A. & T. H. R. Co.* 6 West. Rep. 469, 119 Ill. 68; *West* v. *St. Louis, V. & T. H. R. Co.* 63 Ill. 545; *Smith* v. *N. Y. & H. R. Co.* 19 N. Y. 127; *Nelson* v. *Vermont & C. R. Co.* 26 Vt. 717; *Sawyer* v. *Rutland & B. R. Co.* 27 Vt. 370; *Merrill* v. *Central Vt. R. Co.* 54 Vt. 200, 11 Am. & Eng. R. Cas. 680; *Nugent* v. *Boston, C. & M. R. Co.* 5 New Eng. Rep. 865, 80 Maine, 62; *Washington, A. & G. R. Co.* v. *Brown*, 84 U. S. 17 Wall. 451 (21 L. ed. 678); *Freeman* v. *Minneapolis & St. L. R. Co.* 28 Minn. 443; *Aycock* v. *Raleigh & A. A. L. R. Co.* 89 N. C. 321; *Sellars* v. *Richmond & D. R. Co.* 94 N. C. 654, 25 Am. & Eng. R. Cas. 451.

The original action having been instituted in time, the mere omission of all necessary or proper parties would not affect it in its entirety. The requirement of the statute that the "action" should be commenced and prosecuted within one year was fully met. The amendment making the mother a beneficiary was not a new cause of action, but only a fuller statement of the original.

Rev. Stat. art. 3202; *Prigden* v. *McLean*, 12 Tex. 423; *Thoutenin* v. *Lea*, 26 Tex. 612; *Becton* v. *Alexander*, 27 Tex. 659; *Burleson* v. *Burleson*, 28 Tex. 383; *Martin* v. *Ihmsen*, 62 U. S. 21 How. 394 (16 L. ed. 134); *Bradford* v. *Andrews*, 20 Ohio St. 208; *Agee* v. *Williams*, 30 Ala. 636.

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

W. A. Culberson, while operating a train upon the road of the appellant company as conductor, lost his life in endeavoring to make a coupling between the engine under his control and a train in its front. The appellee, who was his wife, brought this suit, on behalf of herself and other beneficiaries, to recover damages under the statute for the injury. She alleged that the accident resulted from a defect in the engine and the incompetency and carelessness of the engineer.

During the progress of the trial the defendant offered to prove by a witness that at the time of the accident the road was not operated or controlled by the defendant company, and that the deceased was not in its service at the time, but was in the employment, and was acting for the Missouri, Kansas & Texas Railway Company, another corporation. Upon objection to this testimony by the plaintiff, it was excluded by the court.

There is a plea in abatement in the record, which sets up that the road of the defendant company was leased to the Missouri, Kansas & Texas Railroad Company by authority of law; but it was neither sworn to nor insisted

upon at the trial, and it must be considered as waived. If, however, the facts justified the conclusion, it was competent, however, for defendant to show under its general denial that although the injury was received upon its road, and was actionable, another company was responsible for such injury, and that it was not liable. Did the evidence offered tend to show this?

The defendant did not offer, in connection with its other testimony, to prove that the Missouri, Kansas & Texas Company was operating and controlling its road by authority of any statute, and we think the question must be treated as if no such authority existed. We have then the question of the right of a servant of a railway company, operating without authority of statute a road belonging to another corporation, to recover of the owner damages for personal injuries resulting to him in the course of his employment, through the negligence of his employer, or of its officers or agents.

This is a new question in this court, and one upon which we have found no direct authority which is at all satisfactory. This court has held that a railroad company cannot without statutory authority lease its road to another so as to absolve itself of its duties to the public, and that when such lease is made the lessor is liable for an injury to a passenger resulting from the negligence of the lessee. *International & G. N. R. Co.* v. *Underwood*, 67 Tex. 589; *East Line & R. R. Co.* v. *Rushing*, 69 Tex. 308.

We have also held that, in case of an unlawful lease or sale, the lessor or vendor is liable to a shipper for the failure of the company operating the road to furnish transportation upon his demand. *Central & M. R. Co.* v. *Morris*, 68 Tex. 49.

There have been numerous decisions in other States holding the lessor liable, when the lease is unauthorized, for injuries to live stock, and to persons crossing the track, caused by the negligence of its lessees; so that it may now be considered the accepted and settled doctrine that, in all cases where one railroad company is operating its trains upon the road of another without authority of law, the owner of the road remains responsible for the discharge of its duties to the public, and becomes liable for injuries resulting from the lessee's failure to perform those duties.

The lessor, by accepting its charter, assumes the obligation to carry passengers safely over its line. If it intrusts that duty to another company, and a passenger is injured, it is responsible. It binds itself to carry all freight offered to it, and to deliver it safely. Should its lessee fail to do this, it is liable. It assumes to operate its road safely and carefully, so as not negligently to destroy or damage property, and not to injure persons who have the right to pass on or near the track. Should its lessee negligently do damage to property, or inflict personal injuries upon wayfarers crossing the road, this is failure of duty on its part, and it is responsible for the wrong. But the duties which are owed by a railroad company to its servant are not duties owed to him in common with the public, but grow out of the contract of service. He assumes the relation of servant to his employer voluntarily, and out of it arises the reciprocal obligations from one to the other.

It seems to us that the relation of the servant of the company operating the road to the owner is very different from his relation to his employer, and that the relation of the owner of the road to him is different from its relation to the general public. His contract is not with the company owning the road; and it may be asked, Does the latter owe him the duty of a master to his servant, or guaranty that the master with whom he has voluntarily contracted will perform its obligation to him?

It may be that if the injury had occurred by reason of a defect in the roadbed or track, and not by reason of a defect in the engine, the company charged with the duty of keeping up the road would be liable. But if it were true that the injury was caused entirely by another company operating the owner's road, and was inflicted upon one of its own employés, by reason of a defect in machinery entirely under its control, it is difficult to see upon what principle of policy or justice the lessor should be held liable merely because it owned the road.

In the case proposed to be made by the evidence offered, it seems to us that the liability of the deceased's employer would have been precisely the same on the defendant's road as if the train had been running upon its own road at the time of the accident. The act of the Missouri, Kansas & Texas Company in operating the road without a license from the Legislature, if such was the fact, was merely illegal in the sense that it was unauthorized; and the object in holding the lessor responsible in such a case is certainly not to impose a mulct or fine by way of punishment. The reason for the rule is the protection of the public who need the protection.

The passenger and the shipper of goods have no option, but must avail themselves of the services of the lessees, whether the lease is authorized or not. The law will not permit the owner of the road to shirk its duty to them by turning over its road to another company; nor will it permit it to deny its liability where it has allowed such other company, without authority of law, negligently to injure wayfarers over the track or property along the line. There is no privity between the persons injured in such case and the operating company.

It is not so with an employé who voluntarily enters the service of the latter company with a knowledge of the facts, and participates knowingly in the wrong, if wrong it be.

Where in similar cases a recovery has been permitted against a lessor, it has usually been allowed upon various considerations of public policy: *first*, because the franchises granted are in the nature of a personal trust, and sound policy demands, so far as the general public is concerned, that the corporation receiving the grant should be held responsible for the proper execution of the powers granted; and *second*, for the reason that to deny the responsibility of the lessor would enable a railroad to shirk its responsibility, and to injure the public by placing its property under the control of irresponsible parties; and *third*, because a person who had received an injury at the hands of the

operating company, and was ignorant of the relations between that company and the owner of the road, might be at a loss to determine against which to bring his action, and thereby placed at a disadvantage in seeking a redress of his wrongs.

None of these reasons apply to the case of the servant of a lessee who is injured through the neglect of his employer. He needs no protection as one of the general public, because he can enter the service or not as he chooses. He is under no compulsion to take employment from an irresponsible company; and he certainly knows whom to sue for a wrong inflicted through his employer's neglect, for the latter is certainly liable to him in such a case. The reason of the rule which holds the lessor liable fails in case of an employé of the lessee; and we think that to follow it in a case like this would be to give it an arbitrary, and not a reasonable, application.

We conclude that the court erred in excluding the testimony, and for this error the judgment must be reversed.

We do not know what the evidence may disclose upon another trial, as to the relations of defendant corporation and the Missouri, Kansas & Texas Company; and it would be futile to attempt to anticipate the questions that may arise. We merely hold now that the evidence offered and excluded tended, *prima facie*, to show that the defendant was not liable for the alleged injury.

This case was reversed upon a former appeal, because it was then held that the mother of the deceased should have been made a party as an active plaintiff, or as a beneficiary of the recovery. Since the remand of the cause the petition has been so amended as to bring the suit as well for her benefit as for that of the plaintiff and the children of the deceased.

To the amended petition, which was filed more than twelve months after the death of the deceased, an exception was interposed, upon the ground that the cause of action was barred by the Statute of Limitations.

As to the plaintiff and the original beneficiaries, the exception was not well taken. The making a new party did not set up a new cause of action.

The exception should, however, have been sustained as to the mother of the deceased. The action was neither brought by her, nor for her benefit, until twelve months had elapsed from the time her son died. The suit in behalf of the beneficiaries did not affect the running of the statute against her.

But defendant, having pleaded the statute against her, can no longer complain that she is not a party to the action.

We think the other questions raised by the appeal, except in so far as the sufficiency of the evidence to sustain a recovery is concerned, is not likely to arise upon another trial. Since the cause will be remanded, the evidence will not be discussed.

For the errors pointed out, *the judgment is reversed, and the cause remanded.*

A motion for rehearing having been subsequently made, **Gaines, J.**, delivered the following opinion on February 5, 1889:

This is a motion for a rehearing, and is accompanied by affidavits which are intended to impeach a bill of exceptions found in the record. This bill shows the ruling of the court, which in the opinion formerly delivered was held to be reversible error. The affidavits tend to show that the bill was improperly allowed and signed by the trial judge. It is not denied that it was allowed, signed and filed as a part of the record during term time. We are of opinion that the record cannot be attacked in this way. If by any undue practice the signature of the trial judge should be procured to a bill of exceptions, which he did not understand, and which he did not intend to sign, we think it would be competent for the court in which the trial was had, upon a motion made for that purpose, to strike it from the record. This might be done even after the adjournment for the term, and after an appeal had been perfected to this court.

The trial court has the power, in a proper proceeding, and upon proper proof, so to amend its records as to make them speak the truth, even after the jurisdiction has attached in the appellate court. If the amendment be made after the transcript has been filed in the supreme court, the record may be corrected in the latter court by a suggestion of its diminution and a motion for a certiorari. It cannot be corrected here in the first instance, and especially after the cause has been submitted. Besides, the affidavit of the trial Judge, which accompanies this motion, shows that at the time he signed the bill of exceptions he knew its contents. If we could disregard the bill, the motion for a rehearing should be granted; but we are of opinion that it must be treated as a proper part of the record in the case.

The question upon which the judgment in this case was reversed was not very fully discussed in the original briefs of counsel, and we have therefore deemed it proper to give it a careful reconsideration. The argument of appellees in support of the motion contains a very full citation of authorities, which have been carefully examined, but which have not changed our former opinion. We think a review of the cases cited will show that none of them are inconsistent with our views as formerly expressed.

Houston Railroad Company v. *Meador*, 50 Tex. 85, was a case in which the railroad company was held liable to the owner of land for the trespass of its contractors in entering upon his premises and constructing its road without having first condemned the right of way. The principle decided is that the act which the contractors were employed to perform being unlawful, so far as the land owner, whose land had not been condemned, was concerned, the company could not escape its liability by showing that the persons who committed the trespass were independent contractors to perform the work. The principle does not apply to the question presented in this case.

In *Missouri Pacific Railroad Company* v. *Watts*, 63 Tex. 549, it is said that the appellee being the servant of the Missouri, Kansas & Texas Railroad Company, which had leased and was operating the road of the International & Great Northern Railroad Company, the latter company would not be responsible to him for the negligence of the former, provided the

lease was authorized by law. It is not decided that the lessor would have been responsible if the lease had not been authorized.

In *West* v. *St. Louis Railroad Company*, 63 Ill. 545, it was held that the company was not liable to the servants of its contractors for an injury received through the contractors' negligence.

In *Sawyer* v. *Rutland Railroad Company*, 27 Vt. 370, the defendant company had made a contract with another company by which the latter had the privilege of running its trains over the former's road. It was the duty of the defendant to keep a certain switch on its road in order. Through the negligence of its servants the switch was misplaced, and a locomotive of the other company derailed, the derailment resulting in an injury to the plaintiff, who was a servant of the latter company, on duty upon the locomotive at the time of the accident. There the injury was the direct result of the negligence of the servant of the owner of the road, and the plaintiff was held entitled to recover. If, as seems to be contended in the present case, he was to be considered the servant, not only of the company who employed him, but also of the owner of the road, then he would have been the fellow servant of the switchman who caused the injury, and he could not have recovered.

The case of *Merrill* v. *Central Vermont Railroad Company*, 54 Vt. 200, virtually reaffirms *Sawyer* v. *Rutland Railroad Company*, *supra*. There it seems that the defendant company was running over a portion of the road of another company, and that this arrangement was authorized by law. It is apparent that the decision does not apply to the case now before us.

Another case cited is *Nugent* v. *Boston Railroad Company*, 5 New Eng. Rep. 8[illegible]5, 80 Maine, 62. There it is held that "A railroad corporation, over a section of whose track another company, by virtue of a contract, runs its trains, is liable in tort to the latter's brakeman, who, while in the due performance of his duty on his employer's train, receives a personal injury solely by reason of the negligent construction of the former's station house." There the injury complained of resulted directly from the negligence of the company owning the road. It was decided that they were charged with the duty of keeping their road in safe condition for the operation of trains, and that they were liable to the employé of the operating company for an injury resulting from a failure to perform this duty.

In *Washington Railroad Company* v. *Brown*, 84 U. S. 17 Wall. 445 [21 L. ed. 675], the lessor company was held responsible to a passenger on a train of the lessee who was improperly expelled from a car by a servant of the latter. The liability of the owner of the road to passengers on the operating company's trains was recognized in the former opinion.

Freeman v. *Minneapolis Railroad Company*, 29 Minn. 443, seems to have been an action by a wayfarer for an injury received from the railroad train at a public crossing.

Aycock v. *Raleigh Railroad Company*, 89 N. C. 321, was an action by the owner of land for damage caused to his timber by fire communicated by sparks from a passing engine.

Baisley v. *St. Louis Railroad Company*, 6 West. Rep. 469, 119 Ill. 68, involves the same principle as the case last cited.

Nelson v. *Vermont Railroad Company*, 26 Vt. 717, was a suit against a corporation owning a railroad, for a cow run over and killed by a train of its lessee. The liability which was held to exist in each of the five cases last named is distinctly recognized in the former opinion in the case before us.

The case of *Sellars* v. *Richmond Railroad Company*, 94 N. C. 654, 25 Am. & Eng. R. Cas. 451, was brought by the administrator of a servant of the defendant company directly against the company which employed him for injuries which resulted in his death. It throws no light upon the present case.

There are a few other cases cited in the arguments of counsel; but they are upon the same lines, and involve the same principles, as the cases just discussed. None of them are decisions upon the immediate question before us. These cases commented upon afford ample authority for holding that a railroad company, which without authority of law leases its road to another corporation, is responsible for the torts of the lessee, so far as the general public is concerned. Not one of them sustains the position of appellee that the lessor is liable to the servant of the lessee for injuries resulting from the negligence of the latter company.

We have found only one case in which a servant of the company operating a railroad under a license of the owner was permitted to recover of the latter for the negligence of the former's servants. This is the case of *Macon Railroad Company* v. *Mayes*, 49 Ga. 355. The case, however, presented peculiar complications, and there is another ground upon which the decision might properly have been rested. The immediate question before us was not discussed in the opinion.

We are satisfied that no well considered case can be found which sustains the doctrine contended for by appellee. A few may be found where the servant of the lessee has been permitted to recover of the lessor for injuries resulting from a faulty construction of its track or from negligence in failing to keep it in repair. But in such a case the injury results from the failure of the lessor to perform its immediate duty.

The argument in support of the motion for a rehearing assumes that we have in our opinion treated the plaintiff's suit as an action *ex contractu*. This is a mistake. The suit is for a tort. But the duty, the violation of which gives the ground of action, grows out of a contract. The petition alleges that the defendant was negligent in not furnishing a safe engine and a competent engineer, and that from this negligence the deceased received the injuries which resulted in his death. The duty of furnishing the deceased a safe engine grew out of the relation of master and servant, and this relation was created by his contract of employment.

We think it follows that if the deceased was employed as conductor of a train by a company operating the road under a lease, and

the injury resulted from the incompetency of the engineer, or the imperfection of the engine furnished him by the lessee, the lessee would be liable, and not the lessor.

It does not do to say that the lessee would be the agent of the lessor as applied to this case; this would be a mere fiction, not based upon any sound rule of law. The lessee, under an unauthorized lease, may be deemed the agent of the lessor, so far as the latter's duties to the public are concerned. Having undertaken by its charter to operate its road, the company which it puts in charge of its line may be looked upon as its agent, so far as its general duties under its franchises are concerned. But the duty which is owed to an employé of the lessee is a special one, and not a duty owed to him in common with the general public.

It is also urged that we a re in error in hold ing that the mother of the deceased was barred of her right of action by the Statute of Limitations. She was a necessary party to the suit, either as plaintiff or beneficiary in the first instance. She was not made a party until more than one year had elapsed since the death of her son. The amendment which alleged her existence, and prayed a recovery for her benefit as well as that of the other plaintiffs, presented for the first time her right; and it was a new cause of action so far as she is concerned.

We see no reason why the rule that applies to tenants in common in suits for the recovery of land, that one may be barred though the others are not, should not apply in this case.

The motion for a rehearing is overruled.

WEST VIRGINIA SUPREME COURT OF APPEALS.

Edna E. RECE, Admrx., etc.,
v.
NEWPORT NEWS & MISSISSIPPI VALLEY CO., *Plf. in Err.*

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

*1. **A corporation exists** only in contemplation of law, and by force of law, and can have no legal existence beyond the State or sovereignty by which it is created.

2. **While a corporation, by the same name may be chartered by two States,** clothed with the same capacities and powers, and intended to accomplish the same objects, and be exercising the same powers and duties in both States, yet it will, in law, be two distinct corporations—one in each State—with only such corporate powers in each State as are conferred by its creation in that State.

3. **One State** cannot, by a mere legislative declaration, make all corporations created by charter or the laws of other States domestic corporations of such State; at least it cannot, by such declarations, deprive the foreign corporation of its right to resort to the federal courts, in cases where such right is conferred by the Constitution and Laws of the United States.

4. **So much of section 30, chapter 54 of the Code of this State,** as declares that *foreign railroad corporations, doing business* in this State, shall in all suits and legal proceedings be held and treated as domestic corporations of this State, and requires any such corporation to file an agreement to that effect, is, so far as it attempts to deprive such corporation of the right to remove to the federal courts suits brought by or against it in the courts of this State, in cases in which it would otherwise be entitled to such right, inoperative and void; and such foreign corporation may exercise such right in any proper case, notwithstanding it has executed and filed such agreement in pursuance of the provisions of said statute.

*Head notes by SNYDER, P.

NOTE.—*Foreign corporation; right to removal of cause cannot be abridged by state legislation.*

A corporation is an inhabitant of the State which created it, or of the State which keeps its records and principal office. It can have no legal existence beyond the bounds of the sovereignty by which it is created. See Connor v. Vicksburg & M. R. Co. 1 L. R. A. 331 and note.

A state law requiring a foreign corporation to comply with certain regulations does not make it a citizen. N. Y. Piano Co. v. New Haven Steamboat Co. 2 Abb. Pr. N. S. 357; Baltimore & O. R. Co. v. Koontz, 104 U. S. 5 (26 L. ed. 643).

If a corporation is incorporated under the laws of two States, a case instituted against it by a citizen of one of the States in a suit brought in the other may be removed. Allegheny Co. v. Cleveland & P. R. Co. 51 Pa. 228; Chicago & N. W. R. Co. v. Whitton, 80 U. S. 13 Wall. 270 (20 L. ed. 571).

Where the same persons, by the same corporate name, have been incorporated with the same powers and the same objects, by another State, such an Act must be construed as a license enlarging the field of its operations, but shorn of none of its qualities as a corporation of another State: and it is *privileged* to elect to sue in the United States Courts. Mo. K. & T. R. Co. v. Texas & St. L. R. Co. (Tex.) 10 Fed. Rep. 497, 4 Woods, 360.

A State Legislature may exclude a foreign corporation, and the means of enforcing such exclusion, or the motives of such action, will not be inquired into. Doyle v. Continental Ins. Co. 94 U. S. 535 (24 L. ed. 148); State v. Doyle, 40 Wis. 220. But see Hartford F. Ins. Co. v. Doyle, 6 Biss. 461, 3 Cent. L. J. 41.

But it cannot be deprived of its right of removal by state legislation. Chicago & N. W. R. Co. v. Whitton, 80 U. S. 13 Wall. 270 (20 L. ed. 571).

The right to remove is not lost by the fact that it has an office in the State for the transaction of business. Hatch v. Chicago, R. I. & P. R. Co. 6 Blatchf. 105.

So a statute which allows a foreign corporation to do business in the State only on condition that it will agree not to remove suits, is unconstitutional, and such agreement is void. Home Ins. Co. v. Morse, 87 U. S. 20 Wall. 445 (22 L. ed. 365); Metropolitan L. Ins. Co. v. Harper, 3 Hughes, 220.

And a general waiver of the right to remove, in pursuance of a state statute, as a condition for transacting business in the State, is void. Home Ins. Co. v. Morse, 87 U. S. 20 Wall. 445 (22 L. ed. 365); Railway Pass. Assur. Co. v. Pierce, 27 Ohio St. 155; Baltimore & O. R. Co. v. Cary, 28 Ohio St. 208; *contra* N. Y. L. Ins. Co. v. Best, 23 Ohio St. 105.

(February 11, 1889.)

ERROR to the Circuit Court of Cabell County, to review a judgment in favor of plaintiff in an action to recover damages for the death of plaintiff's intestate alleged to have been caused by defendant's negligence. *Reversed.*

The facts and questions arising thereon are fully stated by the court.

Messrs. **J. H. Ferguson** and **Simms & Enslow,** for plaintiff in error:

Neither individuals by agreement, nor a State by its law-making power, can oust the jurisdiction of the United States Courts of their proper jurisdiction over persons and property as given by the Constitution of the United States and the laws made thereunder.

Home Ins. Co. v. *Morse*, 87 U. S. 20 Wall. 445 452 (22 L. ed. 365, 368).

In carrying on interstate commerce, corporations, equally with individuals, are within the protection of the commercial powers of Congress and cannot be molested in another State by state burdens or impediments.

Stockton v. *Baltimore & N. Y. R. Co.* 32 Fed. Rep. 14. See also *Pembina C. S. Min. & Milling Co.* v. *Pa.* 125 U. S. 190 (31 L. ed. 654); *Pensacola Teleg. Co.* v. *Western Union Teleg. Co.* 96 U. S. 12 (24 L. ed. 711); *Cooper Mfg. Co.* v. *Ferguson*, 113 U. S. 727 (28 L. ed. 1137); *Gloucester Ferry Co.* v. *Pa.* 114 U. S. 196 (29 L. ed. 158).

If a state statute cannot take away directly the right of any foreign corporation to remove its cases in state courts to the federal courts, much less can section 30 of chapter 54 of amended Code of West Virginia take away indirectly the right of a foreign corporation engaged in carrying on interstate commerce to remove suits when sued in the state courts to the federal courts.

Messrs. **Gibson & Michie** for defendant in error.

Snyder, P., delivered the opinion of the court:

Action of trespass on the case, commenced June 29, 1887, in the Circuit Court of Cabell County by Edna E Rece, administratrix of T. H. Rece, deceased, against the Newport News & Mississippi Valley Company, to recover damages from the defendant for its negligence in causing the death of the plaintiff's intestate.

There was a verdict and judgment thereon in favor of the plaintiff for $5,000, and the defendant has obtained this writ of error.

The first error assigned is that the circuit court improperly denied the motion of the defendant to remove the action to the District Court of the United States. The declaration was filed at the July Rules, 1887, and at the same rules the defendant filed its petition and bond, under the Act of Congress, passed March 3, 1887, to remove the action to the District Court of the United States for the District of West Virginia, sitting at Charleston, in said district, and exercising circuit court powers. The petition was in proper form, and alleged that the matter in controversy exceeds $2,000, and is between citizens of different States; that the plaintiff was, at the commencement of the action, and still is, a citizen of the State of West Virginia, and that the defendant was, and still is, a citizen of Connecticut, where it was incorporated under the laws of said State, and that it is not a citizen of the State of West Virginia.

At the August Term, 1887, the plaintiff filed her answer, to which the defendant filed a written replication; and the court, after overruling the respective motions of the plaintiff and defendant to reject said answer and replication for insufficiency, decided that the defendant, by accepting the provisions of section 30, chapter 54, of the Code of this State, had become a corporation of this State, and denied the defendant's motion to remove the action to the District Court of the United States, and the defendant excepted.

The facts upon which the court based its said ruling, as shown by the record, are as follows:

Prior to the year 1886 the defendant, the Newport News & Mississippi Valley Company, was incorporated under the laws of the State of Connecticut, with power to construct, buy, hold, own, lease, equip and operate any railroads, bridges, ferries, warehouses, telegraph and telephone lines, wharfs, steamboats, etc., in any State or Territory of the United States or foreign country, provided that said corporation shall not have power to lease, hold, own or operate any railroad within the State of Connecticut. This proviso was, by the General Assembly of Connecticut, in January, 1887, amended by adding thereto these words, "unless such railroad shall be held, owned or operated within said State, in conformity with the provisions of the general railroad laws of this State."

The said company, prior to the date of the injury complained of in the declaration, became the lessee of the road, property and franchises of the Chesapeake & Ohio Railway Company, a domestic corporation, and citizen of this State; and at said date, and since, as well as on and prior to the 27th day of July, 1886, the defendant company was engaged as a public and common carrier for hire of passengers and all kinds of freights from the Town of Newport News, in the State of Virginia, in and through the States of Virginia and this State to the City of Lexington, in the State of Kentucky, as such lessee of the said Chesapeake & Ohio Railway Company, and other railroad companies, and that it was then, and still is, operating a continuous line of railways, and carrying on interstate commerce, in and through the States aforesaid, having its principal offices in the City of New York, in the State of New York, and in the City of Richmond, in the State of Virginia; and that the defendant company did, on said 27th day of July, 1886, by a writing duly executed under its corporate seal and filed in the office of the Secretary of State of this State, accept the provisions of section 30, chapter 54, of the Code of this State, and agree to be governed thereby.

The said section 30 of the Code of this State is as follows: "Any corporation duly incorporated by the laws of any State or Territory of the United States, or of the District of Columbia, or of any foreign country, may, unless it be otherwise expressly provided, hold

property and transact business in this State, upon complying with the requirements of this section, and not otherwise."

Then, after defining the powers and liabilities of such corporation, and prescribing the manner of filing its charter with the Secretary of State, etc., the Act proceeds:

"Every railroad corporation doing business in this State under the provisions of this section, or under charters granted or laws passed by the State of Virginia or this State, is hereby declared to be, as to its works, property, operations, transactions and business in this State, a domestic corporation, and shall be so held and treated in all suits and legal proceedings which may be commenced or carried on by or against any such railroad corporation, as well as in all other matters relating to such corporation. No railroad corporation which has a charter, or any corporate authority, from any other State, shall do business in this State as the lessee of the works, property, or franchises of any other corporation or person, or otherwise, or bring or maintain any action, suit or proceeding in this State, until it shall, in addition to what is hereinbefore required, file in the office of the Secretary of State a writing, duly executed under its corporate seal, accepting the provisions of this section, and agreeing to be governed thereby; and its failure to do so may be pleaded in abatement of any such action, suit or proceeding; but nothing herein contained shall be construed to lessen the liability of any corporation which may not have complied with the requirements of this section, upon any contract or for any wrong."

The remaining portion of this section prescribes a penalty and the form of prosecution, for the failure of the corporation to comply with the provisions of this section. No question is made as to the sufficiency of the bond, or the time at which the application for removal was made, or as to the form of the pleading by which the question of the right of removal was presented.

The only controversy before us is whether or not the facts above stated entitle the defendant to a removal of this action to the district court. It was suggested by the counsel for the defendant that the provision of the statute is that "No railroad corporation . . . shall do business in this State as the lessee," etc., and that, as the defendant does not purport to be a railroad corporation, the statute does not apply to it. This point was not pressed in the argument, and, I think, properly so; for, while the name of the defendant, the Newport News & Mississippi Valley Company, does not include the word *railroad* the said company is by its charter authorized to construct, hold, own, lease and operate any railroad; and the record in this case distinctly shows that it is, and was on July 26, 1886, doing business as a railroad company in this State, and that it must therefore be regarded as such within the intent of said statute.

In *Baltimore & Ohio Railroad Company* v. *Koontz*, 104 U. S. 5[26 L. ed. 643], it was decided that a foreign corporation, operating a domestic corporation, under a lease of the road, property and franchises of the latter, does not thereby forfeit or surrender its rights to remove into the Circuit Court of the United States a suit instituted against it in a court of the State which chartered the leased corporation, by a citizen of that State. In that case the lessor company was a Maryland corporation, and the lessee a Virginia corporation, and in its opinion the court says:

"It is not denied that the Maryland company derived all its power, so far as the operation of the Virginia road was concerned, from the Virginia corporation; nor that, in respect to the business of that road, it must do just what was required of the Virginia corporation by the laws of Virginia; but that does not, in our opinion, make it a corporation of Virginia . . . A corporation, therefore, created by and organized under the laws of a particular State, and having its principal office there, is, under the Constitution and laws, for the purpose of suing and being sued, a citizen of that State, possessing all the rights and having all the powers its charter confers."

So, in the case at bar, the fact that the defendant has leased and is operating the railroad of a corporation of this State, does not make it a citizen of this State, within the meaning of the Constitution and Laws of the United States.

By a statute of the State of Wisconsin, enacted in 1870, it was declared that any fire insurance company, association, or partnership, incorporated by or organized under the laws of any other State of the United States . . . desiring to transact any such business (fire insurance), by any agent or agents, in this State, shall first appoint an attorney in this State on whom process of law can be served, containing an agreement that such company will not remove the suit for trial into the United States Circuit Court or Federal Courts, and file in the office of the Secretary of State a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another attorney be substituted." 1 Taylor, Stat. § 22, p. 958.

While the statute was in force, the Home Insurance Company, a corporation of New York, established an agency in the State of Wisconsin, and, in compliance with the requirements of said statute, filed in the office of the Secretary of State of that State a written power of attorney, duly executed by said company, in which is contained this clause: "And said company agrees that suits commenced in the state courts of Wisconsin shall not be removed by the acts of said company into the United States Circuit or Federal Courts."

Afterwards the company issued a policy of insurance to one Morse, and, a loss having occurred under it, Morse sued the company in one of the state courts of Wisconsin. The company appeared in the state court, and filed its petition to remove the case, under the Act of Congress, into the United States Circuit Court for the district. The state court refused to remove the case, and judgment was rendered by it for the plaintiff. This judgment was affirmed by the Supreme Court of Wisconsin (*Morse* v. *Home Ins. Co.* 30 Wis. 496); and from this latter court the company took the case to the Supreme Court of the United States, which held that the aforesaid statute was repugnant to the Constitution of

the United States, and the laws made in pursuance thereof, and that it was therefore illegal and void; and, further, that the aforesaid agreement, executed and filed in pursuance of said statute, is also void, and afforded no ground for the refusal of the state court to remove said action to the federal court. *Home Ins. Co.* v. *Morse*, 87 U. S. 20 Wall. 445 [22 L. ed. 365].

The substance of this decision is that a foreign corporation, by a positive agreement, made in pursuance of a state statute, cannot take away its right to remove a suit brought against it in a state court to the federal court.

Our statute (section 30, chapter 54, Code 1887), and the agreement of the defendant filed in pursuance thereof, do not, directly or in terms, stipulate that the foreign corporation shall or will not remove any suit from the state to the federal courts; but the statute does declare that the corporation filing such agreement shall be, "as to its works, property, operations, transactions and business in this State, a domestic corporation, and shall be so held and treated in all suits and legal proceedings . . . as well as to all other matters relating to such corporation;" and thus it does indirectly take from the corporation the right to remove into the federal courts any suit brought against it by a citizen of this State, because, as a domestic corporation, it can possess no such right.

The question then arises, Does said statute make the defendant a corporation of this State?

The following propositions of law are settled by the decisions of the Supreme Court of the United States:

First. A corporation exists only in contemplation of law, and by force of law, and can have no legal existence beyond the bounds of the State or sovereignty by which it is created. It must dwell in the place of its creation.

Second. Where a corporation is created by the laws of a State, the legal presumption is that all its members are citizens of the State by which it was created; and in a suit by or against it, it is conclusively presumed to be a citizen of such State.

Third. A corporation endued with the capacities and faculties it possesses by the cooperating legislation of two States cannot have one and the same legal being in both States. Neither State could confer on it a corporate existence in the other, nor add to nor diminish the powers to be there exercised.

Fourth. The constitutional privilege which a corporation has as a citizen of one State to sue the citizens of another State in the federal courts cannot be taken away by simply declaring it to be a corporation of the latter State. *Ohio & M. R. Co.* v. *Wheeler*, 66 U. S. 1 Black, 286 [17 L. ed. 130]; *Marshall* v. *Baltimore & O. R. Co.* 57 U. S. 16 How. 314 [14 L. ed. 953]; *Lafayette Ins. Co.* v. *French*, 59 U. S. 18 How. 404 [15 L. ed. 451]; *Germania F. Ins. Co.* v. *Francis*, 78 U. S. 11 Wall. 210 [20 L. ed. 77]; *Chicago & N. W. R. Co.* v. *Whitton*, 80 U. S. 13 Wall. 270 [20 L. ed. 571]; *Muller* v. *Dows*, 94 U. S. 444 [24 L. ed. 207]; *Memphis R. Co.* v. *Alabama*, 107 U. S. 581 [27 L. ed. 513].

In *Muller* v. *Dows*, *supra*, the court decided that "A corporation created by the laws of Iowa, although consolidated with another of the same name in Missouri, under the authority of a statute of each State, is, nevertheless, in Iowa, a corporation existing there under the laws of that State alone."

And the court, in its opinion in *Memphis Railroad Company* v. *Alabama*, *supra*, says: "The defendant, being a corporation of the State of Alabama, has no existence in this State as a legal entity or person, except under and by force of its incorporation by this State, and, although also incorporated in the State of Tennessee, must, as to all its doings within the State of Alabama, be considered a citizen of Alabama, which cannot sue or be sued by another citizen of Alabama in the courts of the United States."

In the opinion in *Ohio Railroad Company* v. *Wheeler*, *supra*, the court says: "It is true that a corporation by the name and style of the plaintiffs appears to have been chartered by the States of Indiana and Ohio, clothed with the same capacities and powers, and intended to accomplish the same objects; and it is spoken of in the laws of the State as one corporate body, exercising the same powers, and fulfilling the same duties, in both States. Yet it has no legal existence in either State, except by the law of the State; and neither State could confer on it a corporate existence in the other, nor add to nor diminish the powers to be there exercised. It may, indeed, be composed of and represent, under the corporate name, the same natural persons. But the legal entity or person which exists by force of law can have no existence beyond the limits of the State or sovereignty which brings it into life and endues it with its faculties and powers." 66 U. S. 1 Black, 297 [17 L. ed. 133].

The conclusion from these authorities is that a corporation possessing the same name, powers, duties, franchises and purposes, and composed of the same natural persons, if incorporated by two States, will be, under the Constitution and Laws of the United States, regarded and treated as two separate and distinct corporations of the respective States, and not one corporation existing in both States; and, consequently, no corporation of one State can be made a domestic corporation of another State by simply declaring that it shall be such.

In order to make a corporation chartered by another State a corporation of this State, it must be chartered by this State. It will then be a domestic corporation of this State, without reference to its charter in the foreign State, with such powers, duties and franchises only as are conferred by the charter and laws of this State.

The defendant, the Newport News & Mississippi Valley Company, is conceded to be a foreign corporation, created by the laws of the State of Connecticut; and it is not pretended that it has been chartered as a corporation of this State, unless the statute under consideration, which merely declares that it shall be a domestic corporation, and so held and treated in all suits and legal proceedings, as well as in all other matters relating to it, makes it such. The most that can be said to be done by this statute is that it attempts to adopt or naturalize this Connecticut corporation, and all other foreign corporations, and make them domestic corporations, and citizens of this State, without either chartering it as a corpo-

ration of this State by any special Act of the Legislature or requiring it to obtain a charter and organize itself into a domestic corporation under the general laws of this State. If we are to hold the defendant as a domestic corporation of this State, then we have the anomaly, or, rather, the absurdity, of a corporation without a charter; because, according to the settled law, we cannot look to the foreign charter in order to ascertain the powers, duties and franchises of a domestic corporation, but alone to the authority conferred by its domestic charter and the laws of this State.

The evident purpose of that provision of our statute which declares that the foreign corporation shall be a domestic corporation, "and so held and treated in all suits and legal proceedings which may be commenced or carried on by or against it," was to prevent such corporation from removing suits brought by or against it in the courts of this State to the federal courts. This provision, if applied to a foreign corporation, would be in conflict with the Constitution and Laws of the United States, and therefore inoperative and void. *Home Ins. Co.* v. *Morse*, 87 U. S. 20 Wall. 445 [22 L. ed. 365].

The defendant here being, as we have seen a foreign corporation, notwithstanding the declaration of our statute that it shall be a domestic corporation, the said provision of the statute, so far as it attempts to take from the defendant the right to remove any suit to the federal courts, as well as the agreement filed by it in pursuance, must be held inoperative to prevent such removal in any suit in which it would have the right of removal under the Constitution and Laws of the United States.

I am, therefore, of the opinion that the Circuit Court erred in denying the petition and motion of the defendant to remove this action for trial into the District Court of the United States, as prayed for in its said petition; and for said error alone *the judgment of the said court is reversed, the verdict of the jury set aside, and the case is remanded to said Circuit Court*, with directions to it to enter the order required by the Act of Congress in such cases, and to proceed no further in this case, unless its jurisdiction is restored by the action of the said District Court of the United States.

English and **Brannon, JJ.**, concurred; **Green, J.**, absent.

MARYLAND COURT OF APPEALS.

John BURROWS, Use of Charles M. Bainbridge, *Appt.*,
v.
Francis KLUNK.

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

The indorser of a promissory note which is complete on its face, the sum payable, the date, time of payment, and name of payee, all being inserted, who delivers it to the maker, who is neither his agent nor employé, to be carried to the payee, is not liable to a *bona fide* holder for value for the increased amount of the note if the maker raises it before delivering it, simply because spaces were left in the note in such a manner as to permit words and figures to be inserted and thus increase the amount payable and readily deceive innocent third parties.

(March 27, 1889.)

APPEAL by plaintiff, from a judgment of the Baltimore City Court in his favor but for a less amount than was demanded, in an action upon certain promissory notes. *Affirmed.*

The facts sufficiently appear in the opinion.

Messrs. **Charles Poe** and **John Guyton Boston**, for appellant:

Evidence is not competent or admissible, as against the appellant, to show that an alteration was made in the notes, there being nothing upon the face to indicate that such alteration had been made, and he being no party thereto, and having no notice nor knowledge, and being the payee of the notes.

Toms v. *Parkersburg Branch R. Co.* 39 Md. 36.

This is precisely the case in which the doctrine, "Where one of two innocent parties must suffer, that one should suffer whose negligence has enabled the third party to commit the wrong," is applicable.

Daniel, Neg. Inst. 2d ed. § 1405; *Young* v. *Grote*, 4 Bing. 253; *Isnard* v. *Torres*, 10 La. Ann. 103; *Garrard* v. *Haddan*, 67 Pa. 82; *Harvey* v. *Smith*, 55 Ill. 224; *Phelan* v. *Moss*, 67 Pa. 59; *Zimmerman* v. *Rote*, 75 Pa. 188; *Halifax Union* v. *Wheelwright*, L. R. 10 Exch. 183; *Seibel* v. *Vaughan*, 69 Ill. 257; *Bank of Ireland* v. *Evans*, 5 H. L. Cas. 389; *Conklin* v. *Wilson*, 5 Ind. 209; *Van Duzer* v. *Howe*, 21 N. Y. 531; *Yocum* v. *Smith*, 63 Ill. 321; *Blakey* v. *Johnson*, 13 Bush, 197; *Scotland Co. Bank* v. *O'Connel*, 23 Mo. App. 165.

The notes in this case being made payable to the order of the plaintiff, and indorsed by the defendant prior to their delivery by the maker to the plaintiff, the defendant, in the absence of proof to the contrary, was a joint maker and not the indorser thereof.

Ives v. *Bosley*, 35 Md. 262.

Messrs. **Joseph S. Heuisler** and **Charles W. Heuisler**, for appellee:

The defendant pleaded the general issue, pleas of *nil debit*, and did not promise; and under these pleas it was entirely competent for him to prove anything which showed that he did not owe the money sued for, and to have admitted in evidence facts connected with the execution of the note which were supposed to indicate fraud in the procurement thereof.

Poe, Pl. § 607; *Totten* v. *Bucy*, 57 Md. 452, 453; *Crampton* v. *Perkins*, 3 Cent. Rep. 691, 65 Md. 25; *Thorne* v. *Fox*, 8 Cent. Rep. 302, 67 Md. 73.

The notes when they passed from the defendant were complete as to date, time and amount; and however awkwardly drawn, he will be protected from their alteration by forgery in whatever mode it may be accomplished; and

unless the alteration has been committed by some one in whom he has authorized others to place confidence as acting for him, he has quite as good a right to rest upon the presumption that it will not be criminally altered, as any person has to take the paper on the presumption that it has not been.

Holmes v. *Trumper*, 22 Mich. 434, 436; *Greenfield Sav. Bank* v. *Stowell*, 123 Mass. 208; *Knoxville Nat. Bank* v. *Clark*, 51 Iowa, 264.

If the instrument was complete without blanks at the time of its delivery, the fraudulent increase of the amount, by taking advantage of a space left without such intention, although it may be negligently, will constitute a material alteration and operate to discharge the maker. No title will pass, even to an innocent holder for value, when a bill or note has been materially altered after its issue, as against those persons who signed the instrument in its original state.

1 Randolph, Com. Paper, p. 296; *Holmes* v. *Trumper*, 22 Mich. 435; *Greenfield Sav. Bank* v. *Stowell*, 123 Mass. 196; *Knoxville Nat. Bank* v. *Clark*, 51 Iowa, 264; *Bank of Ohio Valley* v. *Lockwood*, 13 W. Va. 416; *Angle* v. *Northwestern Mut. L. Ins. Co.* 92 U. S. 330 (23 L. ed. 556); *Wood* v. *Steele*, 73 U. S. 6 Wall. 80 (18 L. ed. 725); *Owen* v. *Hall*, Md. Ct. of App. (Md. L. J. Jan. 23, 1889); *Trigg* v. *Taylor*, 27 Mo. 245; *Goodman* v. *Eastman*, 4 N. H. 455; *McGrath* v. *Clark*, 56 N. Y. 34; *Masters* v. *Miller*, 4 T. R. 320.

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

John Burrows sued Francis Klunk as joint maker or indorser of two promissory notes, each purporting to be for $550, signed by Charles F. Klunk, dated February 7, 1887, and payable to the order of Burrows, one on the first of June and the other on the first of July following. The defense is that these notes had been fraudulently raised from $50 to $550 each.

At the trial two exceptions were taken by the plaintiff which need not be stated at length. On some points there is a conflict of testimony, but as to the following material facts there appears to be no contradiction.

Charles F. Klunk is the son of the defendant, Francis A. Klunk. The son had become indebted to the plaintiff, Burrows, in about the sum of $4,000, and the plaintiff visited his house on the 5th of February and told him to get notes indorsed by his father to the amount of $1,100, and that his (the son's) father-in-law would settle the balance.

On the same day the son called upon his father with five promissory notes in favor of Burrows drawn up by the son and signed by him as maker, for $50 each, and asked his father to indorse them, which the latter positively refused to do.

On the next day, February 6, the plaintiff and the son visited the father at his house, but the plaintiff testifies there was nothing then said about indorsing notes in the presence of the father, and that he went there simply for the purpose of being introduced as the gentleman who was furnishing the son with goods.

On the following Tuesday, February 8, the son again called upon his father at his shop, again importuned him to indorse these five notes, and after a good deal of persuasion he agreed to indorse two of them which matured respectively on the first of June and the first of July, 1887. Before doing so he took them to his office, read them over carefully, saw they were for $50 each, that they were dated the 7th of February, and were payable to the order of the plaintiff. He then wrote his name on the back of each, and delivered them to his son.

The latter has gone away and when the notes were produced at the trial, it appears the words "Five hundred and" had been inserted before the word "Fifty" in the body, and the figure "5" before the figures "50" in the left hand upper corner of each of them.

This statement is taken mainly from the testimony of the defendant, which in these particulars is uncontradicted. The notes themselves have been submitted to us for inspection. This inspection shows that if they were thus altered, the alterations must have been made by the son after his father wrote his name upon them, and before they were delivered to the plaintiff, and that they must have been in such condition when signed by the defendant, as to admit of the alterations being so made as to readily deceive innocent third parties.

There must have been a space between the "$" and the figures "50" sufficient for the insertion of the figure "5," and a blank before the word "Fifty" sufficient to let in the words "Five Hundred and." As they now appear they are throughout in the handwriting of the son, who signed them as maker, written with the same ink, and with no discoverable trace of erasure.

It was left to the jury, by the granting of the plaintiff's and defendant's first prayers, to find whether the alterations had been made; and the verdict shows that they found this issue of fact in the affirmative. But the plaintiff has testified that he had no knowledge of these alterations when he received the notes, and the question is, Can he recover upon them against the defendant even if he had no such knowledge?

It is manifest that if the defendant is made liable for the full amount of these altered notes he will suffer a wrong and sustain a loss, by means of a crime not less serious than the forgery of his signature. If his signature had been forged, or if the notes had been raised by obliteration of the writing by any chemical process, or by any other device of an ingenious forger, it is conceded he would not be liable. But because these small spaces were in the notes when he wrote his name upon them, it is contended that he was negligent in signing and leaving them in that condition, and that the doctrine that where one of two innocent parties must suffer that one should suffer whose negligence has enabled the third party to commit the wrong, is invoked against him.

There are some cases in which this doctrine has been applied to negotiable instruments in order to protect innocent holders for value; but we think the weight of authority in this country is against its application to a case like the present. In support of this position we refer to the able judgment of the Supreme Court of Michigan delivered by *Judge* Christiancy in *Holmes* v. *Trumper*, 22 Mich. 427, and the

equally able and elaborate opinion of the Supreme Judicial Court of Massachusetts, delivered by *Chief Justice* Gray in *Greenfield Sav. Bank* v. *Stowell*, 123 Mass. 196; also to the cases of *Goodman* v. *Eastman*, 4 N. H. 455; *McGrath* v. *Clark*, 56 N. Y. 34; *Knoxville Nat. Bank* v. *Clark*, 51 Iowa, 264, and *Worrall* v. *Gheen*, 39 Pa. 388.

Such also seems to be the effect of the decisions of the Supreme Court in *Wood* v. *Steele*, 73 U. S. 6 Wall. 80 [18 L. ed. 725], and *Angle* v. *Northwestern Mut. L. Ins. Co.* 92 U. S. 330 [23 L. ed. 556].

The case of *Tome* v. *Parkersburg Branch Railroad Company*, 39 Md. 36, is quite different from this. The main question involved in that case was the extent of the liability of private corporations for the acts of their agents done within the scope of their employment, expressed or implied. The party who committed the fraud was the treasurer and stock-transfer agent of the company, intrusted with its seal, with books of stock certificates signed in blank by the president, and was put in sole charge of the company's office in Baltimore. He was thus furnished by the company with every facility for making a fraudulent issue of stock. But here no such relation existed between the defendant and his son. The latter was neither the agent nor even the employé of the former. The notes were simply delivered to him after they had been signed, for the purpose of being carried to the plaintiff.

Nor is it a case where one signs a note in blank as to amount, and delivers it to another for use with intention that the blank should be filled.

In such case the instrument carries on its face an implied authority to fill the blank, and the signer makes the person to whom it is thus delivered his agent for that purpose, and is responsible to an innocent holder for value for whatever sum may be inserted. But here each note was complete on its face when it left the hands of the defendant. A sum payable was actually written in it, and the date, time of payment and the name of the payee were all inserted.

In such case there can be no inference that the defendant authorized anyone to increase this amount simply because blank spaces were left in which there was room to insert a larger sum. It may have been carelessness in the defendant to sign the notes without drawing lines through these spaces, but he was evidently not a business man accustomed to sign notes, and it was not his carelessness but the crime committed by another that was the proximate cause that misled the plaintiff.

Appellant's counsel have placed great reliance upon the English case of *Young* v. *Grote*, 4 Bing. 253. In that case a husband, having occasion to leave home for several days, signed checks upon his banker in blank, left them with his wife with directions to have them filled up with such sums as the purposes of his business might require during his absence. The wife, in order to pay wages to persons employed by her husband, directed a clerk, who was also employed by him, to fill up one of these checks for a certain sum. The clerk did so, showed it to her and she directed him to draw the money from the banker. When drawn up by the clerk the check was in substantially the same form, as to blank spaces, as these notes, and before he presented it the clerk had in the same manner raised it to a much larger sum. The banker paid the raised check in good faith, and was protected in so doing against the claim of his customer, the husband. The difference as to facts, between that case and this is that there the check was signed in blank by the husband who constituted his wife his agent to fill it up, and the raising or forgery was committed by a clerk in his employment.

It was also a case between banker and customer; and in *Greenfield Savings Bank* v. *Stowell*, *supra*, the position is taken that "The maker of a promissory note holds no such relation to the indorsees thereof as a customer does to his banker; the relation between banker and customer is created by their own contract, by which the banker is bound to honor his customer's drafts; and if the negligence of the customer affords opportunity to a clerk or other person in his employ to add to the terms of a draft, and thereby mislead the banker, the customer may be well held liable to the banker."

There is force in this position; but the case of *Young* v. *Grote*, though it has not, so far as we can ascertain, been directly overruled, has been seriously questioned, not so much as to its result, but as to the reasoning on which it is founded. Subsequent comments of the English judges go far to limit the doctrine there laid down to the peculiar circumstances of that case. All the decisions containing the comment, made up to that time, are referred to in *Greenfield Savings Bank* v. *Stowell*.

To these we may add the more recent case of *Baxendale* v. *Bennett*, in the Court of Appeals, L. R. 3 Q. B. Div. 525, in which Brett, *L. J.* said: "I think the observations made by the Lords in the case of *Bank of Ireland* v. *Evans*, 5 H. L. Cas. 389, have shaken *Young* v. *Grote*, and *Coles* v. *Bank of England*, 10 Ad. & El. 437, as authorities."

The case is discredited if not overruled as an authority, and we have found no English decision in which the maker of a promissory note has been held liable under circumstances similar to those which exist in the present case.

We approve and adopt the following reasoning in *Holmes* v. *Trumper*, *supra*: "The negligence, if such it can be called, is of the same kind as might be claimed if any man in signing a contract were to place his name far enough below the instrument to permit another line to be written above it in apparent harmony with the rest of the instrument; or as if an instrument were written with ink the material of which would admit of easy and complete obliteration or fading out by some chemical application which would not affect the face of the paper; or by failing to fill any blank at the end of any line which might happen to end far enough from the side of the page to admit the insertion of a word.

"Whenever a party in good faith signs a complete promissory note, however awkwardly drawn, he should, we think, be equally protected from its alteration by forgery in whatever mode it may be accomplished; and unless

perhaps when it has been committed by some one in whom he has authorized others to place confidence as acting for him, he has quite as good a right to rest upon the presumption that it will not be criminally altered as any person has to take the paper on the presumption that it has not been; and the parties taking such paper must be considered as taking it upon their own risk, so far as the question of forgery is concerned, and as trusting to the character and credit of those from whom they receive it and of the intermediate holders.

"If promissory notes were only given by first class business men who are skillful in drawing them up in the best possible manner to prevent forgery, it might be well to adopt the high standard of accuracy and perfection which the argument in the behalf of the appellant would require. But for the great mass of the people who are not thus skillful nor in the habit of frequently drawing or executing such paper, such a standard would be altogether too high, and would place the great majority of men of even fair education and competency for business at the mercy of knaves, and tend to encourage forgery by the protection it would give to forged paper."

We are all of the opinion that the defendant is not liable for the amount of these raised notes. In some of the cases, especially in Pennsylvania and Mississippi, recovery has been allowed for the amount of the note before it was thus altered. This, however, seems to ignore the principle said to be of universal application that any material alteration of a written instrument avoids it *in toto* as to any party to it who has not assented to such alteration. But that question does not arise on this appeal. The verdict and judgment were in favor of the plaintiff for the original amount of notes, with interest; and the defendant has not appealed.

In thus disposing of the case we have assumed, and must not be understood as having decided, that the plaintiff is a holder for value.

It follows from what we have said that the Court below was right in admitting the testimony objected to in the first exception, and that there is no error prejudicial to the appellant in the rulings upon the prayers.

The judgment is therefore affirmed.

David M. NEWBOLD, *Appt.*,
v.
PEABODY HEIGHTS CO.

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

1. **An agreement under seal between a land owner and an incorporated company, his lessee,** that certain lawful restrictive covenants and conditions, contained in an agreement and its accompanying memorandum, looking to the formation of the company and the execution of the lease which had been entered into between such land owner and the projectors of the company, should be binding upon the lessee and its assigns and should be fully carried out, will render such conditions binding upon the lessee and its assigns with notice, although they were not actually incorporated in the lease and the agreements were not recorded as a part thereof.

2. **A lawful restrictive covenant** entered into between a lessor and his lessee in respect to the manner of using the leased property will be enforced by a court of equity against the lessee and his assigns with notice although the covenant is not of a character to run with the land.

(March 27, 1889.)

APPEAL by defendant, from a decree of the Circuit Court of Baltimore City in favor of plaintiff in an action for the specific performance of a contract for the purchase of land. *Reversed.*

Argued before Alvey, *Ch. J.*, Miller, Robinson, Irving, Stone, Bryan and McSherry, *JJ.*

Statement by **Alvey**, *Ch. J.*:

The bill in this case was filed for the specific performance of a contract of purchase of certain real estate.

The Peabody Heights Company, the plaintiff in the case, is a land improvement company, organized for the purchase, improvement and sale or lease of real estate. In June, 1888, it sold to the defendant a parcel of ground formerly in Baltimore County, but now within the limits of the City of Baltimore as extended.

By the contract of sale the plaintiff agreed to make to the defendant a good and sufficient title, in fee simple, free and discharged of all restrictions and incumbrances. To the title offered to be conveyed by the plaintiff the defendant objects, upon the ground that such title would be subject to certain restrictive covenants and conditions of which he has acquired notice since the time of the contract of purchase.

It appears that William Holmes, since deceased, being the owner of a parcel of land called "Lilliendale," containing about thirty-six acres, lying in that portion of Baltimore County recently annexed to the City of Baltimore, agreed with certain parties, who at the time contemplated the formation of a joint stock improvement company, of which Holmes was to be a large stockholder, to execute a lease of such land, with certain conditions for the redemption of the ground rents, with the exception of a block or square of 400 feet front, which he reserved for his own use and pur-

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NOTE.—*Separate instruments may be construed together as one agreement.*

Several instruments of the same date, between the same parties and relating to the same subject, may be construed as parts of one contract. Mott v. Richtmyer, 57 N. Y. 65; Rexford v. Marquis, 7 Lans. 261; Mann v. Witbeck, 17 Barb. 388; Stow v. Tifft, 15 Johns. 458; Jackson v. McKenny, 3 Wend. 233; Cornell v. Todd, 2 Denio, 130; Hull v. Adams, 1 Hill, 601; Howes v. Woodruff, 21 Wend. 640; Rawson v. Lampman, 5 N. Y. 456.

Where instruments are connected by a sufficient reference they constitute the contract between the parties. Bonesteel v. N. Y. City, 6 Bosw. 553; Van Hagen v. Van Rensselaer, 18 Johns. 420; Adams v. Hill, 16 Maine, 215; Rogers v. Kneeland, 10 Wend. 219.

A paper given back by the grantee, and referred to in the deed as given on that day, should be read

poses, and upon which he intended to build a residence.

This agreement bears date the 20th of September, 1870; and in it there is a stipulation to the effect that reference shall be made to a certain memorandum appended thereto, dated the 13th of September, 1870, for the better explanation of the agreement for the lease, and for further details in reference thereto, and especially as to the joint stock company referred to in the agreement; and which memorandum, as stated, had been approved and agreed upon by the parties as the basis of the agreement for the lease to be thereafter executed to the company to be formed.

The memorandum referred to had been made by Mr. George W. Tinges, a real estate agent acting for Holmes; and among other things it contained respecting the joint stock company to be formed, were certain conditions and restrictions, under the head of "Plan of Company," and "By-Laws," which were:

1. That no land should be sold or leased without a pledge to build speedily, and the designs of buildings to be approved by the directors:

2. Buildings to be twenty feet back of building line, and front to be ornamented with shrubbery and flowers;

3. No nuisances, factories, lager beer saloons, etc., to be permitted. Clause in deed to this effect;

4. To regulate other proceedings.

The company, contemplated by the agreement to which this memorandum was appended, was duly incorporated on the first of October, 1870. The lease of land was executed by Holmes to the company on the 14th of October, 1870, but without any special reference to the preceding agreement or memorandum.

The lease was placed in escrow until certain conditions were performed; and, in the mean time, that is to say, on the 19th of October, 1870, Holmes and the company executed, under hand and seal, what would appear to be an agreement supplemental to the lease, and to be considered in connection therewith. By this latter or supplemental agreement it is recited and agreed as follows:

"Whereas, there were matters of detail agreed upon, as the basis of the purchase and sale of the property aforesaid, which were contained in the agreement or contract of sale first above referred to, but which could not be conveniently set forth in the lease, and, therefore, the said William Holmes and the Peabody Heights Company do hereby covenant with each other that the agreement or contract of sale, with the memorandum thereto, dated 20th

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and construed together with that of the grantor to ascertain the sense and meaning of the parties. Johnson v. Moore, 28 Mich. 6; Carpenter v. Snelling, 97 Mass. 452; Rogers v. Smith, 47 N. Y. 324; Dudgeon v. Haggart, 17 Mich. 275; Bronson v. Green, Walk. Ch. (Mich.) 56; Norris v. Showerman, Walk. Ch. (Mich.) 208.

The deed and the bond, although bearing different dates, being simultaneously delivered, are to be construed together, each constituting a part of the same transaction. Flagg v. Munger, 9 N. Y. 488; Rogers v. Kneeland, 13 Wend. 114; Cornell v. Todd, 2 Denio, 130; Smith v. Ransom, 21 Wend. 303; Sharp v. Ropes, 110 Mass. 386.

The schedule annexed to the mortgage, and referred to in it, was a part of that instrument; and both papers are to be construed together. Edgell v. Hart, 9 N. Y. 216, 59 Am. Dec. 522; Roberts v. Chenango Co. Mut. Ins. Co. 3 Hill, 501.

Obligation as to use of property.

Where a man acquires property, with knowledge of a previous contract to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, use the property in a manner not allowable to the giver or seller. Kirkpatrick v. Peshine, 24 N. J. Eq. 214; Seymour v. McDonald, 4 Sandf. Ch. 502.

Where a lease for a store contained a clause that it should be occupied for the regular dry goods jobbing business and for no other, the lessee cannot carry on in the store the business of an auctioneer. Steward v. Winters, 4 Sandf. Ch. 500.

Under a covenant in a lease made by a domestic corporation, that neither the lessees nor their assigns should use the premises, or permit them to be used, for any purpose inconsistent with the general purpose and design for which the grounds of the said lessor were to be used, and providing that the lessees should hold and enjoy the premises subject to the laws and constitution of said association, the lessees are bound to use the premises in accordance with the reasonable rules and regulations contained in the by-laws of the lessor. Chautauqua Assembly v. Alling, 46 Hun, 582, 12 N. Y. S. R. 767.

That a lease is silent as to the use to be made of the leased premises does not empower the lessee to make whatever use of them he pleases; but he is bound to use them according to the intention of the lease. N. O. & C. R. Co. v. Darms, 39 La. Ann. 766.

An agreement in a lease to keep the premises clean, accompanied by an agreement that they should not be occupied for a saloon or a meat market, is not qualified by an implied right on the part of the lessees to use the premises for any purpose, however foul in itself, excepting only those occupations mentioned. Clementson v. Gleason, 37 Minn. 102.

A condition in a deed of land that intoxicating liquors shall never be manufactured or sold thereon, and that if this condition be broken the deed shall become void and the title revert to the grantor, is not repugnant to the estate granted, nor unlawful. Cowell v. Colorado Springs Co. 100 U. S. 55 (25 L. ed. 547).

Although a covenant not to carry on trade upon his adjoining property may bind the covenantor, it cannot make it a servitude upon that property, so as to burden it in the hands of purchasers. Tardy v. Creasy, 81 Va. 553.

The assignee of a lease by mesne assignments is under the obligation to indemnify the original lessee against breaches of the covenant in the lease, committed during the continuance of his own tenancy, but not for any subsequent breach. Brinkley v. Hambleton, 8 Cent. Rep. 299, 67 Md. 169.

Covenants not to build.

A covenant or agreement by the grantors of lands with their grantee, then the owner of adjacent lots, not to build on a certain piece of ground, should be enforced by injunction in favor of a subsequent purchaser of these adjacent lands, notwithstanding the person with whom the agreement or covenant was made had released it to the covenantors. Brouwer v. Jones, 23 Barb. 160; Watertown v. Cowen, 4 Paige, 515, 27 Am. Dec. 82; Phenix Ins.

