doubt as to personal judgments. But though such a judgment would be good in Pennsylvania, it does not follow that it would be good here, for the supreme court of Pennsylvania, in *Steel* v. *Smith*, 7 Watts & S. 447, in an opinion delivered by the eminent *Chief Justice* Gibson, held that a judgment of Louisiana on attachment of property and summons served on one of the joint owners, which by the Louisiana law was good as to all defendants, was a nullity in the courts of Pennsylvania as to parties not served. The only Pennsylvania statute to which I have access provides that service of process on a corporation shall be on its president or other chief officer, cashier, treasurer, secretary, or chief clerk. No service of any kind appears here. For this reason the judgment was properly disallowed. No plea of *nul tiel* record was necessary. It is a chancery suit, and concerns the audit of debts, on a reference before a master; and when the judgment creditors presented the judgment, adverse interests could contest it on any legal ground without formal plea. I remark that it was not this *scire facias* judgment which was considered on the appeal reported in *Fidelity Ins. Trust & S. D. Co.* v. *Shenandoah Valley R. Co.* 33 W. Va. 761, but the original one. But let us suppose that the judgments were valid, and that, treating Clark & Co's payment simply as a payment, it would be cut off by the judgment so the payment could not now be pleaded. What then? Jamison & Co. are no longer its owners, but Clark & Co. are assignees of it, and they are not asking its allowance, but Jamison & Co. are claiming for their own use. When Clark & Co. paid it, the law implied that Jamison & Co. would assign it to them, and, without assignment actual, a court of equity treats them as its equitable owners. The case of *Neely* v. *Jones*, 16 W. Va. 625, in point 4, clearly supports this position. Boyce's evidence, uncontradicted, is that Jamison & Co., in the agreement they made with him promised to assign the judgment to him, and their attorney did transmit him a copy of the judgment. Now, if this evidence is not forbidden from consideration by the execution of the writing between Clark & Co. and Jamison & Co., then either Clark & Co. or Boyce have an express agreement to assign, tantamount to an assignment, and, though no actual assignment be made, equity regards it as an equitable assignment; and this is the letter of point 5 in *Neely* v. *Jones*, *supra*, and *Beard* v. *Arbuckle*, 19 W. Va. 135. It, may be with some force said that, as between Jamison & Co. and Boyce, the assignment should go to Boyce, and then there would be no ground for saying that the oral agreement to assign would be excluded by the writing. In fact, Jamison & Co. admit in their petition for the appeal that they assigned it to Boyce; so this court ought not to decree it to them. Thus, I think, law excludes the allowance of this judgment to Jamison & Co., and this conclusion accords with the real justice of the case. Jamison & Co. only wanted the amount they advanced to the Central Improvement Company. They got it. They do not deny, but admit, they received all the company owed them, but they want now to hold it as collateral for a merely personal loan to Boyce.

And now as to U. L. Boyce's claim to said Jamison & Co's judgment. He has no title to it, to his own use. Any shadow of interest that may be vested in him was for other use than his own: First. He negotiated for the acquirement of it from Jamison & Co. for Clark & Co. as financial agents of the Shenandoah Valley Railroad Company, whose vice-president Boyce was at that very time, and in whose service and interest he acted touching this judgment. Clark & Co. paid for the judgment, and took the contract in their name. Boyce explicitly says as a witness, and in a letter to Doran, that he was to get assignment of it, and transfer it to the parties furnishing the money, and that Clark & Co. furnished the money. Never was a resulting trust more plainly established than that any show of technical right in Boyce was for the use of Clark & Co. And then, further, consider that Clark & Co. were agents of the Shenandoah Valley Railroad Company, and Boyce its vice-president. And that he was acting for it, he does not deny, but admits; and a receipt to his company for hotel bill on the trip to acquire the judgment confirms it.

Thus we conclude that neither Jamison & Co. nor Boyce have right to this judgment. It is urged by counsel that the Shenandoah Valley Railroad Company, in a certain answer, stated that a balance was due on this judgment, treating it thus as not paid. If it belonged to the Fidelity Company, under its mortgage, could the Shenandoah Valley Railroad Company, by this admission, prejudice the right of that company? It could not. But, if the Shenandoah Valley Railroad Company owned it, it could say, with entire consistency with the fact that Clark & Co. had paid it as regards Jamison & Co., that a balance was due on it from the Central Improvement Company, as it had never paid it. As assignee, it could say that the Central Improvement Company yet owed a balance.

Barclay's and Green's Demands.

Barclay filed before the commissioner, and asked payment out of the fund, an account for $10,000, for services for four years and one month as president of the Central Improvement Company, and Green filed an account for $6,250 for two and one-half years' services as treasurer and secretary. Both these gentlemen were stockholders and directors of the company. The commissioner rejected the claims. The Central Improvement Company is a Pennsylvania corporation, having its habitat and chief office there, and there the services were performed and were to be paid for, if at all; and, if any contract were implied by law to pay compensation for service of those officers of the corporation, it would be a Pennsylvania contract. Hence, the law of that state operates upon the case specially. We must therefore see whether the law of Pennsylvania would raise an implied contract to pay for such service. *Klinck* v. *Price*, 4 W. Va. 4, 6 Am. Rep. 268; *Stevens* v. *Brown*, 20 W. Va. 450; *Hefflebower* v. *Detrick*, 27 W. Va. 16. There was no express contract to pay for such services, and, if there can be

any recovery therefor, it must be on the theory that the law raises an implied promise to pay for the service. I think the case of *Kilpatrick* v. *Penrose Ferry Bridge Co.*, 49 Pa. 118, 88 Am. Dec. 497, uncontrollably decides against the allowance of these accounts. It holds that "corporations are not liable on a *quantum meruit* for services performed by their officers. There must be an express contract for compensation, or there can be no recovery." In that case, Sersill claimed for service as president, and Kilpatrick as treasurer, as in this case, and the court held that they could not recover. The court said: "The salary or compensation of corporate officers is usually fixed by a by-law or by a resolution either of the directors or stockholders, but, where no salary has been fixed, none can be recovered. Corporate offices are usually filled by the chief promoters of the corporation, whose interests in the stock or in other incidental advantages is supposed to be a motive for executing the duties of the office without compensation, and this presumption prevails until overcome by an express prearrangement of salary. Hence, we held in *Accommodation Loan & Sav. Fund Asso.* v. *Stonemetz*, 29 Pa. 534, as a general principle, that a director of a corporation, elected to serve without compensation, could not recover in an action against the company for services rendered in that capacity, though a subsequent resolution of the board, agreeing to pay him for past services, was shown. . . . And the rule is just as applicable to presidents and treasurers and other officers as to directors. . . . It is well the law is so. Corporate officers have ample opportunities to adjust and fix their compensation before they render service, and no great mischief is likely to result from compelling them to do so. But if, on the other hand, actions are to be maintained by corporate officers for services, which, however faithful and valuable, were not rendered on the foot of an express contract, there would be no limitation to corporate liabilities, and stockholders would be devoured by officers." In the later case of *Martindale* v. *Wilson-Cass Co.*, 134 Pa. 348, it is held: "The general rule on the subject of compensation to the directors of a private corporation is that they are not entitled to compensation for official services unless it is provided for in the corporate charter or by-laws. In the absence of such provision, a director or president of such corporation cannot recover pay for official services, when no agreement for compensation preceded them, no presumption of such agreement arising from their performance." A by-law of the Central Improvement Company provided that the directors "shall have power to appoint all other officers or agents of the company, and fix the compensation and define the duties of all their officers or agents," but the directors never fixed any compensation. This was a mere power, given to be exercised or not, as the directors might choose, and does not itself give compensation, and the very fact that the directors, having this power, never exercised it, negatives the idea that any compensation was intended. *Re Bolt & Iron Co.*, 14 Ont. Rep. 211. So it is clear that, under the Pennsylvania law, these officers can recover nothing.

Though not necessary to go further, my examination has led me to the conclusion that the decisions in Pennsylvania reflect the true rule applicable nearly everywhere, in denying pay without express provision or contract, not only to the president, but a treasurer or secretary, when stockholders or directors. The authorities have led my mind to the conclusion that the law raises no implied promise to pay compensation to directors, president, or vice-president of a private corporation, in the absence of provision in by-law or order of the directors. They are trustees charged with the funds, and cannot recover on a *quantum meruit*. *Gridley* v. *Lafayette, B. & M. R. Co.* 71 Ill. 200; *Cheeney* v. *Lafayette, B. & M. R. Co.* 68 Ill. 570, 18 Am. Rep. 584; *Santa Clara Min. Asso.* v. *Meredith*, 49 Md. 389, 33 Am. Rep. 264; *Citizens Nat. Bank* v. *Elliott*, 55 Iowa, 104, 39 Am. Rep. 167; *Sawyer* v. *Farmers Bank*, 6 Allen, 207; *New York & N. H. R. Co.* v. *Ketchum*, 27 Conn. 180; *Ogden* v. *Murray*, 39 N. Y. 202; 1 Beach, Priv. Corp. § 208. And that if the treasurer, secretary, or other executive officer be a stockholder or director, no such promise is raised by law in his favor; but, if not, then the law does raise such promise, and presume that pay was intended, from the fact of appointment, and he may get compensation. *Smith* v. *Long Island R. Co.* 102 N. Y. 190; *Holder* v. *Lafayette, B. & M. R. Co.* 71 Ill. 106, 109, 22 Am. Rep. 89; *Cheeney* v. *Lafayette, B. & M. R. Co.* 68 Ill. 570, 18 Am. Rep. 584; 1 Beach, Priv. Corp. § 200; *note* to *Grundy* v. *Pine Hill Coal Co.* (Ky.) 23 Am. & Eng. Corp. Cas. 616. Of course, I do not here speak of the mere employés of corporations, they being entitled to compensation.

Therefore, so much of the decree of March 2, 1891, as rejects the claim of B. K. Jamison & Co. and U. L. Boyce to said judgment, and the said accounts of R. D. Barclay and John P. Green, is *affirmed.*

PENNSYLVANIA SUPREME COURT.

George M. COTE
v.
Hugh MURPHY *et al.*, *Appts.*

(159 Pa. 420.)

1. **Greed of profit or malice toward others is an essential element** to an unlawful conspiracy at common law to restrain trade.

2. **A combination of employers to resist an advance in wages determined upon by an association of employes,** by refusing to sell to any persons who concede such advance, is not an unlawful conspiracy, since the passage of the Pennsylvania statute making it lawful for employés to combine to raise wages, and to persuade by all lawful means others from working for a less sum, as such combination is not to lower the price of wages as regulated by supply and demand, but to resist an artificial price made by a combination which by statute is lawful.

3. **That one whose business is injured by a combination of employers to resist a demand of workmen for an increase of wages is not a workman** nor a member of a workmen's union will not entitle him to recover his damages from the members of the combine if the combination was lawful as to the workmen and he had undertaken to aid their cause.

4. **Sending notices to wholesalers that members of an employers' organization formed to resist a demand by workmen for an increase in wages will withdraw their patronage** if sales are made to persons acquiescing in the workmen's demand is not such coercion or threat as will render the combination unlawful.

(January 2, 1894.)

APPEAL by defendants from a judgment of the Court of Common Pleas for Allegheny County in favor of plaintiff in an action brought to recover damages for injuries alleged to have been caused to plaintiff by reason of a conspiracy between defendants to damage plaintiff in his business. *Reversed.*

The facts sufficiently appear in the opinion.

Messrs. **J. McF. Carpenter, J. S. Ferguson** and **E. G. Ferguson,** for appellants:

All that can be claimed by the plaintiff is that the defendants in effect declared to Woods, Jenks & Co., Loeb, and others, that they would not buy from them if they sold to Cote while he was employing strikers and selling to persons who had acceded to their demands, and that they, believing that the trade of the defendants was more valuable to them than that of Cote, saw fit for the time being to discontinue dealing with him. They were free in every sense of the word to do as they pleased.

Any one of the defendants could have done any of these things without incurring any legal responsibility.

Payne v. *Western & A. R. Co.* 13 Lea. 507, 49 Am. Rep. 666; *Heywood* v. *Tillson*, 75 Me. 227, 46 Am. Rep. 373.

If, then, each of these defendants could have lawfully done the acts complained of, why might they not all agree to do the same things?

In law a threat is a declaration of an intention or determination to injure another by the commission of some unlawful act. If the act intended to be done is not unlawful then the declaration is not a threat in law, and the effect thereof is not intimidation in a legal sense.

Payne v. *Western & A. R. Co. supra.*

It is absurd to say that any man is coerced to do that which he does after balancing the advantage of one course or the other to himself. The agreement of a number of men to do that which each of them could lawfully do does not make an actionable conspiracy.

Rogers v. *Dutt*, 13 Moore, P. C. C. 209; *Bowen* v. *Matheson*, 14 Allen, 499; *Mogul S. S. Co.* v. *McGregor*, L. R. 21 Q. B. Div. 544, L. R. 23 Q. B. Div. 598 [1892], A. C. 25; *Bohn Mfg. Co.* v. *Hollis* (Minn.) 48 Alb. L. J. 307.

The same right which we claim has been conceded to the employed by many decisions.

State v. *Donaldson*, 32 N. J. L. 151, 90 Am. Dec. 649; *People* v. *Wilzig*, 4 N. Y. Crim. Rep. 403.

Messrs. **J. A. Wakefield** and **J. W. Kinnear,** for appellee:

We rely on *Morris Run Coal Co.* v. *Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159.

See also *Moores* v. *Bricklayers Union No. 1*, 7 R. R. & Corp. L. J. 108.

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

The defendants were members of the Planing Mill Association, of Allegheny county, and Builders' Exchange, of Pittsburgh. The

NOTE.—The law of conspiracy as touching the lawfulness of combinations of employés or employers has become so important in the last few years that any new development of that branch of the law must claim attention. In the above case the lawfulness of a combination of employers to resist demands of employés is held to be implied from the statutory right of employés to make a combination which the employers are resisting, and this is we believe a new point in the law of this subject.

As to boycotts generally, see *note* to Casey v. Cincinnati Typographical Union No. 3 (C. C. S. D. Ohio) 12 L. R. A. 193, also the cases, Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co. (C. C. N. D. Ohio) 19 L. R. A. 395, and Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co. (C. C. N. D. Ohio) 19 L. R. A. 387; Cœur D'Alene Consol. Min. Co. v. Miners Union of Wardner (C. C. D. Idaho) 19 L. R. A. 382.

As to procuring discharge of nonunion employés see Lucke v. Clothing Cutters & T. Assembly, No. 7507, K. of L. (Md.) 19 L. R. A. 408; while as to blacklisting by employers, see Worthington v. Waring (Mass.) 20 L. R. A. 342.

The unlawfulness of a combination to drive a competitor out of business is decided in Jackson v. Stanfield (Ind.) *post*,—(now held for rehearing).

See also 23 L. R. A. 588; 48 L. R. A. 90.

different partnerships and individuals composing these associations were in the business of contracting and building, and furnishing building material of all kinds. On the 1st of May, 1891, there was a strike of the carpenters, masons, and bricklayers in the building trades, bringing about, to a large extent, a stoppage of building. The men demanded an eight-hour day, with no reduction in wages theretofore paid, which the employers refused to grant. Then a strike by the unions of the different trades was declared. The plaintiff at the time, was doing business in the city of Pittsburgh, as a dealer in building materials. He was not a member of either the Planing Mill Association, or of the Builders' Exchange. There were also contractors and builders, who belonged to neither of these organizations, who conceded the demands of the workmen. They sought to secure building material from dealers, wherever they could, and thus go on with their contracts. If they succeeded in purchasing the necessary material, the result would be that at least some of the striking workmen would have employment at a higher rate of wages than the two associations were willing to pay. The tendency of this was to strengthen the cause of the strikers, for those employed were able to contribute to the support of their fellow workmen who were idle. The two associations already named sought to enlist all concerned, as contractors and builders, or as dealers in supplies, whether members of the associations or not, in the furtherance of the one object,—resistance to the demands of the workmen. The plaintiff, and six other individuals or firms engaged in the same business, refused to join them, and undertook to continue sales of building material to those builders who had conceded the eight-hour day. The Planing Mill Association and Builders' Exchange tried to limit their ability to carry on work at the advance by inducing lumber dealers and others to refrain from shipping or selling them, in quantities, the lumber and other material necessary to carrying on the retail business. In several instances their efforts were successful, and the plaintiff did not succeed in purchasing lumber from certain of the wholesale dealers in Cleveland and Dubois, where he wanted to buy. The defendants were active members of one or other or both of the associations engaged in the contest with the striking workmen. The strike continued about two months. After it was at an end, the plaintiff brought suit against defendants, averring an unlawful and successful conspiracy to injure him in his business, and to interfere with the course of trade generally, to the injury of the public; that the conspiracy was carried out by a refusal to sell to him building materials, themselves, and by threats and intimidation preventing other dealers from doing so. Under the instructions of the court upon the evidence, there was a verdict for plaintiff in the sum of $2,500 damages, which the court reduced to $1,500; then judgment: and from that defendants take this appeal.