September, 1870 (and to which this agreement is now appended), shall be binding upon them and their assigns, so that the covenants, requirements, restrictions, regulations and reservations contained therein shall be fully complied with and carried out, as if they had been embodied in the lease of the property therein referred to, or as if the said Peabody Heights Company had been one of the original contracting parties."

It is shown that Holmes, in his lifetime, and those representing his estate since his death, have conveyed portions of the property embraced in the lease to the company in extinguishment of the ground rents, and that in none of such conveyances has any reference been made to the restrictions and conditions referred to in the agreement of the 19th of October, 1870.

It is also shown that the plaintiff company has conveyed portions of the land acquired from Holmes to third persons, without making any reference to such restrictions or conditions, except in one instance that of a conveyance to Mr. Polk, dated in 1872, which was made subject to the rules and regulations of the Peabody Heights Company in regard to the character, location and uses of the buildings upon the lot conveyed.

The lease was duly recorded; and it appears that the agreements to which reference has been made were filed as exhibits by the company in an equity proceeding in Baltimore County Circuit Court, in respect to the land, and that they have been recorded as part of that proceeding.

The defendant, by his answer, while admitting some of the allegations of the bill, puts the plaintiff upon proof of others, and then avers that he is advised that not only the owners of the square of ground retained by Holmes, as mentioned in the bill, but that also all present owners of any part of the entire ground leased by Holmes to the plaintiff, and by it subsequently sold or leased, would have the right to compel the observance of the covenants, restrictions and conditions referred to in the bill by any owner of the property sold to him, etc. Proof was taken and a decree passed, *pro forma*, against the defendant, and he has appealed.

Messrs. **John Prentiss Poe** and **John J. Dobler**, for appellant:

The restrictions mentioned in the by-laws of the company, at the time Lilliendale was leased by Holmes, have created easements or servitudes in favor of the ground retained by Holmes.

Halle v. *Newbold* (Md.) 12 Cent. Rep. 911; *Thruston* v. *Minke*, 32 Md. 487; *Whitney* v.

Co. v. Continental Ins. Co. 14 Abb. Pr. N. S. 269; Seymour v. McDonald, 4 Sandf. Ch. 508.

Covenant to keep street open.

A covenant to keep a strip of land open as a public street forever is a covenant not to build thereon. Story v. N. Y. Elevated R. Co. 90 N. Y. 170; Phenix Ins. Co. v. Continental Ins. Co. 87 N. Y. 400.

A threatened nuisance tending to deprive others of the full and free use of the street is a well recognized ground for equitable interposition. Zearing v. Raber, 74 Ill. 413; Lawrence v. New York, 2 Barb. 580; Corning v. Lowerre, 6 Johns. Ch. 439; Rowan v. Portland, 8 B. Mon. 232; 2 Story, Eq. Jur. § 927; Oakley v. Williamsburgh, 6 Paige, 262; Wheeler v. Bedford, 2 New Eng. Rep. 832, 54 Conn. 244; 3 Pom. Eq. Jur. 383. See Brown v. Manning, 6 Ohio, 298; Schwoerer v. Boylston Market Asso. 99 Mass. 238.

Equitable remedy for encroachment on rights.

The remedy may be had by and against the assignees of the respective parties. Watrous v. Allen, 57 Mich. 362, 58 Am. Rep. 368; Linzee v. Mixer, 101 Mass. 512; Atlantic Dock Co. v. Leavitt, 54 N. Y. 35.

The court of chancery might protect the owner by injunction against the carrying on of any noxious business, or trade, upon the lot of such subsequent purchaser. Barrow v. Richard, 8 Paige, 356, affirming 3 Edw. Ch. 96.

Enjoyment of public places will be protected against encroachment. Briel v. Natchez, 48 Miss. 449; Wolfe v. Frost, 4 Sandf. Ch. 72; 2 Story, Eq. Jur. §§ 926, 927.

The remedy in equity was to be graduated by the remedy at law upon the covenant or agreement; and where no right of action at law could be traced to the party asking the injunction, he was not entitled to it. Barron v. Richard, 3 Edw. Ch. 103.

Enforcement of covenant in equity.

A covenant may be enforced, although contained in an instrument between third parties, to which the person for whose benefit it is made, is not a party. Brouwer v. Jones, 23 Barb. 161.

Courts of equity, in determining the rights of the parties, will ascertain the intention by all the provisions and stipulations made. Between the original parties only, the agreements and stipulations may be enforced at law. But in equity those claiming title under them may resort to the whole instrument, including the covenants and agreements in gross, for the purpose of ascertaining the nature of the rights intended to be conveyed; and, when ascertained, the court will enforce, in favor of such persons, that use or mode of enjoyment which the grantor has seen fit to impress upon it. Schwoerer v. Boylston Market Asso. 99 Mass. 238; Whitney v. Union R. Co. 11 Gray, 362; Parker v. Nightingale, 6 Allen, 344; Hubbell v. Warren, 8 Allen, 173; Underwood v. Carney, 1 Cush. 285; Hooper v. Cummings, 45 Maine, 364; Willard v. Henry, 2 N. H. 120; Sharon Iron Co. v. Erie, 41 Pa. 342.

A grantee of a lot adjoining a public square, who has a special covenant from the original owner of the ground that it shall be kept open for the benefit of his land, may restrain the grantor from violating the covenant. Story v. N. Y. Elevated R. Co. 90 N. Y. 122.

Where the grantee sold to another, who brought his injunction bill to restrain the original grantor in an attempt to build, contrary to his covenant, it was held that the covenant ran with the land into the hands of the owner, who was therefore a proper party to the bill. Norman v. Wells, 17 Wend. 151.

Whether or not a covenant is one running with the lands, binding the grantees and subjecting them to a personal liability, is immaterial, as affecting the jurisdiction of a court of equity, or the right of the owner of one of the parcels of land to relief, as against the owner of the other, upon a disturbance of the easement. Columbia College v. Lynch, 70 N. Y. 452.

Where the defendants have encroached upon this private road with a piazza, fences and other structures, it is not a question of convenience of how large a space is suitable for the complainant, but one of right under the covenant. Gawtry v. Leland, 40 N. J. Eq. 324.

Union R. Co. 11 Gray, 359; *Columbia College* v. *Lynch*, 70 N. Y. 440; *Clark* v. *Martin*, 49 Pa. 289.

Subsequent purchasers from the company, as well as the present owners of the ground reserved by Holmes, can enforce, in equity, these restrictions against each other.

Parker v. *Nightingale*, 6 Allen, 341; *Barrow* v. *Richard*, 8 Paige, 351.

It is not competent for the company, by an amendment of its by-laws, to modify the rights of Holmes and his successors, or the rights of its vendees accruing prior to such amendment.

Eastwood v. *Lever*, 33 L. J. N. S. Ch. 355; *Piggott* v. *Stratton*, 1 DeG. F. & J. 33.

Restrictions once established remain enforceable and constitute a valid objection to the title, even if it is not likely that a purchaser would care to violate them, or if the conditions surrounding the property should have so changed as to make a compliance therewith no longer desirable.

Tulk v. *Moxhay*, 11 Beav. 571; *Re Higgins & Hitchman's Contract*, L. R. 21 Ch. Div. 95, 51 L. J. N. S. Ch. 772.

The rights of the owners of the Holmes lot and of the lots heretofore sold by the company to the easements or servitudes above mentioned, constitute incumbrances upon the legal title to its remaining property.

Kramer v. *Carter*, 136 Mass. 504; Washburn, Easem. 4th ed. 115, 116; Id. 3d ed. 97–107.

Messrs. **John V. L. Findlay** and **Thomas Mackenzie** for appellee.

Alvey, *Ch. J.*, delivered the opinion of the court:

The question is whether the agreements of the 20th of September and the 19th of October, 1870, contain such restrictive covenants and conditions as will bind the parties to those contracts, and those claiming title through or under them; for if so, there would appear to be ground for the objection taken by the defendant.

That the covenants and conditions referred to were not actually incorporated in the lease can make no difference, as to the effect that they may have upon the parties holding property embraced by the lease. Nor can it make any difference that the memorandum of the plan of the organization of the plaintiff company, and the conditions upon which such company was to hold and dispose of the property leased was adopted only by reference to such memorandum in the subsequent agreements, and that the agreements were not recorded as parts of the lease. *Noonan* v. *Lee*, 67 U. S. 2 Black, 499, 504 [17 L. ed. 278, 279]; *Nicholson* v. *Rose*, 4 DeG. & J. 10.

The covenant contained in the agreement of the 19th of October is very explicit that the preceding agreement with the memorandum attached should be binding upon the parties and their assigns. They stipulate "that the covenants, requirements, restrictions, regulations and reservations contained therein shall be fully complied with and carried out as if they had been embodied in the lease of the property therein referred to, or as if the said Peabody Heights Company had been one of the original contracting parties."

The reason and policy for the adoption of such conditions and restrictions are manifest, and that Mr. Holmes, the lessor of the property, attached great importance to the plan of improvement and the restrictions and conditions embodied in the memorandum, is made apparent from the fact of his requiring the execution of the agreement of the 19th of October. It was his purpose, by that agreement, to require that the Peabody Heights Company should be bound by the conditions and restrictions referred to as well as the individuals who originally contracted for the land; and that the lease, though making no reference to the preceding agreements, should not be construed as a waiver, on his part, of the conditions and restrictions specified in the memorandum.

The covenant and the conditions and restrictions contemplated by it were in all respects legal, and such as the owner of land has a right to impose. And being so, he and those holding under him have the right to insist upon the enforcement of the covenant, not only as against the Peabody Heights Company, but as against every other person acquiring right or title under that company with notice of the covenant.

It may be very true that the covenant is not of a character to run with the land, in the strict legal technical sense of those terms; but if it be of a character to create a right and an equity in favor of the vendor or lessor, and those claiming in his right, as against those holding and occupying the land, a court of equity will assume jurisdiction and administer relief.

This is a well settled principle, and it has been considered and applied by this court in two recent cases, the case of *Thruston* v. *Minke*, 32 Md. 487, and *Halle* v. *Newbold*, 69 Md. 265, 12 Cent. Rep. 911, though in respect to facts somewhat different from those of the present case. But in both of those cases the general principle of equity was acted on and fully adopted, that a restrictive covenant entered into between a vendor and vendee, or lessor and lessee, in respect to the manner of using the property, would be enforced by a court of equity, as against the vendee or lessee, and his assigns, without respect to the question as to whether the covenant did or did not, in a legal sense, run with the land. The relief may be furnished either by way of injunction, or upon application for specific performance, according to the circumstances of the case calling for the exercise of equitable jurisdiction.

In the leading case upon this subject, that of *Tulk* v. *Moxhay*, 2 Phill. Ch. 774, it was held that a covenant between a vendor and purchaser, on the sale of land, that the purchaser, and his assigns should use or abstain from using the land in a particular way, would be enforced in equity against all subsequent purchasers with notice, independently of the question whether it be one which ran with the land so as to be binding upon subsequent purchasers at law. In that case the principle, as applied by courts of equity, is stated by *Lord Chancellor Cottenham* with such admirable clearness that we cannot do better than to quote his language. He said:

"Here there is no question about the contract; the owner of certain houses in the square sells the land adjoining, with a covenant from

the purchaser not to use it for any other purpose than as a square garden. And it is now contended, not that the vendee could violate that contract, but that he might sell the piece of land, and that the purchaser from him may violate it, without this court having any power to interfere. If that were so, it would be impossible for an owner of land to sell part of it without incurring the risk of rendering what he retains worthless. It is said that the covenant being one which does not run with the land, this court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. Of course, the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken. That the question does not depend upon whether the covenant was with the land is evident from this; that if there was a mere agreement and no covenant, this court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased."

The principle thus clearly stated has been applied in a great variety of cases for restrictive covenants and agreements, both in English and American courts; and they all concur in holding that whoever purchases land upon which a former vendor or lessor has imposed an easement, charge or restriction in the manner of its use, such as would be enforced by a court of equity as against his vendee or lessee, the party purchasing the land with notice will take it subject to such easement, charge or restriction, however created. *DeMattos* v. *Gibson*, 4 DeG. & J. 282; *Wilson* v. *Hart*, L. R. 1 Ch. App. 463; *Catt* v. *Tourle*, L. R. 4 Ch. App. 654; *Whitney* v. *Union R. Co.* 11 Gray, 359; *Columbia College* v. *Lynch*, 70 N. Y. 440.

The interest in Holmes for imposing the restrictions and conditions specified in the memorandum is very apparent. He reserved to himself and for his own use, as the site for a residence, a block or square of the parcel of land owned by him, all of which, except the square reserved, was embraced in the lease. He manifestly intended his own property to be benefited by the restrictions imposed upon that leased to the company; and, as we have seen, those restrictions are of a character that will be enforced by a court of equity.

It is, however, insisted that there has been a waiver of the restrictive conditions contained in the memorandum of the plan of organization referred to in the agreements, by Holmes in his lifetime, by the making of certain deeds for portions of the land embraced in the lease, without reference to such restrictive conditions, and, as stockholder and director in the company, by acquiescence in the making of certain conveyances by the corporation to purchasers without any such reference. But, as the case is now presented, it would be a little difficult to see any sufficient ground for concluding that there had been any such acts of waiver on the part of Holmes as would bring the case within the operation of the principle of waiver as established by the authorities in such cases. *German* v. *Chapman*, L. R. 7 Ch. Div. 271, 221.

We forbear, however, the determination of that question, as the estate of Holmes has no one before the court to represent it, and there being no other parties to the cause than the immediate parties to the contract of sale sought to be enforced. If those who represent the estate of Holmes, and others legally interested in the enforcement of the restrictive conditions, think proper to waive them, all difficulty may be easily removed out of the way of making a good title to the defendant; but without such waiver it would appear that the plaintiff cannot make a title of the land sold to the defendant free, clear and discharged of the covenant and the restrictive conditions thereby imposed, as to the mode of improvement and the use of the property. *Halle* v. *Newbold*, *supra*; *Re Higgins & Hitchman's Contract*, L. R. 21 Ch. Div. 95, 51 L. J. N. S. Ch. 772.

It follows that the decree of the Court below must be reversed, and the bill dismissed.

WEST VIRGINIA SUPREME COURT OF APPEALS.

SPRING GARDEN BANK
v.
HULINGS LUMBER CO., *Appt.*

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

***Deed to corporation.** After the corporators had signed an agreement to become a corporation, and before the charter had been obtained, a deed conveying land to such corporation by name was signed and acknowledged by the grantor, and delivered to a third party, with directions to retain it until the corporation obtained its charter and organized, and then to deliver it to the corporation; and after the charter had been received, and the corporation organized under it, such third person delivered the deed to, and it was accepted by, the corporation. *Held*, the said deed operated as a valid conveyance of said land to the corporation from the date of the delivery of said deed to it.

(March 7, 1889.)

APPEAL by the defendant corporation from certain decrees of the Circuit Court of Tucker County, in favor of plaintiff in an action to set aside a deed of certain lands and to subject said lands to the claims of creditors. *Reversed.*

The facts are fully stated in the opinion.

Messrs. **John J. Davis, L. D. Strader** and **C. Heydrick**, for appellant:

*Head note by SNYDER, P.

The deed of January 2, 1885, from Marcus Hulings to the Hulings Lumber Company, was a good and valid deed, and effectual to invest the company with the title to the lands thereby granted, when delivered to it on the 28th day of March, 1885, and it did not take effect as the deed of Marcus Hulings until the delivery thereof. Delivery is essential to the validity of a deed.

4 Kent, Com. p. 450; Bishop, Cont. p. 47, § 325; *Sharington* v. *Strotton*, Plowden, 308; Devlin, Deeds, 260; *Fay* v. *Richardson*, 7 Pick. 91; *Jackson* v. *Sheldon*, 22 Maine, 569.

It takes effect only from the delivery.

4 Kent, Com. 454; Bishop, Cont. p. 49, § 26. See *Brown* v. *Brown*, 66 Maine, 316, cited in 58 Am. Rep. 283, 284; 3 Washb. Real Prop. p. 300; Devlin, Deeds, §§ 177, 264.

Acceptance by the grantee is an essential part of delivery.

3 Washb. Real Prop. p. 310; *Jackson* v. *Richards*, 6 Cow. 617; *Church* v. *Gilman*, 15 Wend. 658, 30 Am. Dec. 82; *Hibberd* v. *Smith*, 67 Cal. 547, 56 Am. Rep. 735.

So long as the deed is within the control of the grantor, and subject to his authority, it cannot be held to have been delivered. A delivery of the deed cannot be effectually made until the depositary receives the proper instructions to deliver it.

1 Devlin, Deeds, p. 238, § 272; *Skinner* v. *Baker*, 79 Ill. 496.

If, on the date of said deed, there was no grantee *in esse*, there could be no acceptance, express or implied. If there was no acceptance there was no delivery; and if there was no delivery the deed did not take effect and was still under the control of the grantor. It could not be delivered to take effect until the corporation was *in esse*.

3 Washb. Real Prop. p. 282, § 32.

If when delivered the grantee named in the deed is *in esse* and competent to receive it, it takes effect upon such delivery.

Ibid.; 1 Devlin, Deeds, § 123.

If the grantee is *in esse* then, at the time of delivery, though nonexistent when the deed is written, signed and sealed, the deed takes effect if grantee accepts it.

See 3 Washb. Real Prop. p. 300; citing in note 5, *Rotch's Wharf Co.* v. *Judd*, 108 Mass. 227; *City Bank of Kenosha* v. *McClellan*, 21 Wis. 112; *Conover* v. *Porter*, 14 Ohio St. 450; *Wiley* v. *Moor*, 17 Serg. & R. 438; *Chauncey* v. *Arnold*, 24 N. Y. 330.

If the corporation, in making the purchase, has acquired property which under the law of its incorporation it had no right to acquire, all that can be said is that it has exceeded its powers, and may be deprived of its property by a judgment of forfeiture. The question is one the State alone can raise.

Cal. State Teleg. Co. v. *Alta Teleg. Co.* 22 Cal. 398; *Natoma Water & Min. Co.* v. *Clarkin*, 14 Cal. 544; *McCullough* v. *Wall*, 4 Rich. L. 68, 53 Am. Dec. 715; *Bank of Virginia* v. *Potiaux*, 3 Rand. 136; Devlin, Deeds, § 121; *Runyan* v. *Coster*, 29 U. S. 14 Pet. 122 (10 L. ed. 382).

When land is purchased for which one party pays the consideration and another party takes the title, a resulting trust immediately arises in favor of the party paying the consideration, and the other party becomes his trustee.

2 Devlin, Deeds, § 1153; *Williams* v. *Hollingsworth*, 1 Strobh. Eq. 103, 47 Am. Dec. 527; *Dow* v. *Jewell*, 45 Am. Dec. 371.

Lands bought and paid for out of partnership funds, where the title is taken in the name of one partner, are not subject to be taken for that partner's individual debt.

Coder v. *Huling*, 27 Pa. 84, 88; 2 Devlin, Deeds, § 1159.

Messrs. **W. L. Cole** and **C. C. Cole**, for appellee:

Inadequacy of price is of itself sufficient to impute notice of the fraudulent intent to the grantee. Knowledge of the fraudulent intent, or of facts sufficient to put a prudent man upon inquiry, is sufficient to avoid the deed.

Philbrick v. *O'Connor*, 15 Oreg. 15; *Hinton* v. *Ellis*, 27 W. Va. 422; *Williamson* v. *Goodwyn*, 9 Gratt. 503; *Blow* v. *Maynard*, 2 Leigh, 29; *Clements* v. *Moore*, 73 U. S. 6 Wall. 299 (18 L. ed. 786); *Mills* v. *Howeth*, 19 Tex. 257, 70 Am. Dec. 331.

A deed purporting to convey title to a corporation which has no existence is void.

Russell v. *Topping*, 5 McLean, 194; *Phelan* v. *San Francisco Co.* 6 Cal. 531.

A deed to an association of individuals conveys no title.

Douthitt v. *Stimson*, 63 Mo. 268; *German Land Asso.* v. *Scholler*, 10 Minn. 358.

It makes no difference that the association is afterwards incorporated by the name mentioned in the deed.

Phila. Baptist Asso. v. *Hart*, 17 U. S. 4 Wheat. 1 (4 L. ed. 499).

A deed executed with the name of the grantee left blank is void, even if the blank be filled by a third person verbally authorized so to do, unless it be done in the presence of the grantor; and while the deed remains subject to his control, the great weight of authority is against its validity.

Burns v. *Lynde*, 6 Allen, 305; *Hibblewhite* v. *McMorine*, 6 Mees. & W. 200; *U. S.* v. *Nelson*, 2 Brock. 64; *Chase* v. *Palmer*, 29 Ill. 306; *Whitaker* v. *Miller*, 83 Ill. 381; *Williams* v. *Crutcher*, 5 How. (Miss.) 71; *Davenport* v. *Sleight*, 2 Dev. & B. L. 381; *Cross* v. *State Bank*, 5 Ark. 525; *Viser* v. *Rice*, 33 Tex. 139; *Heath* v. *Nutter*, 50 Maine, 378; *Wunderlin* v. *Cadogan*, 50 Cal. 613; *Ingram* v. *Little*, 14 Ga. 173; *Lindsley* v. *Lamb*, 34 Mich. 509.

The deed was not delivered to Butler as an escrow, as was argued by counsel in the court below, but was an absolute delivery for the use of the proposed corporation, its delivery to the corporation not depending upon the performance of any condition by the grantee, but upon the happening of an event. It was, therefore, a present and absolute delivery so far as the grantor is concerned.

Hathaway v. *Payne*, 34 N. Y. 92; *Ruggles* v. *Lawson*, 13 Johns. 285; *Foster* v. *Mansfield*, 3 Met. 412, 37 Am. Dec. 154; Martindale, Conveyancing, § 226; 3 Washb. Real Prop. 300.

As soon as the grantor parts with his dominion over the deed, although to a person not authorized by the grantee to receive it, it is a good and sufficient delivery to pass the title.

Mather v. *Corliss*, 103 Mass. 568.

It is a solecism to speak of delivery of a deed to a person not in existence, in the sense in which appellant's counsel attempts to construe it. See 3 Washb. Real Prop. p. 282; 1 Devlin, Deeds, § 123; *Hulick* v. *Scovil*, 9 Ill. 159, 190.

Snyder, *P.*, delivered the opinion of the court:

On December 7, 1886, the Spring Garden Bank, a Pennsylvania corporation, sued out of the clerk's office of the Circuit Court of Tucker County an attachment against the estate of Marcus Hulings, a nonresident of this State, and caused the same to be levied upon a number of tracts of land lying in the Counties of Tucker and Randolph, in this State.

At the January Rules, 1887, the said Spring Garden Bank, suing on behalf of itself and other attachment creditors, exhibited its bill in said circuit court against the said Marcus Hulings, the Hulings Lumber Company, F. W. Mitchell, and others, to set aside a deed dated January 2, 1885, made by said Marcus Hulings to the said Hulings Lumber Company, purporting to convey to it the lands attached as aforesaid, and to subject said lands to the payment of certain debts due to the plaintiff and others from said Marcus Hulings.

The bill assails said deed upon two grounds: *first*, that there was no such body or corporation as the Hulings Lumber Company, mentioned in the deed as grantee, at the time the deed was made; and *second*, that the said deed was voluntary, and made for the purpose of delaying and defrauding creditors.

Answers were filed by defendants, and depositions taken, upon which the cause was heard, and a decree entered, September 7, 1887, holding the said deed to be void, and referring the cause to a commissioner to ascertain and report the liens on said lands, etc.

Upon the incoming of the commissioner's report, the court, on May 14, 1888, made a decree fixing the amounts and priorities of the various liens on said lands, and directed a sale thereof. From this decree and that of September 7, 1887, the defendant, the Hulings Lumber Company, obtained this appeal.

The facts disclosed by the record appear to be as follows:

During the years 1882, 1883 and 1884 Marcus Hulings purchased certain timber lands, and took options to purchase other lands, in the Counties of Tucker and Randolph, along or near the Cheat River and its tributaries. On some of said lands he paid parts of the purchase money, the whole amount paid by him not exceeding $10,000, and obtained deeds therefor, giving his notes for the balance, amounting in the aggregate to about $50,000, which were secured by vendor's liens retained in the deeds. On other portions of the lands he paid nothing, and for others still he had no deeds. By a written agreement dated April 30, 1884, the said Marcus Hulings, his son, Willis J. Hulings, and John E. Butler entered into copartnership under the name of Hulings & Co. for the purpose of dealing in petroleum, manufacturing lumber, and buying, selling, holding, and dealing in lands, and building and operating sawmills, etc., and carrying on a general lumber business.

The said Marcus Hulings, for the consideration stated in said agreement, sold to his son and said Butler a two thirds' interest in all of said lands and options, thus making the said Marcus Hulings, Willis J. Hulings and the said Butler, each the owner of one third of said lands, subject to the vendor's liens existing thereon; and on the same day the said Marcus Hulings, by a contract in writing, bound himself to convey all of said lands subject to the said vendor's liens to a trustee, to be appointed by the said firm of Hulings & Co., as soon as surveys thereof could be completed, and the titles passed upon by counsel.

The said firm at once entered into the possession of said lands and began to operate them in the lumber business, and purchased other lands with partnership funds, taking the title in the name of said Marcus Hulings, who was to convey the whole of said lands to a trustee, when appointed as designated in said agreement. The said firm also took up a large number of the notes which had been given by said Marcus Hulings for said lands.

Before the conveyance of said lands, or the selection of a trustee to whom they could be conveyed, the said firm of Hulings & Co. decided to become an incorporate body, and that said conveyance should be made to said corporation instead of to a trustee. Accordingly, on January 2, 1885, the parties duly executed an agreement to become a corporation of the State of West Virginia by the name of the "Hulings Lumber Co.," and on the same day, but subsequent to the execution and filing of said agreement, the said Hulings & Co., by a writing duly signed by said firm, agreed that they would "cause to be conveyed unto said corporation" all the aforesaid lands to which Marcus Hulings held the title, and also the mills and other property that had been acquired by said firm in the lumber business subsequent to the date of the aforesaid agreement of April 30, 1884.

In pursuance of this writing or contract of January 2, 1885, a deed was written, signed, sealed and acknowledged by Marcus Hulings and wife, conveying to the Hulings Lumber Company all of said lands, subject to the vendor's liens still existing upon them for unpaid purchase money, amounting to over $30,000. This deed was placed in the hands of John E. Butler with the understanding that he was to deliver it to the Hulings Lumber Company as soon as it should be organized, and issued stock in payment for said lands to the corporators.

On February 20, 1885, a certificate of incorporation was issued by the Secretary of State of West Virginia for said corporation, and on March 28, 1885, the stockholders met and duly organized, and elected a board of directors, and on the same day the board of directors met and elected the following officers: Willis J. Hulings, president; John E. Butler, treasurer; and D. W. Osborne, secretary.

At said meeting the president and secretary were authorized to issue $150,000 of the capital stock of the corporation in payment for said lands, and thereupon, at said meeting, John E. Butler delivered said deed, and it was duly accepted by the corporation, and the capital stock issued and delivered in payment for said lands.

The corporation took possession of the lands, engaged largely in the lumber business, paid off part of the outstanding notes for the purchase money, and induced F. W. Mitchell & Co. to take up the balance, and executed a trust deed on said lands, dated February 6, 1886, to secure F. W. Mitchell & Co. for the purchase notes so paid by them.

The said deed to the Hulings Lumber Company was duly recorded in Tucker County on April 3, 1885, and in Randolph County on April 20, 1885; and the said trust deed to secure F. W. Mitchell & Co. was duly recorded in said counties prior to March 6, 1886.

On October 27, 1886, the plaintiff, the Spring Garden Bank, recovered, in the Supreme Court of the State of New York in and for the City of New York, a judgment against Marcus Hulings for $3,374, with costs and damages; making an aggregate sum of $3,622.07.

It is upon this judgment that this suit is founded. The note upon which said judgment was recovered was given by Hulings on September 29, 1884, but, according to the testimony of Marcus Hulings, which is not contradicted, the said note was not negotiated so as to make it a liability upon him until about the middle of June, 1885, more than two months after the date of the deed to the Hulings Lumber Company.

The first question presented is whether or not the deed to the Hulings Lumber Company is void because at the date of said deed the said company had not been incorporated. This inquiry involves the essentials of a valid conveyance of real estate. The law requires more form and solemnity in the conveyance of land than in that of chattels. It is only necessary here to consider conveyances by deed.

A deed is a writing sealed and delivered, and to be duly executed it must be written on paper or parchment. Co. Litt. 35 *b*.

There must, of course, be both a grantor and grantee to every deed. In order to be a grantor the party must be *sui juris*, and capable of contracting; but such is not the case with respect to the grantee. Any person capable of holding lands, including corporations, idiots, persons of unsound mind and infants, may be the grantee in a deed.

Delivery is an incident essential to the due execution of a deed, for it takes effect only from the delivery. The delivery may be by the grantor to the grantee, or to any other person authorized by him to receive it. It may be delivered to a stranger as an escrow, which means a conditional delivery to a stranger, to be kept by him until certain conditions be performed, and then to be delivered over to the grantee. Generally, an escrow takes effect from the second delivery, and is to be considered as the deed of the party from that time; but this general rule does not apply when justice requires a resort to fiction. 4 Kent, Com. 453; *Fewell* v. *Kessler*, 30 Ind. 195; *Gilmore* v. *Morris*, 13 Mo. App. 114.

A writing delivered to a stranger for the use and benefit of the grantee, to have effect after a certain event, or the performance of some condition, may be delivered either as a deed or as an escrow. *Hatch* v. *Hatch*, 9 Mass. 307; 1 Devlin, Deeds, § 275.

According to all the authorities, delivery, whatever may be its form or the manner in which it is made, is absolutely essential. It is the final act, without which all other acts and formalities are ineffectual; and the deed takes effect only from its actual or constructive delivery. 1 Devlin, Deeds, § 260; Bishop, Cont. § 26; 3 Washb. Real Prop. 300.

The foregoing are elementary principles. The important question, however, in this cause, is whether or not the aforesaid deed from Marcus Hulings and wife to the Hulings Lumber Company is void and ineffectual for the want of a grantee. It is admitted that a grant *in præsenti* to a person not *in esse* at the time the deed is delivered would be inoperative; and, likewise, a deed to a corporation never created or organized would be void. *Hulick* v. *Scovil*, 4 Gilman [9 Ill.] 191; *Harriman* v. *Southam*, 16 Ind. 190; *Russell* v. *Topping*, 5 McLean, 202.

These cases and others of the same character fully sustain the doctrine that a deed to a corporation not in existence, or to one incapable by its charter of holding real estate, or to a person not *in esse* at the time of the delivery of the deed, is void; but I have been unable to find any case in which it has been decided that a deed made to a corporation having a potential existence at the date of the deed, and which had obtained its charter and completed its organization at the time the deed was delivered to it was void or ineffectual as a conveyance to the corporation. On the contrary, in *Rotch's Wharf Company* v. *Judd*, 108 Mass. 224, the court held that a deed conveying land to a corporation, dated after the date of its charter and before its organization, was a valid conveyance. The court in its opinion, on page 228, says:

"The acceptance of the deed will be presumed as soon as the plaintiffs (the corporation) were competent to take it. *Concord Bank* v. *Bellis*, 10 Cush. 276; *Ward* v. *Lewis*, 4 Pick. 518; *Bank of U. S.* v. *Dandridge*, 25 U. S. 12 Wheat. 64, 70 [6 L. ed. 552]. And these plaintiffs could accept a deed as soon as they became competent to make a contract under their charter.

In *Drury* v. *Foster*, the court, in its opinion, says: "We agree, if one competent to convey real estate sign and acknowledge a deed in blank, and deliver the same to an agent with authority, express or implied, to fill the blank, and perfect the conveyance, its validity could not be well controverted." 69 U. S. 2 Wall. 33 [17 L. ed. 781].

As before stated, it is the delivery of the deed that is the crowning act to complete its execution, and is as essential to the transmission of the title as the deed itself. Acceptance by the grantee, or someone for him, is an essential part of the delivery. It is true, an acceptance, where it is for the benefit of the grantee, will be presumed; still acceptance is a necessary incident to the conveyance. If, therefore, there is a grantee in existence at the time of delivery, and such grantee accepts the conveyance, I can see no objection, either in law or reason, why the conveyance should not be sustained, especially in a case where justice and equity require it.

It is the duty of courts to uphold, rather than destroy, deeds. *Sherwood* v. *Whiting*, 54

Conn. 330, 3 New Eng. Rep. 673; *Flagg* v. *Eames*, 40 Vt. 16, 94 Am. Dec. 363; *African M. E. Church* v. *Conover*, 27 N. J. Eq. 157; *Shed* v. *Shed*, 3 N. H. 432.

In the case before us the corporators of the Hulings Lumber Company on January 2, 1885, before the deed to it was executed, had duly signed and entered into articles in the form prescribed by the statute, by which they agreed to become a corporation; and at the instance of said corporators Marcus Hulings and wife, on the same day, but after said articles had been entered into, signed and acknowledged a deed to the corporation, thus agreed upon and partly created, for the lands in controversy.

It is fully proved by both Marcus Hulings and John E. Butler that this deed was delivered by the Hulings to said Butler to be held by him until the Hulings Lumber Company received its charter, and organized, and then, upon the issuance of the stock in payment of the lands as agreed upon, Butler was to deliver the deed to the corporation; and it was also proved that on March 28, 1885, after said corporation had fully organized under its charter, and passed a resolution to accept the deed and issue the capital for the lands, Butler did deliver the deed to, and it was accepted by, the corporation; and afterwards, on April 3, 1885, it had said deed duly recorded in Tucker County.

It seems to me that this deed, under the facts and circumstances hereinbefore stated, was a sufficient conveyance to vest the title to the lands therein mentioned in the Hulings Lumber Company. The said company was at the time the deed was delivered to and accepted by it a complete corporation, duly chartered and organized; and not only this, but it had at the date of said deed a potential existence, which subsequently became an actual and legal corporation.

I am, therefore, clearly of opinion that said deed did vest in the said Hulings Lumber Company the legal title to said lands. This conclusion renders it unnecessary to consider at any length the other ground upon which said deed is assailed by the plaintiff's bill.

It appears from the testimony of Marcus Hulings, and there is no evidence in the record contradicting him, that the notes on which the plaintiff obtained its judgment were wholly without consideration, and never became legal and binding obligations upon him until they passed into the hands of *bona fide* holders, and that no part of them did so pass into the hands of the plaintiff or any person under whom it claims until about the middle of June, 1885, which was more than two months after the title to said lands had vested in said company.

If, therefore, it were conceded that said deed was wholly voluntary, and without any valuable consideration, in the absence of any proof of actual fraud the plaintiff is in no position to assail or complain of it. There is no proof in the record of any actual fraud. On the contrary, the answers of both Marcus Hulings and the Hulings Lumber Company deny that the deed was either fraudulent or made without a valuable consideration. And these answers are supported by the evidence taken by and on behalf of the defendants. The plaintiff offered no evidence on these questions.

For the reasons aforesaid I am of opinion that *the decrees of the Circuit Court should be reversed, and the plaintiff's bill dismissed.*

English and **Brannon**, *JJ.*, concurred; **Green**, *J.*, absent.

UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF GEORGIA.

TAYLOR MANUFACTURING CO.
v.
HATCHER & CO.

HATCHER & CO.
v.
TAYLOR MANUFACTURING CO.

(.....Fed. Rep.....)

*1. **When there has been part performance,** and expenditures *properly* made, by one of the parties to a contract, which is broken by the fault of the other party, the party performing may recover his reasonable expenditures. He may also recover the profits of the contract if he proves that direct, as distinguished from speculative, profits would have been realized. If the expenditures of the party not at fault are unreasonable, it is the duty of the opposite party to show it.

2. **Profits remote and speculative,** and incapable of clear and direct proof, cannot be recovered; but when they are the direct and immediate fruits of the contract, they *may* be; they are then part and parcel of the contract itself, entering into and constituting a portion of its very elements. *Citing leading American case, Masterton* v. *Mayor of Brooklyn*, 7 Hill, 69.

*Head notes by SPEER, J.

NOTE.—*Damages for breach of contract.*

In an action upon contract, only such damages are recoverable as are the natural and proximate consequence of the breach. These include direct damages, and such as the parties contemplated would be likely to result from a breach when the contract was made. Rhodes v. Baird, 16 Ohio St. 581; Brayton v. Chase, 3 Wis. 456; Bridges v. Stickney, 38 Maine, 361; Hadley v. Baxendale, 9 Exch. 341; Candee v. W. U. Teleg. Co. 34 Wis. 479; Wibert v. N. Y. & E. R. Co. 19 Barb. 48; Deyo v. Waggoner, 19 Johns. 241; Dorwin v. Potter, 5 Denio, 306; Armstrong v. Percy, 5 Wend. 535; Hargous v. Ablon, 3 Denio, 406; Bennett v. Lockwood, 20 Wend. 223; Clark v. Brown, 18 Wend. 229; Blanchard v. Ely, 21 Wend. 342; Walrath v. Redfield, 11 Barb. 368; Lawrence v. Wardwell, 6 Barb. 424; Vanderslice v. Newton, 4 N. Y. 130.

Damages which arise upon the direct, necessary and the immediate effect of the breach are always recoverable; or those which ensue in the ordinary course of things, considering the particular nature and subject matter of the contract. Booth v. Spuyten Duyvil Rolling Mill Co. 60 N. Y. 487; 3 L. R. A.

See also 18 L. R. A. 315; 35 L. R. A. 633.

3. **The leading English case announces the rule thus:** "When two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract should be such as may fairly and reasonably be considered either as arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of *both parties at the time they made the contract*, as the probable result of breach of it." *Hadley* v. *Baxendale*, 9 Exch. 341-353.

4. **Damages which are the legal and natural result** of the act done, though to some extent contingent, are not too remote to be recovered. Code of Georgia, § 3070.

5. **Where by the action of the party** at fault the profits of a contract have been prevented, all recovery therefor will not be defeated because exact and absolute proof is unattainable; and in view of the tortious refusal of the party at fault to perform its contract, the party injured is permitted to show the particular facts which have transpired and the entire transaction upon which the claim and expectation of profits is founded, in order to prove with reasonable certainty what the profits would have been.

6. **Where a company, manufacturing agricultural steam engines, agrees to furnish an agent who sells on commission** the engines necessary to supply the season's demand, and the agent makes large expenditures in advertising, canvassing and otherwise building up the trade, and proves a heavy demand upon him for these particular engines, largely in excess of his order to the company, the company, refusing without sufficient cause to furnish the engines ordered, will be held liable for the sum of commissions on the engines ordered, and for the reasonable expenditures of the agent in their undertaking.

7. **A claim for damages,** upon the facts stated in the preceding section of syllabus, for destruction generally of agents' business, is too indefinite and uncertain to be the basis of a recovery.

8. **A clause in the contract,** obliging the manufacturing company to furnish engines if the exigencies of its business permitted, gave it under the facts no arbitrary right to refuse. It must have a valid reason for the refusal, and its validity must be shown by evidence.

(March 28, 1889.)

SUIT in equity for an account, on exceptions to Master's report in favor of Hatcher & Co. *Report modified and confirmed.*

The facts fully appear in the opinion.

Messrs. **Lanier & Anderson** and **Alexander Proudfit** for Taylor Manufacturing Co.

Messrs. **Bacon & Rutherford, Hill & Harris** and **Eugene Hawkins** for Hatcher & Co.

Speer, *J.*, delivered the following opinion:

These causes have been, after much circuity of pleading, tried upon the *original bill of the* Taylor Manufacturing Company, as plaintiffs, and that of the Hatcher Manufacturing Company, used as a cross bill, as defendants.

After repeated preliminary hearings, the issues of law and fact were referred to the Master in chancery. His report has been filed and both parties have excepted thereto. For convenience of reference the parties are termed by the Master the "Taylor Company" and the "Hatcher Company," and these designations will be here adopted.

The Taylor Company of Chambersburgh, Pa., are manufacturers of steam engines, suit-

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Scott v. *Hunter*, 46 Pa. 192; *Hadley* v. Baxendale, 9 Exch. 341; Davis v. Talcott, 14 Barb. 611; Cobb v. Ill. Cent. R. Co. 38 Iowa, 601; Haven v. Wakefield, 39 Ill. 509; Ill. Cent. R. Co. v. Cobb, 64 Ill. 128; Winne v. Kelley, 34 Iowa, 339; Van Arsdale v. Rundel, 82 Ill. 63; Rogers v. Bemus, 69 Pa. 432; Hinckley v. Beckwith, 13 Wis. 31; Leonard v. N. Y. A. & B. E. M. Teleg. Co. 41 N. Y. 544; Scott v. Rogers, 31 N. Y. 676; Hexter v. Knox, 63 N. Y. 561; True v. International Teleg. Co. 60 Maine, 9; Fletcher v. Tayleur, 17 C. B. 21; Squire v. W. U. Teleg. Co. 98 Mass. 232; Cory v. Thames Iron Works & S. Co. L. R. 3 Q. B. 181; Borradaile v. Brunton, 8 Taunt. 535; *Ex parte* Cambrian Steam Packet Co. L. R. 6 Eq. 396; Dewint v. Wiltse, 9 Wend. 325; Dobbins v. Duquid, 65 Ill. 464; Shepard v. Milwaukee Gas Light Co. 15 Wis. 318; Richardson v. *Chynoweth*, 26 Wis. 656; *Wolcott* v. *Mount*, 38 N. J. L. 262; Benton v. Fay, 64 Ill. 417; Grindle v. Eastern Exp. Co. 67 Maine, 317; 1 Sutherland, Damages, p. 82.

The *rule first stated in Hadley* v. Baxendale, 9 Exch. 341, for ascertaining damages which are recoverable for breach of contract, that they be such as arise "naturally, *i. e.*, according to the usual course of things from such breach of contract itself," has been universally assented to. Griffin v. Colver, 16 N. Y. 490; W. U. Teleg. Co. v. Graham, 1 Colo. 230; Sanders v. Stuart, L. R. 1 C. P. Div. 326; Great Western R. Co. v. Redmayne, L. R. 1 C. P. 329; Masterton v. Brooklyn, 7 Hill, 61; Cuddy v. Major, 12 Mich. 368; Johnson v. Mathews, 5 Kan. 118; Lawrence v. Wardwell, 6 Barb. 423; Portman v. Middleton, 4 C. B. N. S. 322; Gee v. Lancashire & Y. R. Co. 6 Hurlst. & N. 211; Hales v. London & N. W. R. Co. 4 Best & S. 66; Travis v. Duffau, 20 Tex. 49; Fox. v. Harding, 7 Cush. 516; 1 Sutherland, Damages, p. 84.

Loss of profits as an element.

Loss of profits and advantages which are the immediate fruits of the contract, and which must have been in the contemplation of the parties in making the contract, are a proper and essential element in computing the damages. Fox v. Harding, 7 Cush. 523; Somers v. Wright, 115 Mass. 298; Stoddard v. Treadwell, 26 Cal. 307; Davis v. Talcott, 14 Barb. 624; Griffin v. Colver, 22 Barb. 590; Alder v. Keighley, 15 Mees. & W. 117; St. John v. N. Y. 6 Duer, 321, 13 How. Pr. 534; Eagley v. Smith, 19 How. Pr. 5; Heineman v. Heard, 2 Hun, 332, 50 N. Y. 37; Jones v. Judd, 4 N. Y. 414; White v. Miller, 71 N. Y. 133.

The party who is ready to perform is entitled to a full indemnity for the loss of his contract. He ought to recover precisely what he would have *made by performance. This is as sound in morals* as it is in law. Shannon v. Comstock, 21 Wend. 461; Miller v. Mariner's Church, 7 Maine, 51; Shaw v. Nudd, 8 Pick. 13; Swift v. Barnes, 16 Pick. 196; Royalton v. Royalton & W. Turnp. Co. 14 Vt. 311.

This must not depend on the chances of trade, but upon the market value of goods, and other facts which are susceptible of definite proof. Griffin v. Culver, 16 N. Y. 494; Masterton v. Brooklyn, 7 Hill, 61.

The plaintiff must establish the quantum of his loss by evidence, from which the jury will be able to estimate the extent of his injury, excluding all such elements of injury as are incapable of being ascertained to a reasonable degree of certainty by

able for agricultural uses. They made a written contract with M. J. Hatcher & Co., constituting the latter their agents for the purpose of selling the engines in a large number of the counties in this State.

This contract was practically identical with a previous contract between the same parties for the year 1884. It made Hatcher & Company the sole agent of the Taylor Company in the specified territory, and was of force from January 1, 1885, to January 1, 1886. In brief, the Taylor Company agreed to furnish the engines, and blank forms of contracts of sale, essential to the business; and the Hatcher Company agreed to carry on the business as directed by the terms of the contract.

These are specially found by the Master, and his findings, both as to the terms of the written contracts and the issues thereon made by the pleadings, are accurately stated and are generally approved.

Upon the disputed issues of fact, the Master finds that the Hatcher Company disregarded the contract of February 3, 1884, in that it sold engines for credit, and did not exact cash for one third of the price, and notes at short terms for the balance, but that the breach of the contract was clearly ratified by the Taylor Company.

He finds that the contract of December 8 was broken in like manner, and that there was neither authority for the breach nor subsequent ratification.

He finds that the contract of 1884 was not modified by subsequent parol agreement.

He finds that the Taylor Company violated the contract of December 9, 1884, in that it failed to deliver in Macon on or about July 15 sixteen engines sold outright to the Hatcher Company and to deliver under the terms of the agency contract sixteen other engines at the same time.

The Master finds that these breaches are without justification. He does not attribute this failure to intentional fraud on their part, but to a desire of the Taylor Company to terminate the agency because of anticipated loss and litigation.

He finds no fraud or error in a settlement of the first of August, 1885, but he also finds that it did not comprehend the questions of liability growing out of the Taylor Manufacturing Company's failure to deliver engines as it was bound to do by the contract of December 9, 1884.

He finds that after August 1, 1885, the Hatcher Company had written authority to sell without exacting one third cash, and that the Taylor Company was justified by its contract in refusing to fill the orders made by the Hatcher Company in June, 1885.

He finds that the Hatcher Company was bound to guaranty to its principal all debts accepted by it in its agency.

The Master reports a balance against the Hatcher Company of $8,902.29, subject to recoupments of commissions on the unpaid notes of 1884 and 1885 as such notes are paid; and he suggests that a receiver be appointed to take charge of the assets of the agency business, to sell the same, collect the notes, in order that the rights of the parties may be finally settled. There are other findings not essential to the main matters of the controversy.

To the report of the Master numerous and voluminous exceptions have been filed, and the issues thus presented have been elaborately argued, orally and by brief. The court has had

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the usual rules of evidence. Wolcott v. Mount, 36 N. J. L. 271; White v. Miller, 71 N. Y. 133.

The requisite that the damages must not be remote, but the proximate consequence, is in part an element of the required certainty. Griffin v. Colver, 16 N. Y. 494.

Special circumstances known to both parties.

If the special circumstances under which the contract was actually made were communicated to the defendant, and thus known to both parties, the damages resulting from the breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known and communicated. But, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in contemplation the amount of injury which would arise generally. Griffin v. Colver, 16 N. Y. 489; Hammer v. Shoenfelder, 47 Wis. 455; 1 Sutherland, Damages, p. 79.

On breach by vendor.

Where a vendor has agreed to sell and deliver personal property at a particular day, and fails to perform his contract, the vendee may recover in damages the difference between the contract price and the market value of the property at the time when it should have been delivered. Chitty, Cont. 5th Am. ed. 445; Dey v. Dox, 9 Wend. 129; Gainsford v. Carroll, 2 Barn & C. 624; Shepherd v. Hampton, 16 U. S. 3 Wheat. 200 (4 L. ed. 369); Quarles v. George, 23 Pick. 400; Shaw v. Nudd, 8 Pick. 9; 2 Phil. Ev. 104.

On breach by vendee.

Where a vendee breaks his contract, the vendor may recover difference between the contract price and any less sum the property was worth when the vendee was bound to take and pay for it. The loss he suffers is the profit he would have made by the completion of the bargain. Gordon v. Norris, 49 N. H. 376; Haines v. Tucker, 50 N. H. 307; Collins v. Delaporte, 115 Mass. 159; Ullmann v. Kent, 60 Ill. 271; Sanborn v. Benedict, 78 Ill. 310; Haskell v. Hunter, 23 Mich. 305; Camp v. Hamlin, 55 Ga. 259; McCracken v. Webb, 36 Iowa, 551; Dustan v. McAndrews, 44 N. Y. 72; Hayden v. Demets, 53 N. Y. 426; 1 Sutherland, Damages, p. 108.

So, if a person who has agreed to purchase goods at a certain price refuses to receive them, he must pay the difference between their market value and the enhanced price which he contracted to pay. 2 Starkie, Evidence, 7th Am. ed. 1201; Boorman v. Nash, 9 Barn. & C. 145.

Gains or profits from collateral enterprises not considered.

Under the civil law the parties are deemed to have contemplated only the damages and interest which the creditor might suffer from the nonperformance of the obligation, in respect to the particular thing which is the object of it, and not such as may have been incidentally occasioned thereby in respect to his other affairs. 1 Evans' Poth. 91; and see Dom. b. 3, title. 5, § 2, arts. 3, 4, 5, 6.

In awarding damages for the nonperformance of an existing contract, the gains or profits of collateral enterprises in which the party claiming them has been induced to engage, by relying upon the performance of such a contract, cannot be included.

little difficulty in the ascertainment that the conclusions of the Master, as we have said, are generally accurate and are sustained by the law. With reference, however, to the sixth finding, which disallows the claim of the Hatcher Company for damages resulting from the failure of the Taylor Company to ship thirty-two engines, as ordered by the Hatcher Company, for the trade of 1885, we have had more trouble.

The Master was of the opinion that this claim of the Hatcher Company is without legal merit for the reason, as stated by him on page 86 of the report, that it belongs to the category of "gains, contingent upon the productiveness of the season, the fluctuations of trade, the resources and efforts of competitive dealers," and are too uncertain to be capable of that clear and direct proof which the law requires. There may be found cases which tend to sustain this finding, but they seem adverse to the philosophy of the law.

It is apparent that the Master having found, as before stated, that the failure to furnish the thirty-two engines above referred to was an unmistakable and unjustifiable breach of the contract, and that it has not been adjusted or settled, the Hatcher Company is only called upon to show the degree of proof essential to an estimation of the damages directly resulting therefrom. To do this the Hatcher Company points out the fact that the selling price of the engines is fixed by the contract.

The commissions of the Hatcher Company being perfectly definite, if it be clear that there was a sufficiently certain opportunity to sell the engines, it follows that to ascertain the amount of which the Hatcher Company has been bereft is a simple matter of computation. Now could the Hatcher Company have readily sold these engines had they been furnished in time and in accordance with the ascertained obligation of the Taylor Company? The evidence relied on to show this is properly made a part of the exception. It is there made to appear that the Taylor Company, by its president, estimated that the Hatcher Company, would sell seventy-five engines that season.

A witness, Herron, testified that in his judgment sixty-five or seventy-five engines would have been sold by the Hatcher Company. He was familiar with the business and his estimate was based upon the number of inquiries, the prospect of a good crop, the demand for engines by customers in person and by correspondence.

Barron, another witness, gives a still larger estimate. It is made plain that the year before the sales were large, and in 1885 Hatcher & Company had advertised the Taylor engines thoroughly, had indeed devoted all of their energies exclusively to the business of the Taylor Company, did not try to sell any other engines, and that there were frequent inquiries and in fact a great demand for the engines. Besides, the crop prospect in the spring and summer was fine. The witness stated in addition that there were a hundred men who wanted to buy the Taylor engines from Hatcher in 1885. The witness was employed by Hatcher. The orders were not given, because he could not promise to supply the applicants, on account of the action or non-action of the Taylor Company.

Hatcher, one of the defendants, testifies substantially to the same facts, and added that the business was now established, that the Taylor's was "a good engine" and had given satisfaction, that his territory had been increased and the engines were sold at "closer figures." There were fifty or sixty applications on the "application book" and many applications were not entered. This book was kept to show the number of persons who called to make inquiry relative to engines. It was put in evidence and showed about fifty such applications. The demand was so definite that Hatcher at length proposed to purchase outright certain engines for the agency business; and the correspondence in evidence shows this. McDowell, the treasurer of the Taylor Company, who had gone to Macon to look after the business, writes, on August 3, to his company:

Hormer v. Wood, 16 Barb. 389; Cuddy v. Major, 12 Mich. 368; Masterton v. Brooklyn, 7 Hill, 61; Story v. N. Y. & H. R. Co. 6 N. Y. 85; Bridges v. Stickney, 38 Maine, 361; Barnard v. Poor, 21 Pick. 378; Fox v. Harding, 7 Cush. 516.

Loss of profits from collateral or subordinate contracts with third persons, though entered into for the purpose of carrying an original contract into effect, and upon the faith of it, cannot be included in the damages for a breach of such original contract. Walrath v. Redfield, 11 Barb. 372; Horner v. Wood, 16 Barb. 389; Lowenstein v. Chappell, 30 Barb. 245; Story v. N. Y. & H. R. Co. 6 N. Y. 90; Fox v. Harding, 7 Cush. 523; Phila. W. & B. R. Co. v. Howard, 54 U. S. 13 How. 344 (14 L. ed. 157).

Mere speculative profits or gains not recoverable.

Mere speculative profits and gains, which are conjectural, and with respect to which no means exist of ascertaining, even approximately, the probable results, cannot, under any circumstances, be brought within the range of damages recoverable. Passinger v. Thorburn, 34 N. Y. 634; Wolcott v. Mount, 36 N. J. L. 262; Van Wyck v. Allen, 69 N. Y. 61; White v. Miller, 71 N. Y. 133; Ferris v. Comstock, 33 Conn. 513; Page v. Pavey, 8 Car. & P. 769; Randall v. Raper, El. Bl. & El. (96 Eng. C. L.) 84; 1 Sutherland, Damages, 111.

Speculative, prospective, remote and uncertain profits are never taken into account. Freeman v. Clute, 3 Barb. 427; Scott v. Rogers, 4 Abb. App. Dec. 161; Giles v. O'Toole, 4 Barb. 263, 264; Masterton v. Brooklyn, 7 Hill, 61; Kent v. Hudson River R. Co. 22 Barb. 294; Dugan v. Anderson, 36 Md. 567; Dunn v. Johnson, 33 Ind. 54.

Considerations too remote.

A good bargain made by a vendor, in anticipation of the price of the article sold, or an advantageous contract of resale made by a vendee, confiding in the vendor's promise to deliver the article, are considerations always excluded as too remote and contingent to affect the question of damages. Clare v. Maynard, 6 Ad. & El. 519; Cox v. Walker, 6 Ad. & El. 523 note; Walker v. Moore, 10 Barn. & C. 416; Cary v. Gruman, 4 Hill, 627, 628; Chitty, Contracts, 458, 870.

For negligence in not transporting merchandise in seasonable time, plaintiff can recover as damages the difference between the price at which such merchandise was selling when it should have been delivered and the market price at the time it was selling when it was delivered. Wibert v. N. Y. & E. R. Co. 19 Barb. 40; Jones v. N. Y. & E. R. Co. 29 Barb. 633, disapproving Kent v. Hudson River R. Co. 22 Barb. 278.

"The engines you send, ship as soon as possible, as parties coming in to buy expect to take engines with them, or have them delivered at once."

Smith, a merchant who dealt in engines, a witness at once intelligent and disinterested, testified that the trade in engines was large during the selling season of 1885. This he knew from his own business.

In addition to this evidence, there are in the record admissions of the Taylor Company's agent, J. C. Weaver, which have valuable importance. In the letter of August 31, 1885, to the Taylor Company, he writes:

"He (Hatcher) virtually lost the entire season trade, which is now over . . . His trade, on account of the engines not arriving, countermanded their orders and got engines elsewhere . . . It got winded about that Hatcher could get no engines."

The same agent, July 1, 1885, notified his principal, the Hatcher Company, that several parties had countermanded their orders, on account of the Taylor Company's letters to them. So strong was the demand, that when the Taylor Company refused to fill nine orders made to Hatcher, as agent, the latter offered to buy the engines outright. This is admitted by Weaver, in his letter of July 3, 1885.

The Taylor Company offered no matter of fact to avoid the effect of this evidence, which itself has not been negatived by the master's finding, viz.: that there was in the refusal to ship these engines an unjustifiable breach of their contract with the Hatcher Company. They insist generally that Hatcher was a faithless agent, but there is in the record nothing sufficient to show it.

It is insisted, however, that the commissions which can be computed upon the number of engines ordered and refused are too remote and speculative to warrant a judgment therefor. To support this proposition the counsel for the Taylor Company rely on the case of the *Conveta Falls Manufacturing Company* v. *Rogers*, 19 Ga. 416, where Rogers complained that because of the company's failure to repair the machinery of his mill, which was idle from sixty to ninety days, he was entitled to a recovery for the profits the mill would have made if it had been kept running, but the court held that such claim was founded almost exclusively on speculative profits; it was a calculation upon conjectures and not upon facts.

Substantially the same announcement is made in *Water Lot Co.* v. *Leonard*, 30 Ga. 560, and in *Vischer* v. *Talbotton Branch Railroad Company*, 34 Ga. 536, and an analogy is sought to be drawn also from *Clark & Company* v. *Neufville*, 46 Ga. 261.

The Master in his careful and painstaking report, as we have seen, sustains this contention.

The consideration of the intricate topic embraced in these diverse propositions has deferred the determination of this cause and has not been without difficulty.

The most authoritative statement of the rule upon the question will be found in *United States* v. *Behan*, 110 U. S. 338 [28 L. ed. 168]. The facts of that case (without elaborately stating them) are sufficiently analogous to the findings of fact of the Master here to make the principles settled clearly applicable. There was part performance of the contract, large expenses on the part of the party performing. Without fault of this party the performance of the contract was prevented by the fault of the other party. The question was presented to the court of claims, and that court held that "The profits and losses must be determined according to the circumstances of the case and the subject matter of the contract." "The reasonable expenditures already incurred, the unavoidable losses incident to stoppage, the progress attained, the unfinished part and the probable cost of its completion, the whole contract price, and the estimated pecuniary result, favorable or unfavorable, to him, had he been permitted or required to go on and complete his contract, may be taken into consideration." The court then allowed the "unavoidable losses and expenditures already incurred," but said, "We can give nothing on account of prospective profits, because none have been proved." "The supreme court, *Mr. Justice* Bradley delivering the opinion, decides as follows: 'We think that these views as applied to the case in hand are substantially correct' . . . Unless there is some artificial rule of law which has taken the place of natural justice in relation to the measure of damages, it would seem to be quite clear that the claimant ought at least to be made whole for his losses and expenditures. So far as appears, they were incurred in the fair endeavor to perform the contract which he assumed. If they were foolishly or unreasonably incurred, the government should have proven this fact—it will not be presumed. The court finds that his expenditures were reasonable. The claimant might also have recovered the profits of the contract if he had proven that any direct, as distinguished from speculative, profits would have been realized, but this he failed to do; and the court below very properly restricted its award of damages to his actual expenditures and losses."

Pausing at this point in the consideration of the law to apply the principle with reference to expenditures incurred in part performance of the contract thus settled, to the findings of the Master, it will be apparent that it has been recognized by him as applicable here.

On line 19 *et seq.* of his third conclusion of law, the Master declares "It is certain that the Hatcher Company is entitled to recover the amount expended on faith of said contract of December 9, 1884, which contract the Taylor Company failed to perform." He suggests that to ascertain that amount a trial by jury might be had.

In this finding the Master is only partially right. After stating the principle, which he did correctly, he should have accepted the undisputed evidence showing that these expenditures aggregated $6,127.15, and this amount should have been credited to the Hatcher Company. Of these an account is annexed as an exhibit, and its correctness is fully supported by the testimony of Hatcher, pages 104 and 105 of the record, and there is no evidence to dispute it. It was criticised in argument, but there is nothing on the face of the account to impeach its verity.

To use the language of the supreme court,

in *United States* v. *Behan*, above quoted, if these expenditures "were foolishly or unreasonably incurred" the Taylor Company should have "proven this fact; it will not be presumed." And this is the final hearing, and the parties are presumed to have offered all the evidence at their command.

A more important question is: Has the Hatcher Company proven sufficiently the direct profits of its contract, as distinguished from profits of a speculative character? It is true, as held by the Master, that profits too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires, cannot be recovered. But to quote the language of *Chief Justice* Nelson in *Masterton* v. *Brooklyn*, 7 Hill, 69—cited with approval in *United States* v. *Behan*, *supra:*

"Where they are the direct and immediate fruits of the contract," they are free from this objection; they are then "part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for the right to the enjoyment of which is just and clear and plain as to the fulfillment of any other stipulation."

This case is cited and its principle adopted by the Supreme Court of Georgia in *Water Lot Company* v. *Leonard*, 30 Ga. 560, relied upon by the Taylor Company.

It is true, however, before the damages can be recovered they must be proved, and the serious question is: Have they been sufficiently proven? This inquiry involves the question What proof is sufficiently direct and explicit to authorize a recovery of the profits of a contract partially performed and broken—without fault of the party performing?

In his copious and valuable work upon the Law of Damages Mr. Sutherland announces this general proposition: "A party to a contract is entitled to recover against the other party who violated it, damages for the profits he would have made out of it had it been performed. It is no objection to their recovery that they cannot be directly and absolutely proved. In the nature of things, the defendant having prevented such profits, direct and absolute proof is impossible. The injured party must, however, introduce evidence legally tending to establish damages and legally sufficient to warrant a jury in coming to the conclusion that the damages they find have been sustained, but no greater degree of certainty in the proof is required than of any other fact which is essential to be established in a civil action.