The plaintiff's case is not one which appeals very strongly to a sense of justice. The mechanics of Pittsburgh, engaged in the different building trades, on the 1st of May, 1891, demanded that eight hours should be computed as a day, in payment of their wages. Their right to do this is clear. It is one of the indefeasible rights of a mechanic or a laborer, in this commonwealth, to fix such value on his services as he sees proper, and under the constitution there is no power lodged anywhere to compel him to work for less than he chooses to accept. But in this case the workmen went further. They agreed that no one of them would work for less than the demand, and by all lawful means, such as reasoning and persuasion, they would prevent other workmen from working for less. Their right to do this is also clear. At common law, this last was a conspiracy, and indictable, but under the Acts of 1869, 1872, 1876, and 1891, employés, acting together by agreement, may, with few exceptions, lawfully do all those things which the common law declared a conspiracy. They are still forbidden, in the prosecution of a strike, preventing any one of their number who may desire to labor from doing so, by force, or menace of harm to person or property; but the strike here was conducted, throughout, in a lawful, orderly manner. The employers—contractors and others engaged in building and furnishing supplies, members of the two associations already mentioned, to which these defendants belonged—refused to concede the demands of the workmen, and there then followed a prolonged and bitter contest. The members of the associations refused to furnish supplies to those engaged in the construction of any building where the contractor had conceded the eight-hour day. This, as individual dealers, they had a clear right to do. They could sell and deliver their material to whom they pleased. But they also went further. They agreed among themselves that no member of the association would furnish supplies to those who were in favor of, or had conceded, the eight-hour day, and that they would dissuade other dealers, not members of the associations, from furnishing building material to such contractors or retail dealers. To the extent of their power, this agreement was carried out. This, clearly was combination, and the acts of assembly referred to do not, in terms, embrace employers. They only include, within their express terms, workmen. Hence, it is argued by counsel for appellee, these defendants are subject to all the common-law liability of conspirators, in their attempts to resist the demands for increased wages; that is, there can be a combination among workmen to advance wages, but there can be no such combination of employers to resist the advance. That which, by statute, is permitted to the one side, the common law still denies to the other. If this position be well taken, we then have this inequality: The plaintiff, who is aiding a combination, either directly or indirectly, intentionally or unintentionally, to advance wages, sues, for damages, members of another combination, who resist the advance. Nor is there any difference in the character of the acts or means on both sides in fur-

therance of their purposes. The workmen will not work themselves, and they use persuasion and reason with their fellows to keep them from going to work, until the demand is conceded. The employers will not sell to contractors who concede the demand, and they do their best to persuade others engaged in the said business from doing so. Then, the element of real damage to plaintiff is absent. By far the larger number of dealers in the city and county were members of the combination which refused to sell. Only the plaintiff and six others refused to enter the combination. The result was that these seven had almost a monopoly of furnishing supplies to all builders who conceded the advance. Plaintiff admits in his own testimony that thereby his business and profits largely increased. In a few instances, he paid more to wholesale dealers, and put in more time buying, than he would have done if the associations had not interfered with those who sold him. But it is not denied that as a result of the combination he was, individually, a large gainer. True, he avers that if defendants had gone no further than to refuse to sell, themselves, he would have made a great deal more money; that is, he did not make as large a sum as he would have made if they had not dissuaded others, not members of the association, from selling to him. But that, by the fact of the combinations and strike, he was richer at the end than when they commenced, is not questioned.

We then have these facts, somewhat peculiar in the administration of justice: A plaintiff suing and recovering damages for an alleged unlawful act, of which he himself, in so far as he aided the workmen's combination, is also guilty, and both acts springing from the same source,—a contest between employers and employed as to the price of daily wages,—and then the further fact that this contest, instead of damaging him, resulted largely to his profit. We assume, so far as concerns defendants, if their agreement was unlawful, or, if lawful, it was carried out by unlawful acts, to the damage of plaintiff, the judgment should stand. All the authorities of this state go to show that, while the act of an individual may not be unlawful, yet the same act, when committed by a combination of two or more, may be unlawful, and therefore be actionable. A dictum of *Lord* Denman in *Rex* v. *Seward*, 1 Ad. & El. 711, gives this definition of a "conspiracy:" "It is either a combination to procure an unlawful object, or to procure a lawful object by unlawful means." This leaves still undetermined the meaning to be given the words "lawful" and "unlawful," in their connection in the antithesis. An agreement may be unlawful, in the sense that the law will not aid in its enforcement, or recognize it as binding upon those who have made it, yet not unlawful in the sense that it will punish those who are parties to it, either criminally or by a verdict in damages. *Lord* Denman is reported to have said afterwards in *Reg.* v. *Peck*, 9 Ad. & El. 690, that his definition was not very correct. See *note* to section 2291, 3 Wharton on Criminal Law. It is conceded, however, in the case in hand, any one of defendants, acting for himself, had a right to refuse to sell to those favoring the eight-hour day, and so, acting for himself, had the right to dissuade others from selling. If the act were unlawful at all, it was because of the combination of a number. Gibson, *J.*, in *Com.* v. *Carlisle*, Bright. (Pa.) 40, says: "Where the act is lawful for the individual, it can be the subject of conspiracy, when done in concert, only where there is a direct intention that injury shall result from it, or where the object is to benefit the conspirators to the prejudice of the public or the oppression of individuals, and where such prejudice or oppression is the natural and necessary consequence." In the same case it is held: "A combination is criminal wherever the act to be done has a necessary tendency to prejudice the public, or to oppress individuals by unjustly subjecting them to the power of the confederacy, and giving effect to the purposes of the latter, whether of extortion or mischief. According to this view of the law, a combination of employers to depress the wages of journeymen below what they would be if there was no recurrence to artificial means on either side is criminal." This case puts the law against the combination in as strong terms, if not stronger, than any others of our own state. The significant qualification of the general principle, as mentioned in the last three lines, will be noticed: "If there was no recurrence to artificial means on either side." The prejudice to the public is the use of artificial means to affect prices, whereby the public suffers. A combination of stock-brokers, to corner a stock; of farmers, to raise the price of grain; of manufacturers, to raise the price of their product; of employers, to reduce the price of labor; of workmen, to raise the price,—were at the date of that decision, at common law, all conspiracies. The fixed theory of courts and legislators then was that the price of everything ought to be, and in the absence of combination necessarily would be, regulated by supply and demand. The first to deny the justice of this theory, and to break away from it, was labor; and this was soon followed by the legislation already noticed, relieving workmen from the penalties of what for more than a century had been declared unlawful combinations or conspiracies. Wages, it was argued, should be fixed by the fair proportion labor had contributed in production. The market price, determined by supply and demand, might or might not be fair wages, —often was not,—and as long as workmen were not free, by combination, to insist on their right to fair wages, oppression by capital, or, which is the same thing, by their employers, followed. It is not our business to pass on the soundness of the theories which prompt the enactment of statutes. One thing, however is clear: The moment the legislature relieves one, and by far the larger number, of the citizens of the commonwealth from the common-law prohibitions against combinations to raise the price of labor, and by a combination the price was raised, down went the foundation on which common-law conspiracy was based, as to that particular

subject. Before any legislation on the question, it was held that a combination of workmen to raise the price of labor, or of employers to depress it, was unlawful, because such combination interfered with the price, which would otherwise be regulated by supply and demand. This interference was in restraint of trade or business, and prejudicial to the public at large. Such combination made an artificial price. Workmen, by reason of the combination, were not willing to work for what, otherwise, they would accept. Employers would not pay what, otherwise, they would consider fair wages. Supply and demand consist in the amount of labor for sale, and the needs of the employer who buys. If more men offered to sell labor than are needed, the price goes down, and the employer buys cheap. If fewer than required offer, the price goes up, and he buys dear. As every seller and buyer is free to bargain for himself, the price is regulated solely by supply and demand. On this reasoning was founded common-law conspiracy, in this class of cases. But in this case the workmen, without regard to the supply of labor, or the demand for it, agreed upon what, in their judgment, is a fair price, and then combined in a demand for payment of that price. When refused, in pursuance of the combination, they quit work, and agree not to work until the demand is conceded. Further, they agree, by lawful means, to prevent all others, not members of the combination, from going to work until the employers agree to pay the price fixed by the combination. And this, as long as no force was used, or menaces to person or property, they had a lawful right to do; and, so far as is known to us, the rise demanded by them may have been a fair one. But it is nonsense to say that this was a price fixed by supply and demand. It was fixed by a combination of workmen on their combined judgment as to its fairness; and, that the supply might not lessen it, they combined to prevent all other workmen in the market from accepting less. Then followed the combination of employers, not to lower the wages theretofore paid, but to resist the demand of a combination for an advance; not to resist an advance which would naturally follow a limited supply in the market, for the supply, so far as the workmen belonging to the combination were concerned, was, by combination, wholly withdrawn, and, as to workmen other than members, to the extent of their power, they kept them out of the market. By artificial means, the market supply was almost wholly cut off. The combination of the employers, then, was not to interfere with the price of labor, as determined by the common-law theory, but to defend themselves against a demand made altogether regardless of the price, as regulated by the supply. The element of an unlawful combination to restrain trade because of greed of profit to themselves, or of malice towards plaintiff or others, is lacking, and this is the essential element on which is founded all the decisions as to common-law conspiracy in this class of cases; and, however unchanged may be the law as to combinations of employers to interfere with wages, where such combinations take the initiative, they certainly do not depress a market price, when they combine to resist a combination to artificially advance price. "The reason of the law is the life of the law," and, as given in the cases cited by appellee, irresistibly impels to the conclusion that the combination here was not unlawful; a conclusion which is clearly indicated in *Com.* v. *Carlisle, supra,*—that it would not be unlawful if there was first recurrence to artificial means by workmen to raise the market price. Here, the first step provocative of a combination by the employers was an attempt, by lawful, artificial means on part of the workmen, to control the supply of labor, preparatory to a demand for an advance. Nor does the fact that the appellee was not a workman, nor a member of any of the unions of workmen, put him in any better attitude than if he were. He undertook, for his own profit, to aid the cause of the workmen. His right so to do was unquestionable. But if the employers, by a lawful combination, could limit his ability so to do, they did not make themselves answerable in damages to him for the consequences of a lawful act.

The case of *Morris Run Coal Co.* v. *Barclay Coal Co.*, 68 Pa. 173, 8 Am. Rep. 159, is not in point. It was the attempt to enforce the collection of a draft given by one member of a combination formed to raise the price of coal to another, in consideration of certain stipulations in the agreement. It was held that the combination, being in restraint of trade, was unlawful, and, as the draft was given in pursuance of the unlawful contract, it, also, was tainted with the illegality, and there could be no recovery. But, if the agreement itself were not unlawful, were the methods to carry it out unlawful? If the employers' combination here had used illegal methods or means to prevent other dealers from selling supplies to plaintiff, the conspiracy might still have been found to exist. The threats referred to, although what are usually termed "threats," were not so in a legal sense. To have said they would inflict bodily harm on other dealers, or villify them in the newspapers, or bring on them social ostracism, or similar declarations,—these the law would have deemed threats, for they may deter a man of ordinary courage from the prosecution of his business in a way which accords with his own notions. But to say—and even that is inferential from the correspondence—that if they continued to sell to plaintiff the members of the association would not buy from them, is not a threat. It does not interfere with the dealer's free choice. It may have prompted him to a somewhat sordid calculation. He may have considered which custom was most profitable, and have acted accordingly. But this was not such coercion and threats as constituted the acts of the combination unlawful. *Rogers* v. *Dutt*, 13 Moore, P. C. C. 209; *Bowen* v. *Matheson*, 14 Allen, 499; *Bohn Mfg. Co.* v. *Hollis* (Minn.) 55 N. W. Rep. 1119 (not yet officially reported). On the main question the case last cited goes further than we are called upon to go, as yet, in this state. It holds that what is not unlawful when done

by an individual cannot be unlawful when done by many, and therefore the combination not to deal with those who broke the rules of the association was not a conspiracy. For this a number of cases from other states, as well as from England, are cited. But the law in this state has heretofore been determined otherwise, from a very early day, by an unbroken line of decisions, which here call for no qualification; for, so far as concerns the facts of this case, the legislature has so changed the law as to render these decisions inapplicable. We concede, however, that the decisions of other courts are by no means uniform. Mr. Wright, in his work on the Law of Criminal Conspiracies and Agreements (London, 1873), says: "It is conceived that, on a review of all the decisions, there is a great preponderance of authority in favor of the proposition that as a rule an agreement or combination is not criminal, unless it be for acts or omissions, whether as ends or means, which would be criminal apart from agreement." Logically, the same rule would apply, as was held in *Bohn Mfg. Co.* v. *Hollis*, to combinations which, although not criminal, are alleged to be unlawful. But without regard to whether the general rule be settled by weight of authority, as claimed by appellants, we hold here that this combination was not unlawful, because (1) it was not made to lower the price of wages, as regulated by the supply and demand, but to resist an artificial price made by a combination which, by statute, was not unlawful; (2) the methods adopted to further the objects of the combination were not unlawful.

Another point has been most earnestly pressed upon our consideration by counsel for appellants. It is argued that, under our declaration of rights, either the Acts of Assembly of 1869, 1872, 1876, and 1891, exempting employés from the penalties of unlawful combination to fix the price of labor, are void, because, by their terms, they embrance only a particular class of citizens of the commonwealth, or their scope must be enlarged beyond the express terms of these acts, so as to include within their protection all those interested in the same subject of legislation. It is argued that it is not within the power of the legislature to declare some citizens innocent of any offense against the law, for the very same act which, when committed by some others in the same business, the law will still hold to be criminal; that what the statute declares is not conspiracy in one case cannot, under the law, be conspiracy in the other; and therefore, in every contest of this kind between workmen and employers, the statute, if not void, must at least be held to operate equally to the exemption of all citizens interested in the subject affected by the combination. If there be nothing criminal in a combination to artificially raise wages, there can be nothing criminal in an employers' combination to resist the advance, or to artificially depress them. This question is not in the case, in the view we have taken of the facts. We are at all times averse to passing on questions, the answers to which are not necessary to a decision of the case immediately before us. Much less are we inclined to discuss and decide questions involving the constitutional power of a co-ordinate branch of the government. For this reason we refrain from a consideration of the able argument of counsel for appellants on this point.

The refusal of the court below to affirm appellants' seventh prayer for instructions, that "under all the evidence the verdict must be for defendants," was error, and, being here assigned for error, the appeal is sustained, and *judgment reversed*.

ILLINOIS SUPREME COURT.

PEOPLE of the State of Illinois, *ex rel.* Tida BRADLEY,
v.
BOARD OF MANAGERS, etc., OF ILLINOIS STATE REFORMATORY.

(148 Ill. 413.)

1. **A sentence to a state reformatory of an infant charged with crime** must be regarded as a penalty and punishment for crime, where the statute authorizes sentence only after conviction of crime and requires the sentence to be "to imprisonment."

2. **The maximum term of imprisonment for a crime is to be taken as that for which an infant is sentenced** to a reformatory, where the statute provides that the court shall not fix the limit of duration of the term, but that it shall not exceed the maximum term provided by law for that crime and that it may be terminated by the board of managers on certain conditions.

3. **A constitutional provision that "all penalties shall be proportioned to the nature of the offense" is not violated** by committing infants to a reformatory with a maximum sentence for the crime, subject to be

NOTE.—The disposition and treatment of children convicted of crime has become a question of the highest practical importance and the conformity to the constitution of statutes relating to this matter is not altogether without difficulty.

In respect to general power of the state to assume the guardianship of children, see Whalen v. Olmstead (Conn.) 15 L. R. A. 593, and *note*.

As to commitment of minors to reformatories without conviction of crime, see State v. Brown (Minn.) 16 L. R. A. 691, and *note*.

When infants have actually committed crime their punishment therefor is clearly within the department of criminal law. The validity of sentences which shall be contingent on good behavior or subject in any way to the discretion of the managers of a reformatory, which is a question touched in the above case, is one that touches the vital point in respect to such institutions. As to the lawfulness of paroles or conditional pardons, see *note* to People v. Cummings (Mich.) 14 L. R. A. 285.

See also 23 L. R. A. 603.

reduced on recommendation of the board of managers, while an adult convicted of the same crime has a statutory right to have the term of his imprisonment within the limits fixed by statute determined by a jury.

4. **The constitutional right of trial by jury** does not extend in a criminal case to the determination of the term of imprisonment by the jury.

5. **Articles 5 and 8 of the Amendments** to the United States Constitution have no application to the states.

6. **The unconstitutionality of a section as to the transfer of incorrigible infants** from a reformatory to a penitentiary does not make the whole statute as to the commitment of infants to reformatories necessarily void.

(Shope and Magruder, JJ., dissent.)

(January 16, 1894.)

PETITION for a writ of habeas corpus to secure the release of Joseph Bradley and Harry Justice from the Illinois State Reformatory. *Dismissed.*

The facts are stated in the opinion.

Messrs. **Sands & Murphy** for petitioner.

Mr. **M. T. Moloney,** *Atty-Gen.*, for respondent:

This act is not designed for the purpose of punishment. It is not a penal act, either in its title, its scope, or its results.

Articles 5 and 8 of the Constitutional Amendments have no application to state governments.

Twitchell v. *Pennsylvania,* 74 U. S. 7 Wall. 321, 19 L. ed. 223.

Have the petitioners been deprived of their liberty without due process of law? And has "the right of trial by jury" been interfered with?

Due process of law undoubtedly means in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights.

Board of Education of the State v. *Bakewell,* 122 Ill. 348.

These parties have not been deprived of their liberty without due process of law.

Ferrier's Petition, 103 Ill. 367, 43 Am. Rep. 10; *McLean County* v. *Humphreys,* 104 Ill. 379. See also *Milwaukee Industrial School* v. *Milwaukee County Suprs.* 40 Wis. 328, 22 Am. Rep. 702; *Prescott* v. *State,* 19 Ohio St. 186, 2 Am. Rep. 388; *Roth* v. *House of Refuge,* 31 Md. 330; *Ex parte Crouse,* 4 Whart. 11; *People* v. *Degnen,* 6 Abb. Pr. N. S. 87.

It is said it deprives the petitioners of a trial by jury, in this, that it does not permit the jury to fix the length of time the petitioners may be confined in this reformatory. There is no force in this. At common law, the jury found a person charged with crime, guilty or not guilty. They did not fix the punishment.

2 Bl. Com. bk. 4, p. 361.

The object of the adult's sentence is purely penal, while that of the minor's is entirely reformatory. The legislature, having power over both, might legislate in the way it thought most conducive to attain the best results. To send a minor to a reform school for one year may be of no lasting benefit to him, while one year may be a proper punishment for an adult in a penal institution. But this sentence is not indefinite, in any strict or proper sense.

See *People* v. *Degnen,* 54 Barb. 107, 6 Abb. Pr. N. S. 87.

It makes no difference to the petitioners in this case whether section 15 is constitutional or not. Even if it was unconstitutional, that would not release the petitioners, as the balance of the act could be properly and intelligently enforced and applied, if it was entirely eliminated.

Donnersberger v. *Prendergast,* 128 Ill. 234, and authorities there cited; *People* v. *Nelson,* 133 Ill. 565.

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

A writ of habeas corpus was issued herein by order of this court, upon the petition of Tida Bradley, for the purpose of inquiring into the cause of the imprisonment and detention of Joseph Bradley and Harry Justice in the Illinois State Reformatory at Pontiac. The writ was directed to superintendent, board of managers, and officials in charge of the Illinois State Reformatory, and a return was made to the writ. Said Joseph Bradley and Harry Justice were indicted in the circuit court of Peoria county for burglary and larceny, were tried before a jury upon pleas of not guilty, and the jury returned a verdict finding them guilty in manner and form as charged in the indictment, and that they were each above the age of ten years, and under the age of twenty-one years, *i. e.* of the age of eighteen and twenty years, respectively. The jury did not, in their verdict, fix any punishment or term of imprisonment. Thereupon the circuit court ordered and adjudged that said Joseph Bradley and Harry Justice should be confined in the Illinois State Reformatory, in safe and secure custody, for and during a term of commitment to be terminated by the board of managers of said Illinois State Reformatory. A mittimus was issued by the clerk of the court, which contained a true copy of the final judgment and sentence of the court as entered of record, and was directed to the sheriff of Peoria county to execute; and the detention of said Joseph Bradley and Harry Justice in the reformatory is by virtue of said judgment, sentence, and commitment.

The trial and proceedings upon said indictment for burglary and larceny, and the judgment that was rendered by the court, were based upon the provisions of an act of the legislature of the state entitled "An Act to Establish the Illinois State Reformatory, and Making an Appropriation therefor," approved June 18, 1891. Laws 1891, p. 51. Section 9 of the Act divides the inmates sentenced to the reformatory into two divisions, the first to include males between the ages of ten and sixteen years, and the second to include males between the ages of sixteen and twenty-one years. Section 10 provides, in substance, that in all criminal cases tried by jury, in which the jury shall find the defendant guilty, they shall also find by their

verdict whether or not the defendant is between the ages of ten and twenty-one years, and, if between said ages, then find, as nearly as may be, the age of the defendant; and that if the defendant is found to be between said ages, and it shall not be shown in the cause that the defendant has previously been sentenced to a penitentiary, and if the offense of which the defendant is convicted is not a capital offense, then the jury shall not fix the punishment. Section 11 makes provision for the cases of boys between the ages of ten and sixteen years who are convicted of crime. Section 12 provides as follows: "Any court in this state exercising criminal jurisdiction may sentence to the said reformatory any male criminal between the ages of sixteen and twenty-one years, and not shown to have been previously sentenced to a penitentiary in this or any other state or country, upon the conviction, in such court, of such male person, of a crime punishable under existing laws in a penitentiary. And the said board of managers shall receive and take into said reformatory all male prisoners of the class aforesaid who may be legally sentenced on conviction, as aforesaid; and all existing laws requiring the courts of the state to sentence to the penitentiary male prisoners convicted of any criminal offense, between the age of sixteen and twenty-one years, and not shown to have been previously sentenced to a state prison in this or any other state or country, shall be applicable to said reformatory so far as to enable courts to sentence the class of prisoners so last defined to said reformatory, and not to a penitentiary." Section 13 provides as follows: "Every sentence to the reformatory of a person hereafter convicted of a felony or other crime shall be a general sentence to imprisonment in the Illinois State Reformatory, and the courts of this state imposing such sentence shall not fix or limit the duration thereof. The term of such imprisonment of any person so convicted and sentenced shall be terminated by the board of managers of the reformatory, as authorized by this act; but such imprisonment shall not exceed the maximum term provided by law for the crime for which the prisoner was convicted and sentenced." Section 16 is as follows: "The said board of managers shall have power to establish rules and regulations under which prisoners within the reformatory may be allowed to go upon parole outside of the reformatory building and enclosure, but to remain while on parole in the legal custody and under control of the board of managers, and subject at any time to be taken back within the enclosure of said reformatory; and full power to enforce such rules and regulations to retake and reimprison any inmate so upon parole is hereby conferred upon said board, whose order, certified by its secretary and signed by its president, with the seal of the reformatory attached thereto, shall be a sufficient warrant for the officer named in it to authorize such officer to return to actual custody any conditionally released or pardoned prisoner, and it is hereby made the duty of all officers to execute said order the same as ordinary criminal process; provided that no prisoner shall be released on parole until the said board of managers shall have satisfactory evidence that arrangements have been made for his honorable and useful employment, for at least six months while upon parole, in some suitable occupation." Section 17, among other things, makes it the duty of the board of managers to adopt such rules concerning all prisoners committed to their custody as shall prevent them from returning to criminal courses, best secure their self-support, and accomplish their reformation. It also provides that, if any prisoner on parole shall violate the conditions of his parole or conditional release, he shall, by a formal order entered in the manager's proceedings, be declared a delinquent, and shall thereafter be treated as an escaped prisoner owing service to the state, and shall be liable, when arrested, to serve out the unexpired term of his maximum possible imprisonment. It is provided, in substance, in section 18, that when any prisoner has served not less than six months of his parole acceptably, and has given such evidence as is deemed reliable and trustworthy that he will remain at liberty without violating the law, and that his final release is not incompatible with the welfare of society, then the judge of the court that sentenced him to the reformatory shall enter an order for the final discharge of the prisoner from further liability under his sentence, such order to be based upon a record and recommendation made by the board of managers of the reformatory; and it is provided in said section that nothing in the act contained shall be construed as impairing the power of the governor to grant a pardon or commutation in any case. By section 21 the laws that govern the penitentiaries of the state, so far as they relate to the prevention of escapes and several other specified matters, are made applicable to, and declared to be in force in, the reformatory.

That in the enactment of this law it was the humane and benign intention of the general assembly to afford a means for the reformation of youthful criminals is manifest from the fact that the institution is devoted solely to the reception of minors between the ages of ten and twenty-one years, and from the various provisions of the act. At the same time we cannot concur in the suggestion made by the attorney-general that a sentence imposed by virtue of the act is not intended as, and is not in fact, a punishment for crime committed, but that such sentence is for the sole and only purpose of reforming the offender. Only those who have been convicted, before a court of competent jurisdiction, of felony or other crime, can be sentenced to the reformatory; and the act requires that the sentence shall be "to imprisonment," and uses the expression "term of imprisonment," and other like language, and uniformly employs the words "prisoner" and "prisoners" to designate those who have been committed to the reformatory. Without further reference to the various provisions of the act, many of which we have hereinbefore mentioned, we may say that in our opinion the statute is a criminal enactment, and that a sentence under it to the state reformatory

must be regarded as a penalty and punishment for crime of which the party committed has been convicted. It is admitted by the relator that the judgment and sentence of the court was in accordance with the provisions of the statute, since the statute requires that every sentence to the reformatory of a person between the ages of sixteen and twenty-one years, convicted of a felony or other crime, shall be a general sentence to imprisonment in the Illinois State Reformatory, that the courts imposing the sentence shall not fix or limit the duration thereof, and that the term of imprisonment shall be terminated by the board of managers, as authorized by the act. It is insisted, however, that as, by the judgment and warrant of commitment, the imprisonment was not for a specified time, but "to be terminated by the board of managers of the Illinois State Reformatory," the judgment and mittimus were void for uncertainty, and that the statute which makes provisions for such a judgment is unconstitutional and invalid; and in that behalf reliance is placed upon the case of *People* v. *Pirfenbrink*, 96 Ill. 68, where it was held that all judgments must be specific and certain, and must determine the rights recovered or the penalties imposed. We think that the judgment and mittimus in this case must be read and interpreted in the light of, and under the restrictions imposed by, the statute upon which they are based. That statute provides that although the sentence is a general sentence to imprisonment, yet that "such imprisonment shall not exceed the maximum term provided by law for the crime for which the prisoner was convicted and sentenced." This provision, and others of like import, being read into the judgment and mittimus, we think that it should be regarded that the judgment and commitment in this case was for twenty years, that being the maximum term provided by law for the crime of burglary. The fact that the prisoners might, in accordance with the provisions of the act, be sooner discharged by an order of court, predicated upon the recommendation of the board of managers of the reformatory, or by the pardon or commutation of the governor, would not have the effect of rendering the sentence and commitment uncertain and indefinite. It follows that it is provided by the statute, and by the judgment and commitment herein, for what period of time Joseph Bradley and Harry Justice are to be detained in the reformatory.

It is insisted that, even if this be so, yet the punishment is not proportioned to the offense committed, and that the statute is in violation of that portion of section 11 of article 2 of the Constitution of the state which declares that "all penalties shall be proportioned to the nature of the offense." In 2 Blackstone's Commentaries (bk. 4, § 12), it is said: "The method of inflicting punishment ought always to be proportioned to the particular purpose it is meant to serve, and by no means to exceed it;" and it is there also said: "The quantity of punishment can never be absolutely determined by any standing, invariable rule, but it must be left to the arbitration of the legislature to inflict such penalties as are warranted by the laws of nature and society, and such as appear to be best calculated to answer the end of prevention against future offenses." In fact, the object of punishment is the prevention of future offenses; and such object is to be attained in three ways,—by the amendment of the offender himself, by deterring others through his example, and by depriving the guilty party of the power to do further mischief. Id. pp. 11, 12; 4 Am. & Eng. Encyclop. Law, 721. Imprisonment is not a cruel and unusual punishment for burglary or larceny, or other crime, and on that ground to be regarded as disproportioned to the nature of the offense. 4 Am. & Eng. Encyclop. Law, p. 722, and authorities cited in *notes*. The term of the imprisonment, if it does not extend to perpetual imprisonment, is to a great extent, if not altogether, a matter of legislative discretion. For very many years the statute of this state has been such that the punishment for burglary might extend to a term of imprisonment of twenty years, and the validity of such statute has not been, and could not successfully be, called in question. And, even if the statute fixing the punishment for burglary was such as that it imposed an absolute penalty of twenty years' imprisonment upon every conviction for such crime its validity could not, on that ground, be impeached. When the legislature has authorized a designated punishment for a specified crime, it must be regarded that its action represents the general moral ideas of the people, and the courts will not hold the punishment so authorized as either cruel and unusual or not proportioned to the nature of the offense, unless it is a cruel or degrading punishment, not known to the common law, or is a degrading punishment which had become obsolete in the state prior to the adoption of its constitution, or is so wholly disproportioned to the offense committed as to shock the moral sense of the community. See *Re Bayard*, 25 Hun, 546. Neither the infliction of twenty years' imprisonment for the crime of burglary, nor the infliction, for the violation of any provision of the Criminal Code, of the maximum quantity of the usual punishment for such violation, falls within either of these categories. We think that, from the fact that the statute here in question imposes the maximum term of imprisonment provided by law for the crime for which the prisoner is convicted, it does not follow that such statute is in violation of the constitutional requirement that all penalties shall be proportioned to the nature of the offense.

Nor is it true that a prisoner on trial for burglary and larceny, or for any other violation of the criminal law, has a constitutional right to have the quantity of his punishment fixed by a jury. At common law the jury either returned a special verdict, setting forth all the circumstances of the case, and praying the judgment of the court thereon, or a general verdict of guilty or not guilty. The punishment was fixed by the court, and governed by the laws in force. 2 Bl. Com. bk. 4, p. 361. And in this state, and at the present time, the penalties for violations of the Criminal Code are, in many cases, not fixed

by the jury, but by the court. Rev. Stat. §§ 446, 447, p. 534, *et seq.* The constitutional right of trial by jury is limited to the trial of the question of guilt or innocence, and we think there can be no question of the validity of the sections of the statute to which we have made reference in this connection. In the event that a man of adult years commits the crime of burglary, he may be imprisoned in the penitentiary for a term not less than one year, nor more than twenty years, and, if he pleads not guilty, then the jury say in their verdict for what length of time, within the limits fixed by the statute, he shall be confined in the penitentiary. Crim. Code, §§ 36, 444. It is provided, in substance, in sections 10, 12, and 13 of the statute now under consideration, that if a minor between the ages of sixteen and twenty-one years commits such crime, and has not previously been sentenced to a penitentiary, then the jury shall not fix the punishment, but his sentence shall be a general sentence to imprisonment in the state reformatory, the effect of which shall be imprisonment in such reformatory for the maximum term provided by law for the crime, *i. e.* for twenty years, unless such imprisonment is sooner terminated by the board of managers of the reformatory in the manner authorized by the act. In other words, the adult has the statutory right to have the question submitted to the decision of a jury whether his term of imprisonment shall be one year, or some other space of time, to be fixed by them, and not exceeding twenty years, while for the same offense, and under like circumstances, the minor is necessarily sentenced to imprisonment for twenty years, the maximum term provided by law for the offense. Is there such inequality and injustice in this as that it can be regarded that the penalty imposed upon the minor is not proportioned to the nature of the offense of which he is convicted? There is in the law of nature, as well as in the law that governs society, a marked distinction between persons of mature age and those who are minors,—the habits and characters of the latter are presumably, to a large extent, as yet unformed and unsettled. This distinction may well be taken into consideration by the legislative power in fixing the punishment for crime, both in determining the method of inflicting punishment, and in limiting its quantity and duration. An adult convicted of burglary would be sentenced to the penitentiary, and to either solitary confinement or hard labor therein; and the statute which consigns him to such punishment must be regarded as highly penal. A minor, however, instead of being sentenced to solitary confinement or hard labor in a penitentiary, is committed to the state reformatory. The general scope and humane and benign purpose of the statute establishing the reformatory is clearly indicated by the following provisions, found in section 6: "It shall be the duty of the managers to provide for the thorough training of each and every inmate in the common branches of an English education; also in such trade or handicraft as will enable him upon his release to earn his own support. For this purpose said managers shall establish and maintain common schools and trade schools in said reformatory, and make all needful rules and regulations for the government of the same." And such beneficent purpose is also shown by the provision in section 8, that the general superintendent of the institution shall have charge of its inmates, and shall discipline, govern, instruct, employ, and use his best efforts to reform them; and numerous other provisions of like tendency and effect are to be found in the act, such as those for the releasing of prisoners upon parole, where arrangements have been made for honorable and useful employment in some suitable employment, and for the final discharge of prisoners from further liability under their sentences, etc. It is manifest that the sentences provided for in the statute establishing the reformatory, although to be regarded as punishments for crime, are not of so purely a penal character as those imposed upon adults convicted of like offenses; but that the primary object of the statute is the reformation and amendment of those committed to the reformatory. It follows, therefore, that the case of an adult liable to be sentenced to the penitentiary for the crime of burglary for a term of not less than one, nor more than twenty years, is not parallel to that of a minor required to be sentenced to the state reformatory for a term of twenty years for the like offense, and that no comparison can be instituted between them, and conclusion arrived at therefrom that the penalty imposed upon the minor is not proportioned to the nature of the offense of which he is convicted. Upon full consideration we find no just ground for holding that the act establishing the reformatory is in conflict with section 11 of article 2 of the Constitution of this state.

Some slight degree of reliance seems to be placed by the petitioner upon the claim that the act in question is in conflict with articles 5 and 8 of the Amendments of the Constitution of the United States. Perhaps this claim has been sufficiently answered by that which has been already said; but, however this may be, it is a complete answer to say that said articles of amendment have no application to state governments but are exclusively restrictions upon federal power. *Pervear* v. *Massachusetts,* 72 U. S. 5 Wall. 475, 18 L. ed. 608; *Com.* v. *Hitchings,* 5 Gray, 482; *Twitchell* v. *Pennsylvania,* 74 U. S. 7 Wall. 321, 19 L. ed. 223; *Fox* v. *Ohio,* 45 U. S. 5 How. 434, 12 L. ed. 223.