"If there is no more certain method of arriving at the amount the injured party is entitled to submit to the jury the particular facts which have transpired and to show the whole transaction, which is the foundation of the claim and expectation of profit, so far as any detail offered has a tendency to support such claim." Sutherland, Damages, p. 113, citing *Griffin* v. *Colver*, 16 N. Y. 489, *Giles* v. *O'Toole*, 4 Barb. 261; *Newbrough* v. *Walker*, 8 Gratt. 16.

Now, what is the legal nature of the fact involved in the finding of the Master that the Taylor Company refused to deliver the engines under the contract? It is simply a tortious refusal on the part of the Taylor Company to perform an undertaking absolutely essential to the business of the Hatcher Company.

The Master, as we have seen, finds the breach; he finds it without excuse; and in cases of this character it is only necessary to show with reasonable certainty what the profits would probably have been. 1 Sutherland, Damages, p. 121, and many authorities cited.

The philosophy of this rule is readily intelligible. One will not be permitted, because the injurious consequences of his wrongs are not precisely definite in pecuniary amount, to wholly absolve himself from responsibility, therefor, and this would be the result was the rule otherwise.

The Hatcher Company had, by diligent industry, created a large and important business, to which it had devoted its time for several years. The delivery of the engines to it was the first and most absolute essential. The Taylor Company undertakes to do this. The Hatcher Company relies upon its promise. The Taylor Company utterly refuses to comply. It is impossible that it be the law, because perchance the Hatcher Company might have failed to sell an engine, more or less, or that because perhaps it may fail in specified instances to collect promptly the purchase price, that the Taylor Company will be adjudged irresponsible for its inexcusable breach of contract. But this is not all. The profits of the Hatcher Company were fixed by the contract, the engines had a market price, and as was said by *Mr. Justice* Nelson in *Masterton* v. *Brooklyn*, *supra:*

"If there was a market value of the article in this case the question would be a simple one."

The demand was great, and it was not to be doubted from all the evidence heretofore detailed that the sale of all the engines was a substantial certainty.

The amount of the profits of the Hatcher Company is at the least, then, the sum of their commissions on such sales. It would have been, doubtless, more, because a portion of the engines were purchased outright; but considering the tortious character of the action of the Taylor Company, we are at the least warranted in adjudging to the Hatcher Company the amount of the sum of its commissions on the engines ordered by it and which the Taylor Company wrongfully refuses to deliver. This is estimated at $10,056.06, but the court will direct a careful computation.

Indeed, if this be a Georgia contract—as is insisted by the Taylor Company upon the authority of the latest decisive adjudication in *Stewart* v. *Lanier House Company*, 75 Ga. 582, the rule is stronger against the Taylor Company than that announced here. There, where the lessors of a hotel failed to keep it in repair, as they had covenanted, it was held that the lessee could recoup against suits for the rent, the loss of custom and the profits he might have made if the hotel had been kept in a proper condition, and that he was only required to show facts which would enable the jury to approximate his losses.

See also Code of Georgia, § 3070, which provides that "Damages which are the legal

and natural result of the act done, though to some extent contingent, are not too remote to be recovered."

It will be advisable to consider in this connection the leading English case of *Hadley* v. *Baxendale*, 9 Exch. 341. There Alderson, *B.*, for the court adjudges the rule to be as follows: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered, either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." (p. 353.)

The damages claimed by the Hatcher Company here would seem to be embraced in both the classifications indicated in the rule just quoted.

The finding of the Master disallowing the claim of the Hatcher Company for the destruction of its business is affirmed, the claim being esteemed too indefinite and uncertain to be the basis of a recovery. It was at the option of the Taylor Company to terminate the sale of its engines by the Hatcher Company the next year if it had seen fit to do so. What the Hatcher Company might have accomplished with the sale of other machinery is in the realm of conjecture.

The view of the Taylor Company that the clause in its contract which obliged it to furnish the engines Hatcher might require, if the exigencies of its business permitted, is important — is altogether erroneous. This clause must have a practical and equitable construction. It did not give it the power arbitrarily to decide that the exigencies of the business would not permit the engines to be furnished. It must have a valid reason for such a conclusion and its validity must be shown by evidence. The courts of equity would never, in the absence of express declarations, construe such a clause to mean that, notwithstanding the services and expenditures of the Hatcher Company, the Taylor Company could at pleasure refuse to do anything toward the performance of the obligations it had undertaken.

Nor does it follow that, because the Hatcher Company is bound by the contract to indorse all the notes, it is to be deprived of its commissions.

It is judicially known to the court that the Taylor Company has taken possession of the notes, have discounted them with the banks, and that the Hatcher Company has no control of them whatever. It is not satisfactorily made to appear by the evidence what amount of these notes were insolvent, nor whether it would have been impossible to ultimately collect them had not the business been disorganized and the Hatcher Company harassed and discredited with the business community by the unjustifiable action of the Taylor Company, before adverted to.

On the hearing of the injunction, the court being advised of the fact that the Taylor Company had transferred and assigned all notes on which commissions are claimed to certain banks, required the Taylor Company to give a conditional bond of $10,000 for the protection of the Hatcher Company. The banks are not parties to the suit. The court has no means of knowing the status of collections upon these notes, nor can the court by its receiver take possession of the notes which are out of its jurisdiction.

The Taylor Company having given the bonds were paid the proceeds of notes as collected. This cannot, however, properly delay the litigation here, for the Taylor Company, for its own purposes, took control of the notes and assigned them.

If Hatcher has become liable on any or all of these notes, it was the duty of the Taylor Company by appropriate evidence to inform the court. The court will not presume an indebtedness. The makers of the notes, in the absence of proof to the contrary, are presumed to have discharged them; but if otherwise, we repeat it was incumbent on the Taylor Company to show it.

It is evident from all the evidence in this case, notwithstanding the great explicitness of the written and printed contract stipulating that one third cash should be paid, at no period was the Hatcher Company inhibited from making sales simply because the cash was wanting. Either by ratification or by subsequent authority relating back, the Hatcher Company was practically authorized to do the best it could for its principal, and it seems to have done this.

It is impossible, after reading such cogent evidence as the contemporaneous letters of Hatcher, of the several agents, and of the company itself, to doubt the earnestness and sincerity with which Hatcher pressed at the time the demands for performance, and instances of injury which he now insists upon before the court. Nor is it capable of fair doubt that the Taylor Company, without saying so openly, was doing all in its power to break off its relations with the Hatcher Company and with little regard to its interest.

The Taylor Company appeals to the court for the exercise of its equitable powers in its behalf—it must itself do equity. It must pay the Hatcher Company for its expenses legitimately incurred. It must pay the profits which the Hatcher Company would have made by the engines it promised to deliver and which were refused. A reference will be made to a special master to make an accurate computation in accordance with this decision.

In other respects *the report of the Master will stand confirmed and a decree will be entered embodying the results of this holding.*

MICHIGAN SUPREME COURT.

George FREEMAN *et al.*
v.
DULUTH, SOUTH SHORE & ATLANTIC R. CO., *Appt.*

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

1. **A railroad company is not exempt from liability for failure to place a flagman** at a crossing, where common prudence would dictate that it should do so, because the railroad commissioner had not ordered a flagman to be stationed there.

2. **Where an engineer, approaching a crossing** on an up grade where a high rate of speed is required, is unable to see a traveler on the highway on one side of the track until the locomotive is within seventy-five feet of the crossing, and a traveler on that side cannot see an approaching locomotive until he is within forty feet of the track, and the train is within 175 feet of the crossing, if the train cannot be so run over the crossing that it can be stopped at once, a flagman ought to be stationed where he could give warning of its approach.

3. **Although it is negligence on the part of a railroad company to run a train at a high rate of speed** over a dangerous crossing without having a flagman stationed there, a traveler on the highway who drives upon the crossing at a slow trot, when by looking he could see the train while twenty to forty feet from the track, is guilty of contributory negligence which will prevent a recovery for injuries received.

4. **A person to whom contributory negligence may be imputed** cannot recover for damages caused by a railroad train at a crossing unless there was such gross negligence on the part of the railroad company that the question of contributory negligence cannot arise.

(February 8, 1889.)

ERROR to the Circuit Court of Marquette County (Grant, *J.*), to review a judgment for plaintiffs in an action to recover damages for the destruction of plaintiffs' horse and carriage by a collision with defendant's engine. *Reversed.*

The facts sufficiently appear in the opinion.

Mr. **William P. Healy** for defendant, appellant.

Mr. **F. O. Clark,** for plaintiffs, appellees:

This being a common-law action, and there being no statute which provides that there shall be damages claimed only in case of failure to locate flagmen where the commissioner of railroads shall designate, the ordinary principle of negligence applies, that the defendant would be liable in a common-law action for neglecting any duty, or for neglecting any act which would be for the safety of the people, who have the right to expect ordinary caution and care on its part, under all the surrounding circumstances.

Gugenheim v. *Lake Shore & M. S. R. Co.* (Mich.) 9 West. Rep. 903.

If the plaintiff brings an action for negligent injury, and the action of the parties must have concurred to produce it, it devolves upon the

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NOTE.—*Negligence; duty of railroad company to supply flagmen at crossings.*

A railroad company should maintain flagmen, or gates and gatemen, at street crossings in cities. Cleveland etc. R. Co. v. Schneider, 14 West. Rep. 538, 45 Ohio St. 678.

A municipal corporation cannot, by ordinance, compel a company to maintain a watchman at a street crossing. Ravenna v. Pa. Co. 10 West. Rep. 463, 45 Ohio St. 118.

In the absence of statutory requirement there is no legal obligation on a railroad company to keep flagmen at the crossings of the public roads, to give warnings to travelers on such roads of the passing of trains. State v. R. Co. 47 Md. 76; Welsch v. R. Co. 72 Mo. 451.

The duty of keeping a watchman or flagman at street or road crossings is regulated by the railroad commissioner; but when the company obstructs its track so that its approaching train cannot be seen, and the signals required by statute are not sufficient to warn the traveler, an additional warning must be given, and a flagman may be necessary to acquit the company of negligence. *Gugenheim* v. R. Co. (Mich.) 9 West. Rep. 903.

A flagman signaling to a traveler to come on, when the circumstances are such as require him not to signal or to signal for further waiting, is guilty of negligence in the performance of his duty. Pa. Co. v. Sloan (Ill.) 14 West. Rep. 379.

The negligence of a flagman will not excuse the traveler from looking both ways and listening before crossing. Berry v. Pa. R. Co. 5 Cent. Rep. 111, 48 N. J. L. 141.

But when flagmen are employed by statute to give warnings, at crossings, to travelers, the company will be liable for an injury occasioned by an omission of a flagman to perform his duty. Del. L. & W. R. Co. v. Toffey, 38 N. J. L. 525; Smith, Negligence, Whitt. ed. 404.

The withdrawal of a flagman from a highway crossing where he is usually kept has been held negligence. Burns v. North Chicago Rolling Mill Co. 65 Wis. 312; Smith, Negligence, *supra.*

Duty of traveler when approaching railroad crossing.

When trains are rightfully run, the company has the superior right of passage at crossings. Louisville etc. R. Co. v. Phillips, 11 West. Rep. 119, 112 Ind. 59.

A traveler approaching a highway crossing must yield precedence to trains. Ohio & M. R. Co. v. Walker, 12 West. Rep. 737, 113 Ind. 196.

While it is not always the duty of a traveler to stop before crossing a track, yet it is his duty, at a point where trains are frequently passing, if he cannot see up and down the track, to listen for the train before attempting to cross. Kelly v. R. Co. 4 West. Rep. 577, 88 Mo. 534.

It is the duty of a traveler to stop, look and listen immediately before crossing a railroad track. Phila. etc. R. Co. v. Hogeland, 5 Cent. Rep. 589, 66 Md. 149; Berry v. R. Co. 5 Cent. Rep. 111, 48 N. J. L. 141; Lehigh Valley R. Co. v. Brandtmaier, 5 Cent. Rep. 144, 113 Pa. 610.

The notice of the approach of a train of cars to a railroad crossing should be given by those in charge; and what would be such notice is a question for the jury. Johnson v. R. Co. (D. C.) 11 Cent. Rep. 720.

Negligently crossing a street at high rate of speed.

A company is liable for damages for injuries caused by negligently running its train across a street. Drain v. R. Co. 2 West. Rep. 114, 86 Mo. 574.

It is the duty of a railroad company, in the run-

3 L. R. A.

See also 4 L. R. A. 389; 11 L. R. A. 674; 12 L. R. A. 184.

plaintiff to show that he was not guilty of negligence, and if he gives no evidence to establish that fact, the court may properly instruct the jury that they must return a verdict for the defendant; but if it depends upon disputed facts, the jury must decide. The court cannot instruct the jury to bring a verdict against the plaintiff, unless the facts are so clear as to warrant no other inference.

Detroit & M. R. Co. v. *Van Steinburg*, 17 Mich. 99-121; *Mich. Cent. R. Co.* v. *Coleman*, 28 Mich. 440-449; *Lake Shore & M. S. R. Co.* v. *Miller*, 25 Mich. 274-282; *Teipel* v. *Hilsendegen*, 44 Mich. 462; *LeBaron* v. *Joslin*, 41 Mich. 313.

As a general rule, it cannot be doubted that the question of negligence is one of fact and not of law, and it consists in a want of reasonable care, which would be exercised by a person of ordinary prudence, under all the existing circumstances.

Marquette, H. & O. R. Co. v. *Marcott*, 41 Mich. 439; *Marcott* v. *Marquette, H. & O. R. Co.* 47 Mich. 1.

A case can be taken from the jury only where it is open to but one opinion.

Schuylkill & D. Improvement & R. Co. v. *Munson*, 81 U. S. 14 Wall. 448 (20 L. ed. 872); *Jucker* v. *Chicago & N. W. R. Co.* 52 Wis. 150.

In viewing the question of negligence, in not stationing a flagman at this crossing, or in any other negligent charge, all the circumstances in the case must be considered together, in arriving at a conclusion.

Marcott v. *Marquette, H. & O. R. Co. supra; Grand Rapids & I. R. Co.* v. *Huntley*, 38 Mich. 537; *Linfield* v. *Old Colony R. Corp.* 10 Cush. 562; *Bradley* v. *Boston & M. R. Co.* 2 Cush. 539; *Shaw* v. *Boston & W. R. Corp.* 8 Gray, 45; *Chicago & R. I. R. Co.* v. *Still*, 19 Ill. 499; *Butler* v. *Milwaukee & St. P. R. Co.* 28 Wis. 487; *Chicago & A. R. Co.* v. *Gretzner*, 46 Ill. 75.

As to cases of collisions between railroads and teams at crossings, see—

Mabley v. *Kittleberger*, 37 Mich. 360; *Daniels* v. *Clegg*, 28 Mich. 32; *Mich. Cent. R. Co.* v. *Anderson*, 20 Mich. 244.

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

The plaintiffs sue for the value of a horse and carriage destroyed by collision with an engine on defendant's track at the Genesee Street crossing in the City of Marquette.

The plaintiffs keep a livery-stable in said city, and on the day of the accident hired the horse and carriage to one John Grant, who was driving the same at the time of the collision.

During the course of the trial, by mutual consent of the parties, the place of the accident was visited. The following appears in the record in reference to such visit:

"The court thereupon took a recess for one hour, and the court, counsel, jury and court officers, by stipulation of the counsel, visited the scene of the accident. The jury then proceeded to measure the distance from the intersection of Champion Street with Genesee Street to the track in question, and found the same to be 186 feet. It was also ascertained as a fact in the case that a person standing forty feet west of the track in question, in the center of Genesee Street, could see the top of a locomotive 179 feet north of the center of Genesee Street, on the track in question. The court, jury, court officers and counsel for the

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ning of its trains, to exercise care according to the circumstances; and where the railroad track crosses a much traveled street or highway, the company, as well as the public, is bound to exercise a degree of care reasonably commensurate with the danger. Lehigh Valley R. Co. v. Brandtmaier, 5 Cent. Rep. 147, 113 Pa. 610; R. Co. v. Calebs, 8 W. N. C. 529; Lehigh & Wilkes-Barre Coal Co. v. Lear (Pa.) 8 Cent. Rep. 109.

Although there was no statute limiting the speed of such trains over a crossing, yet the speed must nevertheless be consistent with the care and prudence required for the safety of the lives and property of the persons rightfully approaching and traveling over such crossings. Gugenheim v. R. Co. (Mich.) 9 West. Rep. 904.

The statute prohibiting the running of trains at a greater rate of speed than six miles an hour, across a highway in or near the compact part of a town (Gen. Laws, N. H. chap. 162, § 4), is an exercise of the police power of the State for the safety and welfare of its inhabitants, applicable to railroads which extend into an adjoining State as well as to those which are wholly within the State. Smith v. R. Co. 63 N. H. 25; Clark v. R. Co. (N. H.) 5 New Eng. Rep. 48.

The company is guilty of gross negligence in running over a crossing at a speed of twenty-five miles an hour, without giving signals. Cook v. R. Co. 1 West. Rep. 451, 19 Mo. App. 329.

The running by the railroad company of its train over a crossing at an unlawful rate of speed is evidence from which a jury may find negligence. Clark v. R. Co. *supra*.

Contributory negligence of traveler at crossing.

A traveler approaching a railroad track has a right to assume that in handling its cars the railroad company will act with appropriate care; that the usual signals of approach will be given; and that the managers of the train will be attentive and vigilant. Donohue v. R. Co. 6 West. Rep. 851, 91 Mo. 357.

Whether an attempt to cross a railroad track in front of a moving train is negligence depends upon the rate of speed of the engine and the condition of the person making the attempt. State v. R. Co. (Md.) 12 Cent. Rep. 890.

The negligence of a railroad company in running its trains at an unlawful rate of speed does not make it liable for an injury to a person which is due to his lack of reasonable or ordinary care. Mobile & O. R. Co. v. Stroud, 64 Miss. 784.

While a high degree of care is necessary on the part of a railway company in operating trains or locomotives, especially in streets of a town or city, if one fully able, mentally and physically, to take care of himself, enters upon and remains upon its roadway until he is injured by an approaching train or locomotive which he might see and hear by the use of his senses, he is guilty of contributory negligence which will defeat a recovery. Hughes v. R. Co. 67 Tex. 595.

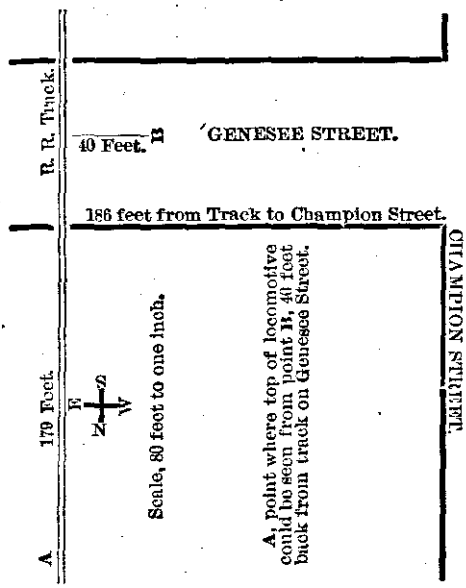
Duty of engineer to avert accidents.

All that the engineer was bound to do, after the discovery of the peril, was to use reasonable diligence and care to avert it. Chrystal v. R. Co. 7 Cent. Rep. 245, 105 N. Y. 164.

The impossibility of checking a train after discovery of the perilous condition of a party injured, by those in charge of the train, will not exonerate the company from the guilt of negligence beforehand, which caused the impossibility. Dunkman v. R. Co. 10 West. Rep. 396, 95 Mo. 232.

respective parties, after ascertaining these distances, returned again to the court room, to proceed with the trial of the said cause."

A diagram showing the streets, measurements and railroad track is given below:



It will thus be seen that it was established as an undisputed fact in the case that a person standing in the center of Genesee Street, at the point B, could see the top of a locomotive at the point A, 179 feet north of the intersection of the railroad track with the center of said Genesee Street.

It was also conceded on the argument here that the nearer you approached the railroad track from the point B, the further you could see a locomotive coming from the north on said track, while west of the point B, between such point and Champion Street, the view of the track north of Genesee Street was nearly, if not entirely, obstructed and shut off by the high bank on the north side of said street.

The jury were charged by the court, and retired to deliberate upon the case. After being out for a time, they returned into court for further instructions, whereupon the following proceedings took place:

Juror. The question is whether the omission of a flagman at that crossing is a preponderance of evidence in favor of the plaintiff.

Court. Whether there is a preponderance of evidence?

Juror. Yes sir; of the defendant having no flagman there. That seems to be the great question—not having a flagman there. Perhaps some other juror can explain better.

Another Juror. Well, we think the evidence is all equally balanced, outside of the omission of the flagman. We all want to know whether the omission of a flagman will overbalance all the other evidence.

Court. I don't know as I exactly understand. There are the three allegations of negligence; you will discuss them each separately. If you have disposed of the question of the bell ringing and the blowing of the whistle, and if you find that the bell was rung and the whistle was blown, then, of course, there was no negligence there; then it leaves you simply the question of whether or not it was negligence in failing to put the flagman there. Is that the point?

Juror. That is the point.

The court then read to them what it had before instructed them in regard to the duty of the defendant to have a watchman or flagman at this street, and added some further remarks to the same import, and in the same direction, which instructions we shall refer to hereafter.

It will, therefore, be seen that it is to be presumed from this colloquy between the court and jury that the questions whether the whistle was blown and the bell rung in compliance with the statute, and in such manner that there was no negligence on the part of defendant in either of these respects, had been determined in favor of the defendant, and that the sole negligence remaining to be found against the railroad company was that of the absence of a flagman at this crossing; and if the absence of such flagman was not negligence, the plaintiffs ought not to, and would not, have recovered. The contention of the defendant is that it was not negligence.

It is claimed that under the statutes of this State the duty of determining where a flagman shall be stationed devolves on the railroad commissioner; and that, in order to hold defendant liable for such negligence in this case, it should have appeared in proof that the railroad commissioner had ordered a flagman to be stationed at this crossing, and that his orders were not obeyed; or that the crossing was such an exceptionally dangerous one that a common-law duty was imposed on the defendant to keep a flagman at that point; and that no showing of this kind was made in this case.

We think the Judge below ruled correctly on this point, and in accordance with our previous decisions.

The jury were instructed, substantially, that it is not the law of this State that at every road or street crossing in a village or city a railroad company is bound to place a flagman. The law put upon the railroad commissioner the duty of determining the necessity of establishing a flagman upon any particular street crossing of a railroad; and the absence of a flagman at Genesee Street crossing, where the accident occurred, is of itself no evidence of negligence upon the part of the defendant, and the plaintiff must show that the circumstances of the crossing are such that common prudence would dictate that the railroad company should place a flagman there, or his equivalent; that before the jury could find this, it must be made to appear to them that the danger at the crossing was altogether exceptional—that there was something about the case rendering ordinary care on the part of the witness, Grant (the driver of the horse and carriage), an insufficient protection against injury, and therefore made the assumption of the burden of a flagman on the part of the railroad company a matter of common duty for the safety of people crossing.

"You have, as I said before, been at this crossing. You have seen the situation. You

have seen its relation to travel and to the city; and it is for you to determine, if you reach that point, under all the circumstances of the case, whether or not it was negligence, under the instructions I have given you and the evidence, not to have a flagman there."

If any fault can be found with this charge, it was too favorable to the defendant, in that it connected the necessity of keeping a flagman at this crossing with the use of ordinary care on the part of Grant.

The duty of maintaining a flagman at this point did not depend on the question whether Grant, in this particular instance, could by common prudence have avoided this collision or not. It depended rather upon the situation of the crossing, its relation to the travel upon the street generally, and the facilities afforded, not only the travelers on the street, but the trainmen on the cars, to avoid collisions and accidents of this kind, without a flagman to give warning of approaching trains. I think the jury were warranted in finding it to be negligence in the defendant in not providing a watchman at this point.

It seems that to the south from Genesee Street there was a steep up grade, so that a train of loaded cars must, in order to ascend the same, cross the street at a higher rate of speed than would, considering the situation of the crossing, be prudent to the safety of passers on the street without warning of the train's approach.

A train coming from the north could not be seen at all by those traveling on the street in the direction Grant was driving, until the traveler was within forty feet of the track, and the train within from 150 to 175 feet of the center of the street; and the engineer on the train, being lower down in his cab than a man in a buggy, could not get his eye into Genesee Street, west of the track, as was the fact in this case, until the locomotive was within sixty or seventy-five feet from the crossing; and then his vision would only extend forty or fifty feet west of the track on the street.

Under such circumstances, a train ought to run over this crossing so that it could be stopped at once, or a flagman ought to be stationed where he could give warning of its approach.

When an engineer, at a distance beyond seventy-five feet from the crossing of a street in a city like Marquette, cannot see into the street except the straight line thereof where the track crosses, and the traveler cannot see even the top of the locomotive until he gets within forty feet of the track, something more than ordinary pains to prevent accidents is incumbent both on the railroad company and also on the traveler, if such traveler is acquainted with the situation.

In *Battishill* v. *Humphrey*, 64 Mich. —, 7 West. Rep. 806, we held, under the pleadings and testimony in the case, that the absence of a flagman at Summit Avenue crossing in Detroit could not be considered negligence in the railroad company, as the railroad commissioner had not determined that it was necessary to maintain one there. But nothing was said, or intended to be said, in that opinion, that there could be no negligence, in any case, in not maintaining a flagman at a street crossing unless such commissioner had ordered one to be stationed there.

In *Gugenheim* v. *Lake Shore Railway Company* (Mich.) 9 West. Rep. 983, 33 N. W. Rep. at pages 167 and 168, the law in this respect is laid down substantially as the Circuit Judge in this case instructed the jury.

The most serious question in the case is the imputed contributory negligence of the driver, Grant. It is claimed by the defendant that Grant was negligent, from his own testimony, and that of one of the persons who was with him, Sundberg, and that a verdict should have been directed for the defendant for this reason. The court below submitted this question to the jury.

It appears without dispute that both Grant and Sundberg had been drinking considerably during the day. It was the day of the county fair, and Sundberg had come on the cars from Ishpeming to attend it. Grant had hired the team, in the first place, to take his wife to the fair. In the afternoon he fell in with Sundberg, an old acquaintance of his. He sent his wife home, or up to the fair, a boy by the name of Pritz driving. While waiting for the boy to return, he and Sundberg visited four or five saloons, and drank beer in most of them. When Pritz came back with the horse the three of them went for a drive. It was about 6 o'clock, or a little after, in the evening; but it was not yet dark.

Grant sat on the right-hand side of the carriage, and Sundberg on the left, the boy on their knees, and between them. They came down Champion Street on a trot, and turned into Genesee Street, going east. Sundberg was then, of course, on the north side of the carriage seat, and on the side towards the approaching train. Grant thinks he came to a stop before he came to the track, but he cannot say that he did, "because I ain't sure."

Sundberg says: "We didn't drive very fast when we got down to the corner there; down to the railroad track; just trotting along slowly."

Jessie Smith, who saw the accident, and was sworn for the plaintiff, says that "They were driving kind of slow trot as they went by the house . . . I saw the buggy come along on a slow trot, and the first thing I knew, I saw the train strike the buggy, or horse."

It is plain from all the evidence that the horse was not stopped, but that he was trotting from Champion Street, through Genesee, until the accident.

The next question is, Did the driver look? It is, as before said, an established fact in the case that the train could have been seen from any point within forty feet of the track, 179 feet north of the center of Genesee Street. If the train was running twelve miles an hour—the fastest time testified to by any witness—the locomotive would have occupied about ten seconds in passing over this 179 feet. The horse would have reached the track and passed it within that time, if on a trot, the distance being forty feet and the width of the track.

It would seem, therefore, to be an absolute certainty that if Grant had looked north when he was forty, thirty or twenty feet from the track, he would have seen this train. He

could, at either of these points, have stopped his horse and saved the accident. When he was within forty feet of the track, the train must have been in plain sight, or he would have passed over the track in safety in front of it, because he could not have seen it, if it had been more than 179 feet away; and, if so, it would not have struck him, because at twelve miles an hour, or less, it would have required ten seconds or more to reach the place of the accident.

If it was in plain sight when he was forty feet away, it was in plain sight from that time until the collision, to one looking north for it.

Sundberg swears that he did not look to the north after they passed about the center between Champion and Genesee Streets, until "just as we got up to the railroad track." Then it was too late to stop.

Q. If you were looking, couldn't you have seen it, if you had looked, say twenty feet away from the track?

A. If we had stopped and looked, I think we could.

He further testified, on cross examination, that if the horse had stopped twenty feet away from the track, he thought the train would have been seen; but "As long as we didn't see the train we were going ahead. I didn't look and see it in time; not after I looked the first time"—referring to his first look to the north from half way up Genesee Street. From Champion Street to the track crossing Genesee Street is 186 feet.

He therefore looked to the north from a point more than ninety feet from the track, where his view of the train was entirely obstructed by the high bank. Sundberg was a stranger to this crossing, and might perhaps be excused from looking again, as he testified that after looking north he looked to the south. Seeing no train approaching from either way, he then looked at the crossing, saw that was clear, and thereafter kept his eyes upon it.

The boy Pritz was in Europe at the time of the trial, and was not sworn.

Grant testifies: "As I approached the track, I saw it ahead. I was looking around to see if anything was moving or coming; looking all over, to see if anything was moving there that I should have to stop for. I did not hear any train coming. I heard nothing. I did not hear any bell ringing, nor any whistle blowing; I should think I would have heard a bell or whistle if there had been one rung or blown. My hearing was good at that time. When I first saw the engine, the horse was just stepping across the track—across the first track. I could not say how near the engine was to the horse at that time, but it could not have been very far. It wasn't far; just close by. I tried to back up to get out of the way, but I could not get out fast enough. There was a bank on the left-hand side along the track where the engine was coming down;" and that a person could not see over the bank to the north, while driving on Genesee Street, and notice a train until the track was reached. This evidence was given before the jury examined the premises.

On cross examination he testified that a person standing on Genesee Street forty feet west of the track, he thought, could not see the top of a locomotive 150 feet up the track to the north, but that he had never tried it to see.

We are impelled to the conclusion that if Grant looked to the north for an approaching train, as he says he did, he did not so look after he came within forty feet of the track. He must have looked back somewhere near where Sundberg did, and where the bank obscured his vision. Grant was not a stranger to this crossing, and the question arises, Was his full duty performed? We think not. Was he acting with even ordinary prudence, when he was driving this forty feet without looking to the north? Could he excuse himself by looking north, where he knew the high bank cut off his view, and then drive straight on to the track, without looking again, when the track was in sight to the north, because he heard, as he says, no bell or whistle, or noise of an approaching train? We think the answer must be in the negative.

A railroad track is a perpetual menace of danger, and the traveler is not excused if his eyes and ears are not kept open up to such distance of it that he may stop if he can see or hear its approach.

If he had looked at any time within the forty feet before he drove his horse upon the track, we think he must inevitably have seen this train, and could have saved a collision; and that, knowing the situation at the crossing as he did, he was guilty of contributory negligence in not doing so.

There is a fair inference to be drawn from his own testimony, and that of his companion Sundberg, that both had drank so much that they did not exercise the usual caution that a sober man uses in such an emergency; and that the recklessness of too much drink, though neither might be called drunk, had something to do with their neglect to take ordinary precaution and prudence in attempting to make this crossing.

The conclusion is irresistible, that they drove down Genesee Street upon a trot, and, without looking to the north, when they ought to have done so, ran the horse negligently and carelessly on the track and in the way of the locomotive.

It is no answer to say that if the company had not been negligent in the matter of a flagman the accident would not have happened.

It must be considered, as before said, that the jury determined that there was no negligence on the defendant's part in relation to the blowing of the whistle and the ringing of the bell. The testimony was conflicting on these points, and the jury evidently found against the plaintiffs in this respect. If Grant had exercised common, ordinary prudence at this known to him to be a dangerous crossing, the collision would not have taken place. The company was at fault in not having a flagman, and he was at fault in being careless and reckless in his driving, without looking, as he ought to have looked. His fault contributed to the injury, and he cannot recover, unless the defendant was guilty of such reckless negligence in the premises that the question of

contributory negligence cannot arise in the case, as in *Battishill* v. *Humphreys* (Mich.) 14 West. Rep. 863.

The testimony, in our opinion, did not show such reckless and wanton negligence on the part of the defendant as would acquit the plaintiff of his fault. A verdict should therefore have been directed for the defendant.

The judgment must be reversed, with costs, and a new trial granted.

Long, J., did not sit. The other Justices concurred.

NEW YORK COURT OF APPEALS.

Re Henry P. EYSAMAN'S WILL.

(.....N. Y.....)

1. **Material evidence erroneously admitted** will not be held harmless unless the additional testimony to the same effect so greatly preponderates that a verdict against it would be set aside by the court as contrary to the evidence.
2. **An objection to evidence** as "incompetent and immaterial" is sufficient to apprise the court of the real nature of the objection, when it immediately succeeds eight previous objections to similar evidence—made upon the ground that the witness was not competent to testify to transactions and conversations with a deceased person.
3. **The testimony of a legatee** on the question of testamentary capacity, consisting of his observations of the acts, conduct and conversations of the testator for several days during which he was in attendance upon him, is incompetent under the New York Code of Civil Procedure, § 829.
4. **A legatee who supported the testator** upon the bed in his arms at the latter's request, while another guided his hand in subscribing his name to the will, is incompetent to testify to a conversation between the testator and the subscribing witnesses attending the attestation and publication of the will. The whole matter of the execution of the will constitutes but a single transaction, and he is therefore incompetent to testify to any part of it.
5. **New York Code of Civil Procedure,** § 2544, providing that "A person is not disqualified or excused from testifying respecting the execution of a will by a provision therein, whether it is beneficial to him or otherwise," refers to subscribing witnesses alone, and does not make a legatee who is not a subscribing witness competent to testify to a personal transaction or communication with the testator, contrary to section 829.

(March 12, 1889.)

APPEAL by contestants, from a judgment of the General Term of the Supreme Court, Fourth Department, affirming a decree of the Herkimer County Surrogate's Court admitting to probate the last will and testament of Henry P. Eysaman, deceased. *Reversed.*

The facts are fully stated in the opinion.

Messrs. **Smith & Steele,** for appellants:

The execution of the will is not proven by two witnesses.

It does not appear that Barse saw the signature, or that it was pointed out or recognized by the deceased.

See *Re Mackay*, 110 N. Y. 611, 1 L. R. A. 491.

Merely signifying assent by a nod of the head, in response to questions, is not enough.

If the will is signed in the presence of the witnesses, slight recognition may be sufficient.

Here the signature was attached before Barse was called.

The attestation clause is not true; it was not signed, sealed or published in the presence of Barse.

See *Mitchell* v. *Mitchell*, 16 Hun, 97, affirmed in 77 N. Y. 596; *Sisters of Charity* v. *Kelly*, 67 N. Y. 409; *Heath* v. *Cole*, 15 Hun, 100; *Howland* v. *Taylor*, 53 N. Y. 627; *Reynolds* v. *Root*, 62 Barb. 250; *Willis* v. *Mott*, 36 N. Y. 486; *dictum* overruled in *Re Mackay, supra*; *Neugent* v. *Neugent*, 2 Redf. 369; *Chaffee* v. *Baptist Missionary Convention*, 10 Paige, 91; *Remsen* v.

NOTE.—*Disqualification of witness under the Code.*

A witness to a will is not disqualified by reason of having hired personal property, belonging to the estate, from the executor. *Seguine* v. *Seguine*, 2 Barb. 385.

Sections 50 and 51 of the Revised Statutes were enacted, first, to render competent a witness who would otherwise not have been so; and secondly, to guard against fraud in the preparation and execution of wills. Du Bois v. Brown, 1 Dem. 317.

Where the probate was not contested and the third attesting witness to the will was not sworn, the record of the testimony of the other two attesting witnesses, taken by the surrogate, is competent evidence to show that the will was proved without his testimony. Caw v. Robertson, 5 N. Y. 125, reversing 3 Barb. 410.

Such third attesting witness, not having been sworn or examined as a subscribing witness to the will, was not therefore deprived of his legacy. *Ibid.*

The bequest is not void, even if he is examined, if the will was sufficiently proved without his testimony. Cornwell v. Wooley, 1 Abb. App. Dec. 441; 43 How. Pr. 475, affirming 47 Barb. 327.

Where a witness, disqualified from taking a legacy, was one of the next of kin, the valid legacies must abate so far as necessary to allow him to take his full distributive share, as in case of intestacy of the testator. *Re* Smith's Estate, 1 Tuck. 83.

A bequest to an executor in addition to commissions or his appointment as legatee in trust or trustee of real estate, for the purposes of the will, is not a beneficial provision which is forfeited by his acting as witness and testifying to prove the will. Pruyn v. Brinkerhoff, 7 Abb. N. S. 400; 57 Barb. 176.

The fact that an executor will be entitled to commissions will not make him a beneficiary so as to prevent his testifying under section 829, nor although it provides that he is to have an additional sum for services in caring for and settling the estate. Reeve v. Crosby, 3 Redf. 74.

A person named as executor in an instrument propounded as a will is a competent witness. Children's Aid Society v. Loveridge, 70 N. Y. 387; Levy's Will, 1 Tuck. 87; McDonough v. Loughlin, 20 Barb. 238.

He is a competent witness after he has renounced his executorship. Burritt v. Silliman, 13 N. Y. 93, 16 Barb. 198.

Brinckerhoff, 26 Wend. 331; *Rutherford* v. *Rutherford*, 1 Denio, 33; *Belding* v. *Leichardt*, 56 N. Y. 680; *Lewis* v. *Lewis*, 11 N. Y. 225; *Re Phillips*, 98 N. Y. 267; *Baskin* v. *Baskin*, 36 N. Y. 416; *Woolley* v. *Woolley*, 95 N. Y. 235.

Inability to remember an essential testamentary declaration in the case of a will lately executed is fatal, and the inability cannot be supplied by a false attestation clause.

Wilson v. *Hetterick*, 2 Bradf. 427; *Rutherford* v. *Rutherford*, 1 Denio, 33; *Seymour* v. *Van Wyck*, 6 N. Y. 120; *Scribner* v. *Crane*, 2 Paige, 147.

The change effected by the will, from giving a deed of 100 acres of land for a discharge of the claims, as testified to by Ware, amounted to near $24,000; and was so radical and sweeping that it cannot be credited.

McLaughlin v. *McDevitt*, 63 N. Y. 212; *Children's Aid Society* v. *Loveridge*, 70 N. Y. 402; *Delafield* v. *Parish*, 25 N. Y. 35; *Marsh* v. *Tyrrell*, 2 Hagg. Eccl. 87, 110; *Blewitt* v. *Blewitt*, 4 Hagg. Eccl. 463; *Van Guysling* v. *Van Kuren*, 35 N. Y. 70.

The fact that the draughtsman of the will was the attending physician calls for close scrutiny. The jealous precautions taken to exclude everybody but the chief beneficiary and the executor during the conferences of the days preceding the death of Mr. Eysaman, emphasize this consideration. This careful and continued secrecy is a badge of fraud.

McGuire v. *Kerr*, 2 Bradf. 245; *Mowry* v. *Silber*, 2 Bradf. 133; *Tyler* v. *Gardiner*, 35 N. Y. 559, 591; *Lake* v. *Ranney*, 33 Barb. 49; *Nexsen* v. *Nexsen*, 2 Keyes, 229; *Crispell* v. *Dubois*, 4 Barb. 393; *Re Smith's Will*, 95 N. Y. 516.

The testimony given by Ware was incompetent under section 829 of the Code.

Holcomb v. *Holcomb*, 95 N. Y. 316; *Lane* v. *Lane*, 95 N. Y. 494; *Re Smith's Will*, 95 N. Y. 516; *Schoonmaker* v. *Wolford*, 20 Hun, 166; *Cadmus* v. *Oakley*, 3 Dem. 324.

Mr. **J. D. Henderson**, for respondent:

The legal presumption is in favor of competency.

Coit v. *Patchen*, 77 N. Y. 533; *Delafield* v. *Parish*, 25 N. Y. 70; *Van Guysling* v. *Van Kuren*, 35 N. Y. 70.

This will was properly executed, within all the cases.

Baskin v. *Baskin*, 36 N. Y. 416; *Jackson* v. *Jackson*, 39 N. Y. 153.

If Barse has forgotten some of the things which occurred at the time, his failure to recollect will not defeat the probate.

Rugg v. *Rugg*, 83 N. Y. 592; *Re Kellum*, 52 N. Y. 517; *Re Higgins*, 94 N. Y. 554; *Brown* v. *Clark*, 77 N. Y. 369; *Re Cottrell*, 95 N. Y. 330.

It was proper to call James Ware, although a legatee under the will, to give his version of the transaction testified to by the contestants' witness, Horace Eysaman; and he was competent under section 829 of the Code.

Marsh v. *Brown*, 18 Hun, 319, 323; *Smith* v. *Christopher*, 3 Hun, 586; Code, § 2544.

The evidence was competent as the question called only for things concerning which the witness took "no part in whatever."

Pinney v. *Orth*, 88 N. Y. 451; *Simmons* v. *Sisson*, 26 N. Y. 277; *Hildebrant* v. *Crawford*, 65 N. Y. 107; *Cary* v. *White*, 59 N. Y. 336; *Holcomb* v. *Holcomb*, 95 N. Y. 325.

Mr. **C. J. Palmer**, for proponents and James Ware:

When an attestation clause is read in the presence of deceased and the attesting witnesses, and shows on its face that all the requirements of law were observed, which are prescribed for the due execution of a will, and it is proven that the signatures of the subscribing witnesses to the attestation clause are genuine, and the execution is proven by circumstances or by other witnesses, a decree may be based on such proof, even as against the positive testimony of the subscribing witnesses.

Re Cottrell, 95 N. Y. 329; *Lewis* v. *Lewis*, 11 N. Y. 224.

A full attestation clause, properly authenticated, is entitled to great weight in the determination of the question of fact.

Re Cottrell, 95 N. Y. 335; *Orser* v. *Orser*, 24 N. Y. 55; *Blake* v. *Knight*, 3 Curteis, Eccl. 547.

Even if Barse had forgotten, or from perversity had denied the execution, still the question of execution would be a fact, and the decision of the surrogate final upon the fact.

Re Cottrell, 95 N. Y. 338; *Re Higgins*, 94 N. Y. 557; Code, § 2620; *Brown* v. *Clark*, 77 N. Y. 369; *Rugg* v. *Rugg*, 88 N. Y. 592, affirming 21 Hun, 383; *Auburn Theological Sem.* v. *Calhoun*, 25 N. Y. 425.

If the testimony of Barse was dropped entirely from the case, if he had forgotten the fact of execution, as well as some of the language,—still the will must be admitted to probate upon the testimony of Sharer and Ware, which is uncontradicted in fact.

Lewis v. *Lewis*, 11 N. Y. 220; *Auburn Theological Sem.* v. *Calhoun*, 25 N. Y. 425; *Re Cottrell*, 95 N. Y. 329.

Upon the issue of undue influence the burden is upon the party alleging it.

Re Martin, 98 N. Y. 193; *Tyler* v. *Gardiner*, 35 N. Y. 559; *Delafield* v. *Parish*, 25 N. Y. 35; *Coit* v. *Patchen*, 77 N. Y. 539.

It is a question of fact, and having been determined must stand.

Carpenter v. *Soule*, 88 N. Y. 257.

It was proper for Dr. Sharer to steady Eysaman's hand at his request, or to write the subscription.

Campbell v. *Logan*, 2 Bradf. 95; 1 Redfield, Sur. 159; Rev. Stat. 7th ed. p. 2286.

The testimony not only shows the writing by deceased, but an acknowledgment that the subscription is his. The acknowledgment alone is sufficient if it appears that he saw and knew it.

Hoysradt v. *Kingman*, 22 N. Y. 372; *Baskin* v. *Baskin*, 36 N. Y. 416.

Ware did not engage in the conversation at declaration of the will, but testified to what he heard. He was competent to speak.

Hildebrant v. *Crawford*, 65 N. Y. 107, affirming 6 Lans. 502; *Patterson* v. *Copeland*, 52 How Pr. 460.

Ruger, *Ch. J.*, delivered the opinion of the court:

The probate of the will of Henry P. Eysaman was contested before the surrogate by some of his heirs and next of kin upon the

ground of undue influence, the want of a sound disposing mind and memory, and the absence of sufficient proof of due execution by the testator.

The main question now presented is whether James Ware, the principal legatee, was competent to testify to the transactions preceding, attending and succeeding the execution of the will, and, if not, whether his evidence on those subjects necessarily prejudiced the contestants in the controversy before the surrogate. The allegation of undue influence was not supported by sufficient evidence to authorize us to review the finding of the surrogate upon that question; and the inquiries must now be addressed to the questions of due execution and the existence of testamentary capacity at the time of its execution, as affected by the evidence of Ware. The decree of the surrogate admitted the will to probate, and his decision was affirmed on appeal by a divided court. The will purported to have been executed on Sunday, April 27, 1884, and the testator died on Thursday, four days thereafter, of uræmia, or blood poisoning, at the age of seventy-eight years.

The material evidence bearing upon the questions of mental and physical condition related mainly to the period of one week preceding the testator's death. The evidence showed that the testator was afflicted with gravel or retention of urine, and had been in failing health for about two months before his death, being much of the time confined to his bed, and during the last week of his life wholly so. Up to Saturday the evidence shows that he was, although feeble, apparently conscious, talking occasionally with visitors and attendants, and able to transact some business, and to give orders concerning the management of his ordinary affairs. On Saturday, after engaging in two transactions, he claimed to be too much exhausted to do any more that day. Thereafter he undertook no business transaction, except that of the execution of his will, and his physical condition seems to have become weaker. He talked but little, if at all, and gradually declined, until he died. His physician testified that on Monday he observed symptoms of the suppression of urine, which became quite pronounced on Tuesday, and were accompanied by drowsiness and coma which generally prove fatal in from two to five days after such symptoms appear. Others testify that some of these symptoms were observable on Sunday.

No witnesses, except Sharer and Ware, testify that after Saturday night he engaged in in any rational conversation, beyond occasional calls for nourishment or attempting to utter some name. This conversation attending the publication of the will was testified to by Sharer and Ware alone, and their version was much impaired, if not contradicted, by Barse, the only other person who was present at the the time. Many persons saw him between Saturday and the day of his death; but none of them testify to any material conversation had by him, except Sharer and Ware, although other persons were present at most of the occasions described by them.

The conversation taking place at the time of the execution of the will, as testified to by Sharer, who drew it, consisted almost wholly of alleged answers made to questions put to him by Sharer, and was substantially as follows; "I handed the will to him on Sunday morning, and left the room. He soon sent for me, and handed me the will, and said, 'It is all right.' He said he would sign it. He was in bed when he signed it. Wrote upon a book. Mr. Barse then signed as one of the witnesses. Mr. Ware and myself were in the room when Barse came in. He said 'Good *morning*' to Mr. Eysaman, and Mr. Eysaman said, 'Good *morning*, Irve.' I said to Mr. Eysaman: 'Is this your last will and testament?' and he said it was his 'last will and testament.' I then asked, 'Do you want Mr. Barse and myself to witness the will in your presence, and in the presence of us?' and he said he did. I told Mr. Barse I had signed my name before he came. Mr. Barse signed."

Repeating the conversation, he further testified: "I asked if he wanted Mr. Barse to witness his will. He said he did. Then I asked him if that was his last will and testament, and he said it was; and then I asked him if it was his signature, and he said it was; or if he wrote it, and he said he did. I asked him if he wanted Mr. Barse and me to witness the will in his presence, and he said he did . . . When the old gentleman signed the will he was sitting up in bed. He asked to be helped; asked Mr. Ware. I had hold of his hand when he wrote. I guided his hand. He was trembling. My fingers were on his wrist. He asked me to do it. The will was read to him fifteen or twenty minutes before the signing. He said it was all right. He said he was glad he had signed it; he was glad it was all over now . . . Mr. Ware held him up—stood by the side of the bed with his arms around his back. I think he used his left arm. The will that time was lying on a book. I held the book by either the right or left arm . . . I had hold of his wrist, back of the bone of his thumb; I steadied his hand."

Mr. Barse, the other attesting witness, testified substantially as follows:

Q. Mr. Eysaman didn't tell you this was his last will and testament?

A. No sir.

Q. And he didn't ask you to sign it as a witness?

A. Not in words.

Q. Did Mr. Eysaman ask you to sign his will at all as a witness, in words?

A. No sir.

Q. Did Mr. Eysaman say to you at all that he had signed this will?

A. No sir.

Q. Did he acknowledge to you in words that it was his signature to the will, or did he say in words to you that it was his signature to the will?

A. No sir.

Q. Did you hear any conversation at all, that you can now recollect—any conversation or words used by Mr. Eysaman on that occasion, that you can now recollect?

A. No sir. . . .

Q. You saw no other sign of attention thna by the nodding of the head?

A. No sir.

Q. Did he nod his head more than once?

A. I don't know.

Q. You have no impression about any nodding of the head more than once?

A. No sir; I think he nodded his head. No other movement that I recollect, by turning his head or opening his eyes. I think he did utter my name, "Irve." Don't recollect any other words. When Dr. Sharer spoke, I do not recollect any movement of the face or head. I think he made movement of his head as if giving attention. Nothing more than nodding.

Another witness who attended the testator during the day and night of Sunday states that he entered the room in the morning directly after Dr. Sharer left, and that he asked the testator "how he felt this morning," and he made no reply. "He was in a drowse when I went in, lying right upon his back. I think his eyes were shut."

Sunday towards evening Dr. Sharer came there with Mr. Petrie. "Dr. Sharer spoke to the old gentleman. He asked him if he knew Mr. Petrie. Mr. Eysaman made no reply to it."

Q. Anything else said to him during that afternoon or evening, that you heard or saw, by anyone?

A. I don't remember anything. Mr. Eysaman most of that afternoon was in a drowse. He would wake up once in a while from his sleep, and go right into a drowse again. I did not hear him say anything at all that day . . . During Sunday I did not hear him say anything to anybody. I don't know whether he saw anything or not, of course. He did not move his head to notice anybody. There was a person come up to the bed, and he took no notice of him. I think he did not by any act or word indicate that he realized any person that was present. I noticed his breathing heavily all along for a number of days. From the time I was there with him, Sunday night, he did not say a word or make a motion to call for anything himself. His condition Monday was the same, except he was a little weaker. I didn't hear him talk any on Monday. From that time to the time he died he made no reply when I spoke to him, more than a mere nod of the head. What I asked him was if he wanted some water or something to wet his mouth. I occasionally asked him if he wanted a drink or something of that kind. I got no reply, not a word, from that time on Sunday. I did not hear him say anything that you could understand. He died Thursday at three o'clock. From Sunday to that time I don't remember that he had any conversation.

The evidence of a number of experts was given on the part of the contestants, to the effect that the signature of the will was not in the handwriting of the testator, but was apparently that of Sharer; and the surrogate in his opinion states that "The appearance of his signature to the alleged will, I think, indicates that he was aided in its formation."

An examination of the will, which was presented to the court on the argument, considered in connection with the evidence of the experts, shows that the capital letters in the signature bore a resemblance to the character of Sharer's handwriting, and did not conform to the manner in which the testator usually formed such letters.

Some discrepancies also appeared in the evidence of Sharer, and several witnesses testified to declarations made by him which were more or less inconsistent with his testimony on the trial.

It seems to us, upon the whole evidence, to be indisputable that the testator was at the time of the execution of the will in the borderland between consciousness and insensibility.

Although we have not alluded to all of the circumstances bearing upon the issue tried, we have endeavored to present its salient features, with a view of showing the bearing which the evidence of Ware had upon the question presented. The probate of the will was affirmed at general term, upon the ground, among others, that the evidence of Ware, even if erroneously admitted, did not necessarily prejudice the contestants.

We are unable to concur in the opinion of the majority of that court upon this question, and think that upon the evidence a serious question of fact was presented to the surrogate, as to the existence of testamentary capacity on the part of the testator on Sunday morning when the will was executed, and whether there was a conscious and intelligent understanding by him of the circumstances attending its execution.

It cannot properly be said that material evidence erroneously admitted upon an issue is harmless, unless the testimony preponderates so greatly in favor of the proposition that a verdict against it would be set aside by the court as contrary to the evidence. When the evidence on each side is so nearly balanced that a determination either way would not be reversed upon appeal, it cannot be said that the losing party is not prejudiced by material evidence testified to by an incompetent witness against his objection.

We think the testimony in this case, excluding that of Ware, was so nearly balanced that a decree in favor of either party could not properly have been reversed upon the facts by an appellate tribunal.

Under these circumstances Ware, who was the principal devisee under the will, and had been in the testator's employ for upwards of forty years, and his constant attendant during his last sickness, was called as a witness in support of the will. He was permitted to testify to his observations of the acts, conduct and conversations of the testator during the last week of the testator's sickness.

This evidence was uniformly objected to, except in one instance, by the contestants, upon the specific ground that Ware, as a legatee under the will, was not competent to testify to personal communications and transactions with the testator under section 829 of the Code.

These objections were uniformly overruled by the surrogate, and Ware gave abundant evidence upon the subject of the testator's mental and physical condition during the last week of his life. Among other things, he was permitted to testify, under objection, to a conversation occurring between himself and the testator on Saturday, the 26th of April, in relation to the subject of an offer by the testator

to execute a deed of a certain 100 acres of land to the witness, which was declined by him.

The conceded error in admitting this evidence was disregarded by the general term upon the ground that the objection thereto was not sufficiently specific. The objection immediately succeeded eight previous objections to similar evidence, made upon the ground that the witness was not competent to testify to such transactions and conversations, and was that it was "incompetent and immaterial." We think the admission of this evidence was error, and that the trial court was sufficiently apprised of the real nature of the objection by the whole course of the examination of the witness. *Church* v. *Howard*, 79 N. Y. 415.

This witness was further permitted to testify to the whole course of his observations of the testator's acts, conduct and conversations during the four days succeeding the Saturday in question. Excluding, for the present, his evidence on the subject of the execution of the will, he testified, under objection, to eleven different conversations with various persons, indicating capacity to converse intelligently and understandingly upon the subject introduced; a recognition of the various persons who visited him; appreciation and intelligent answers to all questions put to him; a consciousness of his physical wants, and the ability, in language, to make them known; and, generally, to a sufficient degree of consciousness, intelligence and judgment to show that when he executed his will he did so with full knowledge and appreciation of the nature and effect of the transaction in which he was engaged.

It is quite impossible to say that this evidence did not have a powerful effect upon the determination of the question of testamentary capacity presented to the surrogate for decision. This evidence was offered and received as bearing upon the condition of the body and mind of the testator, without reference to the particular signification of the language used by him, and was important only as showing the mental capacity of the testator, and whether he had an intelligent understanding and appreciation of what took place within his sight and hearing at the time of the execution of the will.

The issue in the case was whether the testator was conscious and of sound disposing mind on the Sunday in question; and Ware's evidence consisted of his observations of the acts, conduct and conversations of the testator as exhibited to those who were attending him.

Such evidence was important and material upon the issue tried, and is clearly within the letter and spirit of those transactions to which the Code prohibits an interested witness from testifying. It was of the same class of evidence as that pronounced by this court to be incompetent, under section 829 of the Code, in *Holcomb* v. *Holcomb*, 95 N. Y. 316. See also *Lane* v. *Lane*, 95 N. Y. 494, and *Re Smith*, 95 N. Y. 516.

As indicated by the head note of *Holcomb* v. *Holcomb*, it was there held that "The policy of the statute excludes testimony of an interested witness concerning any transaction with the deceased in which the witness in any manner participated, or of any communication in his presence or hearing, if he in any way was a party thereto," and that testimony of interested witnesses was improperly received "as to conduct and actions of the deceased, tending to show his enfeebled and dependent condition, and as to statements made by him, although not addressed to the witness, and made in ignorance of his presence."

The case of *Cary* v. *White*, 59 N. Y. 336, is not an authority for the admission of this evidence. Several grounds for the conclusion reached in that case were stated, but a single judge only concurred with the opinion. Two judges concurred in the result, and two dissented; the remaining judge not voting. One of the grounds suggested in that case was that the party objecting to the evidence offered was not an assignee of the deceased person within the meaning of the statute. The evidence thus sought to be given consisted of a declaration made by the deceased person to his own attorney in the presence of the plaintiff. The point was presented upon an objection to the question calling for the evidence, which was sustained by the trial court. The judge who wrote in this court was of the opinion that the question excluded did not necessarily relate to a personal communication or transaction between the deceased person and the witness, and was therefore competent. The case cannot be considered an authority upon the question here presented.

Ware was also permitted to testify, under objection, to the conversation taking place between the testator and Sharer and Barse—attending the attestation and publication of the will. His evidence tended in every material respect to corroborate the version given of the transaction by Sharer, and conflicted with that of Barse.

At the time this evidence was admitted it appeared that Ware had been present during the whole interview during which the will was alleged to have been executed, and had confessedly taken a part in its subscription by the testator. Ware and Sharer were the only persons then present, and Ware supported the testator upon the bed in his arms, by the testator's express request, while Sharer guided the hand, upon similar request, and assisted Eysaman in subscribing his name to the will.

It cannot be doubted that the request to Ware, and acquiescence and participation in the act of the testator in subscribing the will, was a personal transaction and communication between him and the testator, within the meaning of the statute. Such must have been the understanding of the proponents, for they voluntarily omitted to examine Ware in chief as to the signing of the will, but confined his evidence to the publication and attestation which followed the testator's subscription. This was claimed by them to be competent, as relating to another transaction, in which he took no part. We think it was error to admit this evidence.

The act of executing the will, although consisting of several incidents, constituted but one transaction, and derived its efficacy as a valid execution from the performance of each requirement of the statute. The transaction was continuing, and related to but one subject, viz., the execution of a will. A participation by a person in any of the material acts required

to complete its valid execution made the transaction one between the testator and that person. Ware was present from the subscription to the publication and attestation, and it cannot reasonably be held that he did not participate in the execution of the will.

We are referred by the respondents to section 2544 of the Code of Civil Procedure, providing that "A person is not disqualified or excused from testifying respecting the execution of a will by a provision therein, whether it is beneficial to him or otherwise," as bearing upon the question of the competency of the evidence given by Ware. No argument or discussion accompanied this reference, and we are left to conjecture what bearing it is supposed to have upon the facts of the case. We infer that it is thought to have effected, to some extent, a repeal of section 829, by implication, and some of my brethren are of the opinion that the point is sufficiently grave to require serious treatment. The section occurs in that part of the Code relating exclusively to proceedings in surrogates' courts, and states, in respect to a single subject, that a person shall not by reason of an interest under a will, whether beneficial or otherwise, be disqualified from testifying to its execution.

The persons whose testimony is competent and by statute indispensable to the probate of a will are its subscribing witnesses, and they are, according to general understanding, the persons who are known as witnesses to its execution. To hold, therefore, that the section refers only to those persons who are generally understood to be the witnesses to a will, would accord with its language, and, we think, also with its obvious meaning and intent.

Repeals by implication are not favored by the courts, and will not be allowed, unless there is such a repugnance between two statutes that they cannot stand together and one necessarily nullifies the other. If such a construction, however, can be given to them that both may stand and each have an appropriate office to perform, then it is the duty of the court so to interpret them.

We think that section 2544 refers to subscribing witnesses alone, and was intended to make all such witnesses competent to testify in a probate court to its execution, however their interest might arise. Although the express words do not so confine it, we think such a purpose can fairly be implied from its language and that of statutes *in pari materia*.

It is said in the note to the section in Throop's edition of the Code of Civil Procedure that it was substituted for section 6 and a part of section 50, pt. 2, chap. 6, title 1, of the Revised Statutes. Those sections were substantially as follows:

Section 6 provided that a creditor whose debt was by the will made a charge upon lands devised should, notwithstanding such interest, be a competent witness to prove the will.

Section 50 provided that "If any person shall be a subscribing witness to the execution of any will, wherein any beneficial devise, legacy, interest or appointment of any real or personal estate shall be made to such witness, and such will cannot be proved without the testimony of such witness, the said devise, legacy, interest or appointment shall be void so far only as concerns such witness, or any claiming under him; and such person shall be a competent witness, and compellable to testify respecting the execution of the said will in like manner as if no such devise or bequest had been made."

Section 51, referring to the same subject, provided that in case such witness would have been entitled, as heir or next of kin, to a share in the estate of such testator if he had died intestate, that he might recover from the devisees and legatees in the will, if established, his proportion of such estate, not exceeding, however, the amount devised to him by the will.

Section 6 of the Revised Statutes was expressly repealed by chapter 245 of the Laws of 1880, and thereby rendered all interested witnesses, save those mentioned in section 50, which was expressly excepted from the repeal, incompetent to testify as subscribing witnesses.

Section 2544 was therefore adopted as a substitute for section 6, and was intended to enlarge the former exception, and embrace not only the special case provided for by the repealed section, but all other possible cases where an interest in the event of a controversy over the probate of a will might, under the existing statute, disqualify a subscribing witness from testifying to its execution. Although it may not be easy to specify such cases, the Legislature, probably out of abundant caution, deemed it prudent by general words to embrace all subscribing witnesses by a comprehensive exception from disqualification by reason of interest. The language of the enactment seems to support this view.

The evidence authorized to be given by section 2544 refers to that given in surrogates' courts alone, and relates solely to the subject of the execution of the will. It was clearly intended to operate as a substitute for prior statutes that related to subscribing witnesses alone, and there was no reason for including other persons in its provisions. The reason for exempting such witnesses from the application of the general rule of exclusion made by section 829 is obvious, as their testimony is made indispensable, if obtainable, to the probate of a will. Sections 2618, 2619.

Otherwise numerous wills, to which legatees and others interested, who had through ignorance, carelessness or inadvertence become attesting witnesses, would fail in their probate and the wishes of their makers in respect to the disposition of their property be altogether defeated. To obviate these consequences, the provisions of the various statutes referred to were adopted.