It is urged that the Act establishing the reformatory is invalid, because section 15 of said Act empowers the board of managers of the institution to transfer to the penitentiary of the proper district any prisoner sentenced to the reformatory, who, subsequent to his committal, is shown to have been, at the time of his conviction, more than twenty-one years of age, or to have been previously convicted of crime, or who is apparently incorrigible, and whose presence, therefore, in the reformatory appears to be seriously detrimental to the well-being of the institution, and authorizes the imprisonment in such penitentiary of such prisoner at hard labor, and sub-

ject to all the rules and discipline of such penitentiary, for the full maximum term provided by law for the crime of which he was convicted. It may be difficult to say that the provisions of said section 15 are valid; but that question is not now properly before this court, for it does not appear that either Bradley or Justice has been sent, or is about to be sent, under the provisions of said section, to a penitentiary. Assuming, for the purposes of this decision, that said section 15 is unconstitutional, yet it may be eliminated from the act, and the residue of the act be readily, properly, and intelligently enforced. And the settled law is that, when constitutional and unconstitutional provisions in a statute are distinct and separable, the valid provisions may stand as though the invalid provisions had not been introduced therein. *Donnersberger* v. *Prendergast*, 128 Ill. 229, and authorities therein cited. We are unable to arrive at the conclusion that either Joseph Bradley or Harry Justice is wrongfully, illegally, or without warrant of law imprisoned and deprived of his liberty in the Illinois State Reformatory at Pontiac; and they are therefore remanded to the custody of the constituted authorities of said reformatory, and the writ of habeas corpus herein is dismissed, at the cost of the petitioner.

Writ dismissed.

Shope and **Magruder**, *JJ.*, dissent.

MICHIGAN SUPREME COURT.

SENATE OF THE HAPPY HOME CLUB OF AMERICA *et al.*

v.

Board of Supervisors of ALPENA COUNTY, *Plff. in Certiorari.*

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

The Michigan Act No. 207 of the Laws of 1893, popularly known as the "Jag Cure Act," which authorizes a person convicted of drunkenness to be released on a recognizance conditioned that he will immediately take treatment for the cure of drunkenness of some corporation organized by law to make and file reports in reference thereto, and that he will obey all regulations prescribed by those administering such cure, with the further provision that he may be acquitted and discharged at the end of sixty days on proof that he has conformed to such conditions, is unconstitutional as an attempt to permit unofficial persons to prescribe rules which shall acquit persons charged with crime, while those rules may be as variable as the corporations are numerous.

(February 20, 1894.)

CERTIORARI to the Circuit Court for Alpena County to review an order granting a writ of mandamus to compel the board of supervisors to allow and pay a bill for the treatment and maintenance by the senate of the Happy Home Club of America of one Richard Kelly, who had contracted the liquor habit. *Reversed.*

Upon the filing of the petition for the writ, an order to show cause was issued and the supervisors set up that the sole cause for refusing to pay the bill was that the act of the legislature under which it was contracted was unconstitutional. The Act in question is:—

Act No. 207, of 1893, which is entitled "An Act to authorize the courts, justices of the peace and police justices of this state to permit those charged and complained against as disorderly persons on account of drunkenness or intoxication to give a special recognizance conditioned for such persons taking the cure for such drunkenness and intoxication, and for the adjournment of such case against such person for a limited time for this purpose and to provide means for carrying out the same." The first section provides "that whenever any person shall be charged or complained against as being a disorderly person on account of drunkenness or intoxication," etc., he may give a recognizance "in the penal sum of one hundred dollars with a good and sufficient surety to be approved by such court or justice of the peace or police justice, conditioned that such person will immediately take treatment for the cure of such drunkenness or intoxication, of some corporation organized under the statutes of this state for the purpose of administering such cure and required by law to make and file reports in reference thereto; to be therein specified for the period of at least thirty days, and that such person will observe and obey all directions and regulations prescribed by those administering such cure, and that such person will not indulge in the use of intoxicating or malt liquors for the period of ninety days, and that such person will, at the end of sixty days from the date of said recognizance, appear before such court, justice of the peace or police justice, and answer the charge or complaint against such person." It is further

NOTE.—Methods of punishment or reformation of criminals and children of criminal tendencies are of the greatest interest at present, in respect to the legal as well as the moral questions involved. The problem of reconciling constitutional rights of convicted persons with such discretionary action or flexible system as it seems can alone be effectual for reformatory work is not easy of solution. In Michigan where the courts deny the constitutionality of a parole or conditional pardon by a board of prison control (see People v. Cummings (Mich.) 14 L. R. A. 283, and *note*), such an alternative for imprisonment as the taking of a cure for drunkenness and obtaining the certificate of a corporation operating such a cure must be held clearly invalid, and even in other states in which the decisions are less strict in respect to paroles and conditional pardons the decision on the above case would probably be the same. The case is significant of the increasing tendency to consider the treatment of criminals with reference to their reformation.

See also 27 L. R. A. 646; 33 L. R. A. 199; 36 L. R. A. 55.

provided that, upon giving the said recognizance, the cause shall be adjourned for sixty days, "and if at the end of said sixty days mentioned in said recognizance said person shall appear and show that he or she has conformed to the said conditions mentioned in said recognizance up to that time, then such person shall be acquitted and discharged." It is further provided that, if he fails to show that he has complied with the provisions of the recognizance, he shall be prosecuted for the original offense, or, if he fails to appear, his recognizance shall be forfeited according to law. Section 2 provides that the justice shall "make inquiry into the circumstances and financial condition of such person, and if upon such inquiry and investigation such person is found to be in indigent circumstances and unable to pay for his or her said treatment and maintenance during the time of receiving the same, then the cost and expense of administering such cure and maintaining such person shall be a county charge against the respective counties in which such recognizances are given and filed, but said charge shall not exceed seventy dollars," etc. The same section further provides for the payment, by the board of supervisors or board of county auditors, "upon the certificate of said court, justice of the peace, or police justice, that such person is in indigent circumstances and unable to pay for such cure and maintenance, and upon proof that such person has been properly treated and cured of such drunkenness or intoxication." This section further provides that the court shall furnish a certificate of indigency to the corporation at the time the recognizance is given.

Mr. **A. A. Ellis,** *Atty-Gen.*, for plaintiff in certiorari:

The real object of the law is to allow a man to go to a jag cure and receive treatment in lieu of the statutory penalty provided for drunkards and tipplers; and if he takes the cure it shall be in lieu of any punishment for the offense he has committed.

If it is assumed that the taking of the cure is a punishment for the offense, the act would be in plain violation of the constitution, which provides against "unusual punishments."

Cooley, Const. Lim. 5th ed. p. 404.

If this is not a punishment for drunkenness or for being a drunkard, then the object of the act is not embraced in the title.

The Constitution, article 6, section 28, provides: "In every criminal prosecution the accused shall have the right to a speedy and public trial by an impartial jury."

The act under consideration expressly provides that the cause shall be continued for sixty days for the purpose of curing the person of such "drunkenness or intoxication."

The defendant could not waive the right to a trial by jury.

Hill v. *People,* 16 Mich. 351.

Ought a defendant who is accused of a criminal offense to be allowed to waive the clause in the Constitution which provides that he shall have a speedy trial?

United States v. *Fox,* 3 Mont, 517; *Ex parte Stanley,* 4 Nev. 116; *Klock* v. *People,* 2 Park. Crim. Rep. 676.

It is not the theory of the law, and never has been, that a man who is charged with an offense which is made a misdemeanor under the law, and which has a tendency to degrade him in the eyes of his fellow men, shall be compelled, or given the right, to excuse himself, or choose between two evils.

The law is unconstitutional because it makes the prosecution for a misdemeanor depend upon rules and regulations which are left entirely to the discretion of unofficial persons.

Whatever regulations are made must operate uniformly under the same conditions.

Re Frazee, 63 Mich. 396.

In *Horn* v. *People,* 26 Mich. 225, this court, in speaking of the regulations of navigation, said: "The regulations of navigation which he is to enforce, must be such as are valid and binding on all persons. Neither the city nor the legislature could make the rights of navigators dependent upon the private will of any one. They have a right to know their duties and responsibilities, and cannot be punished except when they violate some public statute or valid ordinance."

The legislature has not the authority to delegate to an unofficial body the right to make rules without limit, and to provide that a man may be acquitted or prosecuted conditioned upon his keeping such rules; for would not this be a delegation of legislative power without limit, and in plain violation of the constitution, which vests the legislative power of this state in the legislature?

Mr. **L. G. Dafoe,** *Pros. Atty.*, also for plaintiff in certiorari.

Mr. **J. D. Turnbull** for defendant in certiorari.

Per Curiam:

Respondents bring to this court by certiorari the proceedings had in the circuit court for the county of Alpena upon an application for mandamus to compel respondents to audit relator's bill for the cure of one Richard Kelly of the liquor habit, under the provisions of Act No. 207 of the Laws of 1893, popularly known as the "Jag Cure Act," a copy of which is appended. The statute providing for the punishment of disorderly persons allows the justice to cause the arrest, and proceed to try the person charged; and upon conviction upon the trial, or if he pleads guilty, he may punish the offender by fine and costs, or imprisonment in the county jail or Detroit House of Correction, or he may require a recognizance for his good behavior for the period of three months. The act in question permits the justice to accept a different recognizance, viz., one conditioned that the defendant will take the cure within a time specified, and conform to the rules and regulations of the corporation administering such cure, and that he will not drink intoxicating liquor for the period of three months. It further provides that upon appearing before the justice at the end of sixty days, and showing that he has conformed to the conditions of the recognizance up to that time, he "shall be acquitted and discharged."

This, in effect, permits unofficial persons to prescribe rules which shall acquit persons charged with crime. These rules may be lax or stringent; but, whatever they are, the justice has only to acquit if they are shown to be complied with. They may be as variable as the corporations prescribing them are numerous. It is not within the province of the legislature to delegate to private corporations the power to make laws for the discharge of offenders.

The order of the Circuit Court will be reversed, with costs.

MISSOURI SUPREME COURT (Div. 1).

W. H. HOWSMON, *Appt.*,
v.
TRENTON WATER CO., *Respt.*

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

A water company is not liable to the owner of a house destroyed by fire because of failure to furnish water under a contract with a municipality, although a special tax was provided for in the contract to pay part of the consideration to the water company and an express provision made that the company snould be liable for all damages occasioned by failure to furnish an adequate supply of water to extinguish any fire.

(December 23, 1893.)

APPEAL by the plaintiff from a judgment of the Circuit Court for Grundy County in favor of defendant in an action brought to recover damages for injuries sustained by plaintiff by reason of defendant's failure to keep its contract with the town of Trenton to furnish a water supply to extinguish fire. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Harber & Knight** and **A. W. Mullins**, for appellant:

In order to confer upon the plaintiff a right of action in the event of loss as set out in the petition, it was not essentially necessary that he should have been a party to the contract. If it were made, in part, for his benefit, in consideration of the burdens he had to bear by reason of the contract between the town and the defendant, that is sufficient. And the facts alleged in the petition and admitted by the demurrer show that the contract was made for the benefit of plaintiff and other tax-paying citizens of the town as individuals as well as for the town as a municipality, while the compensation—the consideration for the supposed benefits to accrue to the town and its citizens for the water supply and for the extinguishment of fires—was to come from the taxpayers

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Note.—Liability for loss by fire due to the lack of adequate water supply.

I. *Of city or municipality.*
II. *Of water company.*

I. *Liability of the city or municipality.*

Municipal corporations have and can exercise only such powers as are expressly granted to them by law, and such incidental ones as are necessary to make those powers available and are essential to effectuate the purposes of the corporation, such powers being strictly construed. Mott v. Cherryvale Water & Mfg. Co. 15 L. R. A. 375, 48 Kan. 15; Albany v. Cunliff, 2 N. Y. 165; Clark v. Des Moines, 19 Iowa, 212, 87 Am. Dec. 423; McPherson v. Foster, 43 Iowa, 57, 22 Am. Rep. 215.

A city cannot assume liability for negligence in cases where the law has not already imposed a liability. Vanhorn v. Des Moines, 63 Iowa, 447, 50 Am. Rep. 750.

If a city is bound to furnish no particular facilities, there is an end of all question of liability for failure. *Ibid.*

The power of the city over the subject is that of a delegated quasi sovereignty, excluding responsibility to individuals for negligence or nonfeasance of any officer or agent charged with the performance of duties. Wheeler v. Cincinnati, 19 Ohio St. 19, 2 Am. Rep. 368.

The power on the part of a municipal corporation to provide for the accomplishment of certain results does not necessarily impose a liability for their imperfect accomplishment. Vanhorn v. Des Moines, *supra.*

The provisions which a given city should make in the matter of the extinguishment of fires is one of legislative discretion. *Ibid.*

The power conferred upon a city or corporation to establish a fire department is a legislative or discretionary power which is within the discretion of the city authorities to exercise or not. Heller v. Sedalia, 53 Mo. 159, 14 Am. Rep. 444.

The injury sustained must be something more than the lack of facility or means of accomplishing an ulterior result. Vanhorn v. Des Moines, *supra.*

In Vanhorn v. Des Moines, *supra*, where the defendant was authorized by law to provide for the supply of water for the extinguishment of fires, and to levy a tax to defray the expense, a water company having contracted to indemnify them against all actions which might be brought against the city for misfeasance or neglect on the part of such company, it was held that the city was not liable for damages occasioned by the inadequate water supply.

The same doctrine is established in Brinkmeyer v. Evansville, 29 Ind. 187, where the city was sued for damages occasioned by the failure to extinguish a fire through the non-supply of water and defective fire apparatus. In the above case it is stated that a contrary decision would result in making them insurers against fire, reason and the soundest public policy forbidding such a liability being imposed.

Again, in Patch v. Covington, 17 B. Mon. 722, 66 Am. Dec. 186, where the city was sued for neglect in keeping the public water systems in repair, whereby the fire spread to plaintiff's house.

Where the city was sued for damages occasioned by reason of its neglect in maintaining a hydrant by which the fire might have been extinguished, the City Act of 1864, chapter 104, section 3, authorizing the city to make and maintain reservoirs and public hydrants in such places as may be deemed proper, to be maintained and erected by the city for the public benefit without pecuniary compensation or emolument, it was held that the city did

See also 24 L. R. A. 287; 28 L. R. A. 532; 30 L. R. A. 660; 36 L. R. A. 535; 46 L. R. A. ...

alone. And so, the contract having been made in part for plaintiff's benefit and on his behalf, he has a right of action.

Rogers v. *Gosnell*, 58 Mo. 589; *Meyer* v. *Lowell*, 44 Mo. 328; *Fitzgerald* v. *Barker*, 70 Mo. 685; *Bank of Missouri* v. *Benoist*, 10 Mo. 519; *Rogers* v. *Gosnell*, 51 Mo. 566; *State* v. *Laclede Gaslight Co.* 102 Mo. 472.

One of the ordinances pleaded provided that "should said water company, from lack of water supply or any other cause, except providential or unavoidable accident, fail to furnish a reasonable or adequate supply of water to extinguish any fire, then it shall be liable for all damages occasioned by such fire or neglect." Defendant having failed to fulfill this important provision in the contract, as shown by the allegations of the petition, it became and is liable to the plaintiff for the damages he sustained by reason of defendant's failure and neglect.

Paducah Lumber Co. v. *Paducah Water Supply Co.* 7 L. R. A. 77, 89 Ky. 340; *Duncan* v. *Owensboro Water Co.* 12 Ky. L. Rep. 35; *Markel* v. *Western U. Teleg. Co.* 19 Mo. App. 80; *Lampert* v. *Laclede Gaslight Co.* 14 Mo. App. 376.

Mr. **R. L. Yeager**, for respondent:

The appellant was not a party to the contract sued on and sustained no relation of privity to either of the contracting parties.

Therefore he cannot maintain an action upon the contract, and the judgment of the trial court should be affirmed.

Vrooman v. *Turner*, 69 N. Y. 280, 25 Am. Rep. 195; *Woodland* v. *Newhall*, 3 Fed. Rep. 434; *Kansas City* v. *O'Connell*, 99 Mo. 357.

The payment of a tax levied by the town of Trenton for the purpose of paying its hydrant rental to the water company does not create a privity of contract, so as to authorize the appellant to sue.

Becker v. *Keokuk Water Works*, 79 Iowa, 419.

The appellant's right of recovery upon similar contracts to the one pleaded has been denied.

Phœnix Ins. Co. v. *Trenton Water Co.* 42 Mo. App. 118; *Davis* v. *Clinton Water Works Co.* 54 Iowa, 59, 37 Am. Rep. 185; *Becker* v. *Keokuk Water Works, supra*; *Nickerson* v. *Bridgeport Hydraulic Co.* 46 Conn. 24, 33 Am. Rep. 1; *Ferris* v. *Carson Water Co.* 16 Nev. 44, 40 Am. Rep. 485; *Atkinson* v. *Newcastle & Gateshead Water Co.* L. R. 2 Exch. Div. 441; *Fowler* v. *Athens City Water Works Co.* 83 Ga. 219.

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

This is an appeal from the judgment of the circuit court of Grundy county, sustaining a demurrer to the plaintiff's petition, the material allegations of which are, in substance, as follows: That the plaintiff is a resident citizen and taxpayer of the town of Trenton in said county, and the owner of a large amount of valuable property within the corporate limits of said town, subject to taxation for ordinary purposes, and to a special tax of five mills on the dollar annually for the purpose of discharging the obligations of said town to the defendant on the contract

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not, by accepting the statute and building such works, enter into any contract with, or asume any liability to, the owners of property, to furnish means or water for the extinguishment of fires upon which an action could be maintained. Tainter v. Worcester, 123 Mass. 311, 25 Am. Rep. 90. In this case the owner of the property had failed to pay his water rates, and the water had been cut off.