To carry the effect of section 2544 beyond the object alluded to would make interested witnesses competent to testify to facts no more essential to the establishment of wills than many other transactions respecting which they are obviously, under section 829, incompetent now to testify. Such witnesses are now incompetent to speak of personal communications and transactions with a testator, showing undue influence or testamentary capacity; and why should it be deemed important to make them competent to prove the execution of a will, which is generally supposed to be effectively taken care of by the subscribing witnesses, and yet deprive them of competency

upon other equally important facts in such a controversy?

It might also be asked why legatees who are subscribing witnesses should be compelled to forfeit their legacies, if called to prove a will, and that those who are also legatees, but not such witnesses, can testify to the same facts with perfect immunity from loss by reason thereof; and it may further be asked why such person should be permitted to testify to the execution of wills before a surrogate, and yet be precluded from doing so in controversies in other courts concerning the validity of testamentary dispositions of real estate.

It is quite apparent that section 2544 has not been supposed, by either the bench or the bar of this State, to have produced any change in section 829; for during the nine years since its adoption it has not been cited or referred to in any case that we have discovered, where section 829 has been the subject of consideration. In the mean while numerous decisions have been erroneously made in the courts of the State, if section 2544 is now given the effect claimed for it. We refer to a few only of the cases which have been decided in this court.

In *Lane* v. *Lane*, 95 N. Y. 494, the evidence of the testator's wife, who was a legatee under the will, was admitted to prove the conversations taking place at its preparation and execution. This court said: "As to any personal transaction or communication with the testator, she was, of course, incompetent to testify, under section 829 of the Code;" and the judgment was reversed for error in the admission of her evidence.

In the same volume (page 516), in *Re Smith*, a legatee and executor of the will was permitted to testify to the instructions of the testator and the draft and execution of a will on September 10, with a view of showing that a subsequent will executed on September 13 was a transcript of the previous will, and in all respects the same, except that the witness was a subscribing witness to the first will, and not of the last. It was held that such witness was not competent to testify under section 829.

In *Re Will of Wilson*, 103 N. Y. 374, 4 Cent. Rep. 769, an executor and legatee under the will of Wilson was allowed to testify to facts relating to the preparation and execution of the will. It was held that the witness, having previously executed a release of his legacy to the executor, was thereby rendered competent, although otherwise he would have been incompetent under section 829.

In *Loder* v. *Whelpley* (Ct. App. Nov. 27, 1888), 111 N. Y. 239, it was stated that "The testimony of the legatee under a will, so far as it relates to communications with the testator, or transactions with him, is inadmissible on proceedings taken for the admission of the will to probate under Code Civil Procedure, § 829."

It may also be observed that Ware's evidence was not offered for the purpose of proving the execution of the will; for the surrogate had already ruled that the formal proofs of execution were sufficient to admit the will to probate, and it was therefore received upon the question of testamentary capacity, and was unquestionably important evidence upon that issue. As we have seen, his evidence upon that question, if derived from personal transactions and communications with the testator, was incompetent, and upon such an issue it was none the less so because it related to observations made during the proceedings for the publication of the will.

The history of sections 828 and 829 shows a uniform, consistent and intelligent purpose on the part of the Legislature, while abolishing the strict rules of the common law in relation to testimony given by interested persons, to so limit and restrict such evidence as not to permit them to speak of personal transactions and communications had with a deceased person through whom the respective parties to the litigation derived the title or interest which was its subject.

The general principle that interest in the event of an action should not disqualify a person from testifying therein was incorporated in section 393 of the original Code of Procedure adopted in 1848. It was thereby provided that "No person offered as a witness shall be excluded by reason of his interest in the event of the action." By section 399, however, it was provided that the previous section should not apply to a party to the action, nor to any person for whose immediate benefit it should be prosecuted or defended. Neither should an assignor of a thing in action or contract be examined in behalf of a person deriving title through or from him, against an assignee or an executor or administrator, unless the other party to such contract or thing in action should be living.

By an amendment to the Code in 1857 the restriction as to parties to an action and persons for whose immediate benefit it was prosecuted or defended was removed in cases where the adverse party was living and was capable of being examined as to the same transaction. Under these provisions, it had been held that they did not apply to special proceedings or probate cases (*Re Belt*, 1 Park. Crim. Rep. 169; *Woodruff* v. *Cox*, 2 Bradf. 223); but by section 12, chapter 459, Laws 1860, it was provided that sections 398 and 399 should apply to surrogates' courts, and that the interested parties thereby made competent should not testify to personal transactions had with a deceased person under certain circumstances therein specified.

By section 31, chapter 460, Laws 1862, sections 398 and 399 of the Code of Procedure were not only again made applicable to surrogates' courts, but such parties as were thereby made competent as witnesses were prohibited from testifying to personal transactions or communications with a deceased person as against the executors, administrators, heirs at law, next of kin or assignees of such deceased person.

Since 1862, therefore, through all of the mutations which sections 398 and 399 have undergone, until they became, in 1877, sections 828 and 829 of the present Code of Civil Procedure, the prohibition upon interested parties, in actions as well as surrogates' proceedings, from testifying to personal communications and transactions with a testator, have been carefully re-enacted and preserved. It can hardly be supposed that these sections which have been the subject of frequent consideration and amendment by the Legislature, and of the full-

est and most careful scrutiny and consideration by the courts, should have been intended to be amended in so important a particular as that contended for, without any reference to it in the section, or some provision making it applicable to other than probate cases involving the validity of wills, and when the want of such evidence might be conclusive upon the controversy.

Indeed, we do not see why the same rule of construction would not require us to hold that section 399 of the original Code operated to repeal section 50 of the Revised Statutes, for certainly section 399 prohibited all interested persons from testifying to personal communications and transactions with a deceased person, and the general language of that section would apply as well to subscribing witnesses as to persons not in that situation. Yet it was never, we think, supposed to have that effect; and section 50 still remains as an existing provision of law prescribing the conditions upon which legatees and others who are attesting witnesses shall testify in respect to the execution of wills.

It seems to us it could not have been intended that these legatees should be compelled to forfeit their legacies to render them competent to testify to the execution of a will, while others who were equally interested could testify to it without losing their interest thereunder.

We are, for the reasons stated, of the opinion that *the judgment of the General Term and decree of the surrogate should be reversed, and the proceedings remanded* for the further action of the surrogate therein, with the question of costs reserved for the determination of the court below upon the final disposition of the case.

All concur, except **Earl, J.**, who takes no part.

GEORGIA SUPREME COURT.

B. W. GRANT, *Plff. in Err.*,
v.
L. A. KUGLAR.

(....Ga.....)

***Where a stream flows through two adjoining tracts of land,** the property of different owners, and in the bed of the stream on the upper tract there was a natural ledge of rock which retarded the flow of the water so as to protect the lower tract from overflow, the proprietor of the upper tract had no right to remove such ledge of rock, and thereby so vary the natural flow of the stream as to occasion damage to the lower tract by causing water and sand to overspread portions of the same, which, but for the alteration, would not be so affected. And this is true, although there be no damage at the point where the stream enters the lower tract, but only further down.

(January 9, 1889.)

ERROR to the Superior Court of Henry County to review a judgment in favor of defendant in an action to recover damages for injuries resulting to plaintiff's land from its being overflowed by water. *Reversed.*

Plaintiff and defendant were owners of adjoining tracts of land through which a stream of water flowed. Defendant owner of the upper tract removed a ledge of rock which operated as a natural dam to keep back the water in the stream. By reason of such removal the volume of water was so increased in the stream that it overflowed its banks at points below where the ledge was removed and caused the damage complained of. The court below dismissed the declaration and plaintiff took this writ.

Messrs. **W. A. Brown** and **E. J. Reagan,** for plaintiff in error:

The plea of *damnum absque injuria* does not apply when the right of a party has been invaded.

71 Ga. 726.

As to right of proprietors to have stream unchanged by upper owners, *see*—

Angell, Watercourses, §§ 95 *a*, 96, 108 *e*, *k*, 166 *r*; 4 Ga. 241; Cooley, Torts, 569.

Messrs. **Bigby & Dorsey** and **J. T. Spence** for defendant in error.

Bleckley, *Ch. J.*, delivered the opinion of the court:

The principle upon which we rule this case is that, water having a time relation as well as a space relation, both of them being fixed by nature, there is no more right in an adjacent proprietor to alter the one than the other. If the time relation of the stream is so altered that the effect of the water upon the lower tract is injuriously different from what it was by the natural flow of the stream, then a wrong has been done to the proprietor of the lower tract.

We think that the owner of water has no more right artificially to project it forward on another man's land than he has to push it back upon land in his rear; and if by so doing he causes damage he ought to answer for

*Head note by BLECKLEY, *Ch. J.*

NOTE.—*Damage caused by projecting water on land further down stream.*

An owner of land has no right to rid his land of surface water or superficially percolating water by collecting it in artificial channels and discharging it through or upon the land of an adjoining proprietor. White v. Chapin, 12 Allen, 516; Foot v. Bronson, 4 Lans. 47; Hicks v. Silliman, 93 Ill. 255; Kauffman v. Griesemer, 26 Pa. 415; Martin v. Riddle, 26 Pa. 415 note; Miller v. Laubach, 47 Pa. 154; Butler v. Peck, 16 Ohio St. 334; Livingston v. McDonald, 21 Iowa, 160; Davis v. Londgreen, 8 Neb. 43; Porter v. Durham, 74 N. C. 767. See Goldsmith v. Elsas, 53 Ga. 186; Gillis v. Nelson, 16 La. Ann. 275; Sowers v. Shiff, 15 La. Ann. 300.

This is alike the rule of the common and civil law. Barkley v. Wilcox, 86 N. Y. 148; Gould, Waters, p. 471.

If the owner of the dominant estate drains his land in such a manner as to injure the owner of the servient estate, and his act is not in the interest of good husbandry, it is an injury for which the latter has a remedy by action or by the preventive remedy of injunction. Harrington v. Peck, 11 Bradw. 62; Livingston v. McDonald, 21 Iowa, 160.

it. There may be difficulty in ascertaining from the declaration in this case how the alleged injury could occur consistently with physical laws; but, if it be true, as averred, that a causal connection exists between the removal of the ledge of rock and the damage to the lower tract, we can see no legal obstacle to a recovery; and we think the court erred in dismissing the declaration upon demurrer.

It is not easy to find any instance in point, but we think the principle is recognized in certain authorities we have examined, most of them cited in Angell on Watercourses, §§ 95*a*, 96, 108*e*, 108*k*, 335.

Nothing in our Code militates against the view we have presented. We think the Code, §§ 2227, 2231, 2232, 3018, makes no substantial change in the common-law rights of land owners, with respect to ditching out and protecting their property; and such, in effect, was the view of the Act of 1856 taken by this court in *Persons* v. *Hill*, 33 Ga. Supp. 141.

Judgment reversed.

MAINE SUPREME JUDICIAL COURT.

L. E. JUDKINS
v.
Samuel WOODMAN.

(....Maine....)

1. **A mortgagor** of a farm who, while remaining in possession, cuts a reasonable quantity of wood for his own use as fuel, can, on leaving the farm, remove the wood for use elsewhere.
2. **A schedule of articles** claimed by a mortgagee is admissible in evidence against him in an action to recover from him wood claimed by the mortgagor.

(February 25, 1889.)

ON defendant's exceptions to the Supreme Judicial Court, Somerset County. *Overruled.*

This was an action of trover by a mortgagor to recover wood cut by him on the mortgaged premises for his own use, and retained by the mortgagee upon the mortgagor's removal from the premises.

Messrs. **Merrill & Coffin** for defendant.
Messrs. **Walton & Walton** for plaintiff.

Walton, *J.*, delivered the opinion of the court:

The question is whether, if the mortgagor of a farm, while remaining in possession, cuts a reasonable quantity of wood for his own use as fuel, he can, on leaving the farm, remove the wood for use elsewhere. His right to cut the wood is not denied. His right to remove it for use elsewhere is denied.

Assuming that the wood was lawfully cut, being reasonable in amount, and that in cutting it no rule of good husbandry was violated, we think that upon leaving the farm the mortgagor would have a right to take the wood with him. When severed from the soil, if rightfully and lawfully severed, the wood would become a mere chattel, and would no more belong to the mortgagee than hay or grain or fruit harvested from the farm.

This rule does not apply to wood or timber unlawfully cut. It applies only to wood lawfully cut for fuel for family use. Such, in effect, was the ruling of the Judge who tried the case; and we think the ruling was correct.

Objection was made to the admission in evidence of a paper said to be a schedule of articles claimed by the mortgagee, and on which the wood in question does not appear. It was objected to on the ground of irrelevancy. We think it was admissible. It was prepared by the defendant, and was admissible upon the same ground that any declaration of a party, written or oral, is admissible. Its probative force, if any, was for the jury.

Exceptions overruled.

Peters, *Ch. J.*, and **Danforth, Virgin, Libbey** and **Foster,** *JJ.*, concurred.

NOTE.—*Right of mortgagor to cut timber from the mortgaged land.*

The mortgagor has the unquestionable right to cut timber from the mortgaged premises, even for milling purposes, provided he makes payment in proportion beyond the annual payments specified in the mortgage; and the mortgagee has no lien on the timber when cut, if cut in good faith by the mortgagor or his grantees. *Ensign* v. *Colburn*, 11 Paige, 503.

Although a mortgagor may cut timber upon the mortgaged premises when he can do so without committing waste, and may appropriate the timber cut to his own use, yet where it is done with a fraudulent intent to diminish the value of the security, equity will restrain his unconscientious act. *Idem.*

Courts restrain mortgagors in proper cases, even without covenants, from diminishing the security to the injury of mortgagees. Miles v. Fralich, 11 Hun, 563; Brady v. Waldron, 2 Johns. Ch. 148; Robinson v. Preswick, 3 Edw. Ch. 246; Phœnix v. Clark, 6 N. J. Eq. 447; Nelson v. Pinegar, 30 Ill. 473; Bunker v. Locke, 15 Wis. 635; Robinson v. *Russell*, 24 Cal. 467; Cooper v. Davis, 15 Conn. 556; State v. Northern C. R. Co. 18 Md. 193; Parsons v. Hughes, 12 Md. 1; Litka v. *Wilcox*, 39 Mich. 94; Emmons v. Hinderer, 24 N. J. Eq. 39; Patton v. Moore, 16 W. Va. 428; Frank v. Brunnemann, 8 W. Va. 462; 3 Pom. Eq. Jur. 380.

The mortgagee has no lien upon timber cut upon the premises in good faith, though the latter was at the time insolvent, and the premises were an insufficient security for the mortgage debt. Syracuse City Bank v. Tallman, 31 Barb. 208.

But an injunction may be granted under special circumstances at the suit of a mortgagee to prevent the removal from the mortgaged premises of timber trees cut down in waste of the security. Chenango Bank v. Cox, 26 N. J. Eq. 452; *Winship* v. Pitts, 3 Paige, 259.

Samuel HUNT
v.
Silas L. ADAMS.

(....Maine....)

A parent who has made a contract with another for the services of his minor son may cancel the contract, take his son from the other's custody, and recover for the services already rendered, if the latter persists in requiring the son to work on the Sabbath in violation of law, although the son was willing to perform the illegal labor.

(March 6, 1889.)

ON defendant's exceptions to the Superior Court of Cumberland County. *Overruled.*

The facts sufficiently appear in the opinion.

Messrs. **Frank & Larrabee,** for defendant:

When one contracts to labor in the service of another during a given time at a specified rate of wages, if he voluntarily quits the service before the expiration of the time, without justifiable cause, he can recover nothing for his previous labor.

Miller v. *Goddard,* 54 Maine, 102.

Plaintiff's son did work which he was not required to do, which it was unlawful for him to do, which defendant did not require or oblige him to do, which he could not have obliged him to do under any contract if he had attempted; did it without protest or objection. His own violation of the law in that manner is not a sufficient cause for his breaking a lawful contract which he made with defendant.

Myers v. *Meinrath,* 101 Mass. 366, 367; *Robeson* v. *French,* 12 Met. 24, 25; *Towle* v. *Larrabee,* 26 Maine, 464, 469; *Plaisted* v. *Palmer,* 63 Maine, 576.

No person is compelled to do an illegal act; and that the work to be done was unlawful, see—

2 Parsons, Cont. note on p. 761; *Watts* v. *Van Ness,* 1 Hill, 76; *Smith* v. *Wilcox,* 19 Barb. 581.

Mr. **W. H. Vinton** for plaintiff.

Danforth, *J.,* delivered the opinion of the court:

This is an action to recover pay for the services of the plaintiff's minor son. The defense is a breach of the contract in leaving the defendant before the expiration of the time agreed upon.

The action is in the name of the father, and no objection is made on that ground to his maintaining it. We must assume, therefore, that he made the contract. There was, as alleged, a breach of it; and the excuse given is that the son was required to do work on the Sabbath, in violation of law. Was this sufficient to justify the breach?

Had the contract been for the father's own labor the argument for the defendant would have been entitled to much consideration. He could act for himself, and either have submitted to the wrong or have refused to violate the law, and wait for the defendant to discharge him. But the son was a minor, and presumed by the law to be lacking in the discretion necessary to govern and control his own conduct. It was his father's duty to look after his welfare, and especially to care for his morals, and to see that he was not only not compelled to become a violator of the law, but that he should not be induced willingly to do so.

We are, therefore, led to the conclusion that after the defendant had once committed the wrong, and, notwithstanding the objection of the father, made known to him, persisted in that wrong, still requiring the obligations of the law and the sanctities of the Sabbath to be disregarded, it was not only the right, but the duty of the father to cancel his contract, and take his son from such influences and out of such custody; and the fact, if it be a fact, that the son was willing to perform the illegal labor, as required, made this duty on the part of the father still more imperative.

Exceptions overruled.

Peters, *Ch. J.,* and **Walton, Virgin, Emery,** and **Haskell,** *JJ.,* concurred.

OREGON SUPREME COURT.

William F. HAINES, *Respt.*,
v.
Thomas HALL, *Appt.*

(.....Oreg.....)

1. **The doctrine that a stream of water is navigable** if of sufficient extent and capacity to float logs and timber from the mountainous regions to market, and may thereby be utilized for the benefit and advantage of the community at large, cannot be extended so as to include small streams of only a few miles in length, although they rise during a few weeks in the year sufficiently high to be used to a limited extent, by the application of artificial means, to float logs and timber a short distance.

2. **Equity will not take cognizance of an ordinary matter of trespass,** or of the violation of any legal right, unless the circumstances are of such a character as to bring the case under some recognized head of equity jurisdiction. Equity will, however, afford a remedy in such cases where the remedy at law is incomplete and inadequate to give such relief as the nature of the case demands.

3. **Where a small stream of water,** only about twenty feet in width where confined within its banks, and about thirty-five in other places, ran across the farm of W. F. H. and emptied into another stream two miles below, which, during four or five weeks in the year, increased in volume, by the melting of snows in its vicinity,

*Head notes by the COURT.

sufficiently to enable T. H. to float logs down it by stationing a large number of men along its banks "to break jams," by arranging logs along the stream so as to confine the water in a narrower channel at points where the banks were not sufficient to prevent its spreading out, and by constructing reservoirs above, and opening them so as to make a greater flow in a given length of time—*held*, that the stream was not navigable in the sense which made it a public easement.

4. **And where it appeared that the attempted use by T. H. of the stream as mentioned resulted in destroying its banks,** extending it in width, in diverting its waters from the channel, and causing them to overflow the land of W. F. H., which was in cultivation, and wash off the soil of a material part of his lands, and that T. H. claimed the right, and threatened to continue such practice; and it further appearing that W. F. H. had already sued a former party in an action at law for attempting to exercise a similar right, and had recovered the sum of $50 as damages on account thereof—*held*, that equity should interfere and prevent T. H. from carrying his threats into execution.

(Strahan, J., dissents.)

On petition for rehearing.

5. **A stream which has floatable capacity at certain periods,** recurring with regularity, and continuing a sufficient length of time to make it useful as a highway for floating logs, is navigable; but to be navigable in this sense it must be capable of such floatage as is of

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NOTE.—*Navigable waters.*

Tidal waters, and rivers above tidewaters, which are *in fact navigable* the entire year, without reference to the manner or degree in which they are affected by the seasons, are presumptively public and navigable. Sullivan v. Spotswood, 82 Ala. 163.

The capability of use by the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. U.S. v. The Montello, 87 U. S. 20 Wall. 430 (22 L. ed. 391).

To make a stream navigable, there must be some commerce and navigation upon it which is essentially valuable. Woodman v. Pitman, 4 New Eng. Rep. 702, 79 Maine, 456.

That a river is sometimes unnavigable cannot affect its navigability at other times. Nelson v. Leland, 63 U. S. 22 How. 48 (16 L. ed. 269).

To constitute a navigable water, it is immaterial whether a current flows through it or not. Water may be navigable without a current, and it may not be, although it has a current; nor is a current essential to the existence of riparian rights. Turner v. Holland (Mich.) 8 West. Rep. 796.

If a stream is, for a considerable period of the year, a safe and convenient means of transporting over it logs cut from the forest on its banks, this condition recurring with the season of usual rains and continuing through it, even though occasionally interrupted by a decline of its waters, it is a navigable stream; but it is not navigable if this condition occurs only temporarily, at irregular and uncertain intervals, regardless of seasons. Smith v. Fonda, 64 Miss. 551.

In Maine a stream which is only capable of floating rafts or logs, is not navigable within the meaning of the Mill Act of 1841, which authorizes the erection and maintenance of water mills and dams upon and across any unnavigable stream. Stetson v. Bangor, 60 Maine, 313. See also State v. Cullum, 2 Speers L. (S. C.) 581; State v. Hickson, 5 Rich. L. 447; Witt v. Jefcoat, 10 Rich. L. 389; Wood v. Hustis, 17 Wis. 416; Waller v. McConnell, 19 Wis. 417; Crosby v. Smith, 19 Wis. 449; Cobb v. Smith, 16 Wis. 661; Gould, Waters, p. 199.

When a river is capable of navigation in different parts of its course, but by reason of rocks, sandbars and other obstructions does not admit of continuous navigation, the public may pass and repass in those parts of the river which are navigable. The Daniel Ball, 77 U. S. 10 Wall. 557 (19 L. ed. 999); Spooner v. McConnell, 1 McLean, 337, 350; Jolly v. Terre Haute Draw-Bridge Co. 6 McLean, 237; People v. Canal Appraisers, 33 N. Y. 461; Morgan v. King, 35 N. Y. 459; Flanagan v. Phila. 42 Pa. 219; Monongahela Bridge Co. v. Kirk, 46 Pa. 112; Cox v. State, 3 Blackf. 193; Hogg v. Zanesville Canal & Mfg. Co. 5 Ohio, 410; Ill. River Packet Co. v. Peoria Bridge Asso. 38 Ill. 467; Harrington v. Edwards, 17 Wis. 586; Brown v. Chadbourne, 31 Maine, 9, 23, 25; Gould, Waters, 199. See The City of Salem, 2 L. R. A. 380.

Watercourse defined.

A watercourse is a stream of water ordinarily flowing in a certain direction, through a defined channel with bed and banks. Its flow need not be continuous, and its channel may sometimes be dry, but there must always be substantial indications of a stream which is ordinarily and most frequently a moving body of water. Hill v. Cincinnati, W. & M. R. Co. 8 West. Rep. 47, 109 Ind. 511.

To constitute a natural watercourse, there must be a bed, banks and evidences of a permanent stream of running water. Ravines through which surface water occasionally flows are not natural watercourses, within the meaning of the law. Rice v. Evansville, 6 West. Rep. 244, 108 Ind. 7.

To constitute a watercourse in law, it is not

See also 7 L. R. A. 460; 26 L. R. A. 425.

practical utility and benefit to the public as a highway for trade and commerce.

6. **Where the facts show that a stream is not navigable** for floating logs without doing irreparable injury to the estate through which it flows, and the defendant claims a right to use such stream for that purpose, not only for himself, but for the public, and threatens to commit and claims the right to repeat the numerous trespasses which the exercise of such right necessarily involves—*held*, that the plaintiff was entitled to an injunction to prevent irreparable injury, and to avoid a multiplicity of suits.

(December 19, 1888.)

APPEAL by defendant, from a judgment of the Circuit Court of Union County in favor of plaintiff in an action to restrain defendant from attempting to float logs in a certain stream across plaintiff's land, and to recover damages for trespasses upon such land. *Affirmed.*

The facts are fully stated in the opinions.

Messrs. **Baker, Shelton & Baker** and **G. G. Bingham,** for appellant:

This suit was brought principally to establish the non-navigability of Anthony Creek for the floating of logs. A stream of sufficient capacity to float logs successfully is a public highway for that purpose.

Weise v. *Smith*, 3 Oreg. 446; *Felger* v. *Robinson*, 3 Oreg. 458; *Shaw* v. *Oswego Iron Co.* 10 Oreg. 371–382; *Haines* v. *Welch*, 14 Oreg. 319.

When the manifest object of a suit is to determine whether a highway exists across the lands of the plaintiff or not, equity will not take jurisdiction excepting upon a state of facts showing that the injury complained of would be irreparable and the remedy at law inadequate to redress the wrong or injury complained of.

Smith v. *Gardner*, 12 Oreg. 221–223; *Walts* v. *Foster*, 12 Oreg. 247, 248; *Luhrs* v. *Sturtevant*, 10 Oreg. 170.

Equity will not settle disputed questions of title in cases of trespass, no irreparable mischief being shown. The complainant must first have a title to the right he claims beyond dispute.

Coe v. *Winnipiseogee Lake C. & W. Mfg. Co.* 37 N. H. 254–262; *Bassett* v. *Salisbury Mfg. Co.* 47 N. H. 426–437; *Dana* v. *Valentine*, 5 Met. 8; *Cox* v. *Douglass*, 20 W. Va. 175–178; *Schoonover* v. *Bright*, 24 W. Va. 698–701; *Higbee* v. *Camden & A. R. Transp. Co.* 20 N. J. Eq. 435; *Storm* v. *Mann*, 4 Johns. Ch. 21; *Boulo* v. *N. O. M. & T. R. Co.* 55 Ala. 480; High, Inj. § 698.

In order to warrant the interference of equity on the grounds of preventing a multiplicity of suits, different persons must be asserting the same right.

Hatcher v. *Hampton*, 7 Ga. 49, 50; *Jerome* v. *Ross*, 7 Johns. Ch. 335; *Roebling* v. *First Nat. Bank*, 30 Fed. Rep. 744; High, Inj. § 700.

Courts of equity will not grant an injunction to restrain a mere trespass.

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necessary that it should at all seasons of the year contain water; but if it has a regular channel and well defined banks, discharging itself into some other stream or body of water, it is sufficient in law to constitute a watercourse, although the quantity be very small and the flow not constant. Stanchfield v. Newton, 2 New Eng. Rep. 526, 142 Mass. 110.

As public highways.

It is not every small creek in which a fishing skiff or gunning canoe can be made to float at high tide which is deemed subject to public use; but in order to have a public character, it must be navigable for some purpose useful to business or pleasure. Com. v. Breed, 4 Pick. 460; Murdock v. Stickney, 8 Cush. 113, 115; West Roxbury v. Stoddard, 7 Allen, 158, 171; *U. S. v. The Montello*, 87 U. S. 20. Wall. 442, 443 (22 L. ed. 394); Getty v. Hudson River R. Co. 21 Barb. 617; Gould, Waters, 199.

It was held that a private unnavigable brook which flows into a public navigable river, and is floatable in times of high water, becomes a public thoroughfare by being publicly used without objection for twenty years as an inlet for rafts. Stump v. McNairy, 5 Humph. 363.

The only decisions tending to limit the above right of floatage are Hubbard v. Bell, 54 Ill. 110; Thunder Bay River Booming Co. v. Speechly, 31 Mich. 336, 343; Am. River Water Co. v. Amsden, 6 Cal. 443.

The fact that the banks are commonly used for the purpose of towing or propelling what is floating, is evidence merely of want of capacity for public use. Gould, Waters, p. 195.

The question whether it is a highway is held to be a question of law for the court, after the facts are determined by a jury. Ellis v. Carey, 30 Ala. 725; Rhodes v. Otis, 33 Ala. 573; Peters v. N. O. M. & C. R. Co. 56 Ala. 528; State v. Bell, 5 Port. (Ala.) 379; Treat v. Lord, 42 Maine, 552; Bryant v. Glidden, 36 Maine, 36. See Wis. Riv. Log Driv. Asso. v. Comstock Lumber Co. 1 L. R. A. 717.

Private streams.

Streams which are not floatable, or cannot in their natural state be used for the carriage of boats, rafts or other property, are absolutely private. Berry v. Carle, 3 Maine, 269; Spring v. Russell, 7 Maine, 273; Wadsworth v. Smith, 11 Maine, 278; Dwinel v. Barnard, 28 Maine, 554; Brown v. Chadbourne, 31 Maine, 9; Treat v. Lord, 42 Maine, 552; Knox v. Chaloner, 42 Maine, 150; Brown v. Black, 43 Maine, 443; Dwinel v. Veazie, 44 Maine, 167; Veazie v. Dwinel, 50 Maine, 479; Gerrish v. Brown, 51 Maine, 256; Davis v. Winslow, 51 Maine, 264; Lancey v. Clifford, 54 Maine, 487; Holden v. Robinson Mfg. Co. 65 Maine, 215; Lawler v. Baring Boom Co. 56 Maine, 443; Hooper v. Hobson, 57 Maine, 273; Gould, Waters, p. 194.

If the stream is so small and shallow that logs cannot be driven in it without traveling upon the banks, it is not open to the public for passage. Morrison v. Bucksport & Bangor R. Co. 67 Maine, 353; Olson v. Merrill, 42 Wis. 203; Morgan v. King, 35 N. Y. 454, 18 Barb. 277, 30 Barb. 9; Munson v. Hungerford, 6 Barb. 265; Curtis v. Keesler, 14 Barb. 511; Shaw v. Crawford, 10 Johns. 236; Varick v. Smith, 9 Paige, 547; Browne v. Scofield, 8 Barb. 239; Palmer v. Mulligan, 3 Caines, 307; *Ex parte* Jennings, 6 Cow. 518; Pierrepont v. Loveless, 72 N. Y. 211, 216; Slater v. Fox, 5 Hun, 544; Moore v. Sanborne, 2 Mich. 519; Lorman v. Benson, 8 Mich. 18; Ryan v. Brown, 18 Mich. 196; Middleton v. Flat River Booming Co. 27 Mich. 533; Brig City of Erie v. Canfield, 27 Mich. 479; Thunder Bay River Booming Co. v. Speechly, 31 Mich. 336, 345; Atty-Gen. v. Evart Booming Co. 34 Mich. 462; Wood v. Rice, 24 Mich. 423; Scott v. Willson, 3 N. H. 321; Barron v. Davis, 4 N. H. 338; State v. Gilmanton, 14 N. H. 467, 479; Thompson v. Androscoggin River Imp. Co. 54 N. H. 545, 58 N. H. 368; Carter v. Thurston, 58 N. H. 104, 107; Whisler v. Wilkinson, 22 Wis. 572; Wis. River Imp. Co. v. Lyons,

Smith v. *Gardner*, 12 Oreg. 221; *Tigard* v. *Moffitt*, 13 Neb. 565; *Brown* v. *Metropolitan Gaslight Co.* 38 How. Pr. 133; *Wason* v. *Sanborn*, 45 N. H. 169.

Any stream in this State is navigable, on whose waters logs or timber can float to market, and they are public highways for that purpose; and it is not necessary that they be navigable the whole year for that purpose to constitute them such. If at high water they can be used for floating lumber, then they are navigable.

Felger v. *Robinson*, 3 Oreg. 457, 458; *Shaw* v. *Oswego Iron Co.* 10 Oreg. 371; *Whisler* v. *Wilkinson*, 22 Wis. 572; *Sellers* v. *Union Lumbering Co.* 39 Wis. 525; *Olson* v. *Merrill*, 42 Wis. 203; *Cohn* v. *Wausau Boom Co.* 47 Wis. 324; *Thunder Bay River Booming Co.* v. *Speechly*, 31 Mich. 336; *Treat* v. *Lord*, 42 Maine, 563; *Brown* v. *Chadbourne*, 31 Maine, 9; *Little Rock, M. R. & T. R. Co.* v. *Brooks*, 39 Ark. 403.

Messrs. **R. Eakin & Bro.**, for respondent:

It is not enough to constitute a stream floatable that it may be able, for two or four weeks in a year, to carry logs down it to the destruction of fences and bridges, etc.

Hubbard v. *Bell*, 54 Ill. 110, 5 Am. Rep. 98; *Munson* v. *Hungerford*, 6 Barb. 265; *Morgan* v. *King*, 35 N. Y. 459; *Curtis* v. *Keesler*, 14 Barb. 511; *Rhodes* v. *Otis*, 33 Ala. 578; *Haines* v. *Welch*, 14 Oreg. 322; Cooley, Const. Lim. 589; *Am. River Water Co.* v. *Amsden*, 6 Cal. 443.

The true rule is, "that the public have a right of way, etc., in every stream which is capable, in its natural state, and its ordinary volume of water, of transporting," etc. And it is not necessary that the stream should be capable of being navigated by a vessel or other guided agency, provided it can ordinarily be carried safely without such guidance.

Morgan v. *King*, 35 N. Y. 459; *Hubbard* v. *Bell*, 54 Ill. 110, 5 Am. Rep. 98 and note, 108, 103, 107; *Little Rock, M. R. & T. R. Co.* v. *Brooks*, 39 Ark. 403, 43 Am. Rep. 277.

A stream, to be navigable, must be such that the floating can be done by the force of the water, and not by being propelled from the banks.

Brown v. *Chadbourne*, 31 Maine, 9, 50 Am. Dec. 642, 647; *Treat* v. *Lord*, 42 Maine, 552, 66 Am. Dec. 298; Angel, Watercourses, §§ 553 *a*, 539.

If the circumstances of this floating were in wanton or reckless disregard of the rights of plaintiff, then we are entitled to punitive damages.

Dorsey v. *Manlove*, 14 Cal. 553; *Russell* v. *Dennison*, 45 Cal. 337.

The common-law rule of punitive damages is intended not only to atone to plaintiff for the annoyance, mental worry, and the indignity of being oppressed, but also as a punishment to the wrong doer by way of criminal punishment.

Jones v. *Steamship Cortes*, 17 Cal. 487.

An injunction will be allowed to prevent the

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39 Wis. 61, 66; Sellers v. Union Lumbering Co. 39 Wis. 525; Olson v. Merrill, 42 Wis. 203; Barclay R. & Coal Co. v. Ingham, 36 Pa. 194; Hickok v. Hine, 23 Ohio St. 523; Weise v. Smith, 3 Oreg. 445; Felger v. Robinson, 3 Oreg. 455. See also Com. v. Chapin, 5 Pick. 199, 202; Blood v. Nashua & L. R. Corp. 2 Gray, 137; Rowe v. Granite Bridge Corp. 21 Pick. 344; Atty-Gen. v. Woods, 108 Mass. 436; Neaderhouser v. State, 28 Ind. 257; Esson v. McMaster, 1 Kerr (N. B.) 501; Rowe v. Titus, 1 Allen (N. B.) 326; Boissonnault v. Oliva, Stuart (Low. Can.) 564; *Hayward* v. Knapp, 23 Minn. 430; Lamprey v. Nelson, 24 Minn. 304; Com. v. Charlestown, 1 Pick. 180; Com. v. Chapin, 5 Pick. 199; Knight v. Wilder, 2 Cush. 199, 209; Charlestown v. Middlesex Co. Comrs. 3 Met. 202; Atty-Gen. v. Woods, 108 Mass. 436; Gould, Waters, p. 195.

Corporate franchises do not confer riparian rights.

The fact that booming companies and companies for the improvement of the navigation are quasi public corporations, and hold their franchises for public use does not give them the privileges of a riparian owner or enable them by legislative authority to devote the river banks to the purposes of their charter, without compensation to the riparian owners. Attorney General v. Chicago & N. Co. 35 Wis. 425; Wis. River Imp. Co. v. Manson, 43 Wis. 255; Delaplaine v. Chicago & N. R. Co. 42 Wis. 214; Stevens Point Boom Co. v. Reilly, 46 Wis. 237; Stevens Point Boom Co. v. Reilly, 44 Wis. 295; Denniston v. Unknown Owners, 29 Wis. 551; Pound v. Turck, 95 U. S. 459 (24 L. ed. 525); Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308; Lawler v. Baring Boom Co. 56 Maine, 443; Perry v. Wilson, 7 Mass. 393; Ten Eyck v. Delaware & R. Canal Co. 18 N. J. L. 200, 204; Sinnickson v. *Johnson*, 2 Har. (N. J.) 129, 152; Brady v. State, 26 Md. 290; Texas & M. R. Canal & Nav. Co. v. Galveston Co. Ct. 45 Tex. 274; Carpenter v. State, 12 Ohio St. 457; Schoff v. Upper Conn. River & Lake Imp. Co. 57 N. H. 110; Cohn v. Wausau Boom Co. 47 Wis. 314; Reimold v. Moore, 2 Brown (Mich.) 15; Hargrave's Law Tracts, 79; Bath River Nav. Co. v. Willis, 2 Eng. R. & C. Cas. 7; Clay v. Pennoyer Creek Imp. Co. 34 Mich. 204; Hooker v. New Haven & N. Co. 15 Conn. 321; Monongahela Nav. Co. v. Coon, 6 Pa. St. 379.

Authority to maintain side booms in convenient places in a river does not warrant an entry upon the close of another. Perry v. Wilson, 7 Mass. 393; Gould, Waters, p. 429.

Riparian rights and liabilities.

In Pennsylvania and Tennessee, where the principal fresh water rivers are held to be public property like tide waters, fresh streams which are merely floatable and have been included in the warrants and surveys of the land office as part of the public lands, belong to the riparian owners *usque ad filum aquæ*, subject to the public right of passage. Coovert v. O'Conner, 8 Watts, 477; Barclay R. & Coal Co. v. Ingham, 36 Pa. 194; *Stuart* v. *Clark*, 2 Swan, 9; Sigler v. State, 7 Baxt. 493; Hodges v. Williams, 95 N. C. 331.

The riparian owner of land on the bank of an unnavigable stream has no title *ad filum aquæ*, if the State has granted the bed of a stream to another. Hodges v. Williams, 95 N. C. 331.

A riparian proprietor who, by means of a dam, and by accumulating his own logs above the dam, intentionally prevents the passage of another's logs down the stream, is liable in damages for the delay and injury so caused. The person thus injured may lawfully boom the proprietor's logs, and repair and open his sluices, and he may recover, with his damages, the expenses which he incurs in thus securing a passage. Parks v. Morse, 52 Maine, 260; Sewall's Falls Bridge v. Fisk, 23 N. H. 171; Carter v. Berlin Mills Co. 58 N. H. 52; Brown v. Kentfield, 50 Cal. 129; Enos v. Hamilton, 27 Wis. 256, 24 Wis. 658.

Remedy for obstruction to stream.

It is the right of any owner of land fronting on a

destruction of the substance of the inheritance. *Livingston* v. *Livingston*, 6 Johns. Ch. 499. See *Jerome* v. *Ross*, 7 Johns. Ch. 332; *Hicks* v. *Michael*, 15 Cal. 117; Pom. Eq. Jur. § 1357.

Thayer, *Ch. J.*, delivered the opinion of the court:

This appeal is from a decree rendered in a suit brought by the respondent against the appellant to enjoin the latter from floating logs down what is known as "Anthony Creek," and to have an account taken of damages done to respondent's premises in consequence of the appellant using, and attempting to use, said creek during the years 1886 and 1887.

The respondent owns two forty-acre subdivisions of land, situated partly in Union and partly in Baker counties, upon which he has resided for some time, using them as a farm. The creek is a small stream, running through the land, down which the appellant claims and exercises the right of floating sawlogs, during its highest stages of water, insisting that it is a navigable stream.

The respondent denies its being navigable, and alleges that the appellant is doing irreparable injury to his land in attempting to use it for such a purpose. He also alleges that the appellant threatens to and will, unless restrained by the court, continue to use said stream, and that he has already suffered damages to a large amount, occasioned by the acts of the appellant in that particular.

The respondent sought by his suit to have decided a question which is more within the province of a jury to determine than that of a court. But the right to run sawlogs down this Anthony Creek has heretofore caused litigation.

The case of *Haines* v. *Welch*, 14 Oreg. 319, arose out of a claim to damages in consequence of using it for such purpose, and the circumstances surrounding it are of a character that would indicate that it is liable to be a source of constant contention.

Besides, the circuit court seems to have thoroughly investigated the affair, and given it a candid and judicious consideration. I think, therefore, it will be better for all parties to entertain jurisdiction of the case, and make a final disposition of it.

The respondent may have been captious in regard to the use of the stream by the appellant, but the land belonged to him, creek and all, and the appellant had no right to attempt to run his logs down the creek unless its capacity was such as to render it capable of serving an important public use as a channel of commerce.

The case is not one of casual trespass, but it is one where a right is claimed which it is apparent will be attempted to be exercised continuously; and if the creek, as a matter of law applicable to the facts proved, is not a public easement, the appellant should desist from attempting to run his logs down it, and the respondent have the right to enjoy his premises unmolested.

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flowing stream to have it continue to flow in its natural channel; and any obstruction placed in such a stream, which so diverts it as to cause an injury to such land, is an injury for which an action will lie, even if the person placing the obstruction should have used great care and have been unable to foresee the conclusions. Armendaiz v. Stillman, 67 Tex. 458.

A well-defined watercourse of running water, although dry at certain seasons, is within the doctrine against obstructions. Schneitzius v. Bailey (N. J.) 11 Cent. Rep. 737.

A riparian proprietor owning to the center of a stream is entitled to the aid of equity to prevent a diversion of the waters from their natural channel, and this notwithstanding that he does not himself use the waterpower, and has sustained but small pecuniary damage. Weiss v. Oregon I. & S. Co. 13 Oreg. 496.

He is entitled to an injunction without first establishing his right at law by recovering a judgment in damages. Lux v. Haggin, 69 Cal. 255.

In an action to restrain the diversion of water from a stream, an allegation to the effect that the plaintiff was in a position to use or distribute the water was unnecessary. Moore v. Clear Lake Water Works, 68 Cal. 146.

Evidence of injuries, caused by the diverson, to lands of the plaintiff not bordering on the stream, and to his cattle pastured thereon, is inadmissible. Heinlen v. Fresno Canal & I. Co. 68 Cal. 35.

Injunction to restrain trespass; jurisdiction.

The practice of the courts of equity to interfere in cases of trespass by way of injunction, is one of comparatively recent origin, but the jurisdiction is now fully recognized and well established by cases both in England and America. McMillan v. Ferrell, 7 W. Va. 230; Smith v. Pettingill, 15 Vt. 82, 40 Am. Dec. 668. See Mitchell v. Dors, 6 Ves. Jr. 147; Hanson v. Gardiner, 7 Ves. Jr. 306; Thomas v. Oakley, 18 Ves. Jr. 184.

Mere trespasses even when injurious to the subject matter of the action and against which the possessor of it could not always guard, unless productive of irreparable injury or a multiplicity of suits or creating a nuisance were formerly not subjects of an injunction order. McGune v. Palmer, 5 Robt. 608; Mogg v. Mogg, 2 Dick. 670; Norway v. Rowe, 19 Ves. Jr. 147; Jerome v. Ross, 7 Johns. Ch. 315; Stevens v. Beekman, 1 Johns. Ch. 318; N. Y. P. & D. Co. v. Fitch, 1 Paige, 97.

But now the preventive authority of the court is exercised to preserve the property from destruction, pending legal proceedings for the determination of the title. Erhardt v. Boaro, 113 U. S. 539 (28 L. ed. 1117).

When courts will interfere.

The cases in which this court has interfered to prevent a mere trespass, have been those in which the complainant had been in the previous undisturbed enjoyment of the property under claim of right, or where from the irresponsibility of the defendant, or otherwise, the complainant could not obtain relief at law. Lyon v. Hunt, 11 Ala. 295; Livingston v. Livingston, 6 Johns. Ch. 497; Mitchell v. Dors, 6 Ves. Jr. 147; Hanson v. Gardiner, 7 Ves. 305; Courthope v. Mapplesden, 10 Ves. 290; Crockford v. Alexander, 15 Ves. Jr. 138; Twort v. Twort, 16 Ves. Jr. 128; Kinder v. Jones, 17 Ves. Jr. 110; Cowper v. Baker, 17 Ves. Jr. 128; Grey v. Northumberland, 17 Ves. Jr. 281.

Case must be peculiar to justify court to act.

Injunction to restrain trespass will be granted only in a peculiar case and under special circumstances. Watson v. Hunter, 5 Johns. Ch. 169, and note.

In ordinary trespasses, or where the courts of

The right to acquire private property is said by Blackstone to belong inherently to everyone, but it would be of little value if a party were not allowed to enjoy it free from disturbance.

The circuit court, in its findings, found as follows: That the respondent was, and for nine years past had been, the owner in fee of the land; that it was inclosed by a fence, had a dwelling house and outbuildings thereon, was occupied by respondent as a home, and had been used by him for general agricultural purposes during his ownership; and that it was of the value of $1,800. That Anthony Creek entered said land at or near the northwest corner, and ran in a southeasterly course, and passed out near the southeast corner, being a distance of about three fourths of a mile, considering the sinuosity of the stream. That it entered North Powder River a short distance below where it left the respondent's land.

That the creek on the respondent's land, and for a mile and a half above there, is a small, shallow, rapid, crooked stream, with a general width of twenty to thirty-five feet, as it appeared in 1886, having banks from eighteen to thirty-five inches high, but which frequently fell away on one, and sometimes on both, sides, leaving nothing but a gravel bar for many feet, with little or no bank at all.

The flow of water in the creek during the previous summer and fall was very limited, not exceeding twenty or thirty inches, miners' measure, but usually during the latter part of May and first of June, the melting snows in the mountains near by cause the water to increase until the banks, in narrow places, are nearly full; but where the banks are broken away on one or both sides, the water, unless confined by artificial means, spreads out until it becomes a depth of not more than sixteen or eighteen inches, even in high water. The annual rise of the water is fairly regular in amount, time and duration of occurrence.

That the banks of the creek on the respondent's land are composed largely of black loam, which washes readily when disturbed in any manner. That the width of the stream did not increase materially for ten years prior to the spring of 1885, but since that time it has increased one third. That in the spring of 1886 appellant deposited in the bed of the creek, at a point about one and a quarter miles above the respondent's land, about 1,000,000 feet of sawlogs, and attempted to float them to a point below said land. That eighteen men were engaged for twenty-five days in getting these logs to float, during the highest water of the season, but the attempt was an utter failure.

Few, if any, of the logs passed respondent's land at all, the drive being less than two miles; and that there was no evidence showing that the flow of water in that year was less than usual. That no attempt was ever made to float logs in the stream prior to 1883, and the attempts made in 1884 and 1885 were slight and unsuccessful.

That in the spring of 1887 the appellant de-

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law can afford complete satisfaction, courts of equity will refuse to interfere except under very peculiar circumstances. Bracken v. Preston, 1 Pinney, 584, 44 Am. Dec. 420. See Stevens v. Beekman, 1 Johns. Ch. 319; Livingston v. Livingston, 6 Johns. Ch. 497, and cases cited in notes.

There must be something particular in the case, so as to bring the injury under the head of quieting the possession, or to make out a case of irreparable mischief, or where the value of the inheritance is put in jeopardy. Lyon v. Hunt, 11 Ala. 295; Troy & B. R. R. Co. v. Boston, H. T. & W. R. Co. 86 N. Y. 126; Akrill v. Selden, 1 Barb. 316; Hart v. Albany, 3 Paige, 214; N. Y. L. Ins. Co. v. Supervisors of N. Y. 4 Duer, 192; Pumpelly v. Owego, 45 How. Pr. 239; Heywood v. Buffalo, 14 N. Y. 534; Albany N. R. R. Co. v. Brownell, 24 N. Y. 348; Harrington v. St. Paul & Sioux C. R. R. Co. 17 Minn. 227.

In cases of irreparable injury.

The jurisdiction of a court of equity to interfere by injunction to quiet the title and prevent an injury for which no adequate remedy exists at law has been frequently exercised and approved by the courts. Mulry v. Norton, 1 Cent. Rep. 753, 100 N. Y. 439, 53 Am. Rep. 215. See Livingston v. Livingston, 6 Johns. Ch. 497; Watson v. Sutherland, 72 U. S. 5 Wall. 74 (18 L. ed. 580); Livingston v. Livingston, 6 Johns. Ch. 497; Lacustrine Fertilizer Co. v. Lake Guano Fertilizer Co. 82 N. Y. 476.

Where there is a prospect of irreparable injury by what is apparently a nuisance a temporary or preliminary injunction may at once issue. Irwin v. Dixion, 50 U. S. 9 How. 29 (13 L. ed. 34).

Right must be established.

Party applying must have vested right, legal or equitable. N. Y. v. Mapes, 6 Johns. Ch. 46, and note; N. Y. Printing & Dyeing Establishment v. Fitch, 1 Paige, 97.

No preliminary injunction will be granted while the plaintiff's legal right is really doubtful and unsettled. Nat. Docks R. Co. v. Cent. R. R. Co. 32 N. J. Eq. 755, overruling Cent. R. R. Co. v. Pa. R. R. Co. 31 N. J. Eq. 475; 3 Pom. Eq. Jur. 378.

Courts of equity have gradually enlarged their jurisdiction in such cases, and now they interfere to prevent injury to land, even where the title is in dispute and the right is doubtful, if the waste or trespass will be attended by irreparable mischief, or if, from the irresponsibility of the defendant, or otherwise, the plaintiff cannot obtain relief at law. Spear v. Cutter, 5 Barb. 488, 4 How. Pr. 177. See Winship v. Pitts, 3 Paige, 259; N. Y. P. & D. Establishment v. Fitch, 1 Paige, 99; Hawley v. Clowes, 2 Johns. Ch. 122; Hanson v. Gardiner, 7 Ves. Jr. 310, 311; Thomas v. Oakley, 18 Ves. Jr. 184; Livingston v. Livingston, 6 Johns. Ch. 497; Field v. Beaumont, 1 Swan, 208.

In support of strict legal right.

Where an injunction is asked in support of a strict legal right, the party is entitled to it if his legal right is established; mere delay and acquiescence will not, therefore, defeat the remedy, unless it has continued so long as to defeat the right itself. Fullwood v. Fullwood, L. R. 9 Ch. Div. 176; Gaunt v. Fynney, L. R. 8 Ch. 8; 2 Pom. Eq. Jur. p. 281.

The equitable remedy to which this quasi estoppel by acquiescence most frequently applies, is that of injunction, preliminary or final, when sought by a proprietor to restrain a defendant from interference with easements, from committing nuisances, from trespasses, or other like acts in derogation of the plaintiff's proprietary rights. Coles v. Sims, 5 De G. M. & G. 1; Great Western R. Co. v. Oxford, W. & W. R. Co. 3 De G. M. & G. 341; Attorney General v. Sheffield Gas Consumers Co. 3 De G. M. & G. 304; Child v. Douglas, 5 De G. M. & G. 739; Gra-

posited in said creek, about a mile and a quarter above the respondent's land, 2,300,000 feet of sawlogs, for the purposes of floating them to a point below said land. That only 1,400,000 feet of these logs, and of the 1,000,000 feet placed in the stream in 1886, and of an unknown quantity placed there prior to that time, ever reached their destination, a point about seven miles below where they were started; and that in order to secure such result the appellant employed, on two miles of the creek, and stationed along the bank, from twenty-five to thirty-five men with cant-hooks and other appliances to prevent the logs from lodging, to roll them back into the stream, drag them over gravel bars, turn them around bends in the creek, break jams, etc. That these men labored in this way on this particular two miles of creek for twenty-seven days. That then the logs frequently formed jams, piling up in such quantities as to force large amounts of water out of the bed of the stream on to respondent's land. That, in order to break these jams, it was often necessary for eight or ten men to get hold of a single log with cant-hooks, and drag it for a considerable distance over bars; which process was continued until about a third of the logs in the jam were moved, when the others would usually float.

That, in attempting to navigate the stream, the appellant placed logs, where its banks were low, at an angle to the stream, so as to expose about one half their length to the action of the water, thereby forcing the water against the opposite bank so as to increase its depth at that point; also built a reservoir above the respondent's land so as by discharging it to increase the volume of water in the creek. That, while attempting to float logs the water in the creek constantly overflowed by reason of logs being in it. The creek was almost full of logs for thirty-eight days.

At one time 1,600 of them were in the creek on respondent's land. For five days 1,000 logs were in the creek on his land, and not one moved. In 1887, 276 logs were at one time on the bank of the creek on respondent's land, and fifty-one were left in the stream, and 130 out of the stream, on his land.

That, in floating logs both in 1886 and 1887, the appellant washed out the respondent's fence where it crossed the creek, and washed out his private bridge, which he had used for many years for passing to and from different parts of his farm. That, in attempting to navigate said stream, appellant had committed no less than thirty separate and distinct trespasses, many of them irreparable in their nature, and that he threatened to continue such trespassing.

That Anthony Creek is not capable of serving an important public use, as a channel of commerce, by the floating of sawlogs, and that such floating cannot be done so as to be of practical benefit. That by reason of the wrongful acts and injuries committed by the appellant in attempting to navigate said creek in the years 1886 and 1887, the respondent had been damaged in several amounts aggregating the sum of $300.

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ham v. Birkenhead, L. & C. Junction R. Co. 2 Macn. & G. 146; Buxton v. James, 5 De G. & Sm. 80; Attorney General v. Eastlake, 11 Hare, 205, 228, 17 Jur. 801; Wood v. Sutcliffe, 2 Sim. N. S. 163; Rochdale Canal Co. v. King, 2 Sim. N. S. 78; *Cooper v. Hubbuck*, 30 Beav. 160, 7 Jur. N. S. 457; Bankart v. Houghton, 27 Beav. 425; Gordon v. Cheltenham & G. W. U. R. Co. 5 Beav. 229, 237; Mitchell v. Steward, L. R. 1 Eq. 541; Western v. MacDermot, L. R. 1 Eq. 499, L. R. 2 Ch. 72; *Senior v. Pawson*, L. R. 3 Eq. 330; Smith v. Smith, L. R. 20 Eq. 500, Attorney General v. Colney Hatch Lunatic Asylum, L. R. 4 Ch. 146; Lee v. Haley, L. R. 5 Ch. 155; Gaunt v. Fynney, L. R. 8 Ch. 8; Bassett v. Salisbury Mfg. Co. 47 N. H. 426, 439; *Odlin v. Gove*, 41 N. H. 465; Peabody v. Flint, 6 Allen. 52, 57; Fuller v. Melrose, 1 Allen, 166; Tash v. Adams, 10 Cush. 252; Briggs v. Smith, 5 R. I. 213; Grey v. Ohio & P. R. R. Co. 1 Grant, Cas. 412; Little v. Price, 1 Md. Ch. 182; *Burden v. Stein*, 27 Ala. 104; *Pillow v. Thompson*, 20 Tex. 206; Borland v. Thornton, 12 Cal. 440; Phelps v. Peabody, 7 Cal. 50; Wilson v. Cobb, 28 N. J. Eq. 177; 2 Pom. Eq. Jur. p. 281.

When not issued.

The court of chancery does not ordinarily issue a permanent injunction to restrain acts alleged to amount to a nuisance, until a court of law has decided that they constitute a nuisance. Silliman v. Hudson River Bridge Co. 4 Blatchf. 309; *Disbro v. Disbro*, 37 How. Pr. 149. See White v. Cohen, 19 Eng. L. & Eq. 146, 149; Earl of Ripon v. Hobart, 1 Cooper, Sel. Cas. 333, 3 Mylne & K. 169; Mohawk B. Co. v. Utica & S. R. Co. 6 Paige, 554; 2 Story, Eq. Jur. §§ 924, 924 *a*.

Injunction will not issue to restrain the erection of a fence (Herr v. Bierbower, 3 Md. Ch. 459); nor the removal of one (Minnig's App. 82 Pa. 373); nor the throwing of mud and earth on the complainant's lands (Mulvany v. Kennedy, 28 Pa. 44); an encroachment of six inches on a highway (Hall v. Rood, 40 Mich. 46, 29 Am. Rep. 528); nor the occasional moving of a house upon and along the line of a street railway (Fort Clark Horse R. Co. v. Anderson, 108 Ill. 64, 48 Am. Rep. 545); nor the extension of a public street over a wharf (Ballantine v. Harrison, 37 N. J. Eq. 560, 45 Am. Rep. 667; Smith v. Gardner, 53 Am. Rep. 350.)

If the evidence is conflicting and the injury complained of is doubtful or uncertain, that alone will constitute a ground for withholding the exercise of the extraordinary power of injunction. Thebant v. Canova, 11 Fla. 173.

Where remedy at law is adequate.

Equity will not interfere to restrain a breach of a contract, or the commission of a tort, or the violation of any right, when the legal remedy of compensatory damages would be complete and adequate. Jersey City v. Gardner, 33 N. J. Eq. 622; Powell v. Foster, 59 Ga. 790; Johnson v. Conn. Bank, 21 Conn. 148, 157; Watson v. Sutherland, 72 U. S. 5 Wall. 74 (18 L. ed. 580); 3 Pom. Eq. Jur. 368.

A court of equity will not interfere to restrain a mere trespass; when the injury is not irreparable, and destructive of the plaintiff's estate, but is susceptible of pecuniary compensation. Akrill v. Selden, 1 Barb. 317; Lyon v. Hunt, 11 Ala. 295, 46 Am. Dec. 216. See Stevens v. Beekman, 1 Johns. Ch. 318; Jerome v. Ross, 7 Johns. Ch. 315; Hart v. Albany, 9 Wend. 571.

A court of equity will not lend its aid to restrain by injunction the commission of any act injurious to the complainant when he has an adequate remedy at law. Tigard v. Moffitt, 13 Neb. 566; *Disbro v. Disbro*, 37 How. Pr. 149.

Unless the injury will be irreparable, the court will leave the party to his remedy at law. There is the same reason why the court should not interfere by restoring him to possession. Troy & B. R. Co. v. Boston, H. T. & W. R. Co. 86 N. Y. 127.

I have examined the evidence submitted in the case and think it fairly supports the findings of the court; nor do the appellant's counsel in their brief attempt to show the contrary, except as to the amount of damages which the court found to have been sustained by the respondent. The nature of the damages was such that the amount could not be ascertained by direct proof. They were of such a character that they could not be computed with mathematical accuracy.

In this kind of cases a party can do nothing more than to prove the facts, and leave the jury, or court when tried without a jury, to estimate the damages. The respondent could not possibly show the amount of his injuries in dollars and cents. The greater part of the injury doubtless consisted in the annoyance, perplexity and disturbance to which the respondent was subjected in consequence of the acts of the appellant, and it is the province of a jury or court, in such a case, to make a fair estimate of the amount which a party should pay for occasioning such annoyance, perplexity and disturbance.

This affair of the appellant's attempting to navigate his logs down Anthony Creek through the respondent's land has been going on during two seasons, and in any view was wrong. If he had a right to use the waters of the creek for such purpose, he had no right to station his men along its banks to float the logs, or allow the logs to go on to the respondent's land, or injure the banks of the creek, or turn the stream out of its banks on to the land.

No one has the right to use the property of another for his own convenience without the consent of the latter. The right to acquire, enjoy and control private property in any manner not injurious to the rights of others is a natural as well as a constitutional right, and no injury arising out of an infringement of it should be allowed to pass unredressed.

Whether the creek in question is navigable or not for the purposes for which the appellant used it depends upon its capacity in a natural state to float logs and timber, and whether its use for that purpose will be an advantage to the public. If its location is such, and its length and capacity so limited, that it will only accommodate but a few persons, it cannot be considered a navigable stream for any purpose. It must be so situated, and have such length and capacity, as will enable it to accommodate the public generally as a means of transportation.

A stream that cannot be used without employing the means and appliances which the appellant made use of, in order to float his logs down this one, certainly ought not to be regarded as a public highway for any purpose. The circuit court found, as we have seen, that Anthony Creek is not capable of serving an important public use as a channel of commerce, and I think its finding in that particular is fully warranted by the evidence in the case.

Courts went to the extreme verge of authority to interfere with or abridge private rights when they held that a stream of water, included within a private grant, constituted a public easement in any case. Such holdings bear a strong resemblance to the encroachment upon the immunity guarantied in the Constitution that private property shall not be taken for public use without just compensation.

It would, in my opinion, be much more in consonance with the spirit and principles of our government to have left the matter to be regulated by the Legislature, which has authority to pass laws for establishing public highways, and to provide for such compensation.

We are, however, committed to the doctrine that a stream of water which is of sufficient extent and capacity to float logs and timber from mountainous regions to market, and can be utilized thereby for the benefit and advantage of the community at large, notwithstanding it is included within the land owned by private individuals, is, nevertheless, a public, navigable stream for such purposes; and we must accept that doctrine as the law.

But I am not willing to extend it so as to include every little rivulet or brook which runs across a man's farm, although its waters may be so swollen for a short time every year by the melting snow in its vicinity as to enable logs and timber in limited quantities to float down it, and by the adoption of extraordinary means for that purpose, convenience one or two neighbors in so using it.

The appellant's counsel strongly insist upon the rule that a court of equity will not entertain jurisdiction in ordinary matters of trespass. I am mindful of the rule, and have no intention or desire to depart from it. I would not undertake to maintain that a court of equity has jurisdiction to take cognizance of the violation of any legal right unless the circumstances are of such a character as to bring the case under some recognized head of equity jurisdiction.

Equity, however, affords a remedy to enforce a legal right when the remedy at law is incomplete and inadequate to give such relief as the nature of the case demands; and I think the respondent can reasonably invoke the benefit of that principle in this case. I do not regard it as an ordinary case of trespass.

The respondent has his little farm, which he is endeavoring to cultivate, in order, I suppose, to provide a living for himself and family. Parties interested in timber a short distance above his farm claim the right to float it down a small stream which runs through his premises, to his detriment and annoyance. He has already had litigation with one party for attempting similar acts. That fact is alleged in the complaint in this suit, and the records of this court substantiate it. He brought an action in the said circuit court against a certain party on account of similar acts, and recovered a judgment against him for the sum of $50 damages, which this court, in the case before referred to, affirmed.