In Heller v. Sedalia, 53 Mo. 159, 14 Am. Rep. 444, the defendant by ordinance, established and regulated the fire department and was sued for damages occasioned by a fire, which it was alleged might have been extinguished by proper exertion on the part of the officers of the department. The court held that it was not the intention of the legislature in conferring power on the city to establish a fire department, to render it responsible as an insurer against fire.

The doctrine of *respondeat superior* does not apply to such a case. Heller v. Sedalia, *supra*.

In Wheeler v. Cincinnati, 19 Ohio St. 19, 2 Am. Rep. 368, it was held that the powers conferred by statute upon municipal corporations with respect to the establishment and organization of fire companies were legislative and governmental, and that the extent and manner of their exercise within the sphere prescribed by statute were necessarily to be determined by the judgment and discretion of the proper municipal authorities, and for any defect in the execution of such powers the corporations were not liable to individuals.

The same conclusion was reached by the court in Springfield Fire & Marine Ins. Co. v. Keeseville, 6 Misc. 233, the court holding that such failure did not give ground of action to either the insurer or insured.

In Grant v. Erie, 69 Pa. 420, 8 Am. Rep. 272, power was given to the city to make and establish a sufficient number of reservoirs to supply water in case of fire; the reservoirs established thereunder, having fallen into decay through want of repair, became leaky and insufficient for the purposes for which constructed. The court held in an action against the city to recover damages occasioned by a fire upon the plaintiff's premises, that the city was not liable, its powers being discretionary.

In the above case, however, the court's decision was based upon the fact of the duty imposed being discretionary, and it was intimated that if the duty were an imposed one, the negligence of the city might have constituted a good cause of action.

Where the action was against the corporation for damages occasioned by fire, by reason of the failure to keep the water pipes, hydrants, and fixtures in repair so as to furnish a sufficient supply of water for which the plaintiff paid taxes, the defendant was held not liable, the duty imposed being a discretionary one and not purely ministerial in its character. Black v. Columbia, 19 S. C. 412, 45 Am. Rep. 785.

In Mendel v. Wheeling, 28 W. Va. 233, 57 Am. Rep. 665, it was stated that no duty was imposed upon the city, even though it imposed a tax for water and owned its own waterworks, public policy forbidding such an action.

The damage must be the direct or the proximate and natural consequence of the defendant's acts. Patch v. Covington, 17 B. Mon. 722, 66 Am. Dec. 186; Oil Creek & A. R. R. Co. v. Keighron, 74 Pa. 316.

The damages must be the result of the proximate cause of the injury, and are a question for the jury, and not one of legal knowledge or science. Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256.

II. Liability of the water company.

The general doctrine deducible from all opinions is, that the waterworks company is not liable for

See also 23 L. R. A. 743.

sued on herein, all of which he has regularly and promptly paid. That by a contract entered into, by ordinances, between the town of Trenton and the defendant, the said defendant (in consideration of the franchise granted it, and the privilege of collecting certain water rates from its citizens, and of the sum of $2,000 to be paid annually by the town, to be raised by an annual tax of five mills, as aforesaid, all of which the defendant has received and enjoyed) promised and agreed with said town to furnish, at all times, an adequate supply of good, clear, and wholesome water, for fire and other purposes, for public and private use, under such a pressure as to have the power to throw, at all times, six streams of water through 50 feet of 2½ inch rubber hose and 1-inch ring nozzle, 80 feet high, in the business portion of the town, and to throw at least two effective streams at any one time in any other part of the town accessible from the mains; and further agreed that, "should said water company, from lack of water supply, or any other cause except providential or unavoidable accident, fail to furnish a reasonable or adequate supply of water to extinguish any fire, then it shall be liable for all damages occasioned by such fire or neglect." That on the 24th of March, 1889, plaintiff's dwelling house in said town, with the household and kitchen furniture and wearing apparel therein contained, all of the value of $3,700, was destroyed by fire. That said house was close to the main of defendant, and situated at a place where, in the event a fire should there occur, it was the duty of defendant, under said contract, to furnish an adequate supply of water, with force and power sufficient to extinguish such fire; which the defendant, without any providential or unavoidable accident, failed to do, and by reason of such failure plaintiff's property was destroyed, to his damage in the sum of $3,700.

It is well-established law in this state, by a line of decisions extending from the year 1847 to the present date, "that a person for whose benefit an express promise is made in a valid contract between others may maintain an action upon it in his own name." *Ellis* v. *Harrison*, 104 Mo. 270; *State* v. *Laclede Gas-Light Co.* 102 Mo. 472; *Fitzgerald* v. *Barker*, 70 Mo. 685; *Rogers* v. *Gosnell*, 58 Mo. 589, 51 Mo. 466; *Meyer* v. *Lowell*, 44 Mo. 328; *Robbins* v. *Ayres*, 10 Mo. 539, 47 Am. Dec. 125; *Bank of Missouri* v. *Benoist*, 10 Mo. 521. And such is now the prevailing doctrine in America, by the great weight of authority. 3 Am. & Eng. Encyclop. Law, p. 863, *note 5*.

This doctrine, originally an exception to the rule that no claim can be sued upon contractually unless it is a contract between the parties to the suit, has become so general and far-reaching in its consequences as to have ceased to be simply an exception, but is recognized, within certain limitations, as an affirmative rule. The foregoing cases from this court are in harmony with the rule as laid down in *Lawrence* v. *Fox*, 20 N. Y. 268, that "an action lies on a promise made by

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the inadequate supply of water for fire purposes, under a contract with a city or corporation to furnish water for the extinguishment of fire, there being no privity of contract between the company and the property owner.

This has been held to be the case, even though the water company may have agreed with the city or corporation to indemnify it against all claims made by or on behalf of any citizen or resident, and may have stipulated that the action might be brought in the property owner's own name. Mott v. Cherryvale Water & Mfg. Co. *infra*.

If a city is not liable to its citizens or residents, the water company is not liable to such citizens or residents upon a contract between itself and the city, the contract in such a case being between the city and the water company only. Mott v. Cherryvale Water & Mfg. Co. 15 L. R. A. 375, 48 Kan. 15.

The mere fact that the plaintiff, a stranger to the contract, may find benefit therefrom for the protection of his property in common with all other persons whose property is similarly situated, does not make him a party to the contract or create privity between himself and such company (Davis v. Clinton Water Works Co. 54 Iowa. 59, 37 Am. Rep. 185); no privity or obligation or duty owing to him giving a legal or equitable claim to the promisee, or an equivalent from him personally being shown. Ferris v. Carson Water Co. 16 Nev. 44, 40 Am. Rep. 485.

Privity of contract must exist between the parties to an action upon the contract. Davis v. Clinton Water Works Co. *supra*.

One who is not a party to a contract cannot sue in respect to a breach of duty arising out of such contract. Marvin Safe Co. v. Ward, 46 N. J. L. 19.

The contracting parties control all interests and are entitled to all rights secured by the contract. Davis v. Clinton Water Works Co. *supra*.

In order to entitle a person to an action against one performing the service or doing work under a contract made with another person, it must be shown that the duty or liability arose independent of contract. Marvin Safe Co. v. Ward, *supra*.

There would be no certain limit to the number and character of actions, if mere strangers might enforce the contract by action. Davis v. Clinton Water Works Co. *supra*.

The mere fact that a city levies and collects a tax to be paid to a water company does not create any privity of interest between the water company and a citizen or resident of the city. Mott v. Cherryvale Water & Mfg. Co. *supra*.

In making such a contract, the city discharges one of its duties for which it was created, and in raising the required money it only provides the consideration due from it by virtue of the contract. *Ibid.*

The law which authorizes cities to contract with individuals and companies for the building and operating of waterworks confers no powers upon a city to make a contract of indemnity for the individual benefit of a citizen or resident of the city, for the breach of which he can maintain an action in his own name. *Ibid.*

In Nickerson v. Bridgeport Hydraulic Co., 46 Conn. 24, 33 Am. Rep. 1, it was alleged that the defendants had contracted with the city for the supply of water for domestic use and the extinguishment of fires, and that it was therefore their duty to keep an abundant supply for such purposes, although nothing appeared showing precisely what the contract was, no terms or conditions being stated. The court held that an allegation of duty was not sufficient; facts sufficient to create the duty or obligation must be alleged and that there was no contract relation between the defendants and the plaintiffs, and consequently no duty which could

the defendant upon valid consideration to a third person, although the plaintiff was not privy to the consideration. Such promise is to be deemed made to the plaintiff, if adopted by him, though he was not a party nor cognizant of it when made." *Meyer* v. *Lowell*, *supra*. "It is not every promise, however, made by one to another from the performance of which a benefit may ensue to a third, which gives a right of action to such third person, he being neither privy to the contract nor to the consideration. The contract must be made for his benefit as its object, and he must be the party intended to be benefited." *Simson* v. *Brown*, 68 N. Y. 355; *Vrooman* v. *Turner* (1877), 69 N. Y. 280, 25 Am. Rep. 195; *Wright* v. *Terry*, 23 Fla. 160; *Austin* v. *Seligman*, 18 Fed. Rep. 519; *Burton* v. *Larkin*, 36 Kan. 246, 59 Am. Rep. 541, and cases cited. In other words, "the rule is not so far extended as to give to a third person, who is only indirectly and incidentally benefited by the contract, the right to sue upon it." But "the name of the person to be benefited by the contract need not be given, if he is otherwise sufficiently described or designated. Indeed, he may be one of a class of persons, if the class is sufficiently described or designated." *Burton* v. *Larkin*, *supra*; *Johannes* v. *Phenix Ins. Co. of Brooklyn, N. Y.* 66 Wis. 50, 57 Am. Rep. 248.

In the opinion delivered by Allen *J.*, in *Vrooman* v. *Turner*, *supra*, it was said: "Judges have differed as to the principle upon which *Lawrence* v. *Fox* and kindred cases rest, but, in every case in which an action has been sustained, there has been a debt or duty owing by the promisor to the party claiming to sue upon the promise. Whether the decisions rest upon the doctrine of agency, the promisee being regarded as the agent of the third party who, by bringing his action, adopts his acts, or upon the doctrine of a trust, the promisor being regarded as having secured money or other thing for the third party, is not material. In either case there must be a legal right, founded upon some obligation of the promisee, in the third party, to adopt and claim the promise as made for his benefit." An examination of very many cases decided before and since it was so held in that case satisfies us that the rule has been confined to such cases in this state, as well as elsewhere, and upon that principle when this case was before the Kansas City court of appeals in an action by another party. *Phœnix Ins. Co.* v. *Trenton Water Co.* 42 Mo. App. 118. It was, in effect, held that the plaintiff had no cause of action against the water company, because the town of Trenton was under no obligation to the plaintiff to furnish an adequate supply of water and power to extinguish the fire by which the premises were consumed; and in support of its position the following additional cases were cited: *Davis* v. *Clinton Water Works Co.* 54 Iowa, 59, 37 Am. Rep. 185; *Nickerson* v. *Bridgeport Hydraulic Co.* 46 Conn. 24, 33 Am. Rep. 1; *Ferris* v. *Carson Water Co.* 16 Nev. 44, 40 Am. Rep. 485; *Fowler* v. *Athens City Water Works Co.* 83

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be made the basis of a legal claim. In the above case, however, there was an entire absence of allegations going to show a subsisting contract of the defendants with the city, much less with the plaintiffs, out of which a duty could arise.

In Fowler v. Athens City Water Works Co., 83 Ga. 219, a contract entered into between the city and another party for the supply at all times, for valuable consideration, of all the water necessary for fire purposes, and to establish hydrants with a guarantee of sufficient pressure to throw from any of these at all times five streams of water to the height of sixty-five feet, was transferred by the contractor to the defendant who was sued for damages occasioned by a fire on plaintiff's premises, the water supply not being of sufficient pressure to extinguish it whereby the fire spread. The court held, the case not being based upon a statutory duty, but solely upon the failure to comply with the contract made with the municipality, that the defendant was not liable there being no privity between him and the plaintiff, and further that he was not liable in tort, there being no legal command by statute or express law superadded to the contract.

Where the defendant's contract to supply water to be used by the city for the extinguishment of fires, was embodied in an ordinance passed by the city authorizing the establishment of waterworks providing for compensation, the only parties to such contract being the city and the defendant, it was held in an action by the plaintiff to recover damages occasioned by a fire, the necessary supply of water not being furnished through defective machinery, and the negligence of the defendant's servants, that there was no liability, no privity of contract existing. Davis v. Clinton Water Works Co. 54 Iowa, 59, 37 Am. Rep. 185.

In Becker v. Keokuk Waterworks, 79 Iowa, 419, the same conclusion is reached, although it was contended that the case differed from that of Davis v. Clinton Water Works Co., *supra*, a special fund being raised by the city to pay for a sufficient supply of water for use in case of fires, to which fund plaintiff contributed, the court holding that the mere fact of the city's levying and collecting a tax to pay the defendant created no privity of interest between the defendant and the taxpayers.

Section 18 of the Ordinance in question provided "that said company shall be liable for all injuries to persons or property caused by the negligence, mismanagement, or fault of itself, or its employés, while engaged in the construction or operation of said works," and in dealing with this section, the court held that the powers of corporations were to be strictly construed, the law which authorizes them to contract for the building and operation of waterworks conferring no power to make a contract of indemnity for the individual benefit of the taxpayer, for the breach of which the latter could maintain action in his own name. Becker v. Keokuk Waterworks, *supra*.

In construing the above section, the court held it referred only to injuries for which the city would have been liable if caused by negligence, mismanagement, or fault on its own part. *Ibid.*

Where by the terms of a city ordinance it was the duty of the water company to furnish water of a certain pressure after a fire alarm, and a certain pressure during the fire, sufficient for fire protection, the pressure to be determined by the register in the engine house, and such company undertook by the terms of the ordinance to pay all damages that might accrue to any citizen of the city by reason of a failure to supply a sufficient amount of water, or a failure to supply the same at the proper time, or by reason of any negligence on its part, and the action was brought for a failure to

Ga. 219; and *Atkinson* v. *Newcastle & Gateshead Water Co.* L. R. 2 Exch. Div. 441.

The last of these cases is not in point, since the action in that case was for the breach of a public statutory duty, and the court held that the action would not lie, because the statute gave no right of action to the plaintiff. The cause of action in each of the other cases was for a breach of duty which it was alleged the defendants owed the plaintiff under a contract with the city, to which the plaintiff was not a party, whereby they agreed to furnish an adequate supply of water and power to extinguish fires in the town or city; to which it was replied in the Connecticut case (decided in 1878): "Whatever benefit the plaintiffs could have derived from the water would have come from the city, through its fire department. The most that can be said is that the defendants were under obligation to the city to supply the hydrants with water. The city owed a public duty to plaintiffs to extinguish their fire. The hydrants were not supplied with water, and so the city was unable to perform its duty. We think it is clear there was no contract relation between the defendants and the plaintiffs, and consequently no duty which can be the basis of a legal claim." In the Iowa case (decided in 1880) it was replied: "The city, in the exercise of its lawful authority to protect the property of the people, may cause water to be supplied for extinguishing fires, and for other objects demanded by the wants of the people. In the exercise of this authority it contracts with defendant to supply the water demanded for these purposes. . . . It cannot be claimed that the agents or officers of the city employed by the municipal government to supply water, improve the streets, or maintain good order are liable to a citizen for loss

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furnish the water of such pressure, whereby the plaintiffs sustained damage, the court held, there being no allegation that the plaintiff was a taxpayer or ever paid taxes, that there was no privity of contract between the citizens, the plaintiff, and such company, as would enable him to maintain an action for the injury sustained through the fire, and caused by the failure of the water company to perform the contract. Mott v. Cherryvale Water & Mfg. Co. 15 L. R. A. 375, 48 Kan. 15.

In Metallic Compression Casting Co. v. Fitchburg R. Co., 109 Mass. 277, 12 Am. Rep. 689, the defendants were sued for negligently severing a hose laid across their track, thereby cutting off the supply of water from a fire which was consuming the plaintiff's factory and causing the destruction of the building and its contents. The court held such interference tortious, the firemen having a right at common law to lay the hose over the road, and the mere fact of their being volunteers made no difference, the severance of the hose being a proximate cause of the plaintiff's injury.

In Eaton v. Fairbury Waterworks Co. (Neb.) 21 L. R. A. 653, where the defendants, under the provisions of the city ordinance, were to keep all fire hydrants supplied with water for instant service and in good order and efficiency, the payment being provided for by the levying of a tax, the loss by the plaintiff was alleged to be caused by their negligence and failure to so provide the hydrants with water. The court held, no mention of or reference to plaintiff, or any class of citizens or taxpayers being embodied in the contract, that the defendants were not liable by reason of the assumption of certain functions which might properly be assumed by the municipal corporation, inasmuch as the municipality itself could not be liable under the circumstances, and no privity of contract was established.

In Ferris v. Carson Water Co., 16 Nev. 44, 40 Am. Rep. 485, the defendant was held not liable to the plaintiff for the insufficiency of the water supply furnished by it under a contract with the city.

In Foster v. Lookout Waterworks Co., 3 Lea, 42, it was held that neither the company nor the city was liable for an insufficient supply of water, owing to the non-repair of pipes, no privity of contract existing with the plaintiff.

In Atkinson v. New Castle & Gateshead Water Co., L. R. 2 Exch. Div. 441, 46 L. J. Q. B. 775, 36 L. T. N. S. 761, 25 Week. Rep. 794, it was held that a mere breach of a statutory public duty against any cause of action, whether the right of action be or be not given, must depend upon the object and language of the statute.

Where the statute bound the company to maintain fire plugs to furnish sufficient supply of water to keep pipes charged with water of a certain pressure, for use in case of fire without compensation, and imposed a fine in case of neglect, the court held that the defendants were not liable for the insufficient supply of water at the fire. Atkinson v. New Castle & Gateshead Water Co. *supra*.

A contrary doctrine would seem to be held in Paducah Lumber Co. v. Paducah Water Supply Co., *infra*, but it will be observed that in that case there was an express contract between the lumber company and the water supply company, by which, in consideration for the rent paid for the use of two hydrants upon the lumber company's own lot, the water was agreed to be furnished directly to such company.

A city having power by its charter to contract for the construction of waterworks, and operating of the same, such contract is made for the personal benefit of the inhabitants within the limits of such corporation. Paducah Lumber Co. v. Paducah Water Supply Co. 7 L. R. A. 77, 89 Ky. 340.

In Paducah Lumber Co. v. Paducah Water Supply Co., *supra*, it is stated that if the city had power to make the contract as well for the personal benefit of its several inhabitants as for purely municipal purposes, and did so make it, the plaintiff being the real party in interest because owner of the property destroyed, had the right to prosecute in its own name if maintainable at all, and that the city was not a necessary party its interest or injury being distinct if not remote. Section 18 of the Kentucky Civil Code provides that the action must be prosecuted in the name of the real party in interest.

Where the contract to supply the city with water provided that the contractor should be exempt from damages occasioned by the temporary shutting off of the water in case of repairs, it was held that no excuse being provided they were still liable for damages by fire, occasioned by the non-supply of the necessary amount of water; and the insertion of a provision relieving the city from liability for rent was no release so far as the contractor was concerned. Paducah Lumber Co. v. Paducah Water Supply Co. *supra*.

In such cases the inquiry is whether, considering the purpose, character, and capacity of the works, and the attending circumstances and agencies, the fire could and would have been prevented or extinguished if such company had performed its contract. *Ibid.*

In Duncan v. Owensboro Water Co. decided in the court of appeals of Kentucky, December 10, 1889, 12 Ky. L. Rep. 35, the doctrine established in the last preceding case was followed. E. W.

or damage sustained by reason of the failure to perform their duties and obligations in this respect. They are employed by the city, and responsible alone to the city. The people must trust to the municipal government to enforce the discharge of duties and obligations by the officers and agents of that government."

In the Nevada case (decided in 1881), after citing 69 N. Y., *supra*, with approval, and quoting therefrom, it was replied: "The board of the trustees of the town, in the exercise of a discretionary power conferred upon them by the legislature, contracted for a supply of water for the extinguishment of fires. The plaintiff, in common with the other residents of the town, enjoyed the advantages of this contract. He had an indirect interest in the performance of the contract by the water company, as had all of the property holders of the town; but such an interest is not sufficient to constitute the privity, either directly or by substitution, which must exist to give him a right of action upon the contract." In the Georgia case (decided in 1889), in an opinion by Bleckley, *Ch. J.*, it was replied: "The present case is not based upon the breach of a statutory duty, but solely upon a failure to comply with a contract made with the municipal government of Athens. To that contract the plaintiff was no party, and the action must fail for the want of the requisite privity between the parties before the court. There being no ground for recovery treating the action as one *ex contractu*, is it better founded treating it as one *ex delicto*? We think not. The violation of a contract entered into with the public, the breach being by mere omission or nonfeasance, is no tort, direct or indirect, to the private property of an individual, though he be a member of the community and a taxpayer to the government. Unless made so by the statute, a city is not liable for failing to protect the inhabitants against the destruction of property by fire. *Wright* v. *Augusta*, 78 Ga. 241; 7 Am. & Eng. Encyclop. Law, p. 997 *et seq.*"

The case in hand is on the contract made by the water company with the town of Trenton, and the only feature that it presents that can take it out of the principle laid down in these cases is that provision was made in this contract for a special tax to be raised to provide part of the consideration the water company was to, and did, receive, to which the plaintiff contributed, and an express promise contained in the contract that "should said water company, from lack of water supply, or any other cause except providential or unavoidable accident, fail to furnish a reasonable or adequate supply of water to extinguish any fire, then it shall be liable for all damages occasioned by such fire or neglect;" the argument being that here is an express promise of indemnity in a contract, in which the plaintiff is privy to the consideration at least. This argument was met by the supreme court of Iowa in *Becker* v. *Keokuk Water Works*, 79 Iowa, 419 (decided in 1890; probably not published when this question was before the Kansas City court of appeals), in the following manner: "(1) The chief question raised by the demurrer was considered in *Davis* v. *Clinton Water Works Co.*, 54 Iowa, 59, 37 Am. Rep. 185, and decided adversely to the claim now made by plaintiff. But he contends that this case differs from that in several material particulars. In this case a special fund was raised by the city to pay for a sufficient supply of water for use in case of fires and to that fund plaintiff contributed. It is said in making the contract, and in levying and collecting the taxes required by its provisions, the city acted as a mere agent. We do not think the fact that the city levies and collects a tax to be paid to defendant creates any privity of interest between defendant and the taxpayers. In making the contract the city discharged one of the duties for which it was created, and in raising the required money it only provided the consideration due from it by virtue of the contract. It would hardly be claimed that the defendant would proceed against a taxpayer in the first instance for any unpaid money due under the contract from the city. . . . (2) It was decided in *Vanhorn* v. *Des Moines*, 63 Iowa, 448, 50 Am. Rep. 750, that the city was not liable for the failure of the waterworks company to furnish the water required by the contract to extinguish fires, even though the city had taken a contract from the company to protect it from liability which might arise for malfeasance or neglect on the part of the company. . . . Much stress is placed by appellant upon that part of section 18 which provides 'that said company shall be liable for all injury to persons or property caused by the negligence, mismanagement, or fault of itself or its employés while engaged in the construction or operation of its works.' Municipal corporations have and can exercise only such powers as are expressly granted to them by law, and such incidental ones as are necessary to make those powers available, and are essential to effectuate the purposes of the corporation; and those powers are strictly construed. *Clark* v. *Des Moines*, 19 Iowa, 212, 87 Am. Dec. 423; *McPherson* v. *Foster*, 43 Iowa, 57, 22 Am. Rep. 215. The law which authorizes cities to contract with individuals and companies for the building and operating of waterworks confers no power upon a city to make a contract of indemnity for the individual benefit of a taxpayer for a breach of which he could maintain an action in his own name."

The town of Trenton, under its charter, had power to pass ordinances "to prevent and extinguish fires" (Laws 1856, p. 353), and, as incident thereto, power to contract for a supply of water for that purpose. But it would seem, under the authorities cited, the plaintiff cannot maintain this action, for cogent reasons, which have been, and may be, put in several ways: First. Although it was within the power of the town, by contract, to supply water for the purpose of extinguishing fires, it did not owe the duty of extinguishing fires to plaintiff. *Heller* v. *Sedalia*, 53 Mo. 159, 14 Am. Rep. 444. Consequently, the case is not brought within the line of adjudicated cases which maintain an exception to the rule that suit upon a con-

tract must be brought by a party to the contract in cases where the promisee owed a duty to the third party, which the promisor undertook to perform. Second. A municipal corporation, in making contracts for the benefit of its citizens, acts for them collectively, and for all of them, in every act, and the relation of privity is not, and cannot be, introduced into such contracts by reason of taxpaying or the discharge of any civic duty by any individual citizen. Third. The benefit to be conferred upon the individual citizen by the contract is incidental to the contract, the primary object of which is the benefit of all the citizens in their corporate capacity. Fourth. It does not clearly appear that the benefit was intended for the citizens in their individual capacity, but may have been intended for the protection of the municipality, and, in the absence of express power in the municipality to make contracts for the indemnity of its individual citizens, should be so construed. *City of Kansas* v. *O'Connell*, 99 Mo. 357. Fifth. The relation that the contractor sustained to the town was that of its agent or servant to carry out the obligations of the contract upon its part for the benefit of all the citizens of the municipality; and for the enforcement of the terms thereof the citizens must look to the authorities of the city, and cannot individually maintain an action for a breach of the contract. Sixth. The town had no authority to make a contract to indemnify the plaintiff for the loss of his property by fire resulting from the neglect of its agents or servants to furnish an adequate supply of water to put it out, and therefore could not make such a contract that would be binding on another. The appellant is, however, not without authority to sustain his position. In a recent case in Kentucky (decided in 1889) the supreme court of that state held "that when a water company has contracted with a city to furnish, at all times, a supply of water sufficient for the protection of the inhabitants and property of the city against fire, the company must answer in damages for loss by fire resulting from its failure or refusal to perform its contract." *Paducah Lumber Co.* v. *Paducah Water Supply Co.* 89 Ky. 340, 7 L. R. A. 77, and 89 Ky. 353, 7 L. R. A. 80. The authority for this proposition is not therein cited, and the reasoning upon which the position is rested does not seem to us entirely satisfactory. The plaintiff's contention also receives some support from the reasoning of *Judge* Thompson in *Lampert* v. *Laclede Gas-Light Co.*, 14 Mo. App. 376, according to whose views it would seem that the contract declared upon here should raise, on the part of the defendant, a public duty to be performed for the benefit of the inhabitants of the town distributively, and for the negligent nonperformance of that duty an action would lie by the town, "suing upon the contract, or by an individual specially damaged thereby, proceeding as for the nonperformance of a public duty, and setting up the contract by way of inducement." As before stated, the suit here is upon the contract, and not against the water company for the negligent nonperformance of a public duty, and these views have simply persuasive force. At all events, the position of the Kansas City court of appeals, and the ruling of the court below in this case, are sustained by the weight of authority, and *the judgment herein will be affirmed.*

All concur, except **Barclay, J.**, absent.

LOUISIANA SUPREME COURT.

A. M. ODOM and Wife

v.

ST. LOUIS SOUTHWESTERN R. CO., *Appt.*

(45 La. Ann. ——.)

***A passenger on a railroad train, when it stops at the station where he is to get off,** when he attempts to do so, and is on the steps of the car, and the train moves ahead when he is in this situation, is compelled to adopt a perilous alternative,—to run the risk of being thrown from the train when its speed is accelerated, or to leave the train with less speed. In trying to escape imminent danger brought about by defendant's negligence, he is not guilty of contributory negligence, and the defendant corporation is responsible for its negligence.

(October 11, 1893.)

APPEAL by defendant from a judgment of the District Court for the Parish of Orleans in favor of plaintiffs in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Modified.*

*Headnote by McENERY, J.

The facts are stated in the opinion.

Messrs. **Alexander & Blanchard** and **Sam. H. West**, for appellant:

In an action for damages for personal injuries, where the plaintiff has, by his own imprudence or negligence, contributed to his own injury, he cannot recover, even though defendant be in fault.

Fleytas v. *Pontchartrain R. Co.* 18 La. 339, 36 Am. Dec. 658; *Damont* v. *New Orleans & C. R. Co.* 9 La. 441, 61 Am. Dec. 214; *Laicher* v. *New Orleans, J. & G. N. R. Co.* 28 La. Ann. 320; *Schwartz* v. *Crescent City R. Co.* 30 La. Ann. 15; *Murray* v. *Pontchartrain R. Co.* 31 La. Ann. 490; *Weeks* v. *New Orleans & C. R. Co.* 32 La. Ann. 615; *Childs* v. *New York City R. Co.* 33 La. Ann. 154; *Woods* v. *Jones*, 34 La. Ann. 1086; *Houston* v. *Vicksburg, S. & P. R. Co.* 39 La. Ann. 796; *Walker* v. *Vicksburg, S. & P. R.*

NOTE.—The above case presents one of the exceptions to the general rule denying right of recovery to a person injured while leaving a train in motion. See note exhaustively reviewing the decisions on the subject, with Carr v. Eel River & E. R. Co. (Cal.) 21 L. R. A. 355,—especially that portion of the note beginning on page 363.

See also 28 L. R. A. 811; 35 L. R. A. 762; 38 L. R. A. 458; 41 L. R. A. 490; 43 L. R. A. 297.

Co. 7 L. R. A. 111, 41 La. Ann. 795; *White* v. *Vicksburg, S. & P. R. Co.* 42 La. Ann. 990; *Olivier* v. *Louisville & N. R. Co.* 43 La. Ann. 804; *Herlisch* v. *Louisville, N. O. & T. R. Co.* 44 La. Ann. 280.

Where a person, in order to avoid being carried beyond his destination, jumps from a train while it is in motion, and sustains an injury, he cannot recover.

Damont v. *New Orleans & C. R. Co.* 9 La. Ann. 441, 61 Am. Dec. 214; *Walker* v. *Vicksburg, S. & P. R. Co.* 7 L. R. A. 111, 41 La. Ann. 795; *Olivier* v. *Louisville & N. R. Co.* 43 La. Ann. 804; *Fournet* v. *Morgan's, L. & T. R. & S. S. Co.* (La.) July Term, 1891.

Messrs. **A. J. Murff** and **J. A. Snider,** for appellees:

In *Lehman* v. *Louisiana Western R. Co.*, 37 La. Ann. 707, this court said: "Nothing is better settled than that carriers owe to their passengers the duty of exercising a very high degree of diligence, care, skill, and foresight in order to carry them safely. They are bound to the *diligentia diligentis patrisfamilias*—the diligence which a good specialist in that particular line of business would exercise, including all the care, caution, and skill, which common experience shows to be proper in order to secure safety."

In *Turner* v. *Vicksburg, S & P. R. Co.*, 37 La. Ann. 648, 55 Am. Rep. 514, is the following language: "We have no hesitation in holding that a railroad company which affords no greater facilities to passengers in boarding their trains than the alternative to step down to the ground from a platform, and thence to climb up the car steps into the proper passenger coach, or to step into a baggage car and thence to walk to the rear, crossing over car platforms while the train is in motion, is guilty of gross negligence."

It is not proper management in a railroad company to require passengers to go through a series of coaches, and to pass over several platforms, in order to reach the particular coach they may desire to occupy.

Moses v. *Louisville, N. O. & T. R. Co.* 39 La. Ann. 653. See also Hutchinson, Carr. pp. 417, 418; Thomp. Carr. p. 108; *Wardle* v. *New Orleans City R. Co.* 35 La. Ann. 201; Beach, Contrib. Neg. p. 174; *Peniston* v. *Chicago, St. L. & N. O. R. Co.* 34 La. Ann. 780, 44 Am. Rep. 444.

Contributory negligence, in its legal signification, is such an act or omission on the part of a plaintiff, amounting to a want of ordinary care, as, concurring or co-operating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of.

Beach, Contrib. Neg. p. 8.

If plaintiff jumped at all it was involuntary and done to save herself and child from being crushed under the wheels of the moving cars. A jump prompted by such motives, when one is placed in such circumstances by defendant's negligence, is not contributory negligence.

Beach, Contrib. Neg. 2d ed. § 40; *Damont* v. *New Orleans & C. R. Co.* 9 La. Ann. 441, 61 Am. Dec. 214; 2 Wood, Railway Law, p. 1126; Thomp. Carr. p. 267.

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

The plaintiff sued the defendant company for $5,000 damages for personal injuries to his wife, alleged to have been received at Mitchells' Mills, in Bossier parish, on July 4, 1892. The petition alleges that the plaintiff "had alighted from the car, and Mrs. Odom, his said wife, was in the act of alighting therefrom; that, when she had reached about the second or third step of defendant company's car, the said train, under the control and management of said company's regular employés, gave a sudden and violent jerk, and began to move off; that, owing to said sudden jerk and violent movement, Emma L. Odom, one of your petitioners, with her infant child, whom she carried in her arms, were violently thrown from said car, her clothing was disarranged, her person exposed, and her body considerably bruised; that she received from said fall a hurt on her thigh, which lasted for several days, and gave her much pain; that in addition to this she received serious internal injuries from said fall, from the effects of which she has not fully recovered, and from which she suffers, and may suffer for an indefinite time; that the shock to her nervous system, resulting from the dangers to which her infant child and herself were exposed, was of such extent as to render her unconscious for a few moments, and to greatly impair her health." The defendant's answer is a general denial, and an averment of contributory negligence on the part of plaintiff. The case was tried by a jury, and a verdict and judgment were rendered in favor of the plaintiffs for $1,000.

It is now well settled that contributory negligence on the part of the plaintiff is a bar to a recovery, although the defendant be in fault. *Fleytas* v. *Pontchartrain R. Co.* 18 La. 339, 36 Am. Dec. 658; *Damont* v. *New Orleans & C. R. Co.* 9 La. 441, 61 Am. Dec. 214; *Laicher* v. *New Orleans & G. N. R. Co.* 28 La. Ann. 320; *Schwartz* v. *Crescent City R. Co.* 30 La. Ann. 15; *Murray* v. *Pontchartrain R. Co.* 31 La. Ann. 490; *Weeks* v. *New Orleans & C. R. Co.* 32 La. Ann. 615; *Childs* v. *New York City R. Co.* 33 La. Ann. 154; *Woods* v. *Jones*, 34 La. Ann. 1086; *Houston* v. *Vicksburg, S. & P. R. Co.* 39 La. Ann. 796; *Walker* v. *Vicksburg, S. & P. R. Co.* 41 La. Ann. 795, 7 L. R. A. 111; *White* v. *Vicksburg, S. & P. R. Co.* 42 La. Ann. 990; *Olivier* v. *Louisville & N. R. Co.* 43 La. Ann. 804; *Herlisch* v. *Louisville, N. O. & T. R. Co.* 44 La. Ann. 280.