Thereafter this appellant engaged in the same scheme, and others, we may presume, are liable to engage in it also; and if the respondent were compelled to protect himself by bringing an action for each trespass, it would soon utterly impoverish him.

The evidence in the case shows, and we can easily understand, that the injury being done to his premises on account of such acts is permanent and irreparable, and he certainly ought

to have the right to have it specifically determined as to whether or not they are subject to the servitude claimed. It is the only way I can discover by which the right and title to the premises can be effectually quieted.

The respondent, it is true, can have it determined in an action at law as to whether or not the stream is navigable, as claimed; but in the mean time the appellant will be enabled to destroy its banks, thereby widen the stream, and wash away other portions of the soil adjacent thereto, which will be the natural and proximate result of the course he has been pursuing.

I am of the opinion that the decree appealed from should be affirmed.

Strahan, J., dissenting:

The object of this suit is to restrain the defendant from floating sawlogs down Anthony Creek, which creek flows through the plaintiff's lands in Union County, Oreg.; also to restrain the defendant from maintaining a certain dam across said creek above the plaintiff's premises; and for damages which, it is alleged, the plaintiff has received by reason of various trespasses upon his lands by defendant, committed in running said logs.

The plaintiff, by his amended complaint, alleges, among other things, that a small, shallow stream, known as "Anthony Creek," flows in a southeasterly direction through plaintiff's land, diagonally dividing it into two equal parts, and fertilizes and irrigates said land, and is the boundary line between Union and Baker Counties, and that the plaintiff owns both banks and the bed of said Anthony Creek where it passes through his land for a distance of about one half a mile; that the defendant during the spring and summer of 1886, and the winter of 1886 and 1887 cast and deposited in Anthony Creek above plaintiff's said lands sawlogs cut from timber above plaintiff's said lands, at various places, and is proposing and threatening to continue to do so, for the purpose of attempting to transport or float said logs by means of said creek from said places, through the plaintiff's said lands to a point on North Powder River below the plaintiff's land and below the mouth of Anthony Creek, a distance of five miles or more, where the defendant is preparing to erect a sawmill as soon as the spring freshet comes in the spring of 1887; that said logs amount to more than 4,000,000 feet, and are piled and banked into and along the banks of said creek at various places above plaintiff's said land.

That during the spring of 1886 the defendant cast and deposited in said creek a large quantity of sawlogs, and in the month of June, 1886, attempted to drive and float about 1,000,000 feet of said logs down said creek, and across the said lands of the plaintiff, by means of which and whereby the defendant injured, displaced and wasted the plaintiff's said lands, and tore, cut and carried away the substance of the soil thereof, and wrongfully committed waste thereon, and upon the plaintiff's said lands; that about the first of June, 1886, the defendant and his employés, in preparing and attempting to float said logs, broke the plaintiff's inclosure upon said lands, and wrongfully entered the plaintiff's said lands, and broke and carried away his fences at two places where the same cross said creek upon the plaintiff's said lands, to his damage in the sum of $25, and, by reason of the same being broken and kept open by the defendant, plaintiff was compelled to, and did, herd the stock off of his crops for one month, to his damage in the sum of $25.

That about June 11, 1886, the defendant, in preparing to float said logs in said creek through the plaintiff's said lands, broke up, carried away, and destroyed plaintiff's bridges across said stream, to his damage in the sum of $5; that during the month of June, 1886, defendant, in so attempting to float said logs in said creek, caused the same to form a jam or dam across said creek, and dammed the same at a point above the plaintiff's lands, and at the head of the plaintiff's irrigation ditch, whereby the water was diverted from said ditch, and the same was injured, and the plaintiff was thereby, and by reason thereof, deprived of the use of the water of said creek upon said lands of the plaintiff for the purpose of irrigation, to his great damage in the sum of $75; that in so attempting to float said logs in the month of June, 1886, the defendant floated, rolled and pushed upon the plaintiff's said land in said creek a large quantity of logs, to wit, about 250, and that said logs so remained, and still remain, on the plaintiff's said land, and on the banks of and in said creek, to plaintiff's damage in the sum of $100; and by reason of said logs being in said creek since June, 1886, plaintiff has been prevented from getting to said creek with his stock except with a great deal of trouble and inconvenience, to plaintiff's damage in the sum of $5.

That by reason of said logs being in said creek on plaintiff's said lands the same have caused, and continue to and will cause, the water of said creek to wash away the banks thereof, and change the channel thereof, and have during all of said times obstructed the flow of the waters of said creek across said lands of plaintiff, to his damage in the sum of $10; that in preparing and attempting to float said logs in said creek in June, 1886, the defendant cut down and destroyed eight of plaintiff's growing trees on said land, to his damage in the sum of $20.

All of the foregoing wrongs were suffered by the plaintiff, as he alleges, prior to the commencement of this suit.

The part of the amended complaint relating to threatened injuries is as follows: That said creek is shallow, and not navigable for boats or canoes, and has low banks, and in its natural state is not navigable for railroad ties or sawlogs in the spring freshet or any season of the year, and is unfit to be used by the public or otherwise as a means of transporting or floating logs to the defendant's proposed sawmill on North Powder River, or elsewhere, through the plaintiff's said lands; that the defendant is preparing to and will float, or attempt to float, a large quantity of sawlogs down said Anthony Creek from a point on the banks thereof above the lands of the plaintiff, to wit, about 4,000,000 feet of said logs down said stream through said lands to North Powder River, and threatens to continue to float, or attempt to float, said logs down said stream

through plaintiff's said lands for years to come; that by reason of the nature of said stream, low banks, and small volume of water and narrow channels it is not possible to successfully float logs down it through the plaintiff's lands, to be beneficial to commerce or to the defendant, and any attempt to do so will result in irreparable injury to the plaintiff's land; that said attempt to so use said stream will result in endless litigation and a multitude of actions without a complete remedy to the plaintiff, unless the court inhibit and restrain the defendant from so floating logs in said stream; that the floating of logs in said Anthony Creek, the maintaining and manipulating of said dams by the defendant, as threatened by him, will result in great and permanent injury to the plaintiff's said lands, and will cut away the banks of said stream, change the channel thereof, flood plaintiff's lands with water, deposit thereon logs, gravel and *débris*, wash out and cut away the meadow and soil from plaintiff's said land, interrupt the plaintiff in the tillage of said land, and the caring for his crops and stock thereon, cause the removal of plaintiff's fences, and expose his lands and crops to the trespasses of stock; and that such threatened trespasses, injuries and damages by the defendant will necessarily result in irreparable injury to the plaintiff's said lands, and great damage to the plaintiff, which cannot be compensated in damages, and, unless restrained by this court, will result in the financial ruin of the plaintiff.

Before the defendant answered the amended complaint, the plaintiff, by leave of court, filed a supplementary complaint, in which it is alleged that the particular damages which plaintiff feared have been sustained by him, by reason of the attempt by the defendant to run said logs down said stream, the particular items of which are specified, aggregate about $955.

The answer to the amended as well as the supplemental complaint denied almost all of the material allegations therein, except the cutting and putting in of the logs, and the defendant's intent to run the same down said stream to North Powder River.

By way of separate defense it is alleged that said Anthony Creek, mentioned in said complaint, is a navigable stream for sawlogs, railroad ties, and other timber, and can be successfully used in transporting and floating logs, ties, and other timber down the same through the plaintiff's said land, and other parts of said creek, and can be thus used beneficially to commerce during the annual freshets in each year in ordinary seasons.

The evidence was taken upon an order of reference for that purpose, and the cause tried by the court, and a final decree entered in favor of the plaintiff, enjoining the defendant, his agents and servants, from floating logs in said stream across the plaintiff's land, or attempting to do so, and for $300 damages, and for costs and disbursements; from which decree this appeal is taken.

1. It appears from the evidence that Anthony Creek is a small, rapid and somewhat tortuous mountain stream, taking its rise only a few miles above the plaintiff's lands, and emptying its waters into North Powder River, a few miles below. Where it flows through plaintiff's lands, it varies in width from ten to thirty feet. Its banks are low and alluvial, and lined with a dense growth of willows, except at four different places—one eighty-four feet, one 135 feet, another 100 feet, and still another place 110 feet. The depth of the water is from two to four and a half feet.

The stream is mainly fed by mountain springs, but during the months of June and July of each year it is swollen by the melting snow in the mountains, at which times it is capable of floating sawlogs, to a limited extent, from a point above plaintiff's lands to its mouth.

The defendant floated 1,600,000 feet of logs down said stream during the year 1886. But I think it evident the defendant, in his anxiety to get logs to his mill, forced the stream beyond its capacity. In other words, he put a greater quantity of logs in said stream than could be conveniently floated, and thus caused them to jam, so that their progress was stopped until relieved by gangs of men using cant-hooks and other appliances.

To accomplish this the men engaged in driving traveled up and down the banks of the stream on the plaintiff's land, doing no greater injury to the premises than by walking over the same.

By the common law all streams are navigable where the tide ebbs and flows, while all others were held not to be navigable; but this distinction has not generally prevailed in this country. The true test seems to be whether or not the particular stream is navigable in fact—that is, capable of being used for transporting to market the products which grow along its banks. Nor is it necessary that it should be at all times capable of being so used.

If a stream, during seasons of high water, continuing for a sufficient length of time, is of sufficient capacity to enable any person to float sawlogs to market or a place where they may be manufactured into lumber, such stream is subject to the public use as a passageway, and to the extent that it is useful it must be deemed navigable. *Weise* v. *Smith*, 3 Oreg. 446; *Felger* v. *Robinson*, 3 Oreg. 455.

In the latter case it was said by this court:

"We hold the law to be that any stream in this State is navigable on whose waters logs or timbers can be floated to market, and that they are public highways for that purpose, and that it is not necessary that they be navigable the whole year to constitute them such. If at high water they can be used for floating timber, then they are navigable, and the question of their navigability is a question of fact to be determined, as any other question of fact, by a jury. Any stream in which logs will go by force of the water is navigable."

And the same doctrine is asserted by this court in *Shaw* v. *Oswego Iron Company*, 10 Oreg. 371.

Numerous other authorities are to the same effect. *Brown* v. *Chadbourne*, 31 Maine, 9; *Olson* v. *Merrill*, 42 Wis. 203; *Morgan* v. *King*, 35 N. Y. 454; *Hickok* v. *Hine*, 23 Ohio, 523; *Whisler* v. *Wilkinson*, 22 Wis. 572; *Sellers* v. *Union Lumbering Co.* 39 Wis. 525; *Holden* v. *Robinson Manufacturing Co.* 65 Maine, 215; *Gerrish* v. *Brown*, 51 Maine, 256; *Morgan* v. *King*, 30 Barb. 1.

I think these authorities abundantly show

that actual capacity and utility of a stream for the purpose of floating logs or other commodities to market are the test of the public right of passage.

Nor is this right of passage lost or impaired because in its exercise trespasses may have been committed on the premises of the riparian proprietor. In a proper action the wrong-doer is responsible to such riparian owner for all such damages. The public right is confined to the streams, and measured by its extent, and does not extend to the shore, except under particular circumstances to land or to secure the floating property to the shore temporarily and in a reasonable manner, and so as not to obstruct others in the free use of the stream. Such right in the use of the stream does not include the right to occupy the shore for the purpose of aiding in driving logs, or dislodging those which have become jammed.

The right to raft logs down the stream does not involve the right of booming them upon private property, for safe-keeping and storage, any more than the right to travel a highway justifies the leaving of wagons standing indefinitely in front of private dwellings or stores. *Lorman* v. *Benson*, 8 Mich. 18.

Perhaps the true rule of law on this subject is stated by Ryan, *Ch. J.*, in *Olson* v. *Merrill*, 42 Wis. 213. He said:

"We, of course, recognize the position that the navigable character of a stream cannot depend upon trespass on the shore; and that one floating his property down a stream has no right without license to use the banks of the stream to aid him. But it appears to us to be begging the question to assume that, because it is convenient, and persons are accustomed so to use the banks, therefore the stream is not navigable without trespass upon them. We take it that a stream which is of sufficient capacity to float logs is of sufficient capacity to float some kind of boat or skiff in which the owner may follow his logs; and if there be some places where, in consequence of bars or other obstructions, neither logs nor boat will pass without human help, the boat may be aided down the stream as well as the logs, so that the logs may be floated through the streams without trespass upon the banks. This might probably be inconvenient and even sometimes dangerous. But the stream is none the less navigable because persons using it are induced by convenience to prefer unlawful to lawful means in aid of the use. Indeed, we gather from cases which have come before us that the same practice prevails on some of the larger streams in this State.

"But the navigable character of a stream does not rest on the tortious practice, but on the capacity of the stream to be lawfully used, and we cannot hold that the right to use a public highway by land or by water is lost even by habitual trespass upon adjoining lands."

So it was said by the Supreme Court of Maine, in *Hooper* v. *Hobson*, 57 Maine, 273: "The right of the public in a stream capable of being used for floating logs, or as a passage-way for boats and barges of sufficient capacity to be useful in commerce or agriculture, is not thus to be extended over adjoining lands. The water makes and defines the highway. The facilities of transportation afforded by it are privileges which, like those of air and light, are too great to be suffered to become the subjects of private property. But the exercise of the common privilege must not be made an occasion for encroachment upon that which is legitimately the exclusive property of another. The right which the public enjoy in a navigable or floatable stream is in general limited by its banks. The proper definition of the word *bank in this connection is* 'a steep acclivity on the side of a lake, river, or the sea.' These banks are the boundaries within which the exercise of the common right must be confined. Except during the continuance of an overflow, or in the exercise of those privileges which are given and defined by statute, log owners and river drivers have no rights in a floatable stream beyond these boundaries. Important as their business has undoubtedly been and is, it must be conducted with a due regard to the rights of others. Their liability to pay damages to the riparian proprietor for traveling upon the banks to propel their logs is expressly recognized in *Brown* v. *Chadbourne*, relied upon by the defendant here."

In *Brown* v. *Chadbourne*, referred to in the above extract, the doctrine under consideration is thus stated:

"If the plaintiff and others were in the habit of going upon the banks of Little River to drive their logs, it does not appear but that they might have confined themselves to its waters, though it might be more inconvenient for them so to have done. Their want of care in the use of the river, creating a necessity to commit trespasses to relieve their property, would not prevent it from being public, nor justify the defendant in obstructing it. They would be responsible in damages for any trespasses committed." 31 Maine, 9.

2. But without at this time deciding whether or not Anthony Creek is a floatable stream for sawlogs, in which the public have an easement for that purpose, it appears to me that this suit ought not to be sustained for other and different reasons from those already suggested. If this creek be not a floatable stream in which the public have an easement, all of the acts of the defendant on the stream where it runs through the plaintiff's lands, as well as those upon the land itself, were trespasses, for which he is liable in an action at law

The ordinary rule in such cases is that equity will not interfere to enjoin a trespass. Something more is necessary before equity will interfere, such as preventing irreparable injury, avoiding a multiplicity of suits, and the like.

Chancellor Kent says, in *Livingston* v. *Livingston*, 6 Johns. Ch. 497:

"There must be something particular in the case so as to bring the injury under the head of quieting possession, or to make out a case of irreparable mischief, or where the value of the inheritance is put in jeopardy."

Ordinary wrongs or torts are never prevented by injunction. The injuries they inflict are not irreparable, and in such case the party must be left to his remedy at law. *Cross* v. *Morristown*, 18 N. J. Eq. 314; *Mulvany* v. *Kennedy*, 26 Pa. 44; *Gause* v. *Perkins*, 3 Jones, Eq. 177; Will. Eq. Jur. 382.

It is not doubted that where the injury complained of reaches to the very substance and value of the estate, and goes to the destruction

of it in the character in which it is enjoyed, such injury may be prevented by injunction. But I think the proof fails to make a case within this principle.

Conceding the stream to be private, the floating of the logs on it across plaintiff's land would not constitute such injury; nor would the use of the banks to assist in driving them. I cannot find from the evidence that the logs caused any *débris* to be deposited on plaintiff's land, or that the banks of the stream were broken or washed by reason of the logs passing down the same.

3. Nor will an injunction be allowed unless the right set up and sought to be protected is free from reasonable doubt (1 High, Inj. § 698); nor when the defendant is in possession, until the title is established by law, unless a strong case of irreparable mischief is made out; nor where the plaintiff's title is in dispute, and has not been established at law. *Id.*

By this suit we are called upon to determine the title to this stream, and to assess damages growing out of its alleged wrongful use by the defendant. His right to use it depends upon the facts, which ought to be tried by a jury, and the estimate of damages, if any, made by them. They are questions peculiarly within their province, and I think ought not to be withdrawn from their consideration.

To allow a case like this to be finally determined in equity would be to make a precedent which, if followed, would invade the right of trial by a jury in a large class of cases where the Constitution declares the same shall remain inviolate.

A motion for rehearing having been subsequently made on March 14, 1889, **Lord, J.,** delivered the opinion of the court thereon:

That the stream in question was not navigable, within the meaning of the authorities, for the transportation of timber or logs, and is not subjected to the public rights of user for that purpose, seems to me to be established by the testimony beyond controversy. Even the testimony for the defendant is pregnant with proof that the stream cannot be used for this purpose without constant and continuing trespass when used for floating logs, and that in its natural state it is not of sufficient depth and width to float the products of the forest to market.

It is hardly possible to read the testimony—in which it appears numerous men were placed along the stream to aid and push the logs along its channel, of the jams and standing of the logs in consequence of its want of depth and width for such floatage, of the destruction of its banks in several places, and the overflow on the adjacent lands of the plaintiff incident to such use, and the injury necessarily resulting therefrom—without the conviction that the stream has not navigable capacity, and is not susceptible of beneficial use to the public for that purpose.

We do not mean to say by this that to be navigable a stream must have a sufficient volume of water to be at all times and during all seasons capable of being used for the purpose of valuable floatage, and as a channel of trade and commerce. It is enough if it has floatable capacity at certain periods, recurring with regularity, and continuing a sufficient length of time to make it useful as a highway for floating logs. Such has been the holding of this court. *Felger* v. *Robinson*, 3 Oreg. 457; *Shaw* v. *Oswego Iron Co.* 10 Oreg. 381, 382.

But a stream, to be navigable in this sense, must be capable of such floatage as is of practical utility and benefit to the public as a highway for trade or, as has been said, "to float the products of the mines, the forests, or the tillage of the country through which it flows to market."

Perhaps as good a test of the navigability of such streams is found in the case of *Rhodes* v. *Otis*, 33 Ala. 578. It is there said:

"In determining the character of a stream inquiry should be made as to the following points: Whether it is fitted for valuable floatage; whether the public or only a few individuals are interested in transportation; whether any great public interests are involved in the use of it for transportation: whether the periods of its capacity for floatage are sufficiently long to make it susceptible of use beneficially to the public; whether it has been previously used by the people generally, and how long it has been so used; whether it was meandered by the government surveyors, or included in the surveys; whether if declared public, it will probably in future be of public use for carriage." *Peters* v. *New Orleans M. & C. R. Co.* 56 Ala. 528.

Tested by this rule there is scarcely a particular in which the stream in question would not be condemned as non-navigable for the transportation of logs. It is not only not adapted to a public use, but the public have made no attempt to use it for any purpose. It is, therefore, perfectly evident that the defendant had no right to float logs down this stream through the lands of the plaintiff.

While this, however, is not much contested, it is strenuously urged that the question of navigability is a question of fact for a jury, and the case, therefore, does not authorize the interference of equity. But this is not so.

The case of *Meyer* v. *Phillips*, 97 N. Y. 490, is so on all fours with the case in hand, and so direct an adjudication and authority for such equitable interference, that we quote it *in extenso:*

"But it is claimed," said Earl, *J.*, "that the facts of this case do not authorize equitable interference, or sustain the jurisdiction of an equity court . . . The defendants threatened to float a large number of logs over the plaintiff's lands, using the stream and its banks for that purpose, and they would thus do some damage to the banks of the stream and other lands of the plaintiff. They would occupy the stream for several days. Not only this; they claimed the right to float the logs, and asserted in substance that they would do so whenever they chose to. By continuing to exercise the right, they might, by lapse of time, be able to prove and establish a right by prescription. They not only claimed a right for themselves, but for the public — for everybody. That in such a case, upon such facts, a plaintiff may maintain an equitable action to quiet his title and settle his rights and prevent the threatened injury, is abundantly settled by authority. Ang. Watercourses, § 449; 2

Story, Eq. Jur. § 927; 3 Pom. Eq. Jur. § 1351; *Holsman* v. *Boiling Spring Bleaching Co.* 14 N. J. Eq. 335; *Campbell* v. *Seaman*, 63 N. Y. 568; *Johnson* v. *Rochester*, 13 Hun, 285; *Swindon Water Works Co.* v. *Wilts & B. Canal Nav. Co.* L. R. 7 L. H. 697; L. R. 9 Ch. App. 451; *Clowes* v. *Staffordshire Potteries Water Works Co.* L. R. 8 Ch. App. 125, 142; *Goldsmid* v. *Tunbridge Wells Imp. Comrs.* L. R. 1 Ch. App. 349, 354.

"This is not a case where the defendants threatened only to commit a single trespass, but they threatened to commit and claimed the right to repeat the trespass every year. Here a preventive action was proper to prevent an irreparable injury within the meaning of the equitable rule, and also to avoid a multiplicity of suits."

The case in hand possesses all these features, with added aggravation. It is incontestable that the stream would not float these logs without extraneous aid, and in rendering this the banks had to be used, and were damaged, and in places destroyed, and the plaintiff's meadow overflowed and rendered useless.

The facts show that in the attempt to make the logs float down the stream thirty or forty men were employed, with cant-hooks and other appliances, for the period of twenty or thirty days, during the season of highest water, to aid in the transportation of these logs. That in this attempt to navigate the stream for this purpose no less than thirty separate and distinct trespasses were committed, many of them irreparable in their nature, and reaching to the destruction of the estate in the character in which it was enjoyed.

The defendant not only asserts his right to use the stream for such use, but he claims a like right for the public. More, he threatens to commit, and claims the right to repeat, not a single trespass, but the innumerable trespasses which, the facts show, must follow its exercise. That in such case, the plaintiff is entitled to an injunction to prevent irreparable injury, and to avoid a multiplicity of suits, is established by the authorities beyond controversy.

The motion for a rehearing is denied.

Mary E. FURGESON, *Respt.*,
v.
Sarah A. JONES, *Appt.*

(.....Oreg.....)

*1. **To give a decree of the county court adopting a child any validity,** such court must have acquired jurisdiction (1) over the parties seeking to adopt such child; (2) over the child to be adopted; and (3) over the parents of such child.

2. **Where it affirmatively appears that an adverse party to a decree was a non-resident** of the State at the time of its rendition, and the record is silent as to his appearance or notice, there is no presumption that such court acquired jurisdiction over his person.

3. **No person shall be personally bound by a decree until he has his day in court,** by which is meant, until he has been duly cited to appear, and has been afforded an opportunity to be heard. A judgment without such citation and opportunity wants all the attributes of a judicial determination.

4. **Where a court of general jurisdiction has summary powers conferred upon it** which are wholly derived from statute, and not exercised according to the course of the common law, or are not part of its general jurisdiction, its decisions must be regarded and treated like those of courts of limited and special jurisdiction.

5. **Estoppels,** to be binding, must be mutual.

6. **A child by adoption cannot inherit** from the parent by adoption, unless the act of adoption has been done in strict accordance with the statute.

7. **The right of adoption was unknown to the common law,** and was repugnant to its principles. Such right, being in derogation of the common law, is a special power conferred by statute; and the rule is that such statutes must be strictly construed.

On petition for rehearing.

8. **Consent lies at the foundation of statutes of adoption,** and when it is required to be given and submitted, the court cannot take jurisdiction of the subject matter without it.

9. **Under our statutes** when the parents are living, and do not belong to the excepted classes, such consent must be given, and is a prerequisite to jurisdiction.

10. **There is a marked distinction between jurisdiction and the exercise of jurisdiction.** When jurisdiction has attached, all that follows is but the exercise of jurisdiction; but jurisdiction does not attach until the conditions upon which it depends are fulfilled; hence, a decree rendered without jurisdiction does not estop anyone, and may be collaterally assailed in any action.

(December 20, 1888.)

APPEAL by defendant, from a judgment of the Circuit Court of Marion County in favor of plaintiff in an action of ejectment. *Reversed.*

The facts are fully stated in the opinion of the court.

Messrs. **William M. Ramsey, George G. Bingham** and **Seth R. Hammer,** for appellant:

Adoption is not recognized by the common law and exists in the United States only by special statute.

Schouler, Domestic Relations, p. 314.

The Statute of Oregon, 2 Hill, p. 1340, provides:

§ 2938. "The parents of the child, or the survivor of them shall, except as herein provided, consent in writing to such adoption," etc.

§ 2940. "If a parent does not consent to the adoption of his child, the court shall order a copy of the petition and order thereon to be served on him personally, if found in the State, and if not, to be published once a week for three successive weeks in such newspaper printed in the county as the court directs, the last publication to be at least four weeks before the time appointed for the hearing," etc.

If the father is not made a party his rights are not affected and no adoption can take place. The adoption is incomplete.

*Head notes by the COURT.

3 L. R. A.

See also 23 L. R. A. 665.

Rights of inheritance can only be acquired through a full compliance with the provisions of the statute.

Shearer v. *Weaver*, 56 Iowa, 578. See also *Tyler* v. *Reynolds*, 53 Iowa, 146–148; *Keegan* v. *Geraghty*, 101 Ill. 26–39; *Luppie* v. *Winans*, 37 N. J. Eq. 245–250; *Humphrey, Appellant*, 137 Mass. 84, 85.

The father of the child would have had, at any time after the attempted adoption, the right, as against Jones and wife, to the custody of the child. Public policy is against the permanent transfer of the natural rights of a parent.

Schouler, Domestic Relations, p. 343; *Re Scarritt*, 76 Mo. 565.

There are no presumptions in favor of the jurisdiction of a probate court exercising a special authority conferred by statute, and not according to the usual course of proceedings at common law or in chancery.

Foster v. *Waterman*, 124 Mass. 592, 594.

Where a court exercises a special power it must strictly comply with the requirements of the statute in its proceedings, and this compliance must affirmatively appear from the record itself.

Northcutt v. *Lemery*, 8 Oreg. 316; *Galpin* v. *Page*, 85 U. S. 18 Wall. 350 (21 L. ed. 959); Smith, Lead. Cas. 1116.

An estoppel by record must be binding on both parties to it, or it binds neither.

Freeman, Judgments, § 159.

The fact that the appellant signed and presented the petition for the adoption, and her grantor consented to it, does not estop her from asserting its invalidity.

Mercier v. *Chace*, 9 Allen, 242; *St. Louis* v. *Wiggins Ferry Co.* 5 West. Rep. 353, 88 Mo. 615, 619; *Applegate* v. *Dowell*, 15 Oreg. 513.

Mr. **George H. Burnett,** for respondent:

The decree of adoption is valid as against those parties who took part in, and procured the decree to be made; and however it might fare on appeal or other direct attack at the hands of the parent who had no notice, it is proof against assault in this collateral proceeding.

Section 2946, Hill's Code, provides that "A parent who has not, before the hearing of a petition for the adoption of his child, had personal notice thereof, may, at any time within one year after actual notice, apply to the circuit court to reverse the decree. Said court, after due notice, may, in its discretion, reverse the same, if it appears that any of the material allegations in the petition were not true."

The record discloses that appellant appeared in the adoption proceedings in the character of a petitioner, and is now standing in the shoes of one who also appeared there as her adversary. The county court thus had jurisdiction of all the persons who are now before this court, and having also jurisdiction of the subject matter, its decree was and is conclusive upon the legal condition or relation of the adopted child, respondent herein, established by the decree.

2 Hill, Code, § 733; Hermann, Estoppel, §§ 52, 53, 149; *Wolf's Appeal* (Pa.) 12 Cent. Rep. 426; *Sewall* v. *Roberts*, 115 Mass. 275.

Appellant and respondent herein were parties to the adoption proceedings within the meaning of the rule laid down in—

Bigelow, Estoppel, p. 46.

As to the binding effect of judgments or decrees on parties and privies, see—

Wilson v. *Deen*, 121 U. S. 525 (30 L. ed. 980); *Neil* v. *Tolman*, 12 Oreg. 289; *Nicklin* v. *Hobin*, 13 Oreg. 406.

Jurisdiction, in a case of this kind, consists of two elements: (1) jurisdiction over the subject matter, and (2) jurisdiction over the person.

"Jurisdiction of the subject matter" is "the power, lawfully conferred, to deal with the general subject involved in the action."

Hunt v. *Hunt*, 72 N. Y. 217, 228; *Lange* v. *Benedict*, 73 N. Y. 12, 27.

It is the character of the suit on the part of a plaintiff, which gives the right of jurisdiction to a court, so far as the subject matter is concerned, and not of the defense thereto.

Wells, Jurisdiction, § 4.

The County Court of Marion County had jurisdiction of the subject matter of adoption conferred upon it by legislative authority. Absence of jurisdiction over the person of the father does not render the decree absolutely and utterly void, as to all persons, and particularly the parties here, who participated in the adoption proceedings.

State v. *Richmond*, 26 N. H. 232; Hawes, Jurisdiction, § 9.

Those persons as to whom the process and proceedings have been regular can take no exception because others have not been notified, or that they have not been notified in the proper manner.

Grand Rapids, N. & L. S. R. Co. v. *Gray*, 38 Mich. 461; *Gott* v. *Brigham*, 41 Mich. 227; *Church* v. *Crossman*, 49 Iowa, 444; *Jack* v. *Des Moines & Ft. D. R. Co.* 49 Iowa, 627. See *Sewall* v. *Roberts*, 115 Mass. 275; *Wolf's Appeal* (Pa.) 12 Cent. Rep. 426.

Section 2946 is evidently an exception to the general rule laid down in § 2938, requiring the written consent of both parents. The Legislature has said that the effect of the decree of adoption as against the natural father, although pronounced without his knowledge, in the first instance, is such that the decree is not void, but merely voidable. A decree, voidable only is binding on all parties until set aside at the instance of one who has a right to complain.

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

This is an action of ejectment prosecuted by the plaintiff to recover certain real property situated in Marion County.

It appears from the findings that one D. W. Jones was the owner of the real property in controversy at the time of his death, and that he died intestate in said County of Marion. That one Emma G. Charlesworth was his only heir at law, unless the plaintiff was also an heir, by virtue of a certain decree of the County Court of Marion County, Oreg., by which said court allowed said D. W. Jones and the defendant herein to adopt the plaintiff, if said decree is valid. That prior to the commencement of this action said Emma G. Charlesworth duly conveyed all her interest in said real property to the defendant, who thereby became the owner thereof, unless the plaintiff was entitled to inherit one half thereof by

virtue of said decree of adoption. That prior to September 28, 1876, said Emma G. Charlesworth and Sylvester H. Jenner were husband and wife, and the plaintiff was born to them in lawful wedlock, and that on the 28th day of September, 1876, said parties were by a decree of the District Court of the Twelfth Judicial District, in the State of California, duly divorced, and the care and custody of the plaintiff was duly awarded to said Emma. That on April 2, 1877, said D. W. Jones, and the defendant, his wife, made and signed a certain petition, which was presented to the County Court of Marion County, Oreg., as follows:

To the Hon. John Peebles, County Judge for the County of Marion and State of Oregon:

Your petitioners, D. W. Jones and Sarah A. Jones, his wife, of the City of Salem and State of Oregon, respectfully represent to your Hon. Court that they now have the care and custody of Mary Ellen Jenner, a female child of the age of ten years; that the parents of the said child are Sylvester H. Jenner, now residing in San Francisco, California, and Emma G. Jenner, since divorced from said Sylvester Jenner, and married to George Charlesworth; that in said decree of divorce the care and custody of said child was given to its mother, Emma G. Jenner, now Emma G. Charlesworth; that your petitioners desire to adopt the said Mary Ellen Jenner as their own child, and pray your Hon. Court for a decree making said child, to all legal intents and purposes, the child of petitioners, and that the name of said child be changed to Mary Ellen Jones.

[Signed] D. W. Jones,
S. A. Jones.

State of Oregon, County of Marion, ss:

I, Emma G. Charlesworth, being duly sworn, say that I am the mother of Mary Ellen Jenner, mentioned in the foregoing petition of D. W. Jones and wife; that I was divorced from Sylvester H. Jenner at San Francisco on or about September 1st, 1876, and that the court in granting the divorce awarded the care and custody of said child to its mother, deponent herein; that I hereby consent to the adoption of said child by said D. W. Jones and wife, and that the name of said child be changed to Mary Ellen Jones. Emma G. Charlesworth.

Subscribed and sworn to before me the 19th day of March, 1877.

[Sealed] Seth R. Hammer,
Notary Public.

Indorsed:

Ordered that the within application be granted, and that a decree be entered in accordance with the prayer of this petition, and the law in such case provided.

J. C. Peebles, County Judge.

April 2, 1877.

Filed April 2, 1877. Geo. A. Eades, Clerk.

On the same day the following decree or order was entered in said matter by said county court:

Now, at this day, comes D. W. Jones and S. A. Jones, his wife, and present to this court their petition asking leave to adopt Mary Ellen Jenner, who is ten years of age, and to change her name to Mary Ellen Jones; and it satisfactorily appearing to the court that said Mary Ellen Jenner is the daughter of Sylvester H. Jenner and Emma G. Jenner, now Emma G. Charlesworth; that said Emma G. Jenner was divorced from said Sylvester H. Jenner in the State of California, and that Sylvester H. Jenner is still a widower of said State; that in the decree of divorce aforesaid the care and custody of said Mary Ellen Jenner was awarded by the court to her mother, the said Emma G. Jenner, now Emma G. Charlesworth; and it further appearing that the written consent of the said Emma G. Jenner, now Emma G. Charlesworth, to the said adoption and change of name has been filed with the petition aforesaid to this court, and that the said D. W. Jones and Sarah A. Jones are of sufficient ability to bring up said child, and to furnish her with sufficient care and attention and education, and that it is fit and proper, and for the best interest of said child, that said adoption should take place—it is therefore ordered by the court that from and after this date the said Mary Ellen Jenner shall be, to all intents and purposes, the child of said petitioners, D. W. Jones and Sarah A. Jones, and that the name be changed to that of Mary Ellen Jones.

[Signed] John C. Peebles, Judge.

It is further found by the court that at the time of presentation of said petition and consent, and the rendition of said decree of adoption, the father of said plaintiff was living, but that no notice whatever was given to him of the filing of said petition or consent, or of said proceedings thereon, prior to the rendition of said decree, nor was any appearance for or on behalf of said Jenner ever entered in said county court in said proceeding, or in relation thereto. That about three years after the rendition of said decree said plaintiff informed her father that she had been adopted by said D. W. Jones and his wife, the defendant herein, and her father approved thereof. That no one has ever appealed from the said decree of said county court. That, after said decree was rendered, Jones and the defendant took charge of the plaintiff, and that she lived with them for about six years, and was during said time treated by Jones and wife as their child.

There were also other findings of fact, but they present no question of law for our consideration on this appeal.

The court found, as conclusions of law: "*first*, that the decree of adoption mentioned in and set out in my sixth finding of fact was and is binding and conclusive upon Emma G. Charlesworth, and upon Sarah A. Jones, her successor in interest; *second*, that the plaintiff is the owner and entitled to the possession of one undivided one half (subject to the defendant's dower interest therein) of the real property described in her complaint; *third*, that the plaintiff is entitled to a judgment for the possession of said real property, and for one dollar damages, and for her costs and disbursements."

From this judgment the defendant has appealed to this court.

1. The sole question to be determined is the validity of the decree of the County Court of Marion County, allowing D. W. Jones and wife, the present defendant, to adopt the plaintiff as their child. If that decree is valid, then

the judgment of the court below is right, and ought to be affirmed; if otherwise, it must be reversed.

The act of adopting a child is not of common-law origin, but was taken from the civil law, and introduced here by statute. The provisions on the subject are found in several sections of Hill's Code.

Section 2937 provides who may adopt a child, residence of parties, and who must join in the petition, and in what court the petition is to be presented.

Section 2938 says: "The parents of the child, or the survivor of them, shall, except as herein provided, consent in writing to such adoption. If neither parent is living, the guardian of such child, or, if there is no guardian, the next of kin in this State, may give such consent, or, if there is no next of kin, the court may appoint some suitable person to act in the proceedings as next friend of the child, and to give or withhold such consent."

By section 2939 the court is authorized to proceed as if a parent were dead if such parent is insane, imprisoned in the state prison under a sentence for a term not less than three years, or has willfully deserted and neglected to provide proper care and maintenance for the child for one year next preceding the time of filing the petition.

Section 2940 provides, where a parent does not give consent to the adoption of a child, he is to be personally served with a copy of the petition and order thereon, if found in the State; if not, to be published once a week for three successive weeks in such newspaper printed in the county as the court directs, the last publication to be at least four weeks before the time appointed for the hearing.

Section 2941 requires the consent of the child to such adoption, if he is of the age of fourteen years or upwards.

Section 2942 defines the duty of the court upon the hearing, and what facts must be made to appear, and the substance of the order to be made.

Section 2943 defines the effect of such adoption as to relationship and inheritance; and section 2944 deprives the parents of such child of all legal rights as respects the child, and frees him from all obligations of maintenance and obedience as respects his parents.

The question thus presented for our determination is a very important one, and lies in narrow limits. Its correct solution depends on the single question whether or not the County Court of Marion County, at the time it made the decree authorizing Jones and wife to adopt the plaintiff, had acquired the requisite jurisdiction over the parties for that purpose.

To give its decree any force or effect, jurisdiction must have been acquired by the court (1) over the persons seeking to adopt the child, (2) over the child, and (3) over the parents of such child.

It may be assumed, I think, that enough is shown to give said court jurisdiction under subdivisions 1 and 2, and over Mrs. Emma G. Charlesworth, the mother of the child.

The sole question to be examined, therefore, is whether enough is shown to give said court jurisdiction over the person of Sylvester H. Jenner, the child's father. But, before proceeding to the consideration of this question, it may be well to advert to the principles of law to be applied in the determination of the question of jurisdiction. And in the examination of this question we assume, for the purposes of this case, but without deciding it, that, under the Constitution and laws of this State, county courts, in the exercise of the powers conferred by this statute, are to be regarded as courts of general jurisdiction.

It appears that at the time the petition was presented to the county court Sylvester H. Jenner was a nonresident of this State. In such case, and the record is silent, there can be presumption that jurisdiction over his person was acquired.

Mr. Justice Field in *Galpin* v. *Page*, 85 U. S. 18 Wall. 350 [21 L. ed. 959], states the rule applicable in such cases: "Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant, against whom a personal judgment or decree is rendered, was at the time of the alleged service without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree."

Further: "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant until he has been duly cited to appear, and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered."

In the same case, and speaking more directly to the point now under consideration, the court quoted with approbation a decision of the Supreme Court of New Hampshire (*Morse* v. *Presby*, 25 N. H. 302), to the effect that a court of general jurisdiction may have special and summary powers, wholly derived from statutes, not exercised according to the course of the common law, and which do not belong to it as a court of general jurisdiction. In such cases its decisions must be regarded and treated like those of courts of limited and special jurisdiction. The jurisdiction in such cases, both as to the subject matter of the judgment, and as to the persons to be affected by it, must appear by the record, and everything will be presumed to be without the jurisdiction which does not distinctly appear to be within it. And after some other observations the court adds:

"But where the special powers conferred are exercised in a special manner not according to the course of the common law, or where the general powers of the courts are exercised over a class not within its ordinary jurisdiction upon the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record."

This doctrine was fully approved by this court in *Northcut* v. *Lemery*, 8 Oreg. 317, which renders its further discussion unnecessary.

Applying these tests to the record before us, it is manifest that the court had no jurisdiction whatever over Sylvester H. Jenner at the time it rendered said decree of adoption. He was never served with notice, and did not appear, and therefore the court was utterly without jurisdiction to render any dcreee or make any order which could in any manner affect his rights.

2. But counsel for plaintiff argues that this defendant is in no condition to make the objection of want of jurisdiction; that she consented to the act of adoption, and that she is bound by it. If this is so, it must be on the ground of estoppel. But estoppels, to be binding, must be mutual, and if Sylvester H. Jenner, who was a necessary party to this proceeding, was not bound by the decree, it is not perceived on what ground the same could be held binding on any of the other parties. But, waiving this objection, I think the findings show that the attempted adoption was never consummated, because the statute under which the proceedings were had was never complied with.

The statutes require the consent in writing of the parents, unless they are brought within its exceptions. Here only one parent consented, and there was no attempt made to bring the other within the exceptions contained in the statute, and the petition was not served upon him.

A question closely akin to this in principle came before the Supreme Court of Iowa in *Tyler* v. *Reynolds*, 53 Iowa, 146, and the court said:

"Therefore a child by adoption cannot inherit from the parent by adoption, unless the act of adoption has been done in strict accord with the statute. The statutory conditions and terms are that the written instrument must be executed, signed, acknowledged and filed for record. When this is done the act is complete. If the named requisites are not done, then the act is not complete, and the child cannot inherit from the parent by adoption. The filing for record is just as important in a statutory sense as the execution or acknowledgment. One may be dispensed with as well as the other, for the right depends solely on the statute. There is no room for construction, unless we eliminate words from the written law, and this we are not authorized to do."

Long v. *Hewitt*, 44 Iowa, 363, and *Keegan* v. *Geraghty*, 101 Ill. 26, lay down in effect the same principle.

In the State of New Jersey a statute is in force very similar to ours, which came before the Prerogative Court of that State, and received a construction in *Luppie* v. *Winans*, 37 N. J. Eq. 245.

In that case the court said: "The child was under fourteen years of age, and the court, as appears by the opinion, construed the statute as requiring no consent, either on the part of parent or child, to the adoption in such a case, but held that in such cases the statute confides the whole matter to the discretion of the orphan's court, without regard to the wishes of either parent or child. This construction is entirely inadmissible. It would make the law liable to be the instrument of the forcible transfer of one man's child to another person, in spite of the parents' opposition, provided the court deems it advantageous for the child that the transfer be made. The law expressly gives to the decree of adoption the effect of severing absolutely the legal ties between the parent and the child, and putting at an end their reciprocal relations. It declares that from the date of the decree the rights, duties, privileges, and relations between the child and the parent shall be in all respects at an end, except the right of inheritance, and transfers them all. A just, and it seems to me an obvious and necessary, construction of our statute of adoption is that, if the child be under fourteen, there need be no consent on its part, but the consent of the parent or parents, if there be any living, provided they be known, and not hopelessly intemperate or insane, and have not abandoned the child, must be obtained."

The same view seems to prevail in Pennsylvania under the statute of that State.

The only cases cited upon the argument from that State are *Booth* v. *Van Allen*, 7 Phila. 401; and *Hurley* v. *O'Sullivan*, 137 Mass. 86. The court, in passing upon the effect and construction of the statute, said: "But there is one other objection which we think is vital. The Act of May 4, 1855, empowers the court to make a decree of adoption with the consent of the parents or surviving parent, and, if there be none, of the next friend of an infant. The strict legal signification of the term 'parents' is the lawful father and mother of a child, but it may be questioned whether it does not mean more than this in the Act of 1855—whether the words ought not rather to be taken to mean those who stand in the relation of father and mother to the infant. If this be the correct view, then the proceedings for leave to adopt the infant as hers are void for want of consent of parents," etc.

New Hampshire has a statute similar to ours, which came before the Supreme Court of Massachusetts in *Foster* v. *Waterman*, 124 Mass. 592. A child of persons resident in the State of Massachusetts had been adopted in the State of New Hampshire, and the validity of said adoption was the question to be decided, and the court held that "Such a statute is not to be presumed to extend to a case in which the domicil of those petitioning for leave to adopt a child is in another State. The provision in the statute of New Hampshire, that the decree may be made in the county where the petitioner or the child resides, implies that the statute is intended to be limited to cases in which all parties have their domicil in that State."

3. It was claimed, however, that the adoption was complete as to the defendant and the other persons who were in fact parties to the record.

This construction was pressed upon the Supreme Court of Iowa in *Shearer* v. *Weaver*, 56 Iowa, 578, and rejected, the court saying: "Our statute having provided specifically the means whereby one sustaining no blood relation to an intestate may inherit his property, the rights of inheritance must be acquired in that manner, and can be acquired in no other way."

From these citations, and the plain import of the statute itself, it is manifest that the attempted adoption of the plaintiff by Jones

and wife was never consummated, and that the plaintiff never acquired any rights to inherit Jones' property by reason of the facts found by the court. The proceedings were fatally defective because the father of the child did not consent to the adoption, nor was any notice of the application for such adoption served upon him, nor did he appear; and, being a nonresident of the State, I am inclined to the opinion the statute did not apply to him.

However that may be the proceedings were fatally defective on the other grounds. The court's second conclusion of law was, therefore, not justified by the facts found; and for that reason *the judgment must be reversed, and the cause remanded to the court below.*

The other case between the same parties, and submitted with this one, and involving the same questions, must also be reversed and remanded.

The conclusions reached render it unnecessary to order a new trial, because in no possible view of the facts would the plaintiff be entitled to recover.

A petition for rehearing having been subsequently made on March 12, 1889, **Lord, J.,** delivered the opinion of the court thereon:

In this motion for rehearing the argument of counsel amounts to this: That the absence of consent of one of the parents, or to give the notice as prescribed by the statute, if not found in the State, only renders the proceeding and decree of adoption voidable, but not void; and, unless corrected on appeal, such decree cannot be collaterally assailed.

This contention is necessarily based on the idea that the consent of both parents, if living and not belonging to the excepted classes, or notice as prescribed and already adverted to, is not a prerequisite to jurisdiction; that it is sufficient if the consent of one of the parents be obtained, and that the other parties, viz., the child and petitioning parents, are present, and consenting to the proceeding, for jurisdiction to attach, and thus to authorize the court to judicially act.

If this position be tenable, the decree of adoption is not void, and cannot be collaterally attacked; for it is elementary law that, after jurisdiction has attached, although errors may occur in the exercise of such jurisdiction, the judgment rendered in such case is beyond the reach of collateral inquiry.

On the other hand, if the consent of both parents, or the consent of one and notice to the other as prescribed, whether in or out of the State, as the case may be, is necessary, and must precede the right or power of the court to act judicially, all other parties being present and consenting—such unity of consent, so to speak, is a prerequisite to jurisdiction, and a decree not founded upon it would be a mere nullity, binding no one, and subject to be so declared in a collateral action.

Our inquiry, then, is reduced to this: What are the requirements of our statute essential to confer jurisdiction upon the facts as presented in this record?

It will assist us some in determining this question to ascertain the nature of the power conferred, and the rule of construction, in such case, to be applied to the statute. The permanent transfer of the natural rights of a parent was against the policy of the common law. The right of adoption, as conferred by this statute, was unknown to it, and repugnant to its principles. Such right was of civil law origin, and derived its sanction from its Code.

The right of adoption, then, being in derogation of common law, is a special power conferred by statute, and the rule is that such statutes must be strictly construed. *Brown* v. *Barry*, 3 U. S. 3 Dall. 365 [1 L. ed. 638]; Dwar. Stat. 257.

This being so, the statute must receive a strict interpretation, and every requirement essential to authorize the court to exercise the special power conferred must be strictly complied with.

The statute provides that the parents of the child, except as therein provided, shall consent in writing to such adoption; but further provides that, if a parent does not consent to the adoption of his child, the court shall order a copy of the petition and order therein to be served on him personally, if found in the State, and, if not, by publication as therein provided.

As the facts do not involve the excepted classes, the provisions of the statute in that regard are omitted. The object of such service, whether actual or constructive, when it has reference to those cases which require the written consent, and such written consent is not given, is to notify the party of the hearing, in order to ascertain whether his consent may be obtained or will be given, so that the court may have the requisite authority to make the decree of adoption. If he appears and refuses to give such consent, there is then wanting what the statute specially names as essential to authorize the court to make a decree or judicially act in the premises. The reason is that consent lies at the foundation of statutes of adoption, and, when it is required to be given and submitted to the court, the court cannot take jurisdiction of the subject matter without it.

"The consent of the natural parents," says one writer, "and of the child, if of sufficient understanding, are, except in cases where the parents have deserted their child, or are confined in prison, as a rule, indispensable." 3 Cent. L. J. 398.

Says another writer, in annotating a case, "The adoption, except where it consists merely in declaring the person adopted an heir of the adoptor, must be founded on consent. All the statutes require the written, and generally the recorded, consent of the adopting parent or parents, and of the parents, parent, guardian, next of kin, or next friend of the minor appointed by the court, in most States the consent of the minor, if over fourteen, and finally the consent of the court." 14 Am. Law Reg. N. S. 682.

And it is further remarked that the case annotated is valuable as an illustration of the strict construction that ought to be applied in deciding questions arising under statutes of adoption.

In *Luppie* v. *Winans*, 37 N. J. Eq. 245, the court says: "A just, and it seems to me an obvious and necessary, construction of our

See also 26 L. R. A. 98.

statutes of adoption is that, if the child be under fourteen, there need be no consent on its part, but the consent of the parent or parents, *if there be any living, provided they* be known and not hopelessly intemperate or insane, and have not abandoned the child, must be obtained."

It is thus apparent that if the parents are living, and do not belong to the excepted classes, their consent must be obtained, and is a prerequisite to jurisdiction; that without such consent jurisdiction does not attach, and the court is without authority to act and make a decree of adoption; and, if it undertakes to do so, its decree will be a nullity, not voidable, but void, and may be collaterally assailed in any action.

Now, by this record, the admitted facts are that the father of the plaintiff did not belong to the excepted classes, that he did not give his written consent, and that no notice in any form was given or attempted to be given him. In such case the statute is explicit, and requires the consent of the parents in writing to sanction the authority of the court before it can make a decree of adoption; certainly, it could not proceed without notice, at least, assuming that notice may be given in such cases, and a failure to appear would be equivalent to consent.

But in this case the contention is that the court could exercise its jurisdiction without such consent, and that its decree would only be voidable, and that those appearing, it not having been corrected upon appeal, would be estopped by it. The vice of this argument lies in assuming that jurisdiction attached, and the court was authorized to make a decree of adoption without the consent, which the statute prescribes as essential upon the facts as presented by this record.

There is a marked distinction between jurisdiction and the exercise of jurisdiction. When jurisdiction has attached, all that follows is but the exercise of jurisdiction; but jurisdiction does not attach until the conditions upon which it depends are fulfilled.

In this case the jurisdictional facts are the consent of the parents, (not one of them, but both, as the statute requires) and the absence of it is fatal to the validity of the decree. Hence such a decree cannot bind or estop anyone, and may be collaterally assailed whenever and wherever it may be interposed, in any action.

The motion is overruled.

NORTH CAROLINA SUPREME COURT.

DIOCESE OF EAST CAROLINA *et al.*
v.
DIOCESE OF NORTH CAROLINA *et al.*, *Appts.*

(.....N. C.....)

A will giving property "to the Board of Trustees for the Protestant Episcopal Church in the diocese of North Carolina," constitutes a gift to the diocese as it existed at the execution of the will, although prior to the death of the testatrix a portion of the territory was detached, and a new diocese, designated as the "Diocese of East Carolina," created therefrom.

(March 18, 1889.)

APPEAL by defendants, from a judgment of the Superior Court of Wake County in favor of plaintiffs upon an agreed case submitted to the court to settle conflicting claims under a certain will. *Affirmed.*

The case is very fully stated in the opinion.

Messrs. **R. H. Battle** and **John Manning** for appellants.

Messrs. **George Davis** and **John Hughes** for appellees.

Merrimon, J., delivered the opinion of the *opinion:*

This is a controversy submitted to the court without action, as allowed by the statute (Code, § 567), and the following is a copy of the case agreed upon:

"The parties above named, plaintiffs and defendants, claiming rights and interests which are mutually disputed and denied, and desiring to have the same legally and amicably settled and adjusted, do submit to your honor this controversy without action, upon the facts hereinafter stated, which are mutually admitted and agreed:

"1. That the Protestant Episcopal Church in the United States is, and for many years has been, a collective unincorporated body or society of Christian men, united and organized under laws established by themselves for the worship and service of Almighty God, and the promotion of the Christian religion.

"2. That the said church is divided into dioceses having a greater or less territorial extent, and known by a certain name or designation, each diocese being presided over by a bishop regularly and duly consecrated according to the laws and ceremonies of the said church; and each diocese is divided into a greater or less number of parishes or congregations.

"3. That the ultimate jurisdictional authority of the said church in each diocese is vested in a diocesan convention or council, composed of clerical and lay delegates from each parish, and presided over *ex officio* by the bishop, which assembles annually for the regulation and government of the affairs of the church within the diocese.

"4. That the ultimate jurisdictional authority of the said church for the whole of the United States is vested in a general convention which is composed of a house of bishops, consisting of all the bishops of the said church in the United States, and a house of clerical and lay deputies, elected by the diocesan convention or counsel of each diocese, and which general convention assembles every third year.

"5. That by the constitution of the said church, article 5, it is provided as follows: 'Whenever the division of a diocese into two

or more dioceses shall be ratified by the general convention, each of the dioceses shall be subject to the constitution and canons of the diocese so divided, except as local circumstances may prevent, until the same be altered in either diocese by the convention thereof.'

"6. That by the general canons adopted for the government of the said church it is provided as follows: 'Canon 4. Section 1. Whenever any new diocese shall be formed within the limits of any other diocese . . . and the same shall have been ratified by the general convention, the bishop of the diocese within the limits of which another is formed . . . shall thereupon call the primary convention of the new diocese for the purpose of enabling it to organize, and shall fix the time and place of holding the same, such place being within the limits of the new diocese.' 'Sec. 4. Whenever the formation of a new diocese shall be ratified by the general convention, such new diocese shall be considered as admitted under article 5 of the Constitution so soon as it shall have organized in primary convention, in the manner prescribed in the previous sections of this canon, and the naming of the new diocese shall be a part of its organization.'

"7. That prior to the year 1883, the Protestant Episcopal Diocese of North Carolina embraced the whole territory of the State of North Carolina.

"8. That at the annual convention of the said church in the diocese of North Carolina, which assembled in the month of May, 1883, the following resolution was duly adopted and passed, to wit: 'Resolved that, the general convention assenting, a new diocese be formed out of the present diocese of North Carolina, consisting of Counties of Hertford, Bertie, Martin, Pitt, Greene, Wayne, Sampson, Cumberland and Robeson, and of all the counties lying between those counties and the Atlantic Ocean.'

"9. That at the said diocesan convention of 1883 the following additional resolutions were also duly adopted and passed: 'Resolved, (1) that the convention hereby ratifies and confirms the action of the convention of 1882 in regard to the expediency of a division of the diocese. Resolved, (2) that the bishop is hereby respectfully requested to give his consent to the formation of the proposed new diocese; and in case such assent shall be given, the deputies from this diocese to the general convention, to be held in October next, are hereby instructed to take the necessary steps for securing the consent of the general convention to the erection of a new diocese within the limits of the present diocese of North Carolina, as described in the foregoing resolution. Resolved, (3) that the securities and property of all descriptions at present constituting the "Permanent Episcopal Fund," the fund for "Education of Children of Deceased Clergymen," and the "Fund for Relief of Disabled Clergymen, and Widows and Orphans of Deceased Clergymen," with such additions thereto as may accrue up to the date of the organization of the new diocese, shall be divided equally, dollar for dollar, between the two dioceses within this State, as may be agreed upon by a joint committee of four laymen, of which committee two members may be appointed by the convention of each of the two dioceses concerned.'

"10. That the bishop of the diocese of North Carolina consented to the formation of the said new diocese, with the territorial limits above set forth, and the general convention of the said church in October, 1883, duly and legally ratified the same as required by the canons aforesaid.

"11. That afterwards, on the 12th day of December, 1883, the primary convention of the said new diocese, which had been duly called according to the requirements of the said canons, assembled at Newbern, within the limits of the new diocese, which was the place legally fixed for such assembly, according to the said canons, and the said new diocese was thereby fully, duly and legally established and organized by the name of the 'Diocese of East Carolina,' and the plaintiff Alfred A. Watson was duly elected bishop thereof, and has been duly consecrated to the said office, and has entered on the discharge of its duties;

"12. That the formation as aforesaid of the said diocese of East Carolina was occasioned solely by motives of policy for the well-being of the church, and not by any disputes or differences in matters of faith, doctrine, discipline, form of worship, or polity, all of which continued to be the same, without alteration, in both of the dioceses, as they had been before the division; and the said creation and organization of the new diocese were made and done in strict conformity with the law and usage of the said church.

"13. That before the formation of the said new diocese, to wit, in the month of February, 1881, Miss Mary Ruffin Smith, of Orange County, in the State of North Carolina, duly made and published her last will and testament in writing, a copy of which is hereunto annexed, and is to be taken as part of this agreed statement of facts.

"14. That after the formation of the said new diocese, to wit: on the 13th of November, 1885, the said Mary R. Smith died without having revoked or in any wise altered her said will, and on the ——— day of November, 1885, the said will was duly admitted to probate before the clerk of the Superior Court of Orange County, and the defendant, Kemp P. Battle, the executor therein named, was duly qualified as such, and received into his possession a large amount of personal property belonging to the estate of his testatrix.

"15. That the plaintiffs are the trustees duly and lawfully appointed under the laws of this State for the purpose of taking and holding the title and managing the property of the Protestant Episcopal Church in the Diocese of East Carolina; and the defendants Theodore B. Lyman, Richard H. Battle and William E. Anderson are the trustees in like manner duly and lawfully appointed for similar purposes in the diocese of North Carolina, and were such trustees before the formation of said new diocese of East Carolina.

"16. That in and by her said will the said Mary R. Smith devised and bequeathed as follows, to wit: '(1) I devise the tract of land on which I reside, about 1,500 acres, of several tracts originally, but now used as one tract, including all the land in Orange County I own, outside of Chapel Hill, and also all the stock and farming implements used on said land, to

my dear friend Maria L. Spear, during her life, and after her death to the board of trustees for the Protestant Episcopal Church in the diocese of North Carolina, appointed to hold the property of the diocese not otherwise provided for by the general convention of said diocese, as authorized by Act of the General Assembly of North Carolina in such case made and provided, said trustees to have full power to dispose of the same in fee simple and absolutely as said convention may direct, specially or by general ordinance; this devise, however, subject to the exceptions hereinafter mentioned. (2) Out of the aforesaid tract I devise to Cornelia Fitzgeral, wife of Robert Fitzgeral (colored) for her life, free from the control or debts of her said husband—after her death, to her children—100 acres out of the aforesaid tract. (3) I devise to Julius Smith (colored) likewise out of the tract of land on which I now live, twenty-five acres in fee. It is my will that the devise to Cornelia Fitzgeral and to Julius Smith shall take effect at my death, and the tract given them be good land, equal to the average of the whole tract, with a fair proportion of wood and arable land, and to be laid off by metes and bounds by three white commissioners—one to be chosen by the said trustees of the church, the other by the devisee or devisees interested, the mother, if living, to choose for herself and children, and those two to choose a third; my executor to make conveyances according to the report of the said commissioners, or a majority of them, whose report shall be final, and the terms of this will.' '(6) Whatever of my kitchen and household furniture Miss Maria Spear wishes to have I bequeath to her absolutely; what she does not want I give to Cornelia Fitzgeral, Emma Morphis, Annette Kirby, and Laura Tirle (all colored), equally to be divided between them. (7) I bequeath out of any money on hand or due me, to Ed. Cole (colored), $100, and to my namesake, Mary Ruffin Smith, daughter of Rev. Columbus Smith, deceased, of Mississippi, $200. The residue of all moneys due me, and also any property not specifically willed, I give to the trustees of the Episcopal Church aforesaid in trust for the diocese of North Carolina.'

"17. That Maria L. Spear, the devisee for life in the said will, is dead, having died before the testatrix.

"18. That a large amount of personal property constituting the residue of the estate above mentioned, has come into the hands of the defendant Kemp P. Battle, as executor, and is now held by him as a part of said estate, and subject to the trusts of the said will.

"1. Upon the foregoing facts the plaintiffs claim that they are entitled to an equal division of all the real and personal estate devised and bequeathed by the said will to the trustees of the diocese of North Carolina in trust for the church in said diocese.

"2. If not entitled to an equal division, then they claim that they are entitled to such a proportion of the said real and personal estate as the whole number of members and pew-holders of the said church in the diocese of East Carolina at the time of the organization thereof bore to the whole number of the members and pew-holders in the present diocese of North Carolina at that time. These claims are denied by the defendants, who insist that all of the said real and personal estate legally belongs to the defendants, the trustees of the present diocese of North Carolina, in trust for the church in said diocese. And these conflicting claims are respectfully submitted to the adjudication of the court upon the foregoing agreed statement of facts."

Thereupon the court gave judgment for the plaintiffs, whereof the following is a copy:

"Upon consideration of the agreed facts set forth as the basis of this controversy without action, and the cause having been debated by counsel on both sides, it is considered, adjudged and decreed by the court that the plaintiffs are entitled to share in all the real and personal estate devised and bequeathed by will of Mary Ruffin Smith to the board of trustees of the Protestant Episcopal Church in the diocese of North Carolina, and that the said real and personal estate be equally divided between the plaintiffs and the defendants the trustees of the diocese of North Carolina. It is further adjudged that an account be taken of the personal estate in the hands of the defendant Kemp P. Battle, as executor of said Mary R. Smith, and belonging to the residue bequeathed to the board of trustees for the diocese of North Carolina; and the parties may agree on a referee for that purpose."

From this judgment the defendants, having excepted, appealed to this court.

The Protestant Episcopal Church in the United States is an organized body of Christian people, and in its ecclesiastical organization it has a constitution, canons, rules and regulations for its government. It is divided into "dioceses," each designated by an appropriate name, and having greater or less territorial extent. It has existed in this State for a long period of time,—about a hundred years,— and prior to 1883, the whole territory of this State was designated as the "Diocese of North Carolina."

Under the statute (Code, § 3665) the church thus organized was capable of taking and holding property of every kind by purchase, gift, grant or will; and it is provided, as to such cases, that "the estate therein [the property] shall be deemed and held to be absolutely vested, as between the parties thereto, in the trustees, respectively, of the said churches, denominations, societies and congregations, for their several use, according to the intent expressed in the conveyance, gift, grant or will; and, in case there shall be no trustees, then in the said churches, denominations, societies and congregations, respectively, according to such intent."

Thus the devisee of a will and of the particular devise under consideration had certainty and distinctiveness of character and capacity to take and hold the property devised.

The testator must be deemed to have known and understood the nature, the constituent elements, the purposes and territorial extent, of the collective object of her bounty. She knew that it was a subdivision of the Protestant Episcopal Church in the United States; that it was composed of all the clergy and laity of that church within the limits of this State. Having such knowledge, she duly made and published her last will and testament in writing in the month of February, 1881, whereby

she devised and bequeathed the property in question "to the board of trustees for the Protestant Episcopal Church in the diocese of North Carolina," etc.

If this were all of the matter, there could be no question as to the intention of the testatrix; the whole church in the State would share in her bounty without distinction. But afterwards, in 1883, a new diocese, designated as the "Diocese of East Carolina," was created strictly as allowed by the canons and usages of the church, having prescribed boundaries, within the diocese of North Carolina; the latter retaining its name unchanged. The formation of the diocese "was occasioned solely by motives of policy for the well-being of the church, and not by any disputes or differences in matters of faith, doctrine, discipline, form of worship or polity, all of which continued to be the same, without alteration, in both dioceses as they had been before the division."

The testatrix, having executed her will in 1881, continued to reside and have her domicil within the diocese of North Carolina until her death, on the 13th of November, 1885. She never resided within the new diocese.

The appellants contend: *first*, that properly interpreting the devise, it is exclusively to the diocese of North Carolina as it is now constituted; and, *secondly*, that the clergy and laity of the new diocese, having voluntarily abandoned the old one, must be treated as having abandoned or lost any possible right they may have had under the will in question.

We are of opinion that these contentions are not well founded, and that the judgment must be affirmed. The intention of the testatrix in disposing of the property in question, as expressed in her will, and not otherwise, must prevail.

The court has no authority to look beyond the will in ascertaining its true meaning, and consider what she may have said before or after its execution, at one time or another, or to one person or another, as to her intention. This must be ascertained from the will itself, its reference to the property disposed of, and the persons to whom, or organization to which, it is devised and bequeathed. The very purpose of putting it in writing was to declare and express her settled intention as to the property, in a solemn and unequivocal manner, and thereby provide certain and permanent evidence of it, not to be thereafter altered or modified, except by an intentional destruction of the will by herself, or by her direction, or by a codicil thereto, or by a subsequent one properly executed.

Nor could the changed condition or circumstances of the devisee and legatee surviving, subsequent to the execution of the will, change or affect the intention of the testatrix as therein expressed, as to the property embraced by it, in the absence of any provision contemplating such change, except as such intention may be in such case affected by some rule of law or statutory provision. This must be so, because the intention, once expressed in the will, could not be effectually changed otherwise than in one of the ways above indicated.

Then, what was the intention of the testatrix as to the property in controversy? Her will was executed in 1881. At that time the diocese of North Carolina embraced the whole territory of this State; that of East Carolina did not then exist, and, so far as it appears, it had not been thought of. The devise was "to the board of trustees for the Protestant Episcopal Church in the diocese of North Carolina." Obviously, she had in view, and intended at the time she executed her will, the whole church within this State, and not that part of it in one section or locality more than another. She said so in express terms. She could not have intended or contemplated a subdivision, such as has come about since 1881, because none existed, and the language employed does not imply or suggest any such thing.

The devise is not to the "diocese" as such, nor to the "board of trustees," for it as a "diocese," but to the church—to the trustees for the church within the diocese. And upon the death of the testatrix the statute above recited vested the property in the trustees for the church, and, in the absence of trustees, directly in the church itself. The statute so expressly provides.

The mere subdivision of the diocese, the change of its boundaries or its name, could not change or render the devise inoperative. The church would remain sufficiently designated and identified, and the church, and not the diocese, was the religious organization to be benefited. If, in the division of the diocese of North Carolina into two parts, one part had been called the "diocese of West Carolina" and the other "East Carolina," this would not have affected the devise adversely, because the church (the real object contemplated and sufficiently designated) remained to take and be benefited.

The diocese was not the church, nor an essential part of the devise. It was only a part of the machinery of the church through which it effectuated its purposes, that might be changed, modified, or dispensed with as to its name and territorial extent, altogether, by the proper ecclesiastical authority. This could be done without affecting the entity of the church generally, or in a particular locality, or within a fixed boundary. Hence, the testatrix in making her will had in view and intended to benefit, not the mere name and form of church organization, but the Protestant Episcopal Church within North Carolina; and neither the church nor the diocese could change or give direction to her intention as expressed in her will by anything they could do. She alone had the right to designate the object of her bounty, and that object as a whole has the right to accept and take benefit of it accordingly as she directed in the devise, although, for its convenience and advantage, it has changed its name, bounds and relations, not affecting materially its nature and substance, since the execution of the will.

There is nothing in the will, or in the particular devise under consideration, that indicates the slightest purpose on the part of the testatrix to modify, limit or restrict at all the devise in the contingency that the diocese should be divided, or in any other contingency; it is unrestricted and absolute as to the devisee to be benefited.

It was said on the argument that the diocese of North Carolina continued to exist at the time

of the death of the testatrix, and therefore the devise should be construed as applying to it as it existed at that time.

This argument is specious, but certainly not sound. It is true that diocese existed at that time in name, but it was not the same in territorial extent, nor did it then embrace a very large and substantial part of the certain and well defined object embraced by the intention and purpose of the testatrix as expressed in her will. At the time of her death a large part of the church, which she clearly intended to benefit, had been detached from that diocese, and nothing appears in terms or by reasonable implication in the will to show that she intended to modify her expressed purpose so as to exclude the detached part of the church.

This church within North Carolina, within the diocese embracing the whole State, as she contemplated it at the time she made her will and therein expressed her intention, continued in all material respects to exist at the time of her death just as it did at the time she made her will. It had only been changed into two dioceses instead of one. The church as defined and specified in the will remained the same, capable of taking benefit under the devise as contemplated and intended by the testatrix.

As it is said above, the mere division of the diocese could not modify or defeat her intention. This was settled and expressed, not to be modified, except in one of the ways already specified, at the time she executed her will. *Richmond* v. *Van Hook*, 3 Ired. Eq. 581; *Tayloe* v. *Bond*, Busb. Eq. 18; *Garratt* v. *Niblock*, 1 Russ. & M. 629; *Parker* v. *Marchant*, 1 Younge & C. Ch. 299; *Boreham* v. *Bignall*, 8 Hare, 131; 1 Redf. Wills, p. 384, par. 9.

Nor can that part of the church embraced by the new diocese of North Carolina be deemed and treated as having lost, abandoned or forfeited its right to have benefit of the devise. The division of the diocese of North Carolina was made by common consent of the clergy and laity of the church within it, for the common good of the church and its purposes, strictly as allowed by and in accordance with its canons and usages. It was not prompted by any spirit of rivalry or insubordination, or dissent from the doctrines of faith, the polity, usages or practices of the church.

There was neither secession nor schism. It continued and continues now to be, in its substance, integrity, spirit and life, just as before the division and the creation of the new diocese, and just as when the testatrix made her will. The church within the diocese of East Carolina is as certainly now within her intention and purpose, as expressed, as it was then. It has done nothing to put itself without such intention, or to forfeit its right to share in the devise. It has done nothing, in the eye of the church or the law, that was or is culpable, or that justly subjects it to censure in any respect.

On the other hand, the creation of the new diocese was praiseworthy, and to be commended, because it was intended by and through it as a legitimate instrumentality to accomplish increased and greater good. As the church within it comes, as we have seen, within the purpose of the testatrix, we cannot discover the slightest reason why it should not share in her generous bounty to the church of her choice. Why shall it not do so? What has it done that in the eye of the law of the church or the law of the land prevents it from doing so? We cannot conceive of a just reason why it may not. It might and no doubt would be otherwise if the clergy and laity of the new diocese had abandoned the faith, doctrines, usages and practices of the church—had seceded from it, and set up an independent church organization; but it is not suggested that anything inimical to the church or at all improper has been done by that part of it within the new diocese.

The views we have expressed, it seems to us, are founded on principles of justice, and are fully sustained by the numerous authorities cited by the learned counsel of the appellees in the course of his able argument, some of which we cite: *Smith* v. *Swormstedt*, 57 U. S. 16 How. 288 [14 L. ed. 942]; *Ferraria* v. *Vasconcellos*, 31 Ill. 53; *Niccolls* v. *Rugg*, 47 Ill. 47; *Wiswell* v. *First Congregational Church*, 14 Ohio St. 44; *Gartin* v. *Penick*, 5 Bush, 110; *Hale* v. *Everett*, 53 N. H. 80; *White Lick Quarterly Meeting of Friends* v. *White Lick Quarterly Meeting of Friends*, 89 Ind. 136.

It seems to us that the authorities in respect to the division of counties, towns and the like, cited on the argument by the learned counsel for the appellants, have no proper application in this case. In those and like cases, simply rules of law applicable determine the rights and liabilities of the county or town, and the detached parts thereof.

In this case the intention of the testatrix expressed in her will, not inconsistent with established rules of law, settles, directs and controls the right of the diocese of North Carolina, and the detached part thereof forming the new diocese, as to the property embraced by the devise in question. If the devise were to a county, and, pending the lifetime of the testator, a part of the county were detached and made a new county or part of another, the detached part would certainly share in the property devised, if it should appear that the testator so intended; and this is so, because his intention must prevail, if it be lawful and practicable.

It has been suggested that the testatrix really intended that the present diocese of North Carolina alone should have benefit of the devise. This, if so, can avail nothing. As we have already said, we can only know her intention as expressed in her will. If she so intended, she ought to have modified the devise by a codicil or in some other effectual way. But with her change of purpose, if she had one, we have nothing to do. We cannot doubt that we have properly interpreted her intention as expressed in her will.

In view of the interpretation we have given of the devise in question, there is no objection to the judgment appealed from, and *so it must be affirmed.*

By consent of the parties, the cost of this controversy must be paid by the defendant executor out of any fund arising from the sale, rents or hires of the property, or any part of it. To the end that further proceedings may be had in the controversy let this opinion be certified to the superior court.

It is so ordered.

KANSAS SUPREME COURT.

C. S. BOWMAN *et al.*, *Plffs. in Err.*,
v.
W. H. PHILLIPS *et al.*

(....Kan.....)

***Where a contract is entered into between certain attorneys** at law, and certain other persons engaged in the illegal sale of intoxicating liquors, providing that the attorneys at law shall, for one year, for the monthly compensation of $80, payable on the first day of each month, defend all cases brought against such persons for violations of the Prohibitory Liquor Laws, and services are actually performed by the attorneys at law under this contract, and are paid for for the first nine months, but not paid for for the last three months,—*held*, *first*, that the contract is against public policy, and void; *second*, that the attorneys at law cannot recover an additional amount for the value of their services actually performed under the contract, although their services may be worth more than the amount which they have already received.

(April 5, 1889.)

*Head note by VALENTINE, J.

ERROR to the District Court of Harvey County, to review a judgment in favor of defendants in an action brought to recover the amount alleged to be due for professional services rendered by plaintiffs. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. **J. W. Ady** and **Bowman & Bucher** for plaintiffs in error.

Messrs. **Green & Shaver,** for defendants in error:

Plaintiffs should have recovered on the *quantum meruit*, even if the contract of employment was void.

See *Utica Ins. Co.* v. *Kip*, 8 Cow. 20; *Bank of Columbia* v. *Patterson*, 11 U. S. 7 Cranch, 303 (3 L. ed. 351); *Tracy* v. *Talmage*, 14 N. Y. 191, 192.

An attorney who has made a bargain with his client, which is void for maintenance and champerty, may recover a reasonable compensation for his services on a *quantum meruit*.

See *Thurston* v. *Percival*, 1 Pick. 415; *Rust* v. *Larue*, 4 Litt. (Ky.) 417; *Redman* v. *Sanders*, 2 Dana, 70; *Allen* v. *Hawks*, 13 Pick. 79; *Caldwell* v. *Shepherd*, 6 T. B. Mon. 392; *Smith* v. *Thompson*, 7 B. Mon. 305.

NOTE.—*Contracts in violation of law not enforceable.*

A promise made in consideration of an Act which is forbidden by the United States Constitution is void. Craig v. Mo. 29 U. S. 4 Pet. 410 (7 L. ed. 903).

No contract can be enforced if it is in violation of the laws of the United States, or is in contravention of the public policy of the government, or in conflict with subsisting treaties. Kennett v. Chambers, 55 U. S. 14 How. 38 (14 L. ed. 316).

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That which the law prohibits, either in terms or by affixing a penalty to it, is unlawful; and it will not promote in one form that which it declares wrong in another. Waugh v. Beck, 5 Cent. Rep. 540, 114 Pa. 422.

Every contract made for or about anything which is prohibited and made unlawful by statute is void, although the statute does not declare it so, but only inflicts a penalty on the offender; because a penalty implies a prohibition, although there are no prohibitory words in the statute. Martin v. Hodge, 47 Ark. 378; Jones v. Surprise (N. H.) 4 New Eng. Rep. 294.

It cannot be the foundation of a right as between the immediate parties. New v. Walker, 6 West. Rep. 872, 108 Ind. 365.

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Courts will not assist a person who has participated in a transaction forbidden by statute, to assert rights growing out of, or to relieve himself from the consequences of, his own illegal act. Parsons v. Randolph, 5 West. Rep. 865, 21 Mo. App. 353.

The test to determine whether an action arises *ex turpi causa* is the plaintiff's ability to establish his case without any aid from an illegal transaction. If his claim or right to recover depends upon a transaction which is *malum in se*, or prohibited by law, and which he must prove in order to make out his case, he cannot recover. Martin v. Hodge, 47 Ark. 378; Tyler v. Larimore, 2 West. Rep. 180, 19 Mo. App. 445; Suits v. Taylor, 2 West. Rep. 579, 20 Mo. App. 166.

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It is contrary to public policy to give the aid of the courts to the vendor, who knew that his goods were purchased, or to the lender, who knew that

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of the death of the testatrix, and therefore the devise should be construed as applying to it as it existed at that time.

This argument is specious, but certainly not sound. It is true that diocese existed at that time in name, but it was not the same in territorial extent, nor did it then embrace a very large and substantial part of the certain and well defined object embraced by the intention and purpose of the testatrix as expressed in her will. At the time of her death a large part of the church, which she clearly intended to benefit, had been detached from that diocese, and nothing appears in terms or by reasonable implication in the will to show that she intended to modify her expressed purpose so as to exclude the detached part of the church.

This church within North Carolina, within the diocese embracing the whole State, as she contemplated it at the time she made her will and therein expressed her intention, continued in all material respects to exist at the time of her death just as it did at the time she made her will. It had only been changed into two dioceses instead of one. The church as defined and specified in the will remained the same, capable of taking benefit under the devise as contemplated and intended by the testatrix.

As it is said above, the mere division of the diocese could not modify or defeat her intention. This was settled and expressed, not to be modified, except in one of the ways already specified, at the time she executed her will. *Richmond* v. *Van Hook*, 3 Ired. Eq. 581; *Tayloe* v. *Bond*, Busb. Eq. 18; *Garratt* v. *Niblock*, 1 Russ. & M. 629; *Parker* v. *Marchant*, 1 Younge & C. Ch. 299; *Boreham* v. *Bignall*, 8 Hare, 131; 1 Redf. Wills, p. 384, par. 9.

Nor can that part of the church embraced by the new diocese of North Carolina be deemed and treated as having lost, abandoned or forfeited its right to have benefit of the devise. The division of the diocese of North Carolina was made by common consent of the clergy and laity of the church within it, for the common good of the church and its purposes, strictly as allowed by and in accordance with its canons and usages. It was not prompted by any spirit of rivalry or insubordination, or dissent from the doctrines of faith, the polity, usages or practices of the church.

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On the other hand, the creation of the new diocese was praiseworthy, and to be commended, because it was intended by and through it as a legitimate instrumentality to accomplish increased and greater good. As the church within it comes, as we have seen, within the purpose of the testatrix, we cannot discover the slightest reason why it should not share in her generous bounty to the church of her choice. Why shall it not do so? What has it done that in the eye of the law of the church or the law of the land prevents it from doing so? We cannot conceive of a just reason why it may not. It might and no doubt would be otherwise if the clergy and laity of the new diocese had abandoned the faith, doctrines, usages and practices of the church—had seceded from it, and set up an independent church organization; but it is not suggested that anything inimical to the church or at all improper has been done by that part of it within the new diocese.

The views we have expressed, it seems to us, are founded on principles of justice, and are fully sustained by the numerous authorities cited by the learned counsel of the appellees in the course of his able argument, some of which we cite: *Smith* v. *Swormstedt*, 57 U. S. 16 How. 288 [14 L. ed. 942]; *Ferraria* v. *Vasconcellos*, 31 Ill. 53; *Niccolls* v. *Rugg*, 47 Ill. 47; *Wiswell* v. *First Congregational Church*, 14 Ohio St. 44; *Gartin* v. *Penick*, 5 Bush, 110; *Hale* v. *Everett*, 53 N. H. 80; *White Lick Quarterly Meeting of Friends* v. *White Lick Quarterly Meeting of Friends*, 89 Ind. 136.

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In this case the intention of the testatrix expressed in her will, not inconsistent with established rules of law, settles, directs and controls the right of the diocese of North Carolina, and the detached part thereof forming the new diocese, as to the property embraced by the devise in question. If the devise were to a county, and, pending the lifetime of the testator, a part of the county were detached and made a new county or part of another, the detached part would certainly share in the property devised, if it should appear that the testator so intended; and this is so, because his intention must prevail, if it be lawful and practicable.

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In view of the interpretation we have given of the devise in question, there is no objection to the judgment appealed from, and *so it must be affirmed.*

By consent of the parties, the cost of this controversy must be paid by the defendant executor out of any fund arising from the sale, rents or hires of the property, or any part of it. To the end that further proceedings may be had in the controversy let this opinion be certified to the superior court.

It is so ordered.

KANSAS SUPREME COURT.

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(April 5, 1889.)

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ERROR to the District Court of Harvey County, to review a judgment in favor of defendants in an action brought to recover the amount alleged to be due for professional services rendered by plaintiffs. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. **J. W. Ady** and **Bowman & Bucher** for plaintiffs in error.

Messrs. **Green & Shaver,** for defendants in error:

Plaintiffs should have recovered on the *quantum meruit*, even if the contract of employment was void.

See *Utica Ins. Co.* v. *Kip*, 8 Cow. 20; *Bank of Columbia* v. *Patterson*, 11 U. S. 7 Cranch, 303 (3 L. ed. 351); *Tracy* v. *Talmage*, 14 N. Y. 191, 192.

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It is contrary to public policy to give the aid of the courts to the vendor, who knew that his goods were purchased, or to the lender, who knew that

See also 4 L. R. A. 728; 12 L. R. A. 563; 15 L. R. A. 727; 21 L. R. A. 617; 24 L. R. A. 206.

The plaintiff cannot recover whenever it is necessary for him to prove, as a part of his cause of action, his own illegal contract, or other illegal transactions; but if he can show a complete cause of action without being obliged to prove his own illegal act, although such illegal act may incidentally appear, and may be important even as explanatory of the facts in the case, he may recover.

Frost v. *Plumb*, 40 Conn. 111; *Woodman* v. *Hubbard*, 25 N H. 67; *Morton* v. *Gloster*, 46 Maine, 520; *Parker* v. *Latner*, 60 Maine, 528; *Hall* v *Corcoran*, 107 Mass. 251.

But the contract of employment was not void, as against public policy.

In order to make a contract unlawful as being against public policy or law, it must be manifestly and directly so; and it is not sufficient that the contract is connected with some violation of the law, however remotely or indirectly.

7 Wait, Actions & Defenses, 91, 92. See *Bier* v. *Dozier*, 24 Gratt. (Va.) 1.

It cannot be maintained that a contract, in itself free from vice, can be avoided on the ground that it may possibly facilitate an illegal transaction.

See *Faikney* v. *Reynous*, 4 Burr. 2069.

In what is generally known as the smuggling cases we have the principle contended for well illustrated.

See *Holman* v. *Johnson*, Cowp. 341; *Biggs* v. *Lawrence*, 3 T. R. 454; *Clugas* v. *Penaluna*, 4 T. R. 466; *Wamell* v. *Reed*, 5 T. R. 599; *Pellecat* v. *Angell*, 2 Cromp. M. & R. 311.

In America, the doctrine of *Holman* v. *Johnson* has been approved.

Armstrong v. *Toler*, 24 U. S. 11 Wheat. 258 (6 L. ed. 468); *Merchants Bank* v. *Spalding*, 12 Barb. 302; *Tracy* v. *Talmage*, 14 N. Y. 169–214; *Cheney* v. *Duke*, 10 Gill & J. 11; *Bowry* v. *Bennet*, 1 Camp. 348; 7 Wait, Actions & Defenses, 72, 73; *McGavock* v. *Puryear*, 6 Coldw. (Tenn.) 34. See also *Stanton* v. *Embry*, 93 U. S. 548 (23 L. ed. 983).

Valentine, *J.*, delivered the opinion of the court:

This action was commenced by C. S. Bowman and Charles Bucher, partners as Bowman & Bucher, and J. W. Ady, against W. H. Phillips, James L. Serviss, G. W. Rogers and George E. Clark, to recover from the defendants the sum of $240, alleged to be due for professional services rendered by the plaintiffs as attorneys and counsellors at law.

The case was tried before the court without

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his money was borrowed, for the purpose of being employed in the commission of a criminal act injurious to society or to any of its members. Hanauer v. Doane, 79 U. S. 12 Wall. 342 (20 L. ed. 439).

A contract contrary to the public policy of the State where it is made or to be enforced, although not expressly prohibited by law, cannot be enforced. Teal v. Walker, 111 U. S. 242 (28 L. ed. 415).

A contract to defeat a public enterprise is not enforceable. Slocum v. Wooley, 9 Cent. Rep. 659, 43 N. J. Eq. 451.

An agreement for compensation, to procure a contract from the government to furnish its supplies cannot be enforced by the courts, it being against public policy. Providence Tool Co. v. Norris, 69 U. S. 2 Wall. 45 (17 L. ed. 868); Carman v. Maloney (D. C.) 9 Cent. Rep. 520.

Personal influence to be exercised over an officer of the government for the procurement of contracts is not a vendible article. Beal v. Polhemus (Mich.) 10 West. Rep. 887.

A contract founded upon a champertous consideration is illegal and void. Bent v. Priest, 1 West. Rep. 753, 86 Mo. 475; Proctor v. Cole, 2 West. Rep. 625, 104 Ind. 380; Beard v. Puett, 2 West. Rep. 673, 105 Ind. 68; Browning v. Marvin, 1 Cent. Rep. 187, 100 N. Y. 144.

A contract between a city and attorney, to the attorney annually, for twenty years, one third of all rents and receipts from ferry and bridge privileges, and mutually binding the parties to do no act and to make no contract interfering with its terms, is in contravention of public policy and cannot be enforced. Waterbury v. Laredo, 68 Tex. 565.

A contract made by a justice of the peace with a litigant in his court that such litigant should not be required to pay any fees or costs therein, unless procured from the adverse party, is contrary to public policy and void. Hawkeye Ins. Co. v. Brainard, 72 Iowa, 130.

Generally in this country, all wagering contracts are held to be illegal and void as against public policy. Irwin v. Williar, 110 U. S. 499 (28 L. ed. 225).

Contracts to control operations of government.

All agreements, for pecuniary considerations, to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution. Providence Tool Co. v. Norris, 69 U. S. 2 Wall. 45 (17 L. ed. 868).

An agreement between candidates that each will pay to the other one half of the net proceeds of his office is against public policy and cannot be enforced. Glover v. Taylor, 38 La. Ann. 634.

The agreement of a candidate for public office that he will reimburse an association promoting his canvass, for its expenses for advertising, clerk hire, room rent, etc., is unlawful and void. Foley v. Speir, 1 Cent. Rep. 716, 100 N. Y. 552.

A contract for the performance of lobby services for another, for a consideration, is against public policy and void. Sweeney v. McLeod, 15 Oreg. 390; Burke v. Child (Trist v. Child), 88 U. S. 21 Wall. 441 (22 L. ed. 623).

A contract by which one party stipulates to employ a number of secret agents, in order to obtain the passage of a particular law, in consideration of a large sum of money, is void. Marshall v. Baltimore & O. R. Co. 57 U. S. 16 How. 314 (14 L. ed. 953).

Contracts injurious to trade.

If the enforcement of a contract would injure public interests, it will not be enforced. McNamara v. Gargett (Mich.) 12 West. Rep. 653; Chicago Gaslight & C. Co. v. People's Gaslight & C. Co. 11 West. Rep. 69, 121 Ill. 530.

Contracts in restraint of trade are invalid, even when the restraint imposed is partial, unless the restraint is reasonable. Mandeville v. Harman, 5 Cent. Rep. 625, 42 N. J. Eq. 185.

A contract in restraint of trade to the injury of others and tending to monopoly, extortion and oppression is void as against public policy. Scofield v. Lake Shore & M. S. R. Co. 1 West. Rep. 827, 43 Ohio St. 571; Louisville, N. A. & C. R. Co. v. Sumner, 2 West. Rep. 665, 106 Ind. 55.

A monopoly in the accommodations which are necessary to the traveling public, the courts ought not to favor or foster by the invention or application of extraordinary or unusual orders or remedies. Pullman Palace Car Co. v. Texas & P. R. Co. 11 Fed. Rep. 632.

See also 17 L. R. A. 96.

a jury, and judgment was rendered in favor of the defendants and against the plaintiffs, for costs; and the plaintiffs, as plaintiffs in error, bring the case to this court for review.

It appears that on May 5, 1883, a society existed at Newton, Kan., composed of the defendants and others, known as the "Saloon & Druggists' Protective Association of Newton, Kansas." The members of the association were principally saloon keepers, and were engaged in selling intoxicating liquors in violation of the Prohibitory Liquor Law, and the principal object of the association was to frustrate the law to the extent of evading all punishment for its violation.

The plaintiffs in this case had full knowledge of all these things. On that day the plaintiffs and the defendants, with a few others, entered into the following written contract, to wit:

Newton, Kansas, May 5, 1883.

We, the undersigned, business men of the City of Newton, agree to pay Mess. Bowman & Bucher and J. W. Ady the sum of eighty dollars per month on the first day of each month for the period of one year, from May 1, 1883, eighty dollars to be paid on the execution hereof—said payments to be made in consideration of the services herein agreed to be rendered.

We, the undersigned, attorneys at law, agree to defend all cases that may be brought against Geo. E. Clark, Jas. Serviss, W. H. Phillips, J. E. Marti, J. H. Gray, J. H. Pappe, O. S. Bassett, E. Wetzell, and any others, who may become members of the Saloon & Druggists' Protective Association of Newton, Kansas, or any person in business with either of them, as clerk, partner, or otherwise, for a violation of the Prohibitory Liquor Laws of the State of Kansas, and to accept as full compensation for our services the sums hereinbefore stipulated to be paid. This is not to include the necessary expenses or outlays on our part, should such be necessary, but only fees for professional services. Executed in duplicate.

[Signed]
Jas. L. Serviss,
W. H. Phillips,
J. H. Pappe,
J. E. Marti,
L. H. Crafts,
Bowman & Bucher,
J. W. Ady,
Geo. E. Clark,
G. W. Rogers.

Sept. 1st.

Afterwards, and within one year thereafter, various criminal prosecutions were instituted and conducted against the several members of the aforesaid "Saloon & Druggists' Protective Association," for violation of the Prohibitory Liquor Law, and the plaintiffs in this action, as attorneys and counselors at law, defended them. Also, during that year, and for the services of the plaintiffs for the first nine months thereof, the members of said association paid to the plaintiffs the sum of $720, leaving, as the plaintiffs claim, still due to them on the aforesaid contract, and for their services for the last three months of the aforesaid year, the sum of $240, for which sum they brought this action.

It is stated in the briefs of counsel that the court below decided this case upon the theory that the aforesaid contract was in violation of public policy, and therefore void; while the plaintiffs claim that the contract is not in violation of public policy, nor void for any other reason; and they further claim that, even if the contract is void, still they alleged enough in their petition, and proved enough on the trial, to enable them to recover in the action as upon an implied contract for the actual services which they in fact performed. They certainly proved that the services which they actually performed were worth more than $960, which is all that they claim for the entire year's work.

We think the contract is against public policy, and void. Of course, attorneys at law may be employed to defend persons charged with crime, where the alleged offenses are charged to have been committed prior to the employment.

An attorney's services may also be engaged for future transactions, where no wrong is intended or contemplated; and in all cases good faith and innocence will be presumed until the contrary appears. Also, where a contract is not in violation of public policy, nor in any manner tainted with immorality or illegality, and services are performed or benefits conferred under it, but the contract is void because of some want of power in one or both the parties to make it, or void because of some irregularity in its execution, a contract will be implied, and a promise assumed, that the party benefited shall pay for all benefits which he has actually received under the void contract. Or, if no contract is expressly made, but services are nevertheless performed, or benefits actually conferred with the knowledge and consent of the other party, and not as a gratuity, which services or benefits are in and of themselves innocent and proper, a contract and promise will be implied to pay for all the benefits actually received.

But none of these cases is the present case. In the present case it was future wrongs and violations of law that were contemplated when this contract was executed; and it was future wrongs and violations of law that were to furnish the foundation for the plaintiff's services, and the foundation for their compensation, and, except for these contemplated future wrongs and violations of law, the contract would never have been made.

This contract was tainted at its inception with these future intended and contemplated violations of law.

Of course, the plaintiffs, when they entered into the contract, did not intend to perform services different from services which may rightfully and legally be performed under a contract made for similar services after the violations of the law have actually occurred; and the plaintiffs, in rendering their services under this contract, did not render any services except such as they might have legally and rightfully rendered under a contract made after the violations of the law had actually taken place. But these things are not the things which render the contract in this case objectionable.

The wrong on the part of the plaintiffs consisted simply in entering into a contract to defend persons for criminal offenses which were, in contemplation of all the parties, to be committed in the future. This was a virtual encouragement of the defendants to violate the law; and surely the defendants expected, by future violations of the law, to furnish to the plaintiffs a sufficient amount of work to make

the plaintiffs earn the agreed compensation; and in all probability the defendants also expected to realize a sufficient amount of profits out of their illegal and interdicted traffic to pay the plaintiffs, and have something left. It was evidently considered by the parties as a mere sharing of the profits.

The evidence tends to show that the defendants employed the plaintiffs in advance, because they believed that by so doing they could better evade the Prohibitory Liquor Law, and could obtain the services of the plaintiffs at a cheaper rate, provided they continued to carry on their illegal traffic. If the plaintiffs had refused to enter into such a contract, possibly the defendants would have closed their illegal business at once.

What operated upon the minds of the plaintiffs to enter into this contract, in advance of the commission of the contemplated offenses, is not shown; but it is open to the supposition that they may have believed that, if they did not enter into this contract, the defendants would close their illegal business, or, at least, would not commit so many violations of law, and thereby would render the plaintiffs' services and their compensation correspondingly lighter.

The defendants, by this contract, agreed to pay the plaintiffs $80 per month and they did in fact pay them that amount for the first nine months of their employment, and failed to pay them only for the last three months.

It must also be remembered that the plaintiffs in this action are attorneys and counselors at law. They belong to a class of persons who are authorized and licensed under the laws of Kansas to assist the courts in the administration of justice, and in enforcing the laws.

Now, is it proper for such persons to say to persons who are contemplating the commission of crime: "If you commit the crime, we will defend you, and are ready now to enter into a contract for that purpose?"

Attorneys at law, above all others, should refrain from doing anything which might seem to encourage a violation of the laws.

We know of no authorities directly and precisely in point as to the questions involved in this case, but we cite the following as giving support to the views herein expressed: *Treat* v. *Jones*, 28 Conn. 334; *Arrington* v. *Sneed*, 18 Tex. 135; *Hayes* v. *Hayes*, 8 La. Ann. 468; 3 Am. & Eng. Cyclop. Law, 869, 875, 886, and cases there cited; 7 Wait, Actions & Defenses, chap. 31; Greenh. Public Policy, pts. 11, 13.

As above stated, we think the contract in question in this case is void for the reason that it contravenes public policy; and we also think that the plaintiffs cannot recover for their services which they actually performed under the contract, and this for the same reason.

As between the original parties, and all persons *in pari delicto*, the courts will not enforce illegal contracts, or any supposed rights founded upon them, but will leave the parties, and those *in pari delicto*, just where they find them, and leave each in the possession of just what he has already obtained.

So much of the contract, or its fruits, as has already been executed, performed or vested, the courts will permit to stand; but whatever remains to be executed or performed, or to become vested, the courts will not enforce.

In the present case the plaintiffs will retain all the money which they have received under the void contract without the defendants having any action to recover it back, and the defendants will retain all the benefits resulting from the services of the plaintiffs which have already been rendered under the void contract, without the plaintiffs having any action to recover for the value of such services. Indeed, except for the contract there might never have been any necessity for the performance of any such services; for without the encouragement given by the contract to the defendants they might never have violated any of the laws of Kansas.

We think the decision of the Court below is correct, and *its judgment will be affirmed.*

All the Justices concur.

TEXAS SUPREME COURT.

Charles DILLINGHAM *et al.*, *Plffs. in Err.*,
v.
Russell ANTHONY.

(.....Tex.....)

1. Receivers appointed by the courts of the United States are subject, under the Act of Congress of March 3, 1887, to suits without leave, in any court having jurisdiction over the subject matter, although no court can interfere with the custody of the property held by another court through its receiver.

2. The erroneous admission of evidence which is subsequently withdrawn from the jury will not constitute ground for reversal where

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NOTE.—*Actions against receivers of railroads.*

It is stated as a general rule in Vermont that before suit is brought against a receiver leave of the court by which he was appointed must be obtained. Lyman v. Central Vt. R Co. 4 New Eng. Rep. 726, 59 Vt. 167.

When the same party is receiver of one railroad and lessee of another, and both are operated by him together, an employé can maintain an action at law against him, without leave of equity, to recover for injuries resulting from the negligence of his servants in operating the leased road. Lyman v. Central Vt. R. Co. 4 New Eng. Rep. 726, 59 Vt. 167.

An action at law lies against the receiver of a railroad company for negligence in constructing a crossing, although leave is not obtained from the court of chancery. Roxbury v. Central Vt. R. Co. 6 New Eng. Rep. 534, 60 Vt. 121.

A receiver is liable to the extent of the funds in his hands. See State v. Wabash R. Co. 1 L. R. A. 179, note.

Carrier of passenger; duty to protect from violence and insult.

A common carrier of passengers undertakes absolutely to protect them against the misconduct of its own servants engaged in executing the contract.

See also 4 L. R. A. 481; 13 L. R. A. 215.

it does not appear that it was calculated to operate to the injury of the party complaining.

3. **Receivers of a railroad company are liable for injuries to a passenger** on a train, resulting from the willful or malicious acts of the conductor, it being the carrier's duty to protect passengers from the wrongful acts of its servants.

4. **Exemplary damages cannot be recovered against a carrier** for the malicious act of the conductor of a train to the injury of a passenger, which has not been ratified or adopted, if there was no carelessness in the selection of employés, or in the establishment of regulations, or in short if the carrier or its officers by whom it is controlled have not been guilty of any malice, gross negligence or oppression.

5. **The mere retention of the conductor of a train in the same position** after knowledge of his misconduct does not operate as a ratification of his willful and malicious act in assaulting a passenger, so as to make the carrier liable for exemplary damages.

6. **The ratification of the act of a servant** is a question to be passed upon under all the evidence as any other fact in issue.

(February 15, 1889.)

ERROR to the District Court of Freestone County, to review a judgment in favor of plaintiff in an action to recover damages actual and exemplary for injuries resulting from an assault and battery upon him by the conductor of a train on the railroad of which defendants were receivers. *Reversed.*

The facts are fully stated in the opinion.

Mr. **O. T. Holt,** for plaintiffs in error:

The declaration of the servant after the transaction is not admissible against the principal.

Northwestern Union Packet Co. v. *Clough,* 87 U. S. 20 Wall. 528 (22 L. ed. 406); *Adams* v. *Hannibal & St. J. R. Co.* 7 Am. & Eng. R. R. Cas. 414, 74 Mo. 553; *East Tenn. V. & G. R. Co.* v. *Maloy,* 31 Am. & Eng. R. R. Cas. 352, 77 Ga. 237; *Sherman* v. *Del. L. & W. R. Co.* 31 Am. & Eng. R. R. Cas. 15, 9 Cent. Rep. 432, 106 N. Y. 542.

The defendant in error was entitled to recover compensation commensurate with the injury sustained.

Sutherland, Damages, p. 17, and cases cited.

Where an agent commits an assault outside the scope of his duty, his principal is not liable.

Galveston, H. & S. A. R. Co. v. *Donahoe,* 56 Tex. 162; *Hays* v. *Houston & G. N. R. Co.* 46 Tex. 273; *Evansville & C. R. Co.* v. *Baum,* 26 Ind. 70; *Parker* v. *Erie R. Co.* 5 Hun, 57; *McKeon* v. *Citizens R. Co.* 42 Mo. 79; *Great Western R. Co.* v. *Miller,* 19 Mich. 305.

There can be no ratification of the acts and conduct of another without a full knowledge of all the facts.

Laredo v. *Macdonnell,* 52 Tex. 511; *Commercial & Agricultural Bank* v. *Jones,* 18 Tex. 811; *Vincent* v. *Rather,* 31 Tex. 77; *Owings* v. *Hull,* 34 U. S. 9 Pet. 607, 629 (9 L. ed. 246); Bishop, Cont. § 848; Story, Agency, 251.

Messrs. **O. C. Kirven, B. H. Gardner** and **Hume & Kleberg** for defendant in error:

Stayton, *Ch. J.,* delivered the opinion of the court:

This action was brought by defendant in error, July 28, 1887, against plaintiffs in error, who were receivers appointed by a Circuit Court of the United States prior to the time the injury complained of was inflicted, and in possession of and operating the Houston & Texas Central Railway at the time plaintiff claims to have been injured. It was brought to recover damages actual and exemplary on account of injuries resulting from an assault and battery made on him, while a passenger in one of the the cars, by the conductor in charge of the train and in the employment of the receivers.

There was a verdict and judgment in favor of defendant in error for $1,000 as actual, and $2,000 as exemplary, damages.

Plaintiffs in error, by plea, denied the jurisdiction of the court below, on the ground that no court other than the one appointing them could exercise jurisdiction. This was overruled, and correctly so; for, whatever may be the true rule in suits brought against receivers

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N. J. Steamboat Co. v. Brockett, 121 U. S. 637 (30 L. ed. 1049).

The idea that lies at the very base of the law of common carriers is that they are public servants and serve all alike. Samuels v. Louisville & N. R. Co. 31 Fed. Rep. 57.

The passenger is entitled, even while being dealt with by the agent pursuant to regulations, to respectful and courteous treatment and protection against insult and indignity. McGinnis v. Mo. Pac. R. Co. 4 West Rep. 797, 21 Mo. App. 399.

The contract of a railroad company is to safely carry people to their several destinations; and the company is liable for all acts and omissions of its agents, connected with or in the line of their duty. Lakin v. Oregon Pac. R. Co. 15 Oreg. 220.

Company liable for injuries resulting from misconduct of its servants.

The common carrier is liable for all injuries resulting from the misconduct of the carrier or its employé. Springer Transp. Co. v. Smith, 16 Lea, 498.

Where a breakman refused to allow a passenger to pass through the ladies' car, used abusive language and committed an assault, plaintiff was entitled to exemplary damages. Atlanta & W. Pt. R. Co. v. Condor, 75 Ga. 51.

The plaintiff is entitled to recover for the indignity put upon him by the opprobrious language used, and by the assault and battery inflicted, by at least one of the employés of the company, while he was in its care, and entitled to its protection, as a passenger in its cars. *Ibid.*

Even a trespasser on a train who receives injuries which are the direct and necessary result of willful, wanton or malicious acts of the conductor or those assisting him is entitled to damages therefor. Atchison, T. & S. F. R. Co. v. Gants, 38 Kan. 608.

Where a train passes the station to which the passenger was entitled to be carried, without stopping a sufficient time for him to get off, the carrier is liable in damages. White Water Valley R. Co. v. Butler, 12 West. Rep. 207, 112 Ind. 598.

A corporation may be charged with punitive or exemplary damages for personal injuries caused by the malicious, oppressive or reckless conduct of its servants. Quinn v. S. C. R. Co. 1 L. R. A. 682, note; South Fla. R. Co. v. Rhoads, post,—

Liability of carrier for torts of its employés.

A carrier is liable for a tort committed by its employé upon the person of another one when the

as to the necessity for leave to sue them in other courts, under the Act of Congress of March 3, 1887, receivers appointed by the courts of the United States are subject to suit, without leave, in any court having jurisdiction over the subject matter.

No court can interfere with the custody of property held by another court through a receiver, but may establish by its judgment a debt against the receivership, which must be recognized even by the court appointing the receiver, and not open to review by it, if the court rendering the judgment had jurisdiction of the subject matter and the parties.

The manner in which a judgment so rendered shall be paid, and the adjustment of equities between all persons having claims on the property and effects in the hands of a receiver made, must necessarily be under the control of the court having custody through its receiver; but this does not affect the jurisdiction of other courts conclusively to establish by judgment the existence and extent of a claim.

On the trial the conductor testified as a witness, and, on being interrogated, stated that he did not tell A. W. Williams on the night after the difficulty, holding his ticket punch in his hand: "This is the thing I did the son of a bitch up with;" and afterwards Williams was permitted to state that the witness at time and place mentioned did make such a statement to him. The evidence was objected to, on the ground that the declarations of the conductor, made subsequently to the difficulty, were not admissible against the defendants. After the evidence was admitted the court withdrew it from the consideration of the jury, and instructed them not to consider it; but it is insisted that the judgment should be reversed because of its admission.

It is frequently the case that evidence is admitted, which, on reflection, the trial court deems it proper to withdraw from the consideration of the jury, and in some cases such action ought to be held to cure the error, while in other cases the evidence might be of such character, and the whole case so presented, as to induce the belief that the jury may have been influenced by the erroneous admission of evidence, although subsequently told by the court to disregard it. In the latter case the admission of evidence that ought to have been excluded might be ground for reversal, and in the former not.

The evidence of the witness Williams was not admissible for the purpose of proving that the conductor did strike the plaintiff with his ticket punch; but it may have been relevant to the issue as to how the battery was made, and, for the purpose of impeaching the evidence of the conductor to show that he had made statements out of court different from those made in court, admissible. If, however, the evidence was not admissible for any purpose, we do not perceive that it was calculated to operate to the injury of the defendants.

From the testimony given by the conductor on the trial, and from the testimony of McCartney and the plaintiff, there could be but little doubt that the conductor did use his ticket-punch in the battery, and the language shown to have been used by him at the time of the difficulty showed as fully his *animus* at that time as possibly could the language testified to by the witness Williams.

It is urged that the court erred in charging that defendants would be liable if the acts of the conductor were willful and malicious. There is no doubt that ordinarily the master is not liable for an injury resulting from the willful and malicious acts of his agent, not done in the course of his employment. This is the rule in all cases in which the liability of the master depends on the sole fact that the person who inflicted the injury was in some business his servant; and if, upon inquiry, it be found that the act was not done while in the transaction of the master's business, then the act is not to be deemed the act of the master; for as to that the wrong-doer was not his servant.

The rule, however, cannot be applied in a case in which the master, by contract express

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person injured is a passenger at the time and the employé is acting within the scope of his business., Central R. Co. v. Peacock (Md.) 12 Cent. Rep. 867.

Although a servant of a carrier may be obliged to use force in the enforcement of reasonable regulations established by the carrier, the carrier will not be protected if he uses excessive or unnecessary force. N. J. Steamboat Co. v. Brockett, 121 U. S. 637 (30 L. ed. 1049).

The common carrier is liable for all injuries resulting from the misconduct of the carrier or his employé. Springer Transp. Co. v. Smith, 16 Lea, 498.

Where plaintiff was assaulted by a porter employed by a sleeping-car company, which ran its cars on defendant's trains, while the porter was not engaged about the transportation of passengers, and not upon the train by which the plaintiff was to be transported, and had nothing to do therewith, the porter was not a servant of defendant, and the defendant was liable for the assault. Dwinelle v. N. Y. Cent. & H. R. R. Co. 45 Hun, 139, 9 N. Y. S. R. 838.

A railroad corporation is liable for all acts of wantonness, rudeness or force, done or caused to be done by its agents or servants, in or about the duties or business assigned to them, although in violation of the general rules or orders prescribed for their conduct; and the rule as to vindictive damages for such acts, in action against the corporation, is the same as in actions against natural persons. Louisville & N. R. Co. v. Whitman, 79 Ala. 328.

A person knocked down and robbed just as he was about to enter a train as a passenger, under a petition charging that plaintiff was assaulted and injured by the servant and employés operating and controlling the train, cannot recover against the company without showing that the person who assaulted him was in the employ of the company, and that the wrongful acts were done by the servant or agent of the company in the course or within the scope of his employment. Sachrowitz v. Atchison, T. & S. F. R. Co. 37 Kan. 212.

Measure of damages; wounded feelings.

For a violation of such duty, and for accusations of fraud, the passenger is entitled to such damages as will compensate for his wounded feelings and secure the public against a repetition of the wrong. McGinnis v. Mo. Pac. R. Co. 4 West. Rep. 797, 21 Mo. App. 399.

or implied, is under obligation to protect the injured person from the servant's wrongful act, as well as his own. When a duty is thus imposed on the master, the servant employed to discharge it is the representative of the master, for whose acts, whether of omission or commission, resulting in injury to the person entitled to have the duty performed, the master must be held as fully responsible, and liable to make, at least, actual compensation, as though the act were his own personal act. In such cases, if the servant does what the master could not do, nor suffer to be done, without violation of the *particular* duty resting upon him; or if the servant omits to do that which is requisite to the full discharge of the master's incumbent duty—then the master must be held responsible for the servant's wrongful or malicious act or omission; for otherwise it would result that a master might relieve himself from obligation to perform a duty fixed by contract or otherwise by the employment of servants to conduct the business to which the duty attaches. The master's obligation cannot thus be avoided; and whether the servant's act violative of the master's duty be willful or malicious is a matter of no importance in determining the liability and obligation of the master to make actual compensation to the injured person.

It has been steadily held to be the duty of a carrier of passengers to protect them, in so far as this can be done by the exercise of a high degree of care, from the violence and insults of other passengers and strangers, and to protect them from the violence and insults of the carrier's *own servants;* and the inquiry whether this duty arises from contract or from the nature of the employment becomes unimportant, except that the duty goes with the carrier's contract, however made, whereby the relation of carrier and passenger is established. *Ramsden* v. *Boston & A. R. Co.* 104 Mass. 120; *Bryant* v. *Rich*, 106 Mass. 180; *Craker* v. *Chicago & N. W. R. Co.* 36 Wis. 657; *Stewart* v. *Brooklyn & C. R. Co.* 90 N. Y. 588; *Sherley* v. *Billings*, 8 Bush, 147; *Chicago & E. R. Co.* v. *Flexman*, 103 Ill. 546; *Wabash, St. L. & P. R. Co.* v. *Rector*, 104 Ill. 296; *Goddard* v. *Grand Trunk R. Co.* 57 Maine, 202.

Under the facts of this case the court below properly held that the defendants, as receivers, were liable for injuries resulting from the willful or malicious acts of the conductor.

On the question of exemplary damages the court instructed the jury as follows:

"You are instructed that, to authorize a recovery of exemplary damages against the employer or master on account of an injury inflicted by an employé or servant, the wrongful act from which the injury resulted must be done by the servant or employé maliciously, and under such circumstances as would also authorize the recovery of actual damages from the employer or master; and, further, the act must be ratified by him. If the employer or master have a knowledge of the act and its character, and still continues the employé or servant in his former position, such retention is a ratification of the act of the servant or employé."

The last paragraph of the charge quoted was repeated in a subsequent charge

In those jurisdictions in which it is held that exemplary damages may be given against a corporation for injuries willfully or maliciously inflicted by its servants in all cases in which the willful or malicious act was done in the course of the business intrusted to the servant, whether the act be authorized or ratified by the corporation the giving of the charge complained of would probably be deemed harmless if the acts complained of in this case can be said to have been in the line of the conductor's duties. In this State, however, that rule has not been adopted.

In *Hays* v. *Houston Railroad Company*, 46 Tex. 284, which was a case in which the act complained of might properly have been held to have been done in the course of the employment of the servant, it was said: "If the malicious act of the agent is ratified or adopted; if there is carelessness in the selection of employés or in the establishment of regulations; if, in short, the corporation or its officers by whom it is controlled are guilty of some fraud, malice, gross negligence or oppression—the settled rules of law will hold it liable to exemplary damages; but, in our opinion, not otherwise."

This ruling was followed in *Galveston Railway Company* v. *Donahoe*, 56 Tex. 162.

We have no disposition to reopen the question, in view of the conflict of authority; and, following these decisions, the remaining inquiry on this branch of the case is: Was the charge as to liability of appellants resulting from their ratification of the acts of the conductor called for by the facts of the case, or correct as a legal proposition in any case? It appears that appellee, as a passenger, entered a car on the road controlled by appellants, and that, having stopped on the platform outside of the car, he was informed by the conductor that this was a dangerous place, and requested to enter the car. As to whether this request was made by the conductor without insult and in proper manner the evidence is conflicting, as is it as to whether the conductor used force in removing appellee from the platform to the inside of the car.

Be this as it may, it does appear that blows passed between the conductor and appellee immediately after the latter entered the car, and his evidence, as well as that of the conductor, tends most strongly to show that in this rencounter appellee was the aggressor, and the conductor acting in his own defense. They were then separated without any considerable injury to appellee, and we do not understand him to base this action on what occurred in the difficulty to which we have referred. After that ended, the conductor went on in the discharge of his ordinary duties, and appellee took his seat among the other passengers; but, after a short time had elapsed, the conductor returned to the car in which appellee was, and then committed an assault and battery upon him, which, at the time, was unprovoked, and made solely to avenge the insult or wrong the conductor conceived had been done him in what he claimed was an unprovoked assault made upon him by the appellee in the former difficulty. The assault and battery then committed, and the injuries resulting therefrom, are made the basis of this action; and there is not

the slightest ground for holding that it was committed in behalf of appellants, for their benefit, in their interest, or in the doing of any act necessary or proper to be done in the discharge of the duties imposed on the conductor. On the contrary, the act complained of is shown to have been the willful and malicious act of the conductor, in violation of his duty to his employers, and to the service, as well as to the passenger.

Appellants, as carriers, are liable to appellee for actual damages, because there was a failure on their part, through the conductor or some other representative, to give that protection to the passenger which they, as carriers of passengers, were bound to give; and this liability does not depend on whether the servant's failure of duty was unintentional, willful or malicious; but to make them liable for exemplary damages, if they stand on the same ground as other carriers, the willful or malicious act of their servant must have become, in law, their willful or malicious act.

The rule in reference to affecting the master with the willfulness or malice of a servant must be the same whether the master be a corporation, a receiver in charge of the business and property of a corporation, or an individual. If in performing any duty within the line of his employment the servant uses unnecessary force in doing an act lawful within itself, and thereby he commits a trespass or crime, then the act may be deemed one for which the master is civilly responsible; but if the act be in itself illegal, however performed, or by whomsoever done, then the master ought not to be held liable, unless he advised, or in some way participated in, the unlawful act.

The court below charged that the act of the servant, with all of the servant's willfulness and malice, would be imputed to appellants, if, with knowledge of his misconduct, they kept him in their employment; and so, without reference to whether the act was within the line of the conductor's duties, or one illegal in itself—without reference to the manner of its execution.

If there were no other ground on which appellants could be held liable for actual damages resulting from the injuries received by appellee from the battery made upon him by the conductor than that they had ratified his act, could their liability be fixed on that ground, however clear their subsequent approval of his act might be made to appear?

"In order to constitute one a wrong-doer by ratification the original act must have been done in his interest, or been intended to further some purpose of his own." Cooley, Torts, 127; *Eastern Counties R. Co.* v. *Broom*, 6 Exch. 326; *Wilson* v. *Barker*, 4 Barn. & Ad. 614; *Wilson* v. *Tumman*, 6 Man. & Gr. 241; Broom, Legal Maxims, 873; Wood, Master & Servant, 598; *Bird* v. *Brown*, 4 Exch. 798; *Sutherland* v. *Sutherland*, 69 Ill. 481; Moak, Underhill, Torts, 38.

In the case before us there can be no pretense that the act of the servant was done in the interest of appellants, under any pretense of authority from them, or to further any interest of themselves or the corporation whose business and property they were controlling; and there was no ground on which to base ratification, which is but an agreement, express or implied, by one to be bound by the act of another performed for him.

If appellants could not be held to have ratified their servant's unauthorized, willful and malicious act, not done in their interest or for their benefit in fact or pretense, it is not perceived on what ground they can be held to be affected by the *animus* with which the servant committed the act; and, unless they could be so affected, there is no legal ground for awarding against them exemplary damages.

If the servant's act be one not authorized by the master, or one not done in the exercise of a power fairly arising from the character of his employment, but be an act done for the use or benefit of the master, then the master may doubtless ratify the act of the servant through which a tort was committed; and it may be that, in such case, the ratification of the master would fix upon him the bad motive which prompted the servant's act, and thus impose on the master a liability even for exemplary damages. It has been so held by courts that hold the master not liable for exemplary damages in all cases in which the servant is. *Bass* v. *Chicago & N. W. R. Co.* 42 Wis. 654.

Such may be the effect of the decisions in this State to which we have referred, though there are contrary holdings. *Sutherland* v. *Sutherland*, 69 Ill. 481.

Such a question, however, is not before us. Relying, as appellee does, on the injury inflicted upon him by the conductor after he took a seat in the car, we are of the opinion, under the evidence, that he shows no case entitling him to exemplary damages, under the decisions heretofore made in this State, to which we have referred; and that a case is not shown in which the jury should have been charged that they might find appellants had ratified the act of the conductor.

If, however, the case were different, and it appeared that the conductor's act was done in the course of his employment, giving to this every intendment arising from his position and the nature of his duties, even then, it seems to us, that it cannot be held as matter of law that the mere retention of the conductor in the same position after knowledge of his misconduct operates a ratification of his willful and malicious act, and thus fixes his evil motive on his employer. The whole doctrine of *ex post facto animus* as a basis for exemplary damages seems to us an anomaly. It goes further than to punish for evil motive, and condemns and punishes for evil afterthought imputed, which the court below informed the jury existed, as matter of law, if the conductor was retained in the service after knowledge of his misconduct.

There are cases which hold that retention in service, under such circumstances, amounts to ratification of acts that may be ratified; but it seems to us that this is not necessarily true, and that, where ratification is an issue, this should be left to the jury or court trying the cause, under all the evidence, to be passed upon as any other fact in issue.

The charge given assumed that the act of the conductor was such as might be ratified, and that the facts recited in the charge, as matter of law, amounted to ratification. We think this was error. This case does not call for it,

and we are not now disposed to consider what bearing the retention of a servant in a position he has abused ought to have in determining the liability of the master for his past or subsequent acts.

It is urged that the actual damages awarded are excessive; but we think, in view of the facts, this is not true; but, for reasons manifest, now decline to discuss the facts bearing on that question.

For the errors mentioned the judgment will be reversed, and the cause remanded.

MISSOURI PACIFIC R. CO., *Appt.*,
v.
William PLATZER *et al.*

(....Tex.....)

1. **A railroad company is liable for failure to exercise such care** as the circumstances of a given case would indicate to a prudent man was proper, to extinguish a fire caused by sparks from its engine, although not guilty of negligence in setting the fire.
2. **Whether due diligence has been used** in a given case by railroad employés in extinguishing a fire is a question for the jury.
3. **A charge** should not be given where there is not sufficient evidence fairly to raise an issue of fact to which it relates.

(February 26, 1889.)

APPEAL by defendant from a judgment of the District Court of Galveston County in favor of plaintiffs in an action to recover damages resulting from the burning of certain of plaintiffs' property by reason of the alleged negligence of defendant. *Reversed.*

The facts are fully stated in the opinion.

Messrs. **Willie, Mott & Ballinger,** for appellant:

The company was not liable because of any negligence on the part of its employés in extinguishing the fire or in failing to do so, unless it was an undisputed fact that the fire was started through negligence on the part of the defendant company; and this was not the case.

2 Wood, Railways, § 327; *Kenney* v. *Hannibal & St. J. R. Co.* 70 Mo. 252–256; *Baltimore & O. R. Co.* v. *Shipley*, 39 Md. 251.

There was no evidence showing that the company's employés were negligent in not extinguishing the fire.

Box v. *Word*, 65 Tex. 159; *Houston & T. C. R. Co.* v. *Rider*, 62 Tex. 267; *Belcher* v. *Fox*, 60 Tex. 527; *Blanton* v. *Mayes*, 58 Tex. 422; *Altgelt* v. *Brister*, 57 Tex. 432.

Messrs. **A. B. Buetell** and **F. Charles Hume,** for appellees:

The court having, in special charges given at appellant's request, instructed the jury, in effect, that no liability attached to appellant unless the fire was set by its negligence, there is no ground to complain of the charge imputing liability to appellant upon the hypothesis of its negligent failure to extinguish the fire; since an adverse finding on that issue could not be reached unless and until it was found that there was negligence in setting the fire.

3 Wilson, C. A. § 50; 61 Tex. 644; 1 W. & W. C. A. § 838; 2 Wilson, C. A. § 681; *Grand Trunk R. Co.* v. *Richardson*, 91 U. S. 470, 471 (23 L. ed. 332); *Webb* v. *Rome, W. & O. R. Co* 49 N. Y. 424; *Field* v. *New York Cent. R Co.* 32 N. Y. 349; *Burke* v. *Louisville & N. R. Co.* 7 Heisk. 458, 461–463.

Appellant was liable for the negligence of its servants in failing to extinguish, or to attempt to extinguish, the fire, even though there had been no proof of negligence in setting the fire. And if the charge complained of be conceded to present the distinct issue of negligence *vel non*, in the failure to extinguish the fire, separate from and independent of the question of negligence in setting the fire, still the charge was the law applicable to the case made by the evidence.

Kenny v. *Hannibal & St. J. Co.* 63 Mo. 101, 102; *Rolke* v. *Chicago & N. W. R. Co.* 26 Wis. 538–540; *Erd* v. *Chicago & N. W. R. Co.* 41 Wis. 66, 67.

Stayton, *Ch. J.*, delivered the opinion of the court:

This action was prosecuted by appellees, to recover the value of grass and other property alleged to have been destroyed by a fire, which it is alleged was caused by sparks and fire neg-

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NOTE.—*Negligence of railroad company in setting fires.*

A railroad company free from negligence is not liable for damages from fire kindled by sparks from locomotives. Newton v. N. Y. & N. E. R. Co. 5 New Eng. Rep. 615, 56 Conn. 21.

A railroad company is not liable for damages caused by the spreading of a fire which it is maintaining to burn dry grass and weeds on its right of way, in the performance of its duty to prevent an accumulation thereof, unless it is guilty of carelessness in setting out the fire or guarding it. Atchison, T. & S. F. R. Co. v. Dennis, 38 Kan. 424.

The statute of Vermont, as to the liability of railroad companies for buildings burned by fire from an engine, embraces buildings on the line of the roadway, and buildings injured by fire spreading from other buildings to which fire was first communicated from a *locomotive*. Grand Trunk R. Co. v. Richardson, 91 U. S. 454 (23 L. ed. 356).

Connecticut Statutes 1881, chap. 92, § 1, declaring that the person or corporation injured may recover from a railroad company damages for any injury done to a building or other property by fire communicated by a locomotive engine, is *constitutional* in its application to a railroad whose charter makes it subject to all general laws the Legislature may thereafter pass. Grissell v. Housatonic R. Co. 4 New Eng. Rep. 85, 54 Conn. 447. The enforcement of Connecticut Statutes 1881, chap. 92, § 1, giving a railroad company an insurable interest in property along its route, and providing that it shall be liable in damages for injuries to property by fire communicated by a locomotive engine, is not dependent upon the ability of the company to obtain insurance upon the class of property injured. *Ibid.* The words "a building or other property" embrace fences, growing trees and herbage. Grissell v. Housatonic R. Co. 4 New Eng. Rep. 85, 54 Conn. 447.

Care and caution are required of railroad companies to guard against loss by fire. *Knowlton* v. N. Y. & N. E. R. Co. 1 L. R. A. 625, note, 147 MASS. 606.

See also 4 L. R. A. 549.

ligently permitted to escape from one of appellant's locomotives.

It is further alleged that the servants of appellant negligently failed to extinguish the fire when it orignated, although they might have done so by the exercise of slight diligence.

The cause was tried before a jury, and resulted in a verdict for appellees, on which a judgment was entered.

Appellees' land seems to have been situated at a considerable distance from the railway. The great weight of the testimony tends to show that the locomotive from which it is claimed fire escaped was furnished with the most approved appliances to prevent the escape of fire, and that it was carefully operated by an experienced and skillful engineer and fireman; but there was testimony tending to show that fire could not have escaped, as witness testified it did, had the appliances to avoid its escape been such as appellant contends they were.

The judgment, therefore, cannot be reversed on the ground that it is not supported by evidence.