And it is equally well established that when a passenger on a railroad train, in order to avoid being carried beyond his destination, jumps from a moving train, and sustains an injury, he cannot recover. *Damont* v. *New Orleans & C. R. Co.* 9 La. Ann. 441, 61 Am. Dec. 214; *Walker* v. *Vicksburg, S. & P. R. Co.* 41 La. Ann. 795, 7 L. R. A. 111; *Olivier* v. *Louisville & N. R. Co.* 43 La. Ann. 804.

It is therefore important to ascertain whether or not Mrs. Odom contributed to her own injury, and whether she voluntarily jumped from the train, while in motion, in

order to avoid being taken beyond her destination. It is alleged that she was on the steps of the car, in the act of leaving the car, when it moved ahead in its regular course, and she was thrown from the car. It is immaterial whether she jumped off or was thrown off, if she was in the act of leaving the car when it had stopped, and the train moved ahead when she was in the act of getting off. Some of the witnesses place her on the platform of the car, and testify that she jumped or stepped from the car platform to the small platform at Mitchells' Mills, which is a flag station. Others place her on the steps, and say that, as she was in the act of getting off, she was thrown to the ground by the movement of the train. On this particular point the evidence is conflicting, and seemingly irreconcilable. We are therefore disposed to apply the rule so often announced by us,—that on questions of fact, when the evidence is conflicting, and the witnesses of credibility, and the testimony almost equally balanced, we will not disturb the verdict of the jury. In this case this rule can be applied with propriety, for, without calling to our aid extraneous circumstances and physical facts, it would be the exercise of intuitive tact and wisdom to unthread the mass of tangled testimony in the record. There is no evidence that Odom and his wife unnecessarily delayed their efforts to leave the train. They had to go some distance, where they could conveniently get to the platform at the depot. The train had signaled for a stop, and when it slowed up they moved forward to get off. This fact is established, and also the fact that Odom got off the train when it had stopped, and had placed his bundles, and turned around to assist his wife. Here the conflict of testimony begins; plaintiff's witnesses placing Mrs. Odom on the steps of the car, and defendant's witnesses on the platform of the car, from which, while the car was in motion, she stepped to the depot platform, two steps, and went beyond it to the ground. Odom says, as he turned to assist his wife from the train, it moved off, separating him from her, and she was carried to the end of the platform, thrown from the steps against the side of the car, and to the ground. We think his testimony is corroborated as to his wife being on the step of the car when it moved off. Sentehl, defendant's witness, places her ten feet beyond the north end of the platform, on the ground, when he saw her. All the witnesses place her north of the platform. This platform faces north and south, and, the car being parallel with it, it is difficult to understand how she stepped to the platform, and was thrown this distance to the north of it. Defendant's witnesses were not, we think, in a position to see any movement of Mrs. Odom; and, when they testify they saw her on the platform, they may have spoken the truth, and at the instant thereafter she may have descended to the step. The witness of defendant nearest to her, in immediate proximity to her, and on whose testimony defendant places great reliance, is confused in his testimony, and makes two separate and distinct statements in the direct and cross-examination. We are of the opinion that the jury were correct in finding the defendant corporation negligent in moving its train when Mrs. Odom was on the car step, in the act of leaving the train. She was placed in a situation, by the company, where she had no time for deliberation, and had to choose between two modes of escape, both of which were dangerous. Error in judgment on the part of plaintiff in trying to escape imminent danger brought about by defendant's negligence does not constitute contributory negligence, even though the accident might not have happened, had the act not been done. *Lehman v. Louisiana Western R. Co.* 37 La. Ann. 705. She was on the steps of the car by defendant's invitation to her to leave the train. In this situation, with an infant in her arms, the perilous alternative was presented to her, to remain there, and run the risk of being thrown from the train when it accelerated its speed, or to step from the train before it increased its motion. It would have been dangerous for her to attempt to reach the car platform with an infant in her arms. Under these circumstances, we are inclined to the opinion that she chose the less dangerous mode of escape. The defendant corporation is responsible for the consequences of the placing of Mrs. Odom in this situation.

The evidence fails to sustain the allegations in plaintiff's petition as to the personal injury of his wife. The evidence is unsatisfactory, and at the time of the injury there was no examination made by the family physician to ascertain the condition of Mrs. Odom, owing to her modesty, rather, we think, than from any desire to deceive. The examination was therefore superficial, and the family phyiscian only visited her once. Medical experts were appointed by the court to make a personal examination of Mrs. Odom. No objection was made to this unusual application for medical experts to examine the person of the plaintiff. We will not, therefore, comment upon it. Objection was made, and a bill was reserved, to taxing the expense of the expert examination as costs to the defendant. It will not be necessary to discuss this, as the defendant will have to pay the costs. The expert testimony, as it was not objected to by defendants, may be referred to. It shows that there is "no evidence of disease existing, that could not reasonably be assigned to other causes." One of these experts is the physician who first visited Mrs. Odom. Mrs. Odom was undoubtedly injured, however, to some extent.

The judgment appealed from will be amended, and the damages fixed at $500. It is therefore ordered, adjudged, and decreed that the judgment appealed from be amended by reducing the damages to the sum of $500, and in other respects it be affirmed.

Response to petition for rehearing:

Without granting a rehearing in this case, we will add to the decree that the plaintiff and appellee pay costs of appeal, although this is unnecessary, as the costs followed the judgment. The amendment to the judgment necessarily cast the costs of appeal on the appellee.

Rehearing refused.

MISSISSIPPI SUPREME COURT.

W. C. JONES, *Appt.*,
v.
R. W. MILLSAPS *et al.*

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

1. An implied covenant of a lessor of the lower part of a building to make such repairs on the upper portion not leased as may be necessary for the protection of the enjoyment of the lessees of the lower portion cannot be raised by the fact that the lessee expressly covenants to make certain extraordinary repairs and alterations in the portion leased for the accommodation of his business.

2. The lessor of the lower story of a building, retaining the upper story in his own possession and use, is not bound by an implied covenant to make any repairs on the upper portion of the building, in the absence of deceit, misrepresentation, or fraud.

(October 30, 1893.)

APPEAL by plaintiff from a judgment of the Circuit Court for Hines County in favor of defendants in an action brought to recover damages caused to plaintiffs as tenants of defendants' property by reason of defendants' failure to make necessary repairs. *Affirmed.*

The facts are stated in the opinion.

Mr. **E. E. Baldwin** for appellant.

Messrs. **Brame & Alexander** for appellees.

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

While the declaration, in some of its allegations, is somewhat indefinite or uncertain, yet we do not think it so indefinite or uncertain, as a whole, as that the precise nature of the complaint is not apparent. While parts of the language employed are involved or obscure, the pleading does nevertheless contain a statement of the facts constituting the cause of action, in ordinary language. Our statutes are designed to obviate the necessity for, and the use of, all

NOTE.—*Liability of landlord as to condition of part of premises not controlled by tenant.*

The opinion in the main case of JONES v. MILLSAPS fails to clearly show the nature of the repairs sought, or cause of action for damages, and therefore will not be as valuable an authority on particular repairs that are essential and requisite, as if the matters in dispute and the elements of damages claimed had been disclosed and discussed.

Elevators.

A landlord operating and controlling the elevator is liable to a tenant or to a stranger for injuries caused by the door of the elevator well being left open and unprotected. Gordon v. Cummings, 9 L. R. A. 640, 152 Mass. 513; Totten v. Phipps, 52 N. Y. 354; Fisher v. Jansen, 30 Ill. App. 91, 128 Ill. 549.

And the statute requiring a railing protection was properly received in evidence. Dawson v. Sloan, 17 Jones & S. 304, 100 N. Y. 620.

And where there was no protecting rail as required by N. Y. Laws 1862, chap. 410, and the hatch was open, the question of negligence was properly submitted to the jury. Atkinson v. Abraham, 45 Hun, 238.

And it was properly submitted to the jury whether the landlord had failed to take reasonable precaution, where a boy apparently in charge of the elevator had left the door open. Tousey v. Roberts, 21 Jones & S. 446, 1 N. Y. S. R. 750; People's Bank of Baltimore v. Morgolofski, 75 Md. 432; *Dawson* v. *Sloan, supra.*

And the question of negligence was properly submitted to the jury, where the boy in charge opened the door when the cage was not at the landing. Fisher v. Cook, 23 Ill. App. 621, affirmed, 125 Ill. 280.

But the landlord is not liable if the elevator is kept locked and the key in proper place and a tenant improperly procures another key and leaves it open without consent or knowledge of landlord. Handyside v. Powers, 145 Mass. 123.

And Mass. Stat. 1882, chap. 208, requiring safeguards does not impose liability unless the act is accepted by the city.

He is liable to a person delivering beer on an elevator, who was injured by the bottles falling on him as the elevator rose, where the elevator was out of repair. Ritterman v. Ropes, 19 Jones & S. 25.

And a landlord is liable for death of a boy delivering goods to a tenant, caused by a defective rope on dumb waiter, that would have been easily discovered on inspection. Krey v. Schlussner, 16 N. Y. Supp. 695.

And it is a question for the jury whether the landlord had used reasonable care in splicing a defective rope, instead of using a new one. Blake v. Fox, 43 N. Y. S. R. 527.

But the landlord is not liable for injuries caused by the rope breaking, if he had no notice of any defects. Turnier v. Lathers, 36 N. Y. S. R. 821.

There was no evidence as to the condition of the rope or why it broke in this case.

And a landlord is not liable for injury to a servant of his tenant, who attempted to ride on an elevator knowing that it was for freight only, and not for persons. McCarthy v. Foster, 156 Mass. 511.

Nor is he liable for the death of a visitor of a tenant's servant, riding on the servant's elevator, who was killed by sliding through a opening in the wire guard of the cage, while overcome by vertigo, fainting, or loss of consciousness. Egan v. Berkshire Apartment Asso. 31 N. Y. S. R. 545.

Common entrance, passway and yard, and access.

A landlord is liable to a tenant or person properly on his premises for injuries caused at common entrances, by openings or excavations left unguarded, or obstructions, which are under the landlord's control. Camp v. Wood, 76 N. Y. 92, 32 Am. Rep. 282; Bunker v. Cummins, 133 Ind. 443; Elliott v. Pray, 10 Allen, 378, 87 Am. Dec. 653; Toomey v. Sanborn, 146 Mass. 28.

And is liable for causing and leaving unprotected an excavation near a common passway. Phillips v. Library Co. of Burlington, 55 N. J. L. 307; Curtis v. Kiley, 153 Mass. 123.

Or dangerous explosives. Powers v. Harlow, 53 Mich. 507, 51 Am. Rep. 154.

Or dangerous awning in a defective condition over a common doorway. Milford v. Holbrook, 9 Allen, 17, 85 Am. Dec. 735.

And is liable for defective platform at entrance controlled by landlord for common use of all the occupants. Readman v. Conway, 126 Mass. 374; Leydecker v. Brintnall, 158 Mass. 292.

And a landlord is liable for injury to a tenant caused by ice on piazza and steps used in common,

See also 36 L. R. A. 790; 39 L. R. A. 246; 41 L. R. A. 554.

technicalities in all pleadings, and to enable every litigant to have his complaint entertained and heard on his stating the facts constituting his cause of action in ordinary and concise language. If irrelevant or redundant matter is inserted in the pleading, the opposite party should move to strike out such matter. If the allegations of the pleading are so indefinite or uncertain that the precise nature of the complaint is not apparent, on motion of the opposite party the court will cause the same to be made definite and certain, or, this failing, will strike the pleading from the files. Code 1892, § 704. On this branch of the case, and beyond these general observations, we think it proper only to add two particularizations, viz.: (1) The first special cause of demurrer is not well taken. On examination of the written contract we find that the lessee (the plaintiff below) covenants to make certain specific repairs and alterations in and upon the leased storeroom, and for other repairs that may be necessary, or charges which he may deem requisite. That all the repairs and alterations covenanted for on the lessee's part are limited to the leased storeroom is quite manifest. (2) The eight special grounds of demurrer are not maintainable. Reference to the transcript before us shows that it is the "cost and carriage and value of the goods,"—damages which the schedule filed with the declaration contains. But this schedule was unnecessary, and this part of the declaration may be treated as surplusage. With this useless matter disregarded, we still find a distinct averment of the pleading that the plaintiff is injured and damaged to the value of $400.

We come now to the consideration of the real contention between the parties, presented in the last special cause of demurrer, and that is, to state it fairly and fully: Can the lessor, in this particular case of the leasing of the lower story to the plaintiff, with retention of the upper story in his own possession and use, be held liable for necessary repairs, in the absence of any covenants to keep in repair imposed upon him by the written contract of lease, and in the absence

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which results from defective pipe controlled by the landlord. Watkins v. Goodall, 138 Mass. 533.

Or for dangerous condition of wall on common passway where he had notice, and a child of the tenant was injured. Schilling v. Abernethy, 112 Pa. 437.

For other walls, see *infra*, that heading.

So he is liable for injury to a child falling in an open-air shaft in the yard, where a heavy iron cover was removed, but he is not liable to the same boy who also had fallen in the cellar through an open door, as it did not appear to be negligence in having it open. Canavan v. Stuyvesant, 7 Misc. 113.

But it was held in Burns v. Luckett (Ohio) 3 Cin. L. Bull. 517, that a landlord of two tenement houses that were rented was not liable for the death of a child of one tenant, caused by falling in a vault in the center of the lot used in common by both houses. The question of common use was not discussed and the case seems to have been determined on the ground that the landlord had parted with all control and was not liable for defective condition, and he is not liable to a tenant on account of construction of steps, being made of rough, unhewn granite with no railing, and ice accumulating thereon—as he is not bound to change the construction after renting. He would be liable to strangers for defective construction. Woods v. Naumkeag Steam Cotton Co. 134 Mass. 357, 45 Am. Rep. 344.

And is not liable to a tenant for injury from construction of floor of passage made of loose boards, where the tenant rents knowing that it was constructed in that way—as the landlord is not bound to change the mode of construction. Quinn v. Perham, 151 Mass. 162.

And a tenant of part of a business house cannot have his lease canceled on account of license to pass through the other part having been denied him, the lease not providing for the same, and he having other access to his part. Ward v. Robertson, 77 Iowa, 159.

And it was held in Williams v. Hayward, 1 El. & El. 1040, 28 L. J. Q. B. 374, in an action for rent for lease of mining privilege with the privilege of using a railroad of the landlord, that an obstruction of such railroad easement is not an eviction; and the court says that "the rent issued out of the thing demised, that is the mines and minerals, and could not have issued out of the easement to use the railway in common with others on the land, not parcel of the demise; and we think that the preventing the defendant from using or obstructing him in the enjoyment is not such an eviction from the thing demised or any part of it as will amount to an answer to the claim of rent."

Halls and stairways.

A landlord is liable to a tenant or person rightfully using the premises, who is injured by reason of defective covering on the stairs used in common, and over which the landlord has exclusive control. Henkel v. Murr, 31 Hun, 28; Evers v. Weil, 43 N. Y. S. R. 336; Gillvon v. Reilly, 50 N. J. L. 26; Neyer v. Miller, 19 Jones & S. 516; Monteith v. Finkbeiner, 50 N. Y. S. R. 453; McGuire v. Joslyn, 31 N. Y. S. R. 990; Peil v. Reinhart, 12 L. R. A. 843, 127 N. Y. 381.

And is liable under New York Consolidation Act, § 652, requiring stairs in tenement houses to be kept in repair. Brennan v. Lachat, 14 Daly, 197.

And a landlord retaining control of a stairway used in common is generally liable to a tenant or party properly thereon, who is injured by reason of the same being dangerous from negligence of the landlord to keep in safe condition. Marwedel v. Cook, 154 Mass. 235; O'Sullivan v. Norwood, 14 Daly, 286; Walton v. Kane, 4 Misc. 296; Brady v. Valentine, 3 Misc. 20; Sawyer v. McGillicuddy, 3 L. R. A. 458, 81 Me. 318; Englert v. Kruse, 14 Daly, 247; McMartin v. Hannay, 10 Sess. Cas. 3d Series, 411; Looney v. McLean, 129 Mass. 33, 37 Am. Rep. 295; O'Neill v. Kinken, 8 N. Y. Supp. 554.

In Donohue v. Kendall, 18 Jones & S. 385, affirmed, 98 N. Y. 635, mem. the executors of a landlord of a tenement house were held liable for not keeping in repair a common stairway to a cellar used by several families occupying the building. The court said the executors were not bound to go into control of the property but if they did so they must fulfill duties and obligations grounded on their power of management.

But it was held in Halpin v. Townsend, 2 N. Y. City Ct. Rep. 417, affirmed, 107 N. Y. 683, that a visitor of a tenant injured on a common stairway where there was no rail or light, could not recover from the landlord, as the landlord did not light the hall and was not obliged to do so, and the visitor was guilty of contributory negligence.

The same was held in Hildebrand v. Schenck, 2 N. Y. City Ct. Rep. 249.