The court below more than once instructed the jury that appellees were not entitled to recover, unless the fire had its origin in the negligence of appellant or its servants.

Two of the charges given were as follows:

"Railroads are authorized and allowed by law to run trains upon their tracks propelled by steam generated by fire, and they are authorized to use all reasonable means which will permit them to carry out the purposes for which they were created. They are permitted to use fire in their furnaces, and are not to be restricted in their operation, or held to liability because sparks of fire may be emitted from their engines. They are required to keep their engines in good order, and skillfully and carefully handled, and to use and keep in good order such appliances as the experience of practical railroad men determine are among the best to prevent the escape of sparks and fire, and to prevent the accumulation of combustible material on their right of way; and they are not required to do any more. If no appliances are invented which will prevent the escape of sparks and fire, and at the same time allow sufficient steam to be generated to properly propel their trains, then they are only required to use such appliances as are considered among the best by railroad experts."

"If the jury believe from the evidence that the engine, at the time of the fire, was in good order, and skillfully handled by competent employés, and that it was supplied with appliances that are considered among the best by practical railroad men to prevent the escape of sparks and fire, and that said appliances were in good order, and that the servants and employés of defendant in charge of the train did not negligently permit the escape of sparks or fire therefrom, and that there was no accumulation of combustible material on the right of way in which the fire could start, they will find for the defendant, even though they may believe that the fire was caused by sparks from the locomotive."

The court, however, gave the following charge:

"If you believe from the evidence that fire from defendant's engines or appliances caused the burning of plaintiff's and intervenor's property, and that the employés of defendant saw the fire after its starting; and if you believe from the evidence that they could have extinguished it by diligence; and if you believe that they were guilty of negligence in not extinguishing it,—then such negligence of the employés would be imputed to the defendant company, and make it liable for damages."

It is contended that it was error to give this charge, and the proposition is made that "The company was not liable because of any negligence on the part of its employés in extinguishing the fire, or in failing to do so, unless it was an undisputed fact that the fire was started through negligence on the part of the defendant company."

If the fire had its origin in the negligence of appellant, it would be liable whether its servants make effort, however strenuous, afterwards to extinguish it.

There is some conflict of authority as to whether it is negligence in a railway company to omit the extinguishment of a fire, having its origin in the careful prosecution of its business.

In *Kenney v. Hannibal Railroad Company*, 63 Mo. 99, it was held that, if a railway company's servants saw a fire, and by the exercise of reasonable care might have extinguished it, their failure to do so would render the company liable, notwithstanding the fire had its origin in the careful management of the business of the company. The same case again coming before that court, the former decision was pronounced *obiter*, and a different rule established. 70 Mo. 256.

In disposing of the question the court said: "We hold that the company is not liable because its servants neglected to extinguish the fire when they discovered it on the track. It was their duty as citizens to prevent the spread of the fire, and by their conduct on the occasion, as testified to by one of their number, they manifested a cruel and brutal indifference to the destruction of a neighbor's property; but it was not in the line of their employment, and was no more their duty to extinguish the fire than that of any other person who saw it . . . If not liable for the origin of the fire, he (the master) cannot be held so on account of the neglect of a social duty by persons in his employment, in a business not connected with the origin of the fire, or imposing any duty to extinguish it in addition to that which every citizen owes to society."

It may be that the inquiry in such a case is not, what was within the line of the servant's employment, but what was within the line of the master's duty, and what was it under obligation to make within the line of the servant's employment. To assume that a railway company is not liable for the origin of a fire caused by sparks from a locomotive having the most approved appliances to prevent the escape of fire, controlled by most careful and competent men, and on a right of way free from combustible material, is to assume, as matter of law, that negligence cannot coexist with those things; that a railway company that has in so far used due care has discharged its whole duty, and is under no further obligation to do more for the protection of property, along its line or

near to it, from fire that may escape from its engines, although this might be done by the exercise of but little more care.

The Court of Appeals of Maryland seems to have held that the exercise of the care specified in the two charges first above quoted would absolutely relieve a railway company from liability for an injury resulting from the escape of fire from an engine, and that no obligation whatever rested upon a railway company to extinguish a fire caused by the escape of sparks from a locomotive operated under such conditions. *Baltimore & O. R. Co.* v. *Shipley*, 39 Md. 254.

The cases to which we have referred were probably cases in which the owners of the land on which the fire occurred had been compensated for the right of way through condemnation proceedings or otherwise, into which had entered the item of increased risk of fire from the construction and operation of the railroad in a careful manner.

In some of the States this item of increased risk is taken into consideration in ascertaining the damages in condemnation proceedings; and this has sometimes been given as a reason why the exercise of the care stated in the two charges before referred to should relieve a railway company from further duty to provide against injuries resulting from fires caused in the conduct of their business.

It would seem, even in such cases, in the absence of some settled rule of law prescribing the specific acts of care incumbent on a railway company, and with reference to which condemnation or other proceeding to acquire right of way may be presumed to have been conducted, that the true rule would be that a railway company would be liable for an injury from fire resulting from the failure of the company to use due care under the circumstances of a given case; for while "The company has paid for its right of way, and for all the inconveniences which were likely to result from the construction and use of its road, yet this does not cover all sorts of damage . . . and it cannot cover damages arising from negligence; for the law never anticipates this in assessing damages, and it never allows people to purchase a general immunity for carelessness." *Huyett* v. *Phila. & R. R. Co.* 23 Pa. 374.

In some of the States it is held to be the duty of a railway to extinguish a fire, having its origin in the conduct of the company's business, if this can be done by the exercise of ordinary care; and the inquiry as to whether this duty arises in all cases, or only in cases in which the fire originated through the company's negligence, seems not to have been deemed important. *Rolke* v. *Chicago & N. W. R. Co.* 26 Wis. 538; *Erd* v. *Chicago & N. W. R. Co.* 41 Wis. 66; *Bass* v. *Chicago, B. & Q. R. Co.* 28 Ill. 9.

If the injury from fire escaping from a locomotive be unavoidable, the business of operating them being lawful, no damages can be recovered for a loss thus accruing unless this general rule be controlled by some constitutional provision; but if the fire have its origin in the negligence of the company, or without negligence, but in the conduct of its business, then we do not see that it would not be the duty of the company, in the one case as much as in the other, to use proper care to prevent injury to others.

The rule that a railway company owes no duty looking to the safety of property of persons situated on or near to its line, other than to use a high degree of care to prevent the kindling of fires through the escape of fire from their engines, seems to us a narrow rule. The business is conducted for the benefit of the company, and is of great advantage to the public; but there is no hardship in requiring them, not only to use a high degree of care to prevent the kindling of fires, but to extinguish them when they have their origin in the conduct of the company's business, if this can be done by the exercise of ordinary care.

Every person has the right to kindle a fire on his own land, for any lawful purpose, and, if he uses reasonable care to prevent its spreading and doing injury to the property of others, no just cause of complaint can arise; yet, although "The time may be suitable and the manner prudent, if he is guilty of negligence in taking care of it, and it spreads and injures the property of another in consequence of such negligence, he is liable in damages for the injury done. The gist of the action is negligence, and if that exists in either of these particulars, and injury is done in consequence thereof, the liability attaches; and it is immaterial whether the proof establishes gross negligence, or only a want of ordinary care on the part of the defendant. *Bachelder* v. *Heagan*, 18 Maine, 32; *Barnard* v. *Poor*, 21 Pick. 380; *Tourtellot* v. *Rosebrook*, 11 Met. 462;" *Hewey* v. *Nourse*, 54 Maine, 259; *Higgins* v. *Dewey*, 107 Mass. 494.

If one who had kindled a fire on his own land should see it spreading, under the influence of a strong and unexpected wind, without which it would not have spread, should then use every possible effort to extinguish it before it reached the line of his own land, but be unable to do so, could he there cease his efforts, and be heard to say that he had discharged the entire duty cast upon him by law and the clearest principles of right, and was not liable for the destruction of his neighbor's house or barn by the fire of his own kindling, if it appeared that by ordinary diligence he could have arrested the fire soon after it had crossed his own line, and before it seriously injured his neighbor?

We think not; for, having put in motion the destructive element, nothing short of the exercise of due care to prevent injury from it ought to relieve him from responsibility. He could not be heard to say that the limit of his obligation was fixed by and as narrow as the boundaries of his land. A failure under such circumstances to follow the fire across the line between him and his neighbor, and to extinguish it when he could, could not be said to be only the neglect of a social duty.

If this be true as to an individual, who in the exercise of the highest care has kindled a fire on his own land for a lawful purpose, and who has no suspicion that thereby his neighbor's property is imperiled, what must be the rule with a railway company, claiming as all do, that the business it is conducting is necessarily, when conducted with the utmost care, attended with danger to property along its line?

The very ground work on which the two

charges given by the court, and together before quoted, stand, is that, to conduct the business of such companies successfully, they must use fire in engines from which, with the use of the highest care, fire will sometimes escape, and property through this be destroyed.

The cases show that it is not important whether the origin of a fire be in negligence, and that liability exists on the ground that the failure to use proper care to prevent the spread of fire lawfully kindled is negligence as clearly as is an originally unlawful kindling from which injury to another results. The kindling of a fire by the escape of sparks or coals from an engine, when the utmost care has been used to prevent their escape, and to prevent their kindling when they do escape, whether the fire arose on the company's right of way, or on contiguous lands, cannot be more lawful, or the obligation to extinguish less, than it is when done by an individual on his own land; and it cannot be said, without doing violence to reason and right, that as high an obligation does not rest on a railway company to extinguish a fire, when kindled under such circumstances, as rests on the owner of land when fire lawfully kindled by him spreads. The kindling in the one case is absolutely lawful, while in the other it is lawful by permission, if due care be used to control it, on the theory that engines on railways cannot be operated successfully without some danger of scattering fire.

Without entering into any discussion as to the degree of care a railway company should use to extinguish a fire caused by the escape of fire from its engine, we feel constrained to hold that the duty does exist, however careful such companies may be to prevent the escape of fire from their engines, and that the failure to exercise such care as the circumstances of a given case would indicate to a prudent man was proper will give cause of action for an injury resulting.

Some of the courts to whose decisions we have referred have held that specific acts of diligence were or were not required; but we are of the opinion that whether due diligence has been used in a given case is a question of fact to be passed upon by the court or jury trying a cause, when there is evidence on which such an issue fairly arises. We are of opinion, however, looking to the evidence, that the charge would have authorized a verdict in favor of appellees, for the failure of appellant's servants to do what, under the evidence, there is no reason to believe they could have done.

The charge was evidently drawn with reference to the position of employés of appellant to the fire at the time it commenced, and not with reference to the general duty of appellant; and the appellee, with a knowledge of their position, and of the surroundings which tended to spread the fire rapidly, which he obtained from the other testimony, was evidently of opinion that the employés could not have averted the spread of the fire; and such was the general tenor of the testimony. A charge should not be given where there is not sufficient evidence fairly to raise an issue of fact to which it relates; for the giving of a charge, under such circumstances, induces a jury to believe that in the opinion of the court there is such evidence.

It may be that the finding of the jury would have been the same had the charge complained of not been given; but this we cannot know, and because the court gave it, *the judgment will be reversed and the cause remanded.*

Motion for rehearing overruled.

BELL *et al.*, *Appts.*,
v.
INDIAN LIVE STOCK CO.

(....Tex.....)

1. **An exemption of "current wages** for personal service" from garnishment applies to nonresidents of the State as well as to residents.
2. **A balance** of $624.50 due to a man who has been employed for about eighteen months at a salary of $200 per month, and which has been voluntarily left by him in the hands of his employer, is not "current wages," so as to be exempt from garnishment.

(March 19, 1889.)

APPEAL by plaintiffs from a judgment of the District Court of Cooke County in favor of the garnishee in an action against an employé in which the employer was garnished. *Reversed.*

(Commissioners' decision.)

The facts are sufficiently stated in the opinion of the commissioners.

Messrs. **Davis & Garnett** for appellants.

Mr. **C. C. Potter,** for appellee:

The law exempting current wages is not limited to citizens of Texas, but applies alike to all persons within the jurisdiction of our courts.

Const. Texas, art. 16, § 28; Rev. Stat. art. 218; *Cobbs* v. *Coleman*, 14 Tex. 597, 598; *Mineral Point R. Co.* v. *Barron*, 83 Ill. 366; 2 Wade, Attachment, § 373; 14th Amend. Const. U. S.

Wages due an employé for personal labor which accumulate in the hands of an employer are current wages while the relation of employer and employé exists, and as such are not subject to garnishment.

Brown v. *Hebard*, 20 Wis. 326; *Kuntz* v. *Kinney*, 53 Wis. 510; Freeman, Executions, § 234.

Acker, *Ch. J.*, delivered the following opinion:

J. P. Addington was indebted to appellants, for which they brought suit and garnished appellee. The garnishee answered that Addington was in its employ as its manager for the compensation of $200 per month; that he was a nonresident; that there was to his credit on the books of appellee the sum of $624, due to him as current wages for personal service; and that the money was not subject to garnishment under the laws of this State.

Appellants controverted the answer upon the following grounds: (1) that Addington, being a nonresident, was not entitled to the benefits of the laws of this State which exempt from garnishment current wages for personal service; (2) that the $624 in the hands of the garnishee to the credit of Addington were not current

wages for personal service within the meaning of our Constitution and statutes. The trial court held the money exempt, and discharged the garnishee on his answer.

It was proven on the trial that Addington owned $150,000 of the stock of appellee company, which was pledged for its full value.

The two questions involved in the case are properly presented here for our determination:

1. Are current wages due to a nonresident for personal service subject to garnishment in this State?

2. Is the sum of $624 due by a corporation to one of its stockholders, on a contract to pay the stockholder $200 per month for his services as manager of the company, "current wages for personal service" within the meaning of the Constitution and laws of this State?

The Constitution (art. 16, § 28) provides that "No current wages for personal service shall ever be subject to garnishment." Substantially the same language is found in article 218 of our Revised Statutes, and it is there provided that "Where it appears upon the trial that the garnishee is indebted to the defendant for such current wages, the garnishee shall nevertheless be discharged as to such indebtedness."

Clause 16, article 2335, Rev. Stat., which article enumerates the articles of personal property exempt from forced sale, is as follows: "(16.) All current wages for personal services."

The foregoing are the only provisions of our laws, organic or statutory, bearing upon the questions in this case. It will be observed that none of these, in terms or by necessary implication, are limited in their application to citizens or residents of this State. Such provisions affect the remedy merely, and it seems reasonable to us that the law of the forum should apply in determining the rights of the parties. We are to interpret these provisions of our laws in accordance with the obvious intent of those who enacted them, and that intent is to be arrived at by giving to the language employed its ordinary significance.

We are to declare what the law is, without expanding or contracting its purview. The Constitution declares that no current wages for personal service shall ever be subject to garnishment, and the statute reiterates this declaration.

We discover nothing in the context of the language used to support the view contended for by appellants, that these provisions of our laws were designed for the benefit and protection of residents of this State only. It seems to us that the context and the language used tend very strongly to support the converse of the proposition insisted upon by appellants.

Article 183 of the Revised Statutes authorizes the issuance of the writ of garnishment when an original attachment has been sued out, and article 152 authorizes the writ of attachment to issue upon the ground that the defendant is a nonresident.

The Exemption Laws in force prior to the adoption of the present Constitution expressly limited their application to citizens or residents of this State. The convention that framed the present Constitution, and the Legislature that enacted the present Exemption Laws, must have had some purpose in omitting the limitation contained in the previous laws, and we are unable to conceive any reason for the change other than the design that the benefits of these laws should inure to nonresidents as well as to the citizens of our State.

We do not consider it necessary to discuss the effect which the adoption of the 14th Amendment to the Constitution of the United States had with reference to state statutes discriminating in favor of its own citizens and against citizens of other States. The laws of several of the American States contain provisions similar in some respects to these provisions of our laws. In the absence of adjudications by our own courts, we look for authority to the decisions of those States where like questions have been determined.

In the case of *Mineral Point Railroad Company* v. *Barron*, 83 Ill. 366, the defendant in the original action, whose wages were garnished in the State of Illinois, was a resident of the State of Wisconsin, and claimed the benefits of the following statute: "The wages and services of a defendant, being the head of a family and residing with the same, to an amount not exceeding $25, shall be exempt from garnishment." It was held that the nonresident was entitled to the exemption.

In the case of *Lowe* v. *Stringham*, 14 Wis. 225, the debtor being a nonresident, temporarily in that State, in delivering the opinion of the court *Judge* Paine uses the following language:

"We think also there was no error in the instructions of the circuit court in respect to the plaintiff's right to the benefit of the Exemption Law. The statute makes no discrimination between temporary and permanent residents, nor does it purport to confine its privileges to residents at all. It exempts certain articles of the debtor and his family. And we think it would be entirely inconsistent with the beneficent intentions of the statute, as well as with the dignity of a sovereign State, to say that the temporary sojourner, or even the stranger within our gates, was not entitled to its protection."

In the case of *Sproul* v. *McCoy*, 26 Ohio St. 577, the court says: "The exemptions from execution or sale allowed to 'every person who has a family,' under the provisions of the Act of April 16, 1873, may be claimed by any debtor against whom an action is prosecuted in the courts of this State, whether such debtor be or be not a resident of this State."

In some of the States the benefits of the statutes exempting personal property and wages from liability to seizure for payment of debts are expressly limited to residents of the respective States, and the decisions made under such statutes of course conform to them.

The statute under which the decision in *Lowe* v. *Stringham*, 14 Wis. 225, *supra*, was rendered was amended in 1861 so as to limit the benefits of the statute to "married persons, or persons who have to provide for the entire support of a family, in the State of Wisconsin."

The case of *Commercial National Bank* v. *Chicago Railway Company*, 45 Wis. 172, cited by appellants, was decided under this amended statute.

Our attention has been called to but one case in which it seems to have been held, in the ab-

sence of statutory limitation, that the exemption of personal property does not apply in favor of nonresidents of the State where the property is sought to be subjected, and that is the case of *Hawkins* v. *Pearce*, 11 Hump. 45 (decided in 1850). The opinion does not recite the statute under which the decision was made, but we infer from the argument used in the opinion that the statute contained no limitations, but, like the provisions of our laws, granted the exemption in general terms to all persons. That decision was placed principally upon the ground that such statutes are designed to protect the State against pauperism, and to prevent indigent persons from being deprived of all means of subsistence whereby they would become charges upon the poor fund.

We consider the reasoning in that opinion unsound and somewhat fallacious. We cannot consent to attribute the enactment of such laws to a purpose so sordid and inhuman. We prefer to attribute such legislation to the more humane and philanthropic purpose of protecting to the employé his current earnings to meet and defray the current expenses of his living, that he may enjoy a credit to the extent of his current earnings, and not be forced into a condition of abject dependence and want.

We are constrained to hold, with the weight of authority, as well as the established rules of construction, that current wages due to a nonresident for personal service are not subject to garnishment in this State.

We have had more than ordinary difficulty in our investigation and decision of the second question involved in this case. In most of the States where laws of like character have been enacted, the exemption is given for a stated amount of "wages," or for the "earnings" for a given length of time preceding the service of the writ. In all of the States, we believe, the protected wages or earnings must be the proceeds of or compensation for personal service. With us, the protected fund must be not only "wages for personal service," but must be also "current wages." It is evident that it was not intended that all wages for personal service should be exempt, but only such as are current.

Webster defines "current" to mean "running or moving rapidly; now passing or present in its progress, as, a current month or year."

Bouvier says the word "current" is "a term used to express present time, current month, etc." "Wages" are the compensation given to a hired person for service, and the same is true of "salary."

The words seem to be synonymous, convertible terms, though we believe that use and general acceptation have given to the word "salary" a significance somewhat different from the word "wages" in this: that the former is understood to relate to position or office, to be the compensation given for official or other service, as distinguished from "wages," the compensation for labor.

It is of little or no importance, however, in determining the question now being discussed, whether the distinction here suggested be recognized or not. We have to deal with the phrase "current wages," without other limitation as to time or amount, and we think the exemption would apply without regard to whether the compensation be called "wages" or "salary."

Counsel for appellants argue with much force and persuasive earnestness that this exemption was provided for the benefit of such employés as require their wages as they are earned to defray the expenses of their living, and not for the protection of persons who receive for their services $200 per month, and whose circumstances are such that they are able to leave their earnings in the hands of their employer until the wages for more than three months have accumulated to their credit.

It appears that Addington was employed by the garnishee "at a monthly salary of $200 per month;" that he had been so employed for about eighteen months, and had drawn on his employer for money as he needed it; that on the first day of April, 1886, he requested to know how his wages account stood, and there was found to be due him the sum of $624.50.

While we think it clear that the money in the hands of the garnishee was due to Addington as wages for personal service within the meaning of that phrase as used in our Constitution and statutes, we are also of opinion that the money had ceased to be current wages, and that it was subject to the writ of garnishment. The wages were payable monthly and were exempt for the month current at the time of the service of the writ, but the exemption ceased to apply when the wages became past due.

Cases may arise, however, in which a party would not be entitled to the benefit of the writ of garnishment sued out after the wages became due.

It appears that the wages were voluntarily left by Addington in the hands of the garnishee, and were past due. As there is no controversy about the facts, we are of opinion that the judgment of the court below should be reversed, and judgment rendered here in favor of appellants for $624.50, with interest from May 1, 1886, the date of the judgment below.

Stayton, *Ch. J.:*

Report of Commission of Appeals examined, their opinion adopted, *judgment reversed, and rendered for appellants.*

TEXAS COURT OF APPEALS.

Alexander ANDERSON *et al.*, Impleaded, etc., *Appts.*,
v.
STATE OF TEXAS.

(....Tex. App.....)

1. **Brakemen on a railway train are not guilty of negligent homicide** "in the per-

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NOTE.—*Criminal negligence defined.*

Criminal negligence is the omission to do something which a reasonable and prudent man would do, or the doing of something which such a man would not do under the circumstances surrounding each particular case, or it is the want of such care as a man of ordinary prudence would use under similar circumstances. People v. Buddensieck, 24 N. Y. Week. Dig. 82; 8 Crim. Law Mag. p. 350.

It is an unlawful act done carelessly or negli-

formance of a lawful act," under Texas Penal Code, art. 579, if, while on the engine in motion they omit to stop it or to signal the engineer to stop it after seeing a child on the track, and in consequence of their failure to act the child is killed by the train. It is the exclusive duty of the engineer and fireman to look out for obstructions and give signals of danger, and the brakemen have no legal duty in the premises.

2. **A person who is in fact a principal** in an offense, and is in reality, but under another name, charged as such in the indictment, is incompetent to testify in behalf of the other defendants, under Texas Code Criminal Procedure, art. 731, forbidding principals, accomplices, etc., to testify for each other.

(February 2, 1889.)

APPEAL by defendants Anderson and Woods, from a judgment of the District Court of Polk County convicting them upon an indictment for negligent homicide. *Reversed.*

This was an indictment under Texas Penal Code, art. 579, which provides that "If any person in the performance of a lawful act shall, by negligence and carelessness, cause the death of another, he is guilty of negligent homicide of the first degree." It was against O. Torgerson, engineer, J. A. DeCogne, fireman, and Alexander Anderson and Joe Woods, brakemen on an engine belonging to the Houston East & West Texas Railroad, and charged them with negligent homicide in the first degree.

The indictment alleged, in substance, that on the 7th day of February, 1887, while engaged as workmen in running said engine and tender on said railroad said Torgerson, DeCogne, Anderson and Woods, did back said engine and tender negligently and carelessly, without ringing the bell or blowing the whistle, and without giving any warning, and without first looking to see if any person was likely to be injured thereby; and by said negligence, and carelessness one Sing Morgan was struck by said engine and tender, so run, and the death of said Morgan was caused by said negligence and carelessness—the said Morgan being at the time in a position to be struck by said engine and tender, which fact would have been known by said Torgerson, DeCogne, Anderson and Woods if they had used that degree of care and caution which men of ordinary prudence would use under like circumstances, there being then and there an apparent danger of causing the death of said Morgan and of other persons passing on said railroad and highway.

Torgerson and DeCogne not having been arrested, Anderson and Woods were put on trial July 3, 1888, when they pleaded not guilty, waived a jury and submitted the case to the court.

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gently, or a lawful act done without due caution or circumspection. 1 Whart. Crim. Law, 8th ed. § 125; 1 Bishop, Crim. Law, 6th ed. § 313; Studstill v. State, 7 Ga. 13.

The negligence which will render a person criminally liable for injury caused thereby must be gross negligence. Reg. v. Lowe, 3 Car. & K. 123, 4 Cox, C. C. 449; 9 Crim. Law Mag. p. 155.

Gross carelessness is criminal even if the act done is lawful. Com. v. Rodes, 6 B. Mon. 174; Ann v. State, 11 Humph. 159; U.S. v. Freeman, 4 Mason, 505.

General Statutes, chap. 264, § 14, does not make a distinction between negligence and gross negligence, and does not require less than reasonable care in railroad proprietors, nor more than reasonable care in their servants. State v. Boston & M. R. Co. 58 N. H. 408; 4 Crim. Law Mag. p. 457.

An act of omission, as well as an act of commission, may be criminal. U. S. v. Farnham, 2 Blatchf. 528; U. S. v. Taylor, 5 McLean, 242.

If one takes upon himself the discharge of a duty and performs it in an indifferent manner, or neglects to fulfill the duty, and thereby death or other injury results to anyone, such a one is criminally liable. U. S. v. Thomson, 12 Fed. Rep. 245; 9 Crim. Law Mag. 149.

If the occupation or employment requires the exercise of skill, the failure to exert the needed skill from want of ability or from inattention, is gross negligence. Au v. N. Y. L. E. & W. R. Co. 29 Fed. Rep. 73.

Negligent omission is the basis of a criminal action, when it constitutes a defect in the discharge of a duty especially imposed upon a person. U. S. v. Knowles, 4 Sawy. 517; State v. Berkshire, 2 Ind. 207; State v. Bailey, 21 N. H. 185.

Negligence supplies the place of criminal intent.

Carelessness within certain limits supplies the place of direct criminal intent. Sturges v. Maitland, Anth. N. P. 208.

To perform an act carelessly or negligently, or even recklessly, where a sufficient injury is inflicted, subjects the one so performing it to a criminal liability. In such an instance the one perpetrating the act is held to have intended the result of this act, and he cannot plead the absence of an intention to do harm. Roscoe, Crim. Ev. 286, 711, 713, 717; Elliston v. State, 10 Tex. App. 361; Aiken v. State, 10 Tex. App. 610; 9 Crim. Law Mag. p. 148.

Where the gist of the case is negligence or carelessness, intent will be presumed. Stein v. State, 37 Ala. 123.

Negligence of servant not imputable to master.

A person cannot be deemed to have committed a crime by reason of the negligence of his servant or agent. Barnes v. State, 19 Conn. 398; Hipp v. State, 5 Blackf. 149; Anderson v. State, 39 Ind. 553; Com. v. Nichols, 10 Met. 259; Com. v. Morgan, 107 Mass. 199; State v. Privett, 4 Jones, L. (N. C.) 100; State v. Dawson, 2 Bay, 360.

Homicide caused by carelessness and negligence.

Everyone placed in a situation in which his acts may affect the safety of others must guard against the risk to them arising from his acts, and a failure to do this, resulting in the death of another, is homicide. *Re* Paton, 2 Broun, Justic. 525; *Re* Rowbotham, 2 Irvine, Justic. 89.

Thus, if a man carelessly, or negligently, or recklessly discharge a loaded gun into a crowd, he is liable for murder or manslaughter if the shot produces the death of anyone. Aiken v. State, 10 Tex. App. 610; Elliston v. State, 10 Tex. App. 361; Lopez v. State, 2 Tex. App. 204; State v. Gilman, 69 Maine, 163, 31 Am. Rep. 257; Com. v. Adams, 114 Mass. 323; Washington v. State, 60 Ala. 10; Mitchell v. State, 60 Ala. 26; 9 Crim. Law Mag. p. 148.

If the negligence was such that it was willful or wicked, the crime will be murder. 4 Bl. Com. 192.

But if it did not amount to murder, but was gross negligence or ordinary negligence (where the lack of it renders the act criminal), the crime will be manslaughter. Reg. v. Swindall, 2 Car. & K. 230; Reg. v. Finney, 12 Cox, C. C. 625; Reg. v. Longbottom, 3 Cox, C. Ct. 439; Rex v. Walker, 1 Car. & P. 320.

A man may be guilty of manslaughter through his mere carelessness. People v. Keefer, 18 Cal. 636.

Judgment was rendered, finding appellants guilty of negligent homicide of the first degree and assessing their punishment at a fine of $250 each. Motion for new trial was made and overruled, and the case was brought to this court on appeal.

Under the Code of Criminal Procedure, article 731, which forbids persons charged as principals, accomplices, etc., *to testify for each* other, the court refused to permit one Edward J. Ducoing to testify on behalf of defendants, and this action was, *inter alia*, assigned for error.

Further facts appear in the opinion.

Mr. **R. S. Lovett,** for appellants:

The name of the witness "Edward J. Ducoing," is not *idem sonans* with that charged in the indictment—"J. A. DeCogne"—and he was competent and his testimony material.

Gorman v. *State*, 42 Tex. 221; *Shields* v. *Hunt*, 45 Tex. 424; *Faver* v. *Robinson*, 46 Tex. 204; *McDevro* v. *State*, 23 Tex. App. 429; *Neiderluck* v. *State*, 21 Tex. App. 320.

It was not the duty of these defendants or either of them to look out in the direction in which the engine was moving. It was not the duty nor the privilege of either of these defendants to ring the bell or blow the whistle on said engine, or to give any other danger signal; *there is no evidence that either of them* were in any manner negligent or that the death of Morgan resulted from any act or omission of both or either of them; and they are not guilty.

2 Wharton, Crim. Law, 7th ed. §§ 1010, 1011; *Reg.* v. *Gray*, 4 Fost. & F. 1098; *Reg.* v. *Trainer*, 4 Fost. & F. 105.

Mr. **W. L. Davidson,** *Asst. Atty-Gen.*, for the State.

Willson, *J.*, delivered the opinion of the court:

This appeal is from a conviction of negligent homicide of the first degree. The indictment charges the appellants and two other persons jointly with the commission of the offense.

Appellants only were put upon trial, and the punishment assessed was a fine of $250 against *each of them.*

We think the indictment is a good one. It follows the statute defining the offense, and alleges all the elements of said offense, setting forth specifically the acts and omissions of the defendants, alleging that said acts and omissions caused the death of the deceased. Penal Code, art. 579.

It was not error to refuse to permit Ducoing to testify in behalf of defendants. It was made to appear by the State that said Ducoing was one of the persons charged jointly with the defendants with the same homicide, but charged under a different name, the true name of said Ducoing having been mistaken by the grand jury presenting the indictment.

Said Ducoing was an incompetent witness in behalf of defendants, he being in fact a principal in the offense, and in reality, but under another name, charged as such in the indictment. Penal Code, art. 731.

As we view the evidence and the law applicable thereto, this conviction is not warranted.

These appellants were brakemen. They had no control whatever of said engine and tender. They were riding upon the same for the purpose merely of performing their specific duties as brakemen, which duties had no connection with, or relation to, the homicide.

It was the exclusive duty of the engineer

If a person professes to deal with the life or health of another and causes death through his gross want of skill and attention, he will be guilty of manslaughter (Com. v. Thompson, 6 Mass. 134; Fairlee v. People, 11 Ill. 1; Rice v. State, 8 Mo. 561); as the giving of a wrong drug. Y. B. 3 Edw. III. 163; Knight's Case, 1 Lewin, Cr. Cas. 168; 4 Bl. Com. 14; 1 Hale, P. C. 429; 1 Allison, C. L. 116.

Thus, when one whose duty it was to keep and adjust the switches of a railroad so that passenger trains would keep on the main track at a certain point, failed to perform his duty, which resulted in the death of a passenger, it was held that the switch tender was guilty of manslaughter. State v. O'Brien, 32 N. J. L. 169.

The officer of a steamboat through whose negligence an explosion takes place, which destroys life, is guilty of manslaughter. U. S. v. Taylor, 5 McLean, 242.

Indictment lies for.

Every negligent omission of a legal duty, whereby death ensues, is indictable either as murder or manslaughter. U. S. v. Warner, 4 McLean, 463; U. S. v. Freeman, 4 Mason, 505; State v. O'Brien, 32 N. J. L. 169; Oliver v. State, 17 Ala. 587; People v. Enoch, 13 Wend. 159; State v. Hoover, 4 Dev. & B. 365; State v. Williams, 12 Ired. L. 172; Com. v. Keeper of Prison, 2 Ashm. 227; Wilson v. Com. 10 Serg. & R. 375.

Where the employé of a corporation is indicted for manslaughter by culpable negligence causing death, it is no excuse that his negligence arose from his obedience to the instructions of his official superior, which were in violation of the rules of the corporation. People v. Melius, 1 N. Y. Cr. Rep. 39; 5 Crim. Law Mag. p. 281.

Such instruction cannot relieve him from the consequences of his nonperformance of his legal duty. People v. Melius, 1 N. Y. Cr. Rep. 39.

Statutory remedy against corporation.

Any incorporation may be legally subjected to proceedings by indictment and fine in case of loss of life by reason of the negligence of the proprietors or their servants. Boston, C. & M. R. Co. v. State, 32 N. H. 215; Reg. v. Birmingham & G. R. Co. 2 Gale & D. 236.

It must be brought against the corporation, and not the individual stockholders. State v. Gilmore, 24 N. H. 461.

The remedy under the statute is limited to cases where the person dies immediately, and is not applicable in any case to the employés of the road. State v. Maine Cent. R. Co. 60 Maine, 490; State v. Grand Trunk R. Co. 61 Maine, 114.

Form of indictment.

So far as the form of the indictment is concerned, it must be governed by the principles of the criminal law. State v. Manchester & L. R. 52 N. H. 528; State v. Wentworth, 37 N. H. 196.

The indictment must give the names of the persons who are to receive the forfeiture. State v. Grand Trunk R. Co. 60 Maine, 145.

It must aver that deceased left an heir or a widow, or both, as the case may be. Com. v. Eastern R. Co. 5 Gray, 473.

It is not necessary in such indictment to state the particular acts of negligence or carelessness, or by what special unfitness of servants the accident occurred. State v. Manchester & L. R. Co. 52 N. H. 528; Com. v. Eastern R. Co. 5 Gray, 473; Com. v. Boston & W. R. Co. 11 Cush. 512.

and fireman to operate said engine carefully; to look out for obstructions upon the track; to give signals of danger when necessary. With these duties appellants were in no way concerned. They had no *right to start* the engine in motion, to blow the whistle, to ring the bell, *to stop* the engine, or otherwise to control its movements. They performed no act which connected them with the death of the child.

It is only for a supposed omission of duty on their part that they have been convicted of negligent homicide. They omitted to look out for obstructions on the track. They might have seen the child in time to save its life, but they omitted to see him. Or if they did see him they omitted to stop the train or to signal the engineer to stop it.

Were these omissions criminal within the meaning of the statute defining negligent homicide?

We think not; because to constitute criminal negligence or carelessness there must be a violation of some duty imposed by law, directly or impliedly, and with which duty the defendant is especially charged.

Mr. Wharton says: "Omissions are not the basis of penal action, unless they constitute a defect in the discharge of a responsibility with which the defendant is especially invested." Whart. Homicide, § 82.

Again, this author says in *treating of* omissions by those charged with machinery: "The responsibility of the defendant which he thus fails to discharge must be exclusive and peremptory. A stranger who sees that unless a railway switch is turned, or the car stopped, an accident may ensue, is not indictable for not turning the switch or stopping the car. The reason for this is obvious.

"To coerce by criminal prosecution every person to supervise all other persons and things would destroy that division of labor and responsibility by which alone business can be safely conducted, and would establish an industrial communism by which private enterprise and private caution would be extinguished. Nothing can be effectually guarded when *everything* is to be guarded by everybody. No machinery could be properly worked if every passer-by were compelled by the terror of a criminal prosecution to rush in and adjust anything that might appear to him to be wrong, or which was *wrong, no* matter how it might happen to appear.

"By this wild and irresponsible interference even the simplest forms of machinery would be speedily destroyed." *Id.* § 80.

And, upon the subject of omission to give warning of danger, the same author says: "The test here is, Is such notice part of an express duty with which defendant is exclusively charged? If so, he is responsible for injury which is the regular and natural result of his omission; but if not so bound, he is not so responsible." *Id.* § 11.

These rules of the common law are not inconsistent with our statute, but are in harmony therewith, as we construe it. As we understand both the common law and the statute, there can be no criminal negligence or carelessness by omission to act unless it was the special duty of the party to perform *the act omitted*. Negligence or carelessness by omission presupposes duty to perform the act omitted, and cannot in law be imputed except upon the predicate of duty.

In this case the evidence is uncontradicted and clear that appellants did not do any act or omit any legal duty with *reference to* the deceased child. In law they are no more responsible for the death of the child than any other person who was present and witnessed the accident. They were strangers to the transaction in contemplation of the law, because they were not charged with any duty with respect to it.

We are of the opinion that the judgment of conviction is contrary to the law and the evidence, and, therefore, *said judgment is reversed, and cause remanded.*

NORTH CAROLINA SUPREME COURT.

John FARRELL *et al.*,
v.
The RICHMOND & DANVILLE R. CO.,
Appt.

(.....N. C.....)

1. **Under the present practice in North Carolina** when specific issues are submitted to the jury which present questions of fact or mixed questions of law and fact, it is for the court to say upon their findings whether or not the plaintiff is entitled to recover; and an instruction that if they should believe a *certain state* of facts the plaintiff is or is not entitled to recover is erroneous.

2. **The right of stoppage in transitu** is not defeated by the fact that the consignees were in-

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NOTE.—*Right of stoppage in transitu.*

The delivery by the vendor of goods sold to a carrier who is to carry on account of the vendee, is a constructive delivery to the vendee; but the vendor has a right, if unpaid, and the vendee be insolvent, to retake the *goods* before they are actually delivered to the vendee; the vendor is entitled, so long as the goods are *in transitu*, and have not reached their final destination, or come into the manual possession of the purchaser, to retake them and put himself in the same situation as if he had never parted with the actual possession of them. Gibson v. Carruthers, 8 Mees. & W. 338-341.

It was held in Rogers v. Thomas, 20 Conn. 54, that the insolvency or bankruptcy must occur between the dates of the sale and the stoppage; but it has been said in Ohio that the vendor may stop the goods upon discovering that the purchaser was insolvent at the date of the sale. Benedict v. Schaettle, 12 Ohio St. 515; and see Naylor v. Dennie, 8 Pick, 198; Reynolds v. Boston & M. R. Co. 43 N. H. 589; Conyers v. Ennis, 2 Mason, 236; Buckley v. Furniss,

3 L. R. A.

See also 4 L. R. A. 732; 33 L. R. A. 351.

solvent at the time of the sale of the property, if that fact was not known to the seller.

3. **Until the actual or constructive delivery** to the consignee of property in transit, the right of stoppage *in transitu continues*, unless there is some agreement or usage to the contrary.

4. **An attachment** or execution against the vendee does not preclude the exercise of the right of stoppage *in transitu*.

5. **A stipulation in a bill of lading** that the carrier shall have a lien upon the goods shipped for all arrearages of freight and charges due by the consignees on other goods is subordinate to the right of stoppage *in transitu*.

6. **Where a consignee of a safe** in a carrier's warehouse, placing his hand upon it, says to the carrier's agent, "I place this safe *in your hands* as security for what I owe," the carrier already having a lien upon it for the freight on that as well as on other goods, and there being no new consideration for the proposition, and the agent makes no response, even if it is conceded that his silence constitutes an acceptance of the offer, the transaction does not amount to such a delivery of the goods as will defeat the right of stoppage *in transitu*.

(March 18, 1889.)

APPEAL by defendant, from a judgment of the Superior Court of Dunham County, in favor of plaintiffs in an action to recover damages for an alleged breach of contract to carry and deliver a certain safe. *Affirmed.*

Statement by **Shepherd, J.:**

This was a civil action tried before Merrimon, *J.*, and a jury, at June Term, 1888, of the Superior Court, of Durham County.

The plaintiffs alleged, in substance, that they were residents of Philadelphia, Pa.; that they sold a safe on credit to Robertson & Rankin, of Durham, N. C.; that they delivered it to the defendant company for transportation to Durham in said State, directed to said Robertson & Rankin; that after the shipment, and before its delivery to the purchasers, the plaintiffs learned that the purchasers were insolvent, and they notified the defendant not to deliver the safe to said purchasers, or any other persons but the plaintiffs, at the same time tendering to defendant the freight and all other charges on the safe, and demanding the delivery thereof; that defendant refused to surrender said safe, but retains the same wrongfully, etc.

As there was no objection to the issues, only so much of the answer of the defendant as relates to them and the exceptions will be stated.

The answer denied that defendant wrongfully withheld the said safe from the plaintiffs, and alleged that Robertson & Rankin being indebted to the defendant in the sum of $130, defendant sued out a warrant of attachment against the said property before defendant had any notice of the plaintiffs' claim on said safe, and before any demand made by them for the same, and that under the judgment and execution in said proceeding defendant purchased said safe.

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15 Wend. 137; 17 Wend. 504; *Biggs v. Barry*, 2 Curtis, 259; Stevens v. Weeeler, 27 Barb. 663; *Thompson v.* Thompson, 4 Cush. 127, 134; *Lee v.* Kilburn, 3 Gray, 594, 600; Herrick v. Borst, 4 Hill, 650; Chandler v. *Fulton*, 10 Tex. 2; Blum v. Marks, 21 La. Ann. 268.

The basis of the right of *stoppage in transitu* is the insolvency of the vendee, without reference to whether the contract of sale was procured by fraud, and the right to rescind, resulting from fraud, may be waived without affecting the right resulting from insolvency. Allyn v. Willis, 65 Tex. 65.

Who may exercise the right.

The right is strictly confined to the unpaid vendor of goods sold. *Sweet v. Pym*, 1 East, 4; Jenkyns v. Usborne, 7 Man. & Gr. 678.

The right of stoppage *in transitu* is nothing more than an extension of the vendor's common-law lien upon goods for his price, and has no effect of itself upon the contract. *Rowley v. Bigelow*, 12 Pick. 313; Rogers v. Thomas, 20 Conn. 53; *Atkins v.* Colby, 20 N.H. 154; Grout v. Hill, 4 Gray, 361, 366; Jordan v. James, 5 Ohio, 98; 2 Kent, Com. 541; Chandler v. *Fulton*, 10 Tex. 2; Newhall v. Vargas, 13 Maine, 93, 104, 15 Maine, 315; Hunn v. Bowne, 2 Caines, 38, 42.

The stoppage may be effected either by the vendor himself or his authorized agent, but not by a person who has no authority from the vendor to stop the goods; and a subsequent ratification by the vendor of an unauthorized stoppage is not equivalent to a precedent authority, and will not cure the defect of want of authority. Bird v. Brown, 4 Exch. 796; Hutchings v. Nunes, 1 Moore, P. C. N. S. 243.

This right of the vendor is not defeated or destroyed by part payment of the purchase money, or by the acceptance of a bill of exchange or promissory note for part of the price. Hodgson v. Loy, 7 T. R. 440; Feise v. Wray, 3 East, 93; New v. Swain, 1 Danson & L. Merc. Cas. 193; Edwards v. Brewer, 2 Mees. & W. 375; 2 Addison, Cont. p. 188.

Goods, when in transitu.

When the carrier takes possession from the seller as carrier, the transit begins; when he devests himself of possession in such capacity to the buyer, the transit ends (Hall v. Dimond, 1 New Eng. Rep. 848, 63 N. H. 565); and the stoppage by the seller, to be effective, must occur between these two points. Walsh v. Blakely, 6 Mont. 194.

They are still *in transitu* although lying in a warehouse to which they have been sent by the vendor on the purchaser's order. Powell v. McKechnie, 3 Dak. 319.

Where there was no action by the seller except, on being informed that the goods were in the warehouse subject to his order, he wrote a letter for the return of the goods, which was never received, there was no stoppage *in transitu*. Millard v. Webster, 3 New Eng. Rep. 542, 54 Conn. 415.

Priority of right over claims of creditors.

The fact that creditors of a vendee have attached the goods does not defeat the right of the vendor to repossess himself of the goods by stoppage *in transitu*. Allyn v. Willis, 65 Tex. 65.

The bringing of suit and levy of attachment on the goods to secure the purchase money does not estop the vendor from asserting the right of stoppage *in transitu*; both remedies recognize the title of the vendee. Ibid.

Effect of stoppage.

Stoppage *in transitu* merely secures the possession of goods to the vendor, so as to enable him to exercise his right as unpaid vendor, and does not rescind the sale. Allyn v. Willis, 65 Tex. 65.

Change of character to that of agent to keep goods for buyer is not inconsistent with right to retain goods for freight. Hall v. Dimond, 1 New Eng. Rep. 848, 64 N. H. 565.

3 L. R. A.

See also 48 L. R. A. 50.

Defendant also alleged that, after the safe was received at its warehouse in Durham, it was delivered to Robertson & Rankin, and by them delivered to John A. Holt, agent of defendant at Durham, to be held by him as security for certain indebtedness then due and owing to the defendant by the said Robertson & Rankin.

The following issues were submitted to the jury: "(1) Did the defendant deliver the safe to Robertson & Rankin? A. No. (2) If it was delivered, did the plaintiffs demand possession before it was delivered, and tender freight and charges, as alleged in the complaint? A. Yes. (3) What damage, if any, have plaintiffs sustained? A. $100, with interest from September 10, 1885."

The plaintiffs introduced the deposition of Jordan Matthews, as follows:

"I am a member of the firm of Farrell & Co. The other members of the firm are John Farrell and George L. Remington. The business of the firm is manufacturing and selling fireproof and burglar-proof safes. Our agent in May, 1885, for the State of North Carolina, was E. F. Hall, of Greensboro, N. C. Through him we sold a No. 5 Champion safe at $100, at Philadelphia, to the firm of Robertson & Rankin, of Durham, N. C., upon an order dated May 21, 1885, signed by Robertson & Rankin. [Witness produces the order and identifies it.] By the term 'at Philadelphia,' which I have just used, I mean that we deliver the safe free on board at Philadelphia, and the purchaser pays the freight. [We delivered the safe to the steamship company named in the order, only in the capacity of a common carrier. When the safe was shipped we believed Robertson & Rankin to be solvent; otherwise we would not have shipped it.] I did not personally stop the delivery of the safe. [That I believe was done by our agent, Mr. Hall. It was within the scope of the authority given by us to the said agent to stop the delivery of any safe shipped to any person, upon the discovery that the vendee was insolvent.] Robertson & Rankin have never paid us a cent for this safe. [We have taken no security for the payment of the safe, except the printed clause in the order reserving the title to us until the safe should be paid for.]"

The defendant objected to that portion of the foregoing testimony embraced within brackets. The court overruled the objections, and permitted the entire deposition to be read, and the defendant excepted.

No point was made as to the right of the defendant to object, it being admitted that by an agreement made when the deposition was opened the defendant had the right to make the objections on the trial.

EXHIBIT B.

THE ASSOCIATED RAILWAYS OF VIRGINIA AND THE CAROLINAS—PIEDMONT AIR LINE. BILL OF LADING.

Philadelphia, 6-14, 1885.

Received by Philadelphia and Richmond S. S. Line (The Clyde S. S. Co.), of Farrell & Co., under the contract hereinafter contained, the property mentioned below, marked and numbered as per margin, in apparent good order and condition (contents and value unknown), viz.:

Marks and numbers: One iron safe, 1184. Shippers' weight.

* * * * * * *

The several carriers shall have a lien upon the goods specified in this bill of lading for all arrearages of freight and charges due by the same owners or consignees on other goods.

The above extracts are all of Exhibit B which is necessary to an understanding of this case.

W. W. Fuller, witness for plaintiffs, testified that, a few days before the sale of the safe, E. F. Hall, plaintiffs' agent, and W. W. Fuller, plaintiffs' attorney, went to the depot of the Richmond & Danville Railroad Company, in Durham. Saw the safe in the warehouse, covered with bagging, marked to Robertson & Rankin, from Farrell & Co., and demanded the delivery to Hall and Fuller of the safe, at the time asking the amount of freight and charges thereon; which amount not being given, they tendered to Holt, agent of defendant, a sum of money not less than $10, and offered to pay said freight and charges. Holt refused to receive the money or to deliver the safe. Plaintiffs rested, it being agreed that they might later give evidence of the insolvency of vendees of the safe at time of demand by Hall and Fuller.

John A. Holt, witness for defendant, testified that he was agent at Durham station for the defendant company, and was such agent at the time the safe was received at the warehouse. Robertson & Rankin were and had been receiving a lot of lumber, the freight on which amounted to considerably over $100, which was then owing by them to defendant company.

Witness had been sending to them, demanding payment of these freight bills, and had seen them in person about it. "That he went down to the side track we term 'lumber track,' and found they had been taking off lumber after having been notified not to do so. That he had sent for Robertson, whom he knew to be the one attending to the firm's business. He came down to the warehouse, and witness met him at the upper end of the warehouse, where safe was standing. Asked him if I had not notified him time and again not to remove any lumber without first paying the freight. He said I had. I told him he had placed himself in a very bad situation, and that I was compelled to take steps against him. We were then standing beside the safe, both of us leaning upon it. He said to Holt: 'Here is a safe I paid $100 for in Philadelphia. It is true I have disappointed you in my promises about coming to pay you those freight bills, but I have been disappointed myself in not receiving money.' He mentioned about having a large amount of money at several places, and said, pointing in the direction of Webb & Kramer's warehouse, that he was having an office put up there, and it would be completed the next day or the day after. He then said, placing his hands on the safe: 'I place this safe in your hands as security for what I owe, until the next day or the day after, when my office will be completed, and I will come and pay all freight bills, and remove the remnant of lumber and the safe,

and take it over to my office.' I held the safe until some little time after that, when I got news that he had run away. This was before the time Mr. Fuller came after it—some weeks before, may have been a month or two months—considerable time. Don't remember exactly what time it was."

Cross examination. "The safe came about the 9th or 10th of June; had been here three or four or five weeks before my conversation with Robertson. The defendant sold the safe on the 10th of same month—either August or September. The place where Robertson came at the warehouse was the same place where the safe was first placed. Robertson & Rankin were notoriously insolvent when Mr. Fuller came and made demand, and had been so long before. Defendant has no receipt from Robertson & Rankin for the safe. Defendant took out attachment proceedings after Robertson & Rankin left here, and levied upon the safe under the proceedings, as Robertson & Rankin's, and it was afterwards sold under these proceedings, and bought by the defendant, who paid nothing for it, but credited Robertson & Rankin on their debt to the defendant. It is a rule of the defendant company not to deliver goods to anyone without their signing receipt and paying freight."

Re-direct. "At the time the safe was shipped to Robertson & Rankin they were entirely insolvent."

By the Court. "It is a rule of the defendant company not to deliver goods until the freight is paid. I had the power and could have delivered it, but it would have been disobeying orders, and would have thrown the entire responsibility on me. I was seeking to secure the freight on the lumber as well as on the safe. It is also a rule of the defendant that, if freight is not paid in thirty days, notice is given to the shippers to pay. The safe had been in the warehouse fully thirty days before Robertson pledged it to me, but no notice had been given the plaintiffs by me. I do not remember positively about this; it was some two, three, or four weeks. Never made any memorandum of it. I meant to say the safe was in the warehouse thirty days before it was sold under the attachment."

The defendant asked the following special instructions:

(1) That upon the testimony the plaintiffs are not entitled to recover. (Refused, and defendant excepted.)

(2) That, if the jury believe the testimony of John A. Holt, they must respond to the first issue, "Yes," and to the second issue, "No." (Refused, and defendant excepted.)

(3) That if the jury shall find that Robertson & Rankin were insolvent at the time the safe was shipped to them by the plaintiffs, the plaintiffs are not entitled to recover. (Refused, and defendant excepted.)

His Honor charged the jury that there was no evidence that Holt, the defendant's agent, was authorized to accept the safe from Robertson & Rankin as a pledge to secure the freights due on the safe and lumber by them to the defendant, and, even if he was authorized so to do, that what transpired between Holt and Robertson did not amount to a delivery of the safe to Holt, and was not sufficient to deprive plaintiffs of any rights they might acquire in respect to the safe; that while the defendant might ratify Holt's act, if there was any pledge, yet if the safe had been pledged the jury might consider the fact that the defendant took out attachment proceedings against Robertson & Rankin as evidence of the repudiation by defendant of any contract of pledge; that if the jury should find that the plaintiffs, or any of them, knew, or had reason to know, that Robertson & Rankin were insolvent at the time the safe was shipped, the plaintiffs were not entitled to recover.

His Honor then instructed the jury that there was no evidence of any delivery of the safe to the defendant, or its agent authorized for such purpose, and directed them to answer the first issue in the negative, and the second in the affirmative. The defendant excepted to the charge of the court and to the instructions given the jury.

Upon the appeal taken the defendant assigns as error:

(1) The admission in evidence of the portions of the depositions of Jordan Matthews objected to by defendant.

(2) The refusal of the court to give the special instructions asked by defendant.

(3) That the court erred in instructing the jury that Holt was unauthorized to accept its safe from Robertson & Rankin as a pledge, and that, even if he was authorized, what transpired between Holt and Robertson did not amount to a delivery of the safe to Holt, and was not sufficient to deprive plaintiffs of any rights they might acquire in respect to the safe.

(4) That the court erred in instructing the jury that they might consider the fact that the defendant took out attachment proceedings against Robertson & Rankin as evidence of the repudiation by defendant of any contract of pledge.

(5) That the court erred in instructing the jury that there was no evidence of any delivery of the safe, and in directing the jury to answer the first issue in the negative and the second in the affirmative. There was a verdict and judgment for plaintiffs, and the defendant appealed.

Messrs. **D. Schenck** and **Busbee & Busbee** for appellant.

Messrs. **E. C. Smith** and **W. W. Fuller** for respondents.

Shepherd, *J.*, delivered the opinion of the court:

Several objections were made to the testimony, all of which we think were properly overruled. That which relates to the witness' speaking of the contents and effect of Exhibit A would have been tenable; but as the exhibit was subsequently introduced, and was entirely consistent with the witness' statement, the defendant was in no wise prejudiced, and the exception is therefore without merit.

It is proper to notice that the third instruction asked by the defendant was that, if the jury should believe a certain state of facts, "The plaintiffs are not entitled to recover." The same words are used by the court in one of the instructions given.

Such language is not pertinent to any of the issues submitted. These present questions of

fact, or mixed questions of law and fact, and upon the findings it is for the court to say whether or not the plaintiff is entitled to recover. Such instructions were proper upon the general issues submitted under the old practice, but are confusing when applied to our present system.

It is true that in the present case no harm has resulted, as we can dispose of the appeal upon the testimony of the defendant; but we have adverted to this improper manner of asking for and giving instructions in order that the loose practice in this respect may be discontinued. We can very readily conceive how juries may be perplexed and misled by such general charges when they come to pass upon the specific issues submitted to them, and how new trials may be thus made necessary which could otherwise have been easily avoided.

The plaintiffs' action is based upon their alleged right to stop the property *in transitu*. This right "arises solely upon the insolvency of the buyer, and is based on the plain reason of justice and equity, that one man's goods shall not be applied to the payment of another man's debts. If, therefore, after the vendor has delivered the goods out of his own possession, and put them in the hands of a carrier for delivery to the buyer (which, as we have seen, is such a constructive delivery as devests the vendor's lien), he discovers that the buyer is insolvent, he may retake the goods, if he can, before they reach the buyer's possession, and thus avoid having his property applied to paying debts due by the buyer to other people." It is "highly favored on account of its intrinsic justice." 2 Benjamin, Sales, §§ 1229-1231.

It "is but an equitable extension or enlargement of the vendor's common-law lien for the price, and not an independent and distinct right." Note to § 1229, *supra*.

"It is quite immaterial that the insolvency existed at the time of the sale, provided the vendor be ignorant of the fact at that time." *Loeb* v. *Peters*, 63 Ala. 243, and a number of cases cited in note to § 1244, Benjamin, Sales, *supra*.

These last authorities fully sustain His Honor in refusing the third instruction asked by the defendant.

The mere fact that Robertson & Rankin, the consignees, were insolvent at the time of the sale could not defeat the lien of the plaintiffs, unless they knew of such insolvency. The charge as given was correct in this particular, and the jury having found substantially that the plaintiffs were, nothing further appearing, entitled to avail themselves of the right of stoppage *in transitu*, and that they exercised that right through their agent, Mr. Fuller, we will now consider the several defenses made by the defendant. No agreement or usage having been shown to the contrary, the right of stoppage *in transitu* continued until the safe was actually or constructively delivered to the consignee. 2 Benjamin, Sales, § 1269; *Hause* v. *Judson*, 4 Dana, 7, 29 Am. Dec. 377, and notes.

The first defense, though not seriously pressed upon the argument, is that the defendant acquired title by reason of the sale under the attachment proceedings instituted by it against the consignee for arrearages of freight due on lumber. "The vendor's right of stoppage *in transitu* is paramount to all liens against the purchasers (Hilliard, Sales, 289; *Blackman* v. *Pierce*, 23 Cal. 508); even to a lien in favor of the carrier, existing by usage, for a general balance due him from the consignee. *Oppenheim* v. *Russell*, 3 Bos. & P. 42.

An attachment or execution against the vendee does not preclude the stoppage *in transitu*, for this is not a taking possession by the vendee's authority; the proceeding being *in invitum*." Note to *Hause* v. *Judson*, *supra*, where a large number of authorities sustaining the text are collected. These authorities conclusively settle that the defense under the attachment proceedings cannot be maintained.

The second defense rests upon the following clause of the bill of lading: "The several carriers shall have a lien upon the goods [shipped] for all arrearages of freight and charges due by the said owners or consignees on other goods."

The counsel for the defendant could give us no authority in support of this defense, and none, we think, can be found, to the effect that such a stipulation should be construed to take away this "highly favored" and most important right of the vendor to preserve his lien, in order "that his goods may not be applied to the payment of another man's debts," much less to those of his agent to whom he delivered them for carriage.

Shippers would hardly contemplate that, in accepting such a bill of lading, the well established and cherished right of stoppage *in transitu* was to be made dependent upon whether a distant consignee was indebted to the carrier; and the commercial world would doubtless be surprised if it were understood that, whenever such a stipulation was imposed upon consignors, they were in effect yielding up their lien for the purchase money, and substantially pledging their goods for the payment of an existing indebtedness due their agent, the carrier, by a possible insolvent vendee. If such is the proper construction, we can well appreciate the language of *Lord* Alvanley, in *Oppenheim* v. *Russell*, 3 Bos. & P. 42, when he said that he hoped it would "never be established that common carriers, who are bound to take all goods to be carried for a reasonable price tendered to them, may impose such a condition upon persons sending goods by them." He doubts whether an express agreement between the carrier and the consignor would be binding; and Best, *J.*, in *Wright* v. *Snell*, 5 Barn. & Ald. 350, in speaking generally of such contracts, said he "doubted whether a carrier could make so unjust a stipulation."

Chancellor Kent, in the second volume of his Commentaries, remarks that "It was again stated as a questionable point in *Wright* v. *Snell* whether such a general lien could exist between the owner of the goods and the carrier, and the claim was intimated to be unjust. It must therefore be considered a point still remaining to be settled by judicial decision." P. 638.

It is unnecessary, however, for us to say whether such a condition or agreement would be reasonable and binding, as it seems very clear to us that the stipulation in the present case is not susceptible of the construction contended for, and that it is entirely subordinate

to the right of stoppage *in transitu*. The exercise of this right revested the right of possession in the plaintiffs, and, they having tendered all they owed the defendant, no interest was ever acquired by the vendee to which the claim of the defendant could attach.

The third and most plausible defense is that, according to the testimony of the agent, Holt, there was a constructive delivery to the consignee, and that this defeated the rights of the plaintiffs. The doctrine is well settled that "where goods are placed in the possession of a carrier, to be carried for the vendor, to be delivered to the purchaser the *transitus* is not at an end . . . until the carrier, by agreement between himself and the consignee, undertakes to hold the goods for the consignee, not as carrier, but as his agent; and the same principle will apply to a warehouseman or wharfinger." 2 Benjamin, Sales, *supra*, § 1269.

Was there any such agreement in this case? The most that can be said is that the consignee offered to pledge the safe to the defendant for the freight already due on lumber. There was no actual change of possession. The safe was in the defendant's warehouse, and Holt, the agent, and the consignee were both leaning upon it. The consignee, placing his hand on it, said: "I place this safe in your hands as security for what I owe."

There was no response whatever by Holt. He simply states that he "held the safe till some little time afterwards," when he heard that the consignee had run away, and that he sued out the attachment proceedings mentioned in the answer.

The majority of us are doubtful whether there was reasonably sufficient evidence to be submitted to the jury upon the question of the acceptance of the offer and of delivery. There being no actual delivery, a constructive one can only be effected by a valid agreement on the part of the common carrier to hold for the consignee.

Mr. Benjamin, from whom we have largely quoted, says "That the existence of the carrier's lien for unpaid freight raises a strong presumption that the carrier continues to hold the goods as carrier, and not as warehouseman; and, in order *to overcome this presumption* (the italics are ours), there must be proof of some arrangement or agreement between the buyer and the carrier, whereby the latter, while retaining his lien, becomes the agent of the buyer to keep the goods for him."

But, conceding that the acquiescence of Holt was some evidence of the acceptance of the offer, would this in law amount to such a delivery as will defeat the plaintiffs' right?

Passing by the question as to whether the defendant bailee was not estopped to set up such a transaction in favor of itself and against its principal (2 Wait, Act. & Def. 57), and also the fact that the alleged agreement was not to hold as agent of the vendee, but for itself, we are of the opinion that what transpired between the defendant's agent and the vendee did not alter in the slightest degree the relation in which they stood to each other.

It will be borne in mind that there was no actual delivery; that the defendant had a lien for the freight due on the property, and under the stipulation in the bill of lading it had, as against the consignee, also a lien for the arrearages of freight due by him. There was no new consideration, and the proposition of the consignee, and its alleged acceptance by the defendant, left them in precisely the same position as before. It amounted virtually to the defendant's saying: "If you will pay the freight and arrearages, I will deliver you the safe." This was, as we have seen, the effect of the bill of lading.

In the leading case upon this subject (*Whitehead* v. *Anderson*, 9 Mees. & W. 518, cited with approval by Benjamin, *supra*), the agent of the consignee went on board the ship when she arrived in port, and told the captain that he had come to take possession of the cargo. He went into the cabin, into which the ends of the timber projected, and saw and touched the timber. When the agent first stated that he came to take possession, the captain made no reply, but subsequently, at the same interview, told him that he would deliver him the cargo when he was satisfied about his freight. They went ashore together, and shortly after an agent of the consignor served a notice of stoppage *in transitu* upon the mate, who had charge of the cargo.

"Held, that, under these circumstances, there was no actual possession taken of the goods by the consignees, and that, as there was no contract by the captain to hold the goods as their agent, the circumstances did not amount to a constructive possession of the goods by them. There is no proof of any such contract. A promise by the captain to the agent of the consignees is stated, but it is no more than a promise, without a new consideration, to fulfill the original contract, and deliver in due course to the consignee on payment of freight, which leaves the captain in the same situation as before. After the agreement he remained a mere agent for expediting the cargo to its original destination."

This, it seems to us, is conclusive of our case. Here there was no new consideration whatever moving from the vendee, nor was there any definite understanding that the defendant was to forbear pressing the vague proceedings suggested by him. 1 Addison, Contracts, 11, note.

There was therefore no new contract, and the defendant held the safe in the same character as he did before, when, as we have shown, it was subject to the paramount claim of the plaintiffs. We have been able to find no case where a pledge of this kind has been asserted, but we have observed that all the cases we have examined lay down the rule that constructive delivery is only made by the carrier agreeing, either expressly or by implication, to hold as the agent of the consignee.

While the amount involved in this suit is small, we have thought it our duty, in view of the importance of the questions of law presented, to carefully examine many of the multitude of cases upon the subject, and our conclusion is that His Honor was correct in telling the jury that what transpired between Holt and Robertson (one of the consignees) did not amount to a delivery, and was not sufficient to deprive the plaintiffs of any rights they might acquire in respect to the safe.

There is no error.

CALIFORNIA SUPREME COURT.

Mary A. SESLER, *Respt.*,

v.

A. MONTGOMERY, *Appt.*

(....Cal.....)

A communication from a husband to his wife, not in the presence of any other person, does not constitute a publication within the meaning of the law of slander.

(March 23, 1889.)*

APPEAL by plaintiff, from a judgment of the Superior Court of Alameda County in favor of plaintiff in an action for slander. On rehearing in bank. *Reversed.*

The case sufficiently appears in the opinion.

Messrs. **Estee, Wilson & McCutchen, J. C. Martin** and **W. F. Goad** for appellant.

Messrs. **W. W. Allen, A. R. Cotton** and **W. H. H. Hart** for respondent.

McFarland, *J.*, delivered the opinion of the court:

Action for slander. Verdict and judgment for plaintiff. Defendant appeals from the judgment and from an order denying a new trial. The evidence shows that the alleged slanderous words were spoken (if at all) in the house of the defendant in a conversation addressed exclusively to his wife; and the question to be determined is this: Did the speaking of the words, under these circumstances, to his wife alone, constitute a "publication" within the meaning of that word as used in the definition of slander?

(The plaintiff was eaves-dropping, and claims to have heard the alleged slanderous words from a point outside of the door of the room in which defendant and his wife were talking.)

The Codes of this State provide how marriages may be entered into and how divorces may be obtained, and they also have certain provisions, different from the rules of the common law, about the property of the spouses, and, to a limited extent, about their power to make contracts, etc. But in the Codes there is no attempt made to change the essential nature of marriage, or to state its manifold incidents and consequences, or to establish new rules for the solution of the various questions which arise out of those incidents and consequences.

Moreover, although the Codes define slander as a "false and unprivileged publication" of certain matters, they do not declare what shall constitute "publication." For the determination of these questions, therefore—as there are no provisions about them in the Codes—we must look to the common law, which is the basis of our jurisprudence. Pol. Code, § 4468; *Van Maren* v. *Johnson*, 15 Cal. 312.

It is admitted to be the settled rule that there can be no publication within the meaning of the law of slander unless the words alleged to be slanderous are spoken to, and in the presence of, a third person; that is, a person other than the one who speaks and the one to whom the words are spoken. A man entirely alone cannot commit slander by talking aloud to himself. And the final question to be solved is whether a wife, when spoken to by her husband in the privacy of home, and not in the presence of others, is a "third person" within the meaning of the law under review, or whether, under those circumstances, there should be applied the doctrine that the husband and wife are, civilly, one person. There is no doubt of the general common-law rule that the civil existence of the wife is merged in that of her husband.

Blackstone says that "by marriage the husband and wife are one person in law," and that "the legal existence of the woman is suspended during the marriage, or, at least is incorporated and consolidated into that of the husband." Vol. 1, p. 442.

Upon this principle of the legal union of husbands and wives most of their rights, duties and disabilities depended. They could not be witnesses for or against each other because of the maxims, *Nemo in propria causa testis esse debet*, and *Nemo tenetur se ipsum accusare.*

And upon this ground it has been always held that no prosecution for conspiracy can be maintained against a husband and wife only; because the crime of conspiracy cannot be committed by one person alone, and a husband and wife are but one person in law. Hawk. P. C. p. 448, § 8; 2 Russ. Crimes, 690; *People* v. *Richards*, 67 Cal. 412.

It is said that this rule was a legal fiction, and that in the course of modern legislation and judicial decisions it has been exploded. But it is no more a fiction than any other general principle of law, and we have seen no authentic account of the explosion. There always were some exceptions to the rule, from the earliest history of the common law, and modern legislation and decision have merely created additional exceptions.

The general rule still obtains, save where an exception has been legally established; and we have been referred to no decision establishing an exception as to the point involved in the case at bar. Indeed, the only case in point cited at all is from an inferior court of New York (*Trumbull* v. *Gibbons*, 3 City H. Rec. 97), in which it was directly held that the delivery of a defamatory manuscript by a husband to a wife was not a publication. And every sound consideration of public policy, every just regard for the integrity and inviolability of the marriage relation—the most confidential relation known to the law—should restrain a court from establishing the exception upon which the judgment in the case at bar rests.

When husbands and wives talk to each other

*A decision in this case was rendered December 3, 1888. A rehearing was subsequently granted and the opinion now published was delivered upon the date above indicated. The former opinion was so materially changed that it is of little general value. [Rep.]

See also 6 L. R. A. 780; 15 L. R. A. 760.

alone, the conversation differs but little from the process of talking to one's self, or, as it is sometimes called, "thinking aloud." There is no intention that the conversation shall be repeated to others, and no presumption that it will be.

It would be strange, indeed, if a husband or wife could not safely say anything to the other about their neighbors or acquaintances which he or she would not feel warranted in saying to the world. Such a rule would destroy all opportunity for confidential conference, advice, or suggestion. To a curious person asking what had occurred between a husband and wife in the seclusion of their home, the appropriate answer would be, *Id est nullum tui negotii.*

It has been held in another State that there was a sufficient publication of a libel where a letter was sent to a wife containing defamatory matter about her husband; and it is argued that the court making the decision must have held the wife to be a third person. *Schenck* v. *Schenck*, 20 N. J. L. 208.

Whether or not that decision was a correct exposition of the law, it is clear, at least, that another principle was involved. As the court says in that case: "Such a communication, made directly to the wife, is an attempt to poison the fountain of domestic peace, conjugal affection and filial obligation at their very sources." There the exception which was allowed to the general rule was in support of the confidential relation of marriage, while in the case at bar the exception sought to be established would be destructive of that relation.

Our conclusion is that a communication from a husband to a wife, not in the presence of any other person, does not constitute a publication within the meaning of the law of slander. It follows from this conclusion that the judgment in the case at bar was erroneous.

Judgment and order appealed from reversed, and cause remanded.

We concur: **Beatty**, *Ch. J.*; **Works**, *J.*; **Sharpstein**, *J.*; **Paterson**, *J.*; **Thornton**, *J.*

TENNESSEE SUPREME COURT.

A. S. McGHEE, Jr., *Appt.*,
v.
J. E. EDWARDS.

(.....Tenn.....)

The statutory lien of a livery-stable keeper, given by Tennessee Mill. & V. Code, § 2760,* is inferior to a mortgage duly registered before the feeding of the horse for which the lien is claimed, in the absence of an agency to contract the liability or some other authorization or recognition by the mortgagee in respect to the keeping of the horse.

(April 16, 1889.)

APPEAL by plaintiff, from a judgment of the Circuit Court of Shelby County in favor of defendant upon an agreed statement of facts, in an action of replevin to recover possession of a horse. *Reversed.*

The facts are stated by the court.

Mr. **Thomas H. Jackson,** for appellant:

A chattel mortgage upon a horse is superior to a subsequent lien of a stable keeper, where the horse is placed in the stable by the mortgagor, after the making of the mortgage, without the knowledge or consent of the mortgagee.

Jones, Liens, § 691; *Jackson* v. *Kasseall*, 30 Hun, 231; *Bissell* v. *Pearce*, 28 N. Y. 252; *Charles* v. *Neigelsen*, 15 Bradw. (Ill. App.) 17; *Sargent* v. *Usher*, 55 N. H. 287; *State Bank* v. *Lowe*, 22 Neb. 68.

If the innkeeper knows that the goods brought to the inn by a guest belong to another person, he can have no lien upon them for the guest's personal expenses.

Jones, Liens, § 502.

If he knows that the goods were stolen, he cannot charge the owners for the services he has knowingly rendered to the thief.

Waugh v. *Denham*, 16 Irish C. L. 405; Jones, Liens, note to § 499.

The defendant knew, or might have known, of the deed of trust. The registration of the deed of trust was notice to him.

Reid v. *Bank of Tenn.* 1 Sneed, 262; *Pride* v. *Viles*, 3 Sneed, 127.

The keeper of a livery stable is under no obligations to take and feed the horses of a customer (*Munson* v. *Porter*, 63 Iowa, 455), and does not come within the reason of the rule of law which gives a lien to an innkeeper, namely: that the innkeeper is bound to entertain and provide for anyone who presents himself in the character of a guest.

Jones, Liens, § 611.

Messrs. **Poston & Poston,** for appellee.

Folkes, *J.*, delivered the opinion of the court:

The only question presented in this record is, Has the statutory lien of the livery-stable keeper, given by section 2760 of the Mill. & V. Code, precedence over a mortgage duly registered before the feeding of the horse, for which the lien was claimed?

The case was tried upon an agreed statement of facts, from which it appears that the mortgage was made and registered on December 19, 1887; that the debt secured was not due until March 19, 1888, and that, under the terms of the mortgage, the mortgagor was allowed to re-

*Section 2760, Code of Tennessee, is as follows: "Livery-stable keepers shall be entitled to the same lien provided for in article 4, on all stock received by them for board and feed, until all reasonable charges are paid."

Article 4, section 2756, of Code of Tennessee, is as follows: "Whenever any horse or other animal is received to pasture, for a consideration, the farmer shall have a lien upon the animal for his proper charges, the same as the innkeeper's lien at common law."

See also 20 L. R. A. 719.

main in possession of the horse until the maturity of the debt; that, while so in possession, he boarded the horse with the livery-stable keeper, who had no knowledge in fact of the existence of the mortgage; that the mortgagee was ignorant of the fact that the horse was being kept or fed at the livery stable; that after the maturity of his debt, the same being unpaid, the mortgagee brought his action of replevin, to recover of the stable keeper the possession of the horse.

The trial Judge gave judgment for the defendant, and the plaintiff has appealed.

Upon the question thus presented there is a conflict of opinion to be found in the books, while it has never been decided in this State. We are to ascertain which of the antagonistic views is more in keeping with sound principles and the better sustained by authority.

In arriving at the intention of the Legislature in the passage of the Act conferring the stable keeper's lien, we should regard the object and policy of our legislation with reference to the Registration Laws. The mortgage, being registered, amounts in law to actual notice to all parties dealing with the property, as fully, to all intents and purposes, as if the fact were placarded on the property itself, so far as the rights of the mortgagee therein are concerned. To permit the mortgagor to incumber it to its full value, and consequent destruction to the mortgagee, is as fatal to the latter's rights, and defeats as effectually the policy of our Registration Laws, as if the former were allowed to sell it to a purchaser who was in fact ignorant of the mortgage. Nor are we able to appreciate any considerations of public policy which lead us to extend to the livery-stable keeper any immunity from the fate of all who deal with property the title to which is matter of record with which they are not only chargeable with knowledge in law, but with which they can, through the Registry Laws, acquaint themselves in fact. This being so, it is not for the courts to give to the statute in question any such effect, unless constrained to do so by the language or manifest intention of the Legislature.

By our statute the livery-stable keeper's lien is not defined in terms, but it is merely provided that they shall have the same lien given in article 4.

When we turn to article 4 we find that it relates to pasturage, and season of male animals, and the lien given for such services by the Act declared to be "the same as the innkeeper's lien at common law."

Now, it is true that at common law the innkeeper had a lien on the horse of a third party, brought to him by a stranger, and cared for at the inn, and even upon a stolen horse brought there by the guest; but this was of course in the absence of notice.

"If the innkeeper knows that the goods brought to the inn by a guest belong to another person, he can have no lien upon them for the guest's personal expenses," says Mr. Jones, in section 502 of his work on Liens; citing *Johnson* v. *Hill*, 3 Starkie, 172.

Again; if a manufacturer sends a piano to a guest at a hotel for his temporary use, and the hotel keeper knows that it does not belong to the guest, he acquires no lien upon it; citing *Broadwood* v. *Granara*, 10 Exch. 417–425.

So, also, it has been held that an innkeeper has no lien on a horse placed in his stable by one not a guest, nor by his authority.

Thus, in *Binns* v. *Pigot*, 9 Car. & P. 208, it was held that if a person is stopped upon suspicion, and his horse is placed at an inn by the police, the innkeeper has no lien on the horse; and if he sells him for his keeping he is liable in trover to the owner. Jones, Liens, § 504.

It is also worthy of note that an innkeeper is bound to receive and entertain one who presents himself as a guest, while a keeper of a livery-stable is not bound to accept and provide for the horse of every customer who may present himself. *Munson* v. *Porter*, 63 Iowa, 453.

It was by reason of this difference that at common law the innkeeper had a lien, while the livery stable keeper had none. The lien of the latter exists by statute only, and in construing the statute now before us, it is helpful to bear in mind these distinctions as shedding light upon the legislative intention; as also the further fact that our Registration Laws were unknown to the common law.

Mr. Jones, in his late work on Liens, with the adjudged cases on both sides of the question before him says (§ 691): "A chattel mortgage upon a horse is superior to a subsequent lien of a stable keeper, where the horse is placed in the stable by the mortgagor, after the making of the mortgage, without the knowledge or consent of the mortgagee;" citing therefor *Jackson* v. *Kasseall*, 30 Hun, 231; *Bissell* v. *Pearce*, 28 N. Y. 252; *Charles* v. *Neigelsen*, 15 Ill. App. 17; *Sargent* v. *Usher*, 55 N. H. 287; *State Bank* v. *Lowe*, 22 Neb. 68.

The learned author adds: "It is not to be supposed that a statute giving a lien for the keeping of animals was intended to violate fundamental rights of property by enabling the possessor to create a lien without the consent of the mortgagee, when the person in possession could confer no rights as against the mortgagee by a sale of the animals. The keeper of animals intrusted to him by the mortgagor undoubtedly acquires a lien as against the mortgagor, but it is a lien only upon such interest in them as the mortgagor had at the time, and not a lien as against the mortgagee, between whom and the keeper of the animals there is no privity of contract. The mortgagor, though in possession, is in no sense the mortgagee's agent; nor does he sustain to the mortgagee any relations which authorize him to contract any liability on his behalf. The statute cannot be construed to authorize the mortgagor to subject the mortgagee's interest to a lien without his knowledge or consent, as security for a liability of the mortgagor, unless such a construction clearly appears from the language of the statute to be unavoidable."

As stated in the outset, authorities are to be found holding a contrary view. See *Case* v. *Allen*, 21 Kan. 217–220; *Smith* v. *Stevens*, 36 Minn. 303,—which were cases where an agister's lien was held superior to an older registered mortgage. But this reasoning does not commend them to us sufficiently to shake our

convictions that the other view is the sounder and better. Nor do we think that the rule which prevails with reference to railroad mortgages, that claims for fuel, rails, cross-ties, labor and repairs take precedence over such mortgage, furnishes any analogy to the case at bar. They rest upon the principle or presumption of implied agency in the company to contract such liabilities, and discharge them out of the earnings of the mortgaged property, as contemplated by the mortgagee, and necessary to the operation and preservation of the property.

We do not mean to say that an implied agency might not arise out of the terms upon which the mortgagor was left in possession, which would authorize the mortgagor to contract with the stable keeper a lien that would in the particular case be superior to the claim of the mortgagee, which seems to have been the case in *Hammond* v. *Danielson*, 126 Mass. 294.

But we see nothing in the agreed statement of facts in the case at bar that creates such an agency, and, in the absence of such an agency, or some other authorization or recognition by the mortgagee, we hold his claim superior to that of the stable keeper, contracted with the mortgagor subsequent to the registration of the mortgage.

Let the judgment be reversed; and, the case having been tried without a jury, *judgment will be entered here for the plaintiff.*

UNITED STATES CIRCUIT COURT, EASTERN DISTRICT OF PENNSYLVANIA.

SHELDON AXLE CO.
v.
STANDARD AXLE WORKS.

(37 Fed. Rep. 789.)

The purchaser of a patented machine, with notice of a prior assignment of all the patentee's rights to certain territory, cannot use the machine within the limits of such territory.

(February 21, 1889.)

BILL in equity, to restrain defendant from using a certain patented machine within territory claimed exclusively by complainant. *Relief granted.*

The facts sufficiently appear in the opinion.

Mr. **John R. Bennett** for complainant.

Messrs. **Fleming & McCarrell,** for respondent:

When the patented machine rightfully passes to the hands of the purchaser from the patentee or from any other person by him authorized to convey it, the machine is no longer within the limits of the monopoly. It then passes outside of the monopoly, and is no longer under the peculiar protection granted to the patented rights.

Chaffee v. *Boston Belting Co.* 63 U. S. 23 How. 217 (16 L. ed. 240); *Bloomer* v. *Millinger*, 68 U. S. 1 Wall. 340 (17 L. ed. 581); *Mitchell* v. *Hawley*, 83 U. S. 16 Wall. 544 (21 L. ed. 322); *Adams* v. *Burke*, 84 U. S. 17 Wall. 453 (21 L. ed. 700); *Bloomer* v. *McQuewan*, 55 U. S. 14 How. 549 (14 L. ed. 532); *Paper-Bag Machine Cases*, 105 U. S. 766, 772 (26 L. ed. 959, 961).

A license from the patentee, to make, use and sell machines, gives the licensee the right to do so, within the scope of the license, throughout the term of the patent, and has the same effect upon machines sold by the licensee, under authority of his license, that a sale by the patentee has upon machines sold by himself, of wholly releasing them from the monopoly, and discharging all claim of the patentee for their use by anybody; because such is the effect of the patentee's voluntary act of licensing or selling, in consideration of the sum paid him for the license or sale.

Birdsell v. *Shaliol*, 112 U. S. 485 (28 L. ed. 768). See *Hatch* v. *Adams*, 22 Fed. Rep. 434; *Hobbie* v. *Smith*, 27 Fed. Rep. 656–662; *Hatch* v. *Hall*, 30 Fed. Rep. 614.

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

The principal objections made to the plaintiff's title are met by the amendment to the record just filed. The transfer from the Philadelphia Axle Company is properly executed. The state statute, relating to the execution of deeds by such companies, has application to transfers of real estate.

The plaintiffs owned the interest acquired by the Philadelphia Axle Company. The patentees transferred to this company all their right and interest in the patent, and any improvements and reissues which might thereafter be made or granted, within the territorial limits specified in the transfer. The company thus took the exclusive monopoly of the manufacture, use and sale within these limits. The patentees thereafter could not interfere with the enjoyment of this monopoly, and consequently could not authorize anyone else to do so.

Subsequent assignees of interests, and purchasers of machines (with notice) took subject to the company's rights. This seems entirely clear. It is urged, however, that *Adams* v. *Burke*, 84 U. S. 17 Wall. 453 [21 L. ed. 700], decides otherwise, as respects the use of machines subsequently purchased; that such use may be enjoyed within this territory.

It would be strange, indeed, if this were so. It is as clear as language can make it that the right to use within the territory is as distinctly conveyed as the right to manufacture and sell. It is not, of course, questioned that the latter right cannot be interfered with. On what ground, then, can such a distinction be supported? None has been suggested, and we can see none. It is urged, however, that this distinction is drawn in *Adams* v. *Burke*.

We do not so understand that case. There the patentees assigned their right to manufacture, use and sell within certain territorial limits, and subsequently transferred their remaining interest to another. The patented ar-

See also 35 L. R. A. 728.

ticle was a coffin lid. The purchaser of a lid from the first assignee used it outside the prescribed limits. Of this use the second assignee complained. The question thus raised was one of construction. Its decision turned on the interpretation of the first assignment. If the use of lids sold under this instrument was intended to be confined to the territory named, the complaint was well founded; otherwise it was not. The court (laying stress on the character of the article—the fact that it is incapable of continuous use) held that the use was not intended to be so confined; that the right to sell (which is distinct from the right to manufacture and use) contemplated a use of the lids sold, everywhere; consequently that the second assignee took subject to this right, and therefore had no just cause of complaint. The case stands on this interpretation of the contract. The court says: "It would ingraft a limitation not contemplated . . . nor within the reason of the contract, to say that it [the lid] could only be used within the ten-mile circle," to which the right of sale was confined.

This construction seems to rest on the conclusion that as a sale by the patentees before assigning, conferred a right to such unrestricted use, the assignment of their authority to sell conferred on purchasers under it the same unrestricted use. The court distinguished (as it had done before) between the right to manufacture and use and the right to sell, and held that the territorial limitation was not intended to restrict the use of lids sold. What is said in this case of the patentee's "receipt of compensation for the use outside the territory," of a sale "emancipating the patented article from the monopoly," etc., was applicable there, but it is inapplicable to the case before us.

The defendants here did not pay for a use within the plaintiffs' territory—a use which they knew the patentees had previously sold and received compensation for. Their purchase could not emancipate the machine from a monopoly which their vendors did not own and could not interfere with.

The distinction (which seems to be broad and plain) between our case and *Adams* v. *Burke* consists in the facts that the assignment here (under which the plaintiffs hold) is first in the order of time, conferring upon them the entire monopoly of the patent within their territory, and that the second assignment (under which the defendants hold) is subject to this; while in *Adams* v. *Burke* the plaintiff's assignment was subsequent to that under which the defendant purchased—by which latter assignment, as the court held, a right was transferred to use the article so purchased, everywhere. The situation of the parties in *Adams* v. *Burke* is here reversed, which makes all the difference in the world—rendering the decision in that case wholly inapplicable to this.

Other decisions of the supreme court, cited by the defendants, lend no support to their position.

Bloomer v. *McQuewan*, 55 U. S. 14 How. 549 [14 L. ed. 532], determines no more than that the lawful purchase of a patented machine confers a right to use it until worn out, notwithstanding the patent may have expired and been renewed in the mean time. General observations made by the court in disposing of such a case can have no influence in deciding the question before us.

Chaffee v. *Boston Belting Company*, 63 U. S. 22 How. 217 [16 L. ed. 240], and *Mitchell* v. *Hawley*, 83 U. S. 16 Wall. 544 [21 L. ed. 322], are equally inapplicable; the facts involved bear no relation to those before us.

Nor are the cases cited from the circuit courts entitled to greater influence. We had occasion to consider them in *Hatch* v. *Adams*, 22 Fed. Rep. 434, and nothing need be added to what is there said on the subject.

The foregoing is predicated on the supposition that the defendants and their predecessors, Ives and Miller, had knowledge of the previous assignment to the Philadelphia Axle Company. Had they such knowledge? Notice may be actual or constructive. The latter (which results from an authorized record) Ives and Miller had not. The duty of recording was neglected until after they had purchased. It is entirely clear, however, that they had actual notice. A review of the testimony respecting this is unnecessary. The fact is abundantly proved.

Ives and Miller first purchased the patentee's entire remaining interest, some months after the transfer to the company, with knowledge that the latter had an interest; and later, on being informed by the company of the character and extent of this interest, they refused to pay the consideration, returned the property, and entered into a contract for twenty machines one of which was sold to the defendants, brought within the plaintiffs' territory and used.

It is unimportant that Mr. Miller says the patentees denied the company's statement respecting its interest. The latter was not required to do more than inform Ives and Miller of it. Ives and Miller, however, acted as if they believed it; declining to carry out their contract, and returning the property.

It is unnecessary in this case to invoke the rule that knowledge of facts sufficient to put a prudent man to inquiry is notice. Direct, explicit notice is proved. That the defendants also had notice (constructive as well as actual) is equally clear. The assignment was on record several years before their purchase; and the evidence abundantly shows that they had actual knowledge of the plaintiffs' rights. Their correspondence with Ives and Miller puts this beyond doubt. It shows not only that they were fully apprised of these rights, but that they directed their most earnest efforts to the discovery of means whereby the enjoyment of them might be circumvented and defeated. They were slow to believe that a purchase outside this territory would confer a right to use the machine within (in view of the exclusive right vested in the plaintiffs), and they consequently demanded a guaranty from Ives and Miller. This being refused, however, they resolved to take the risk.

A decree must be entered for the plaintiffs.

KANSAS SUPREME COURT.

CITY OF PARSONS, *Plff. in Err.*,
v.
Zerelda P. LINDSAY, Admrx., etc.

(.....Kan.....)

*1. **At common law,** *Dies dominicus non est dies juridicus*—the Lord's Day is not a day for legal proceedings.

2. **A judgment** rendered on Sunday *is void.*

(*April 5, 1889.*)

ERROR to the District Court of Labette County to review a judgment for plaintiff in an action to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts sufficiently appear in the opinion.

Mr. **C. H. Kimball** for plaintiff in error.

Messrs. **H. G. Webb** and **E. C. Ward** for defendant in error, made preliminary objection to rendition of judgment on Sunday, and filed no brief to sustain it.

Horton, *Ch. J.*, delivered the opinion of the court:

This action was brought by W. H. Lindsay, against the City of Parsons for injuries resulting from a fall alleged to have been caused by a defective street crossing.

The action was commenced on the 11th day of October, 1879. A trial was had at the February Term, 1880, of the district court, and judgment for the plaintiff for $3,000 and costs. This judgment was reversed by this court at its July Term for 1881, and the cause remanded for a new trial. 26 Kan. 426.

Another trial was had before the court with a jury, at a special term, commencing on the 10th day of November, 1883. A verdict was returned by the jury at 3 o'clock P. M. on Sunday, the 11th day of November, 1883, in favor of the plaintiff, and assessing his damages at $1,000. On the same day the court discharged the jury, and rendered judgment in favor of the plaintiff upon the verdict for the sum of $1,000, and costs taxed at $565.50.

On the same day a motion for a new trial was filed by the defendant, but the hearing of the motion was continued until the February Term for 1884. On the 29th of February this motion was heard and overruled. The defendant excepted, and brings the case here. While it was pending in this court W. H. Lindsay died and the action has been revived in the name of Zerelda P. Lindsay, his administratrix.

The defendant alleges that the judgment is null and void because it was pronounced on Sunday. At the time the judgment was rendered the law in force provided that the regular term of the court in the fall of 1883 should commence on the second Monday in November, which, in 1883, came on the 12th day of the month.

It is well settled that the verdict of a jury may be received on Sunday. *Stone* v. *Bird*, 16 Kan. 488; *Reid* v. *State*, 53 Ala. 402.

By some of the courts the reason assigned for the validity of such a verdict is that the rendition and receiving is a work of necessity; by others, that it is merely a ministerial act, and not within the prohibition relating to judicial acts on Sunday. *Coleman* v. *Henderson*, [Litt. Sel. Cas. 171] 12 Am. Dec. 290–295.

The acceptance of a verdict, however, is not equivalent to a judgment, but the rendition of a judgment thereon is a judicial act. By the common law, Sunday is *dies non juridicus;* and therefore all judicial proceedings which take place on that day, where the common-law rule is in force, are void.

The common-law rule of the invalidity of judicial proceedings upon Sunday is impliedly recognized by the provisions of our statute. *Blair* v. *Shew*, 24 Kan. 280; *Morris* v. *Shew*, 29 Kan. 661.

The common law, as modified by constitutional and statutory law, judicial decisions, and the condition and wants of the people, is enforced in this State in aid of the general stat-

*Head notes by HORTON, *Ch. J.*

NOTE.—*Sunday, a nonjudicial day.*

At common law ministerial, but not judicial, acts may be performed on Sunday in the absence of a prohibitory statute. Hadley v. Musselman, 1 West. Rep. 492, 104 Ind. 459; Cory v. Silcox, 5 Ind. 370; Kiger v. Coats, 18 Ind. 153.

Judicial notice will be taken that a certain date is Sunday, and that it is a nonjudicial day. Ecker v. First Nat. Bank, 1 Cent. Rep. 476, 64 Md. 292.

Upon the ground that it is a work of necessity a verdict may be rendered and received on Sunday. Reid v. State, 53 Ala. 402; McCorkle v. State, 14 Ind. 39; Rosser v. McColly, 9 Ind. 587; True v. Plumley, 36 Maine, 466; State v. Fenlason, 3 New Eng. Rep. 276, 78 Maine, 495; Webber v. Merrill, 34 N. H. 202; Van Riper v. Van Riper, 4 N. J. L. 156; Hoghtaling v. Osborn, 15 Johns. 118; State v. Ricketts, 74 N. C. 187; State v. Engle, 13 Ohio, 490; Huidekoper v. Cotton, 3 Watts, 56; Com. v. Marrow, 3 Brewst. 402; Powers v. State, 23 Tex. App. 42; Pierse v. Fauconberg, 1 Burr. 292; Proffatt, Jury Trial, § 455.

In some of the States, however, it has been held that a judge could not open his court and receive a verdict from the jury on Sunday. Bass v. Irvin, 49 Ga. 436; Davis v. Fish, 1 Greene (Iowa) 410; Sorrelle v. Craig, 9 Ala. 534.

But the rendition of a judgment is a judicial act and cannot legally be performed on Sunday. Chapman v. State, 5 Blackf. 111; Arthur v. Mosby, 2 Bibb, 589; Allen v. Godfrey, 44 N. Y. 433; Blood v. Bates, 31 Vt. 147.

But where judgment was entered as of Sunday by mistake, the record showing the correct date of the trial may be amended after the term. Ecker v. First Nat. Bank, 1 Cent. Rep. 476, 64 Md. 292.

The hours of an intervening Sunday are excluded from the computation of time for the rendition of a judgment on a coming in of the verdict of the jury. Cattell v. Dispatch Pub. Co. 3 West. Rep. 843, 88 Mo. 356; Meng v. Winkleman, 43 Wis. 41; Read v. Com. 22 Gratt. 924.

As a general rule judicial acts done on Sunday are void, and writs issued or service made on that day are invalid. Pierce v. Hill, 9 Port. (Ala.) 151; Moore v. Hagan, 2 Duvall, 437; Peck v. Cavell, 16 Mich. 9; Shaw v. Dodge, 5 N. H. 462; Story v. Elliot, 8 Cow. 27; Butler v. Kelsey, 15 Johns. 177; Bland v. Whitfield, 1 Jones, L. 122; Stern's App. 64 Pa. 447; Hauswirth v. Sullivan, 6 Mont. 203.

For contract in violation of Sunday law, see W. U. Teleg. Co. v. Yopst, 3 L. R. A. 224.

See also 7 L. R. A. 327, 847; 8 L. R. A. 427; 11 L. R. A. 63.

ute. Section 3, chap. 119, Comp. Laws 1885.

After midnight of the 10th day of November, 1883, another day (Sunday) had commenced—a day not judicial, and one on which the courts are not authorized to render judgments. The judgment being void it cannot be enforced or sustained. *Blood* v. *Bates*, 31 Vt. 147; *Allen* v. *Godfrey*, 44 N. Y. 433; *Chapman* v. *State*, 5 Blackf. 111; *Arthur* v. *Mosby*, 2 Bibb (Ky.) 589.

The judgment of the District Court will therefore be reversed.

All the Justices concur.

MISSISSIPPI SUPREME COURT.

Board of Supervisors of HARRISON COUNTY, *Appt.*,
v.
Roderick SEAL.

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

The owner of land which is laid off on a map in streets, blocks and squares, who conveys lots with reference to a certain street marked on the map, covenanting that such street shall be left open forever, cannot exclude the public use of that street, or demand compensation for any part of it when taken for a public road which crosses it, although at the time of the dedication there was not, and has not at any time been, any local authority authorized to accept the dedication of the street, except for a portion of its width; and the grantee or his heir at law of so much of the street as exceeded the width of a lawful road, who has had it assessed as his property and paid taxes on it, has no greater right to compensation.

(March 11, 1889.)

APPEAL by defendants, from a decree of the Chancery Court of Harrison County, enjoining them from interfering with plaintiff's land in proceeding to lay out a public road until damages therefor had been awarded. *Reversed.*

The case is sufficiently stated in the opinion.

Mr. **W. G. Evans, Jr.** for appellants.

Messrs. **W. P. & J. B. Harris** for appellee.

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

About fifty years ago a company called "The Mississippi City Company" procured a body of land in Harrison County lying on the Gulf of Mexico and laid it off into streets, blocks and public squares. According to the plan of the company this was to be the site of a great seaport city, and they gave to it the name of "Mississippi City."

A plat was made and filed in the office of the clerk of that county, as we infer from references made to it in certain conveyances found in the record in this cause. A copy of that plat is in the record, and from it we learn that there were nearly 300 squares, bounded by streets numbered from one to seventeen, running east and west, and about an equal number named for different States, running north and south. The prospective city was intersected by a street named on the map "Railroad Street," over which a prospective railroad was to run to a real depot building and wharf, which the company then and there built, and then became insolvent. The whole property was sold under execution and bought in by one Tegarden.

Railroad Street as laid down on the map is shown to have been 110 or 120 feet wide. After his purchase, Tegarden sold a number of lots according to the plan of Mississippi City, several of which abutted upon Railroad Street and are described in the conveyances made as bounded by it; in one or more of the deeds it is expressly covenanted by him that Railroad Street shall be left open forever; but the grantor frequently in making other conveyances reserved the right to close up other streets appearing on the map.

One of the lots thus situated on Railroad Street was conveyed to the county authorities of Harrison County for the site of a court house and jail, and the same were there located and yet remain. Directly opposite the court house and across Railroad Street is the post-office, and there are several residences on lots abutting on that street.

Mississippi City never became a city or even an incorporated village, in consequence of which there are no streets adopted as such by municipal authority; but the strip of land called Mississippi Street has always remained open, except as encroached upon on the one side or the other by those who have built residences along its boundary. It has never been accepted by the county authorities as a public highway by an order entered on its minutes, but it has been occasionally worked upon as a highway by the overseers of the roads, but only at points remote from the court house, where by reason of its passing through swampy ground work has been necessary to keep it in repair. Within the limits extending from the court house to the point of controversy in this suit no work seems ever to have been needed, because of the sandy character of the land; and consequently none has been done.

When Tegarden, the owner of the land, saw that there was but little prospect of building up a town upon his land, many of the streets laid down in the plat were closed up, and the land was sold in lots laid off without regard to the location of the numerous streets.

Some evidence appears in the record tending to show a purpose on his part of cutting down the width of Railroad Street to thirty feet,—the limit of a country road. The extent of the evidence is that he claimed the right to do so; but it is not shown that those to whom he had conveyed lots situated on the street yielded to his claim or that he ever attempted to take actual possession of the excess over thirty feet.

In the year 1879 the heir at law of Tegarden conveyed Railroad Street, or so much of it

as exceeded thirty feet in width, by metes and bounds to the appellee, who has had it assessed as his property and paid taxes on it since that time.

The Board of Supervisors of Harrison County have recently caused a public road to be laid out which crosses Railroad Street, and, not recognizing any right in the appellee to the land located within the limits of that street, failed to notify him of their action or to award any damages for its use. The appellee thereupon exhibited this bill to enjoin the board of supervisors and the overseer appointed to work the road thus laid out, from interference with his land until there should be a formal condemnation and award of damages. The injunction having been made perpetual on final hearing the board of supervisors prosecute this appeal.

It is conceded by appellant that the evidence of an intention by Tegarden to make the dedication is ample, but the objection is made that there is no local authority to accept the dedication to its entire extent, and that the power of the county authorities to accept a highway does not extend to one more than thirty feet wide, that being the width to which a public road is limited by law. As to a road thirty feet wide there is no controversy, the complainant contending only for the excess over that quantity.

It seems to be well settled that to constitute a highway, which the public authorities are bound to repair, there must be an acceptance of it as such by the constituted authorities, which may be proved either by a formal acceptance, or by repairing, and probably by the use of it by the public for many years with the knowledge and assent of the local authorities.

But the question here involved is not whether the county is bound to keep in repair the whole of Railroad Street as a public highway, but whether the owner of the fee can exclude the public use or demand compensation for the land. It seems to be well settled that he cannot.

In *Beatty* v. *Kurtz*, 27 U. S. 2 Pet. 566 [7 L. ed. 521], a lot of land on the plan of the town of Georgetown was marked by the owner "for the Lutheran Church," and though there was no incorporated church to accept the dedication it was held that, a congregation of that faith having used it for the purposes intended, the owner could not resume the property.

In *Cincinnati* v. *White*, 31 U. S. 6 Pet. 432 [8 L. ed. 452], a public square and way was marked upon the plan of the town by the owners, and lots sold with reference to it. The town was not then incorporated but the public used the property. It was decided that the absence of a grantee capable of accepting the grant was immaterial and that the dedication was so far consummated as to preclude the owner from revoking the dedication.

In *Rowan* v. *Portland*, 8 B. Mon. 232, the controversy was in reference to the effect of a plat of the town by the owner of the land, sales of lots with reference thereto, and use by the public of the streets laid down on the plan; and the court said:

"The mere laying out of a town upon a man's own land, and by his own private act, and the making and recording of a plan of the town, may not, and as we suppose do not, of themselves, conclude him to any extent. The land, notwithstanding these acts, is still his own, and neither any other individual nor the public have any right to interfere with such use of it as any man may make of his own. Though he has laid out a town upon the land and on paper, he is not bound to sell the lots or to make or authorize the making of a town in fact. If he never disposes of a lot or lots, as part of a town, no one has any interest in the town as such, or any right growing out of his acts in relation to it. But in selling to others the lots laid off as parts of the town, he creates in them an interest in the town and its plan, which places both beyond his future control, to their injury, unless by the consent of the vendees, or by reacquiring the lots which he had sold to them, before any other actual interest in the town had grown up. And, as we suppose, that in the case of a town thus established, or made by the private acts of the proprietor he might, by a repurchase of all the lots before any actual use of the streets and other open places by the public, reinvest himself with the same rights and dominion which he had before any sale, it would seem to follow that the public at large does not acquire immediately from the proprietor, even by his act of selling and conveying the lots, any absolute or indefeasible right or interest in the existence or plan of the town, or in any of the advantages which it promises. But this right vesting at first in the purchasers of lots, and as appurtenant thereto, and subject to be defeated by their reconveyance of the lots to the proprietor before the land is appropriated to any actual uses of a town, becomes consummated and indefeasible by such appropriation; and being thus perfect in the lot owners, results necessarily to all who, by residence, business or in any other manner may have an interest in the town or in the use of all or any of its various parts and divisions, for the purposes to which, by its plan, they are to be or may be appropriated."

The case of *Holmes* v. *Jersey City*, 1 Beasley, 12 N. J. Eq. 299, relied on by counsel for appellee, goes only to the extent that a private owner may not by his own act of dedication impose on the public authorities the duty of repairing the way dedicated, and perhaps, where the width of highways is fixed by law, that there may not be an acceptance of a way of greater width as such.

But it is well settled in that State that a dedication expressly made cannot be revoked even though not accepted by formal adoption.

In *Hoboken Land Company* v. *Hoboken*, 7 Vroom [36 N. J. L.] 540, the court said:

"It was argued that the dedication had not been consummated when the suit was brought, by reason of the absence of an acceptance or user by the public of that part of the street in controversy. That question has been set at rest in this State. Acceptance by a formal adoption by the public authorities or by public user is necessary to impose on the public the duty to amend or repair, but is not essential to the consummation of the dedication so as to cut off the owner from the power of retraction or subject the dedicated lands to the public use, whenever, in the estimation of the local authorities, the wants or convenience of the public require it for that purpose."

To the same effect are *Dummer* adv. *Jersey City*, 20 N. J. L. 86; *Jersey City* v. *Morris Canal & Bkg. Co.* 1 Beasley [12 N. J. Eq.] 553; *Irwin* v. *Dixion*, 50 U. S. 9 How. 10 [13 L. ed. 25]; *Watertown* v. *Cowen*, 4 Paige, 510; *Hannibal* v. *Draper*, 15 Mo. 639; *Re Seventeenth St.* 1 Wend. 266; *Re Lewis St.* 2 Wend. 472; *Weyman* v. *N. Y.* 11 Wend. 486.

The decree is reversed, the injunction dissolved and the bill dismissed. The cause will be remanded to the court below.

FLORIDA SUPREME COURT.

PENSACOLA & ATLANTIC R. CO., *Appt.*, *v.* STATE OF FLORIDA.

(....Fla.....)

*1. **The enforcement of a tariff** of freight and passenger rates which will not pay the expenses of operating a railroad,—*held*, upon the pleadings, to show an abuse of the discretion given to railroad commissioners by the statute authorizing them to prescribe reasonable and just rates of freight and passenger transportation, and to amount to a taking of the railroad company's property without just compensation.

*2. **The effect of the provision of the Railroad Commission Statute,** that the schedules of rates fixed by the commissioners shall, in any action brought in the courts of this State against a railroad company, be deemed and taken as sufficient evidence that the rates fixed therein are just and reasonable rates for the transportation of passengers and freights and cars, is not to make such schedules conclusive as against judicial inquiry, but is to provide a new mode of proving the reasonableness and just character of the rates fixed by the commissioners, and make the schedules competent and adequate evidence of the correctness of the action of the commissioners in the absence of countervailing proof that they have exceeded their powers, or abused their discretion and invaded some right of the railroad company.

*3. **Where a tariff of freight and passenger rates has been established** by the railroad commissioners, and the railroad company and the commissioners *differ as to* whether

*Head notes by RANEY, *Ch. J.*

NOTE.—*Railroads; authority of Legislature over freights and fares.*

Railroad companies are subject to legislative control as to their rates of fare and freight, unless protected by their charters, or unless what is done amounts to a regulation of foreign or interstate commerce. Dow v. Beidelman, 125 U. S. 680 (31 L. ed. 841); Stone v. Farmers L. & T. Co. ("R. R. Commission Cases") 116 U. S. 307 (29 L. ed. 636); Chicago B. & Q. R. Co. v. Iowa, 94 U. S. 155 (24 L. ed. 94); Chicago, M. & St. P. R. Co. v. Ackley, 94 U. S. 179 (24 L. ed. 99); Winona & St. P. R. Co. v. Blake, 94 U. S. 180 (24 L. ed. 99); Ruggles v. Ill. 108 U. S. 536 (27 L. ed. 812); Ill. Cent. R. Co. v. Ill. 108 U. S. 541 (27 L. ed. 818).

The regulation of matters of this kind, says the court, is *legislative in its character*, not judicial. "Express Cases," (St. Louis, I. M. & S. R. Co. v. Southern Exp. Co.) 117 U. S. 1 (29 L. ed. 791); Del. L. & W. R. Co. v. Central Stock Yard & T. Co, 9 Cent. Rep. 113, 43 N. J. Eq. 81.

The power of a State to limit railroad charges for transportation can only be bargained away, if at all, by words of positive grant or their equivalent. Stone v. Farmers L. & T. Co. *supra*.

The Legislature has reserved, in the general Act for the formation of railroad companies, the *right* to regulate the question of freights. Laws 1850, chap. 140, § 28, subd. 9. Killmer v. N. Y. Cent. & H. R. R. Co. 1 Cent. Rep. 525, 100 N. Y. 395.

General statutes fixing maximum rates of charges for transportation, when not forbidden by charter contracts, do not deny to the railroad companies the equal protection of the laws, or deprive them of their property without due process of law, within the *meaning of the* 14th Amendment. Stone v. Farmers L. & T. Co. *supra*.

A power of government which actually exists is not lost by nonuser. Chicago, B. & Q. R. Co. v. Iowa, 94 U. S. 155 (24 L. ed. 94).

The Legislature, in the exercise of its power of regulating freights and fares, may classify the railroads according to the length of their lines, if the same rule is applied to all roads of the same class. Dow v. Beidelman, 125 U. S. 680 (31 L. ed. 841).

Arkansas Act. Feb. 27, 1885, prohibiting greater charge by carrier for transportation of freight than specified in the bill of lading, and imposing a penalty for refusal to deliver on payment or tender of charges as shown in such bill, is not special legislation, or a regulation upon interstate commerce, but is within the police power of the State. *Little Rock & Ft. S. R. Co.* v. Hanniford, 1 Inters. Com. Rep. 580, 49 Ark. 291.

Regulation by railroad commission.

Railroad switching charges may be regulated by a commission appointed under a state Act by virtue of *its police powers*; and this does not make an unlawful interference with commerce, although the cars switched contain freight for transportation *between* States. Chicago, M. & St. P. R. Co. v. Becker, 32 Fed. Rep. 849.

The charter of a company is not a contract the obligation of which is impaired by the Mississippi Statute of March 11, 1884, creating a commission to provide for the regulation of freight and passenger rates, prevent unjust discrimination, and enforce certain police regulations affecting railroad companies doing business in that State. Stone v. Farmers L. & T. Co. ("R. R. Commission Cases") 116 U. S. 307 (29 L. ed. 636).

State officers in appropriating and assessing the expenses of the board of railroad commissioners act in a *quasi* judicial character; and their action is reviewable on certiorari by a company aggrieved thereby. People v. Chapin, 42 Hun, 239.

An Act requiring railroads to pay the expenses of a railroad commission is part of subsequent charters; and successive assessments for this purpose, in annual tax Acts, were only a provision to carry out this existing law. Columbia & G. R. Co. v. Gibbes, 24 S. C. 60.

Courts cannot administer railroad affairs.

Courts cannot carry into effect the decisions of the railroad commissioners. Neither the Attorney-General nor the courts can enforce their order. People v. N. Y. L. E. & W. R. Co. 6 Cent. Rep. 39.

3 L. R. A.

See also 13 L. R. A. 70; 24 L. R. A. 141.

such rates, considered as a whole, will prove remunerative to the company, and there is room for a difference of intelligent opinion on the question, the courts cannot interfere or substitute their judgment for that of the commissioners, but the tariffs as fixed by the commissioners must, in so far as the courts are concerned, be left to the test of experiment.

4. **The courts have no power** to make freight or passenger tariffs.

5. **The courts will not interfere** or grant any relief to a railroad company upon a complaint made as to one or several rates only, or where the freight and passenger rates established by the commissioners are not assailed as an entirety.

(May 1, 1889.)

APPEALS by defendant, from judgments of the Circuit Courts of Gadsden and Jackson Counties in favor of plaintiff in actions brought by the State to recover penalties alleged to have been incurred under the Railroad Commission Acts. *Reversed.*

The facts are stated in the opinion.

Mr. **W. A. Blount** for appellant.

The Attorney-General for the State.

Raney, *Ch. J.*, delivered the opinion of the court:

There are before us, on appeal from judgments of the circuit court, several actions instituted by the State against the appellant, to recover *penalties under the statute* approved June 7, 1887, and commonly known as the Railroad Commission Act. The cases from Gadsden County, in the Second Circuit, were *brought last July*, and the penalty adjudged in each of them is $2,500; that from Jackson County was commenced last April, and the penalty denounced in it is $2,000. Upon the *conclusion* of the argument made before us at the present term, we announced that the decision of these cases would, in view of the public interests involved, be disposed of at an early day.

The pleadings are similar in substance. The declaration in one of the Gadsden County cases, which we take as a type of all, alleges that the railroad company is a body corporate organized under a special statute of this State, approved March 4, 1881 (chap. 3334), and operating a railroad from Pensacola to River Junction, both of which points are in the State, and that

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104 N. Y. 58; People v. Rome, W. & O. R. Co. 4 Cent. Rep. 197, 103 N. Y. 95.

It is beyond the powers and functions of the courts to hold practically under their control the administration of railroad affairs as to freight and other business. Chouteau v. Union R. & T. Co. 4 West. Rep. 397, 22 Mo. App. 286.

Power of court over controversies.

In the absence of legislative regulation, courts must decide for the company, when *controversies* arise, what is reasonable. Dow v. Beidelman, 125 U. S. 680 (31 L. ed. 841).

If the classification operates uniformly, the court cannot decide whether it was the best that could have been made. *Ibid.*

A railroad extending through several States is an entirety within each and is subject to the jurisdiction of courts in either State in an action to prevent discriminations in rates of freight. Providence Coal Co. v. Providence & W. R. Co. 2 New Eng. Rep. 507, 15 R. I. 303.

Remedy against discriminating charges.

The remedy against a railroad company for charging discriminating freights, where there is no adequate remedy at law, is by injunction. Scofield v. Lake Shore & M. S. R. Co. 1 West. Rep. 830, 43 Ohio St. 571.

A court of equity, to enforce statutes against discrimination, must be fully satisfied that its orders will not likewise work a discrimination. Chouteau v. Union R. & T. Co. 4 West. Rep. 397, 22 Mo. App. 286.

Where a suit was brought against a railroad company on account of alleged overcharges beyond a reasonable rate, but the declaration did not allege either that no rates had been fixed for the defendant's road or that the charges were beyond the rates so fixed, it was demurrable. Sorrell v. Central R. Co. 75 Ga. 509.

Discriminations; what are.

At common law the rule is that carriers shall not exercise any unjust discrimination in rates of toll. They are held to do exact and even-handed justice to everybody doing business with them. Scofield v. Lake Shore & M. S. R. Co. 1 West. Rep. 825, 43 Ohio St. 571; Indianapolis, D. & S. R. Co. v. Ervin, 6 West. Rep. 103, 118 Ill. 250.

Discriminations in freights, if fair and reasonable, founded on grounds *consistent with public* interests, is allowable. Scofield v. Lake Shore & M. S. R. Co. *supra.*

To charge one a rate less than the regular fixed rate is not discrimination. To charge one a higher rate than the lowest rate given to anyone else, under certain circumstances, is discrimination. McNees v. Mo. Pac. R. Co. 4 West. Rep. 875, 22 Mo. App. 224.

An agreement by a railroad company to carry for one at a cheaper rate than for another is void. Scofield v. Lake Shore & M. S. R. Co. *supra.*

Rates should be so relatively reasonable as to *protect communities* and business against unjust discrimination. Boards of Trade Union v. Chicago, M. & St. P. R. Co. 1 Inters. Com. Rep. 608.

An advantage given by a railroad, in establishing its charges on *different branches* on its road, to competing towns on the main line, must not be unreasonable. Raymond v. Chicago, M. & St. P. R. Co. 1 Inters. Com. Rep. 627.

Massachusetts Public Statutes, *chapter 112*, § 191, does not require a carrier allowing an expressman to keep a stand at its depot, to furnish equal facilities to all persons. Old Colony R. Co. v. Tripp, 6 New Eng. Rep. 367, 147 Mass. 35; Com. v. Carey, 6 New Eng. Rep. 371, 147 Mass. 40, note.

Trade centers are not entitled to more favorable rates than smaller towns for which they are distributing centers. Martin v. Chicago, B. & Q. R. Co. 2 Inters. Com. Rep. 32.

The fact that, under impartial arrangement of rates between large and small towns, one large distributing center has an advantage over a competing *distributing* center, does not show undue preference. *Ibid.*

That refusal to give a through rate as for one shipment operates prejudicially to a town desiring the privilege *does not make the refusal an unjust* discrimination when the carrier applies the same rule to all towns. Crews v. Richmond & D. R. Co. 1 Inters. Com. Rep. 703.

Under Illinois Statutes (2 Starr & C. p. 1962, § 3), it is not incumbent to prove a personal discrimination and a personal injury, as between individuals of a class, but the offense is made out by proof of a discrimination as between localities. Ill. Cent. R. Co. v. People, 10 West. Rep. 582, 121 Ill. 304.

on a certain day in April of the year 1888, it did "willfully charge, collect and demand and receive" of a person, naming him, for transporting him as a passenger from River Junction to Marianna, another point on the road, a distance of twenty-six miles, the sum of $1.25, and that this sum was more than three cents per mile, the rate prescribed by the railroad commissioners, and that the sum so collected was more than a fair and reasonab'e rate of toll or compensation for the transportation of the passenger; and that eighty cents, the sum which the company was allowed by the above rate prescribed by the commissioners (and a special rule as to amounts ending in other figure than 5 or 0) to charge, collect and receive, was a just and reasonable rate of compensation; and that by thus willfully collecting and receiving the stated excess over and above what it was allowed by the commissioners' rules to charge, collect and receive, the railroad company became and was guilty of extortion, and of a violation of the rules and regulations prescribed and published by the commissioners, by which rules and regulations the commissioners made, among others, a schedule or tariff of just and reasonable rates for the transportation of passengers on appellant's railroad.

It is also alleged that the commissioners gave notice to the principal officer of the railroad company of this violation, and directed the company to make reparation to the passenger for the injury and wrong so done him, by refunding to him the excess of forty-five cents, within thirty days, as prescribed by the statute; but it failed and refused to do so, and thereby forfeited to the State and incurred a penalty of $5,000.

To this declaration the railroad company interposed four pleas, and the State demurred to them as insufficient in law. The demurrer having been overruled, and the company not electing to plead over, judgment was entered, the Circuit Judge fixing the penalty at the amount indicated above.

Section 13 of article 16 of the Constitution of this State is as follows: The Legislature is invested with full power to pass laws for the correction of abuses, and to prevent unjust discrimination and excessive charges by persons and corporations engaged as common carriers in transporting persons and property, or performing other services of a public nature, and shall provide for enforcing such laws by adequate penalties or forfeitures.

Whether or not there is in this section a grant of any power which the Legislature did not have before, it is unnecessary for us to decide. There is, however, upon the face of it an apparent purpose to correct abuses. It shows that the convention in adopting and the people in ratifying the section were impressed with a belief that there existed a necessity for the enactment of laws correcting abuses, preventing unjust discriminations and excessive charges by common carriers in transporting persons and property, and that confidence in the sufficiency of the common-law remedies as agencies by which the individual citizen could find protection against or relief as to these evils had failed.

As to the necessity for the command thus made by the people to the law-making power, the judicial department is concluded by the existence of the section.

To effect the end proposed by the Constitution, the first Legislature assembled under it enacted the Railroad Commission Law, which was approved June 7, 1887, it being chapter 3746 of our statute.

This statute provides for the appointment of three commissioners and (§ 5) that they shall "make and fix reasonable and just rates of freight and passenger tariffs, to be observed by all railroad companies doing business in this State on the railroads thereof," and just and reasonable regulations as to charges for the necessary handling and delivery of freights at any and all points and for preventing discrimination in the transportation of freight and passengers, and reasonable and just rates of charges for the use of railroad cars carrying freight and passengers on said railroads, no matter by whom owned or carried; and just and reasonable rules and regulations to be observed by said railroad companies on said railroads, to prevent the giving of any rebate or bonus, directly or indirectly, and from misleading or deceiving the public in any manner as to the real rates charged for freight and passengers.

It also confers power upon the commissioners to designate and fix by rules and regulations the difference in the rates of freight and passenger transportation for longer or shorter hauls, and to ascertain what shall be the limits of longer and shorter distances.

There is in the above section also a provision to the effect that nothing in the act shall abridge or control the rates for freight which comes from or goes beyond the State and for which freight less than local rates for carrying the same is charged.

By the 6th section the commissioners are authorized and required to make for each railroad corporation a schedule "of just and reasonable" rates of charges for the transportation of passengers and freights and cars, and "Said schedule shall in any suit brought against any such railroad corporation wherein is involved the charges of any such corporations for the transportation of any passengers or freight or cars, or unjust discrimination in relation thereto, be deemed and taken in all courts of this State as sufficient evidence that the rates fixed therein are just and reasonable rates of charges for the transportation of passengers and freight and cars upon the railroads.'

The commissioners are required to publish these schedules, and the railroad companies to post them in a manner stated; and any such schedules purporting to be printed and published shall be received and held in all suits as *prima facie* the schedule of said commissioners without further proof than its production with a certificate from the commission of its being a true copy of the schedule prepared by them for the railroad company or corporation therein named, and that it has been duly published as required by law, stating the name of the newspaper, the date and place of publication.

This section also enacts that the commissioners shall, from time to time, and as often

as circumstances may require, change and revise the schedules.

Sections 7 to 13 inclusive provide for a protest by the railroad company against the enforcement of any and all "rates of freight and passenger tariffs, or other rules and regulations" made by the commissioners, and a hearing and decision thereon by them, and for an appeal from the decision to a board of revisers, consisting of the Comptroller, Secretary of State, Commissioner of Agriculture, Attorney-General and the Treasurer of the State, and a hearing and decision by such board. Section 14 gives the same right of protest to any individual, corporation, firm or partnership.

Section 5 enacts, *inter alia*, that if any rail road corporation, organized under the laws of this State and doing business therein, "shall willfully charge, collect, demand or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight of any description," it shall be "deemed guilty of extortion, and upon conviction thereof shall be dealt with as hereafter provided."

Section 17 provides that if any railroad company doing business in this State, by its agent or employés shall be guilty of a violation of the rules and regulations prescribed by the commissioners, and, if after due notice of such violation given to the principal office thereof, ample and full recompense for the wrong and injury done thereby to any person or corporation, as may be directed by said commissioners, shall not be made within thirty days from the time of such notice, such company shall incur a penalty for each offense of not less than $100, nor more than $5,000, to be fixed by the presiding judge.

This action is to be in the name of the State, and to be instituted by the commissioners through the Attorney-General or a state attorney, and in the county where the wrong was perpetrated.

Under section 19 all fines collected under the Act are to be paid to the county treasurer for county school purposes; and the rules of evidence in all cases under the Act are the same as in civil actions, except as hereinbefore provided.

There are other features of the statute, but it is not necessary to set them out now. They give a personal remedy, in addition to those provided by the common law, to individuals wronged by a violation upon the part of a railroad company of any rule or regulation of the commissioners, and relate to matters of detail not necessary to an understanding of the statute in so far as either its general purpose, or its effect in the case before us is concerned.

The question of the extent of the power of the Legislature in the regulation of the charges of common carriers for carrying persons and property is not settled or defined.

The doctrine of the case of *Munn* v. *Illinois*, 94 U. S. 113 [24 L. ed. 77], it being one of the so called *Granger Cases* reported in that volume, is as follows:

Where one devotes his property to a use which the public have an interest in, he in effect grants to the public an interest in such use, and the property, during such use, ceases to be a subject of mere private right, and the owner must, to the extent of that use, submit to be controlled by the public for the common good so long as he maintains such use. The devotion of it to the public use takes from him the right to make arbitrary or excessive charges for its use by the public, and he must be content with a reasonable compensation. In the absence of legislative regulation what is a reasonable compensation is under the common law a matter to be determined by the courts; but this may be changed by statute, and the Legislature may exercise it by prescribing the maximum rates of charges to be made by common carriers, ferries, hackmen, bakers, wharfingers and others of like avocations, and has often done so.

The cases upon which the controlling opinion in the *Munn Case* is based recognize the right of the owner of the property applied to public use, to a reasonable compensation, and so does that opinion; yet, admitting that the Legislature may abuse its power, that opinion says that "for protection against abuses by the Legislature the people must resort to the polls, and not to the courts."

In *Chicago Railroad Company* v. *Iowa*, 94 U. S. 155 [24 L. ed. 94], another of the *Granger Cases*, it is held that railroad companies are carriers for hire; that they are incorporated as such and given extraordinary powers in order that they may the better serve the public in that capacity, and they are therefore engaged in a public employment affecting the public interest, and, under the doctrine of *Munn* v. *Illinois*, subject to legislative control as to their rates of fare and freight, unless protected by their charters. "This railroad company," says the opinion, p. 161 [95], "has in the transaction of its business the same rights and is subject to the same control as private individuals under the same circumstances. It must carry, when called upon to do so, and can charge only a reasonable sum for the carriage. In the absence of any legislative regulation upon the subject, the courts must decide for it, as they do for private persons when controversies arise, what is reasonable. But when the Legislature steps in and prescribes a maximum of charges it operates upon this corporation the same as it does upon individuals engaged in a similar business." It is also said that, in the absence of a contract to the contrary in the charter, the company invested its capital, relying upon the good faith of the people and the wisdom and impartiality of legislators for protection against wrong under the form of legislative regulation.

In *Stone* v. *Farmers Loan & Trust Company*, 116 U. S. 307, 325 [29 L. ed. 636, 642], it is said: It is settled (in that court) that a State may limit railroad transportation charges within its territory unless restrained by some contract in the charter, or unless the regulation amounts to one of foreign or interstate commerce. In this opinion, after stating that the charter of the Baltimore & Ohio Railroad Company gives authority "to carry persons and property," it is remarked:

"This of itself implies authority to charge a reasonable sum for the carriage. In this way the corporation was put in the same position as a natural person would occupy if engaged