And Purcell v. English, 86 Ind. 34, 44 Am. Rep. 255, holds that a landlord is not liable to a tenant

of deceit, misrepresentation, or fraud? The general rule that a landlord, in the absence of express covenants in the contract of lease, and in the absence of deceit or misrepresentation, cannot be held liable on any implied warranty on his part for repairs, is not called in controversy by counsel for appellant, as we understand his argument. The correctness and the universality of the rule as stated are admitted; but the lease of a lower story by a landlord retaining the other parts of the building in his own possession and use presents a case exceptional to the general rule, it is contended. This position rests, as it appears to us, upon one of two grounds: (1) Either upon an implied covenant for repairs on the lessor's part, springing out of the written contract itself; or (2) upon the relationship of the parties to each other and to the leased premises. The subject is not free from difficulty, nor is there wanting eminent authority for both of the grounds just mentioned, of fixing liability upon the lessor. Let us examine these in order, and in the light of the authorities cited in support of them.

The first proposition is to fix liability for repairs upon the lessor, in the absence of any express covenants in the written contract of lease, on an implied covenant growing out of the lessee's express covenants to repair the leased storeroom. In the case at bar there are two ready answers to the contention: (1) The repairs and alterations covenanted for by the lessee are not to be supposed to refer to repairs of ordinary wear and tear. These were imposed by law, and needed no sanctions of covenant. They are, as is plainly to be seen in the contract, covenants for extraordinary repairs or alterations, to be made for the peculiar accommodation of the lessees' business. And (2) conclusively, to raise this implied covenant to repair by the lessor would be to introduce into the written contract of the parties a most important condition which they did not incorporate in it themselves when they reduced their agreement to writing. It would amount to an essential

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injured by reason of ice and snow being left on a common stairs where the tenant had knowledge of danger, distinguishing Looney v. McLean, *supra;* as in that case the unsafe condition was permanent and this temporary, and in that case it was not connected directly with plaintiff. Here it was not defective construction or unsafe condition when leased—and the court claims that this stairway by the lease was under control of the tenant as he had the right to use it.

And a landlord was not liable to a tenant injured in using an outside stairway where the evidence tended to show that the injury was caused by a horse pulling it down that was hitched to the same. Platt v. Farney, 16 Ill. App. 216.

And a person not entitled to enter the premises, having no business there, cannot recover for injuries caused by defective condition of steps. Hart v. Cole, 16 L. R. A. 557, 156 Mass. 475; Plummer v. Dill, 156 Mass. 426.

So the landlord is not liable to a subtenant, injured by a hole in the common hall, where the landlord had no notice, and the tenant's lease prohibited subletting. Cole v. McKey, 66 Wis. 500, 57 Am. Rep. 293.

And is not liable for injuries to a child of a third-floor tenant, caused by a dark hall, where the child's mother was accustomed to light the hall. Muller v. Minken, 5 Misc. 444.

A landlord is not liable to a party injured by reason of opening a wrong door by mistake and falling down stairs at the door. Kaiser v. Hirth, 46 How. Pr. 161, 4 Jones & S. 344; Hilsenbeck v. Guhring, 131 N. Y. 674.

And the same was held where a tenant had agreed to light the hall and failed to do so. Jucht v. Behrens, 26 N. Y. S. R. 690.

And in Barker v. Baker, 7 N. Y. S. R. 834, it was held that a landlord of a business block was not liable for injury received by a party falling on a landing between two flights, where the only light was through the glass doors and transoms of the offices, and the day was dark.

And Humphrey v. Wait, 22 U. C. C. P. 580, holds that a landlord is not liable to a tenant having knowledge of the construction of the hall with a pipe hole in the floor, injured in attempting to move her goods across the hall to another room.

The court also placed the decision on the ground that as no liability existed if tenant had leased a whole house, still less would there be if he rented only part; but this proposition is not generally accepted as applicable to a tenement or apartment houses, for repairs in common halls.

Fire escape.

A landlord failing to provide a fire escape required by statute, will be liable for damages caused thereby. Willy v. Mulledy, 78 N. Y. 310, 34 Am. Rep. 536; McLaughlin v. Armfield, 58 Hun. 376.

So where a statute requires all buildings over two stories high to be furnished with fire escapes, or the owner will be liable for damages, he is not relieved although the tenant injured was in the second story. Rose v. King, 15 L. R. A. 160, 49 Ohio St. 213.

But he is not liable for injury to a child of a tenant caused by using fire escape platform as a balcony, although the hinge was defective and trap door gave way. McAlpin v. Powell, 70 N. Y. 126, 26 Am. Rep. 555.

Sidewalk.

A landlord having control is liable to the party injured in falling down unprotected openings on the street. Stevenson v. Joy, 152 Mass. 45; Jennings v. Van Schaick, 108 N. Y. 530; Tomle v. Hampton, 129 Ill. 379.

In the case of Tomle v. Hampton, *supra,* the opening existed before renting.

And a landlord is liable for injuries received by a person falling in a defective and unprotected coal-hole in the sidewalk although the premises are occupied by a monthly tenant. Dalay v. Savage, 145 Mass. 38.

But a landlord employing a watchman is not liable for injuries caused by an open coal hole, where the covering is removed while the watchman's back is turned. Martin v. Pettit, 5 L. R. A. 794, 117 N. Y. 118, reversing Wasson v. Pettit, 49 Hun, 166.

And a landlord occupying one room as a boarder is not liable for neglect to remove snow on sidewalk under a city ordinance requiring it to be "removed by the tenant occupant and in case of no tenant by the owner." Com. v. Watson, 97 Mass. 562.

Landlords would be liable to strangers for defects of buildings having control of entrance, and doors in common; but under Mass. Stat. 1850 the city is liable for defects in sidewalks and injuries from snow and ice, and this remedy is exclusive. Kirby v. Boylston Market Asso. 14 Gray, 249, 74 Am. Dec. 682.

Walls.

A landlord is liable for injury to a tenant in attempting to raise a building. Butler v. Cushing, 46

See also 32 L. R. A. 782.

modification by parol of a written contract. It would be, not the explanation by parol of an obscurity on the face of the contract, but the substitution of one contract for another,—a contract by parol for the written one made by the parties. The case of *Bissell* v. *Lloyd*, 100 Ill. 214, affords distinct support to the contention of appellant as to the implied covenant of the lessor to repair the portion of the building whose possession he retained, in order that the comfort or security of the tenant of the leased room might be maintained. But there is no attempt to fortify this conclusion of the supreme court of Illinois by reason or authority. It is the naked, dogmatic assertion of a court of last resort, and we decline to yield our assent to it.

The other ground of contention, viz., the liability for repairs on the part of the lessor in cases where a part, only, of the premises are leased, and the remainder retained by the landlord, because of the relationship of the parties to each other and to the property, seems to be clearly recognized in the case of *Toole* v. *Beckett*, 67 Me. 544, 24 Am. Rep. 54. The decision and its reasoning are not satisfactory, and the vice of the opinion is that it confounds the passivity of the landlord with affirmative action on his part amounting to negligence. It overlooks the fundamental principle in all leases by which the lessor is made to "hand off" during the continuance of the lease. He may not be required to affirmatively aid the tenant in repairs, and he may not affirmatively act inconsistently with his lessee's right to possession and enjoyment; and, so long as the lessor abstains from all action, he is within the line of his duty. The Maine case confounds negligence with nonintervention, and is unsound.

A critical study of the case of *Priest* v. *Nichols*, 116 Mass. 401; *Kirby* v. *Boylston Market Asso.* 14 Gray, 249, 74 Am. Dec. 682, and *Looney* v. *McLean*, 129 Mass. 33, 37 Am. Rep. 295,—the two former cited, and supposed to have been followed, by the court in 67 Me., and the last relied upon by appellant's counsel,—readily distinguishes them from the Maine case and the case at bar. The case of *Kirby* v. *Boylston Market Asso.*, 14 Gray,

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Hun, 521. This case does not show whether tenant was of whole or part.

And a landlord of a tenement house failing to keep the part of the house under his control in repair is liable to the tenant, injured by the fall of the walls. Bold v. O'Brien, 12 Daly, 160.

And the landlord of an apartment house is liable to a lessee injured by a wall falling, caused by excavation of adjoining owner. Ward v. Fagan, 28 Mo. App. 116.

This building was controlled by the landlord, and as to this wall the tenant occupied the relation of stranger.

But Howard v. Doolittle, 3 Duer, 464, holds that the landlord was not liable for failing to shore up the wall of his tenant's building while an excavation was made by an adjacent owner. In this case the landlord had parted with all control and the question considered was whether he was bound to repair after renting.

And a landlord owning adjacent lot and removing outside wall from part of leased premises exposing goods, is not liable, where it was questionable if the extension exposed had any wall of its own, and also questionable if the tenant was injured. The liability of the landlord in such a case is the same as that of another owner. Rotter v. Goerlitz, 16 Daly, 484.

Falling articles.

A landlord in control of a building occupied by several is liable to a person injured from the fall of the cornice, or timbers from the roof, or a stone from the top of the fire-escape. O'Connor v. Andrews, 81 Tex. 28; O'Connor v. Curtis (Tex.) Feb. 23, 1892; Hungerford v. Bent, 55 Hun, 3; Schachne v. Barnett, 26 Jones & S. 145.

And a landlord furnishing power in an apartment building is liable to an employé of a tenant injured by defective shafting falling in the stairway. Poor v. Sears, 154 Mass. 539.

A landlord having notice is liable to his tenant or person properly on the premises, injured in a common hallway by reason of the same being out of repair, as from fall of plaster. Dollard v. Roberts, 14 L. R. A. 238, 130 N. Y. 269.

And is liable to a tenant for injury from a falling sign used by the landlord above the tenant's room. Payne v. Irvin, 144 Ill. 482, affirming 44 Ill. App. 105.

And a landlord controlling the roof is liable for injuries caused to a stranger by the fall of accumulated snow and ice from the same. Shipley v. Fifty Associates, 101 Mass. 251, 3 Am. Rep. 346.

But a landlord occupying premises and renting bench and power to a tenant in a lumber mill, is not liable to him for injury by timber thrown from the upper door as the tenant was coming out of the lower door, having knowledge of the custom of loading and of this load in particular. Allen v. Johnson, 4 L. R. A. 734, 76 Mich. 31.

Light and air.

A tenant of a second floor is entitled to damages for addition built in front of his rooms obstructing his view and access, between the building and the sidewalk. Brande v. Grace, 154 Mass. 210.

But it is no eviction of a tenant for the landlord to build on an adjoining lot, obstructing the light, and the statute allowing a surrender when the building is untenantable does not apply. Johnson v. Oppenheim, 2 Jones & S. 416.

For other cases on light and air, see *note* to Case v. Minot (Mass.) 22 L. R. A. 536.

Nuisances.

A landlord is not liable to one tenant for renting another part of the same premises to another tenant who used gasoline or other dangerous articles, unless the landlord knew it would be so used. Lewis v. Hughes, 12 Colo. 208.

And a tenant vacating a stable because the landlord rented the other part as a restaurant cannot claim an eviction on account of smoke, heat, and fumes injuring his horses. Gray v. Goff, 8 Mo. App. 329.

This on the ground that there is no implied covenant that premises are tenantable.

And a lessee of a storeroom cannot refuse to pay rent on account of operation of elevator and use of stairway necessary for other part, when such tenant renewed his lease after such use. Benedict v. Barling, 79 Wis. 551.

A party having a delicate trade should stipulate for protection, and where the landlord used the cellar and heated the first floor to 80 degrees, causing paper stored there to lose weight, the tenant could not recover damages as there was no implied warranty of fitness, and the tenant saw the boiler in the cellar when he rented, and the landlord did not know that the kind of paper stored would be injured. Robinson v. Kilvert, 17 Wash. L. Rep. 697, 40 Alb. L. J. 312, 61 L. T. N. S. 60.

See also 40 L. R. A. 476, 754.

249, 74 Am. Dec. 682, determined that "the owner of a building leased in several tenements, who is bound to make all necessary repairs, and has control of the passageways and doors for that purpose, and who keeps the keys, and opens and closes the doors of portions of the building at times fixed by occupants, is not relieved from liability for injuries caused by defects in the building, or by the falling of snow and ice therefrom." The case, on its facts, does not bear the slightest semblance to the case at bar, nor is the opinion of the court authority for the proposition we are considering. The case of *Priest* v. *Nichols*, 116 Mass. 401, presents a clear case of negligence in affirmative action on the landlord's part. The landlord occupied the upper story, and negligently injured his tenant below by water escaping from a waste pipe and from an engine which the landlord used and had charge of. Here liability was imposed for negligence in affirmative action by the landlord in the use of his engine and waste pipe. The case of *Looney* v. *McLean*, 129 Mass. 33, 37 Am. Rep. 295, held that a landlord who lets rooms in a tenement house to different tenants, with a right of way in common over a staircase, is bound to keep such staircase in repair; but that is not the case at bar. If the weight of authority is controlling, it will be ascertained, on examination, that the current is against liability of the lessor in such case as this. See *Walker* v. *Gilbert*, 2 Robt. 214; *Doupe* v. *Genin*, 45 N. Y. 119, 6 Am. Rep. 47; *Ward* v. *Fagin*, 101 Mo. 669, 10 L. R. A. 147; *Cole* v. *McKey*, 66 Wis. 500, 57 Am. Rep. 293; *Purcell* v. *English*, 86 Ind. 34, 44 Am. Rep. 255; *Krueger* v. *Ferrant*, 29 Minn. 385, 43 Am. Rep. 223.

This line of decisions rests upon sound reason. The general rule is firmly established that no implied covenant for repairs can be raised against the lessor. The lessee cannot invoke an implied covenant of the landlord that the leased premises are fit and suitable for the lessee's business or use. The intending tenant must use his own faculties, and judge for himself if the premises he desires to lease are in repair, and are suitable

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And a tenant cannot plead an eviction where the other tenant so used his part as a house of prostitution without the knowledge or consent of landlord. Gilhooley v. Washington, 4 N. Y. 217.

But a landlord cannot recover rent where the tenant vacated part on account of landlord converting other part into a house of prostitution. Dyett v. Pendleton, 8 Cow. 727.

And a lordlord of an apartment building is liable to lower tenants for injury caused by fall of upper floor, from overloading the same, where he misrepresented to tenant of upper floor the strength of the same. Brunswick-Balke Callender Co. v. Rees, 69 Wis. 442.

For other nuisances, see "Water."

Roof used in common.[1]

A license to use roof as a drying place for clothes does not require the landlord to fence it. Ivay v. Hedges, L. R. 9 Q. B. Div. 80.

And the landlord is not liable for injuries caused by breaking of slat on roof used in common for drying clothes, where he had no notice of any defect and was not guilty of any negligence. Alperin v. Earle, 55 Hun, 211.

And is not liable, where child of tenant fell out of a window and through a skylight on a roof used in common for drying clothes, as landlords are not required to build protections to catch children that fall out of windows. Miller v. Woodhead, 104 N. Y. 471.

Water from roof.

A landlord having control of the roof is generally liable to the tenant below for damages from defective condition of the same, or for negligently leaving the conducting pipe so as to flood premises below, or for exposing goods of tenant by uncovering roof. McVie v. McNaughton, 21 N. Y. Week. Dig. 89; Worthington v. Parker, 11 Daly, 545; Rauth v. Davenport, 45 N. Y. S. R. 926, and 60 Hun, 70; Sulzbacher v. Dickie, 6 Daly, 469; Center v. Davis, 39 Ga. 210; Toole v. Beckett, 67 Me. 544, 24 Am. Rep. 54; Glickauf v. Maurer, 75 Ill. 289, 20 Am. Rep. 238; Bissell v. Lloyd, 100 Ill. 214.

And under Georgia Code, a landlord is bound to repair a leak after notice, and if the landlord occupied the upper rooms he would be liable to the lower tenant for damages from a leaky roof without notice, but would not be liable for damages resulting from an extraordinary fall of snow. Guthman v. Castleberry, 49 Ga. 272.

Where the landlord examined the roof five days prior and found it all right, he is not liable for injury caused to lower floor tenant, by leak in gutter pipe made by rats gnawing a hole therein. Carstairs v. Taylor, L. R. 6 Exch. 217, 40 L. J. Exch. 129, 19 Week. Rep. 723.

And it was held in Tenant v. Hall, 27 N. B. 499, that a landlord occupying the upper floor was not liable to the tenant below, injured by water from an insufficient pipe during a severe storm where there was no negligence in the construction of the pipe, or the mode adopted. While the court said that there was no implied warranty the jury found for the defendant on the question of absence of negligence in the construction of the pipe and there was no question made as to the terms on which the question of negligence was submitted to them. So the verdict was not disturbed.

And it was held in Krueger v. Ferrant, 29 Minn. 385, 43 Am. Rep. 223, that in the absence of an express covenant to repair, a landlord having control of the roof where there are several tenants is not liable for damages from leak on tenant below as there is no covenant implied to keep in repair, or that the premises are suitable, and shelter from roof does not require landlord to repair, and the risk was assumed.

This case appears to conflict with the weight of authority, although cited with approval by the main case. The cases on which it mainly depends are those of liability of adjoining owners or where tenant has exclusive control.

Water, pipes, and plumbing controlled by landlord.

A landlord occupying the upper floor is liable to tenant below for injury to tenant below for leakage from his room. Slapenhorst v. American Mfg. Co. 15 Abb. Pr. N. S. 355; Jackson v. Eddy, 12 Mo. 209; Priest v. Nichols, 116 Mass. 401.

And is liable to tenant for damages for defective plumbing controlled by the landlord. Bernauer v. Hartman Steel Co. 33 Ill. App. 491; Pike v. Brittan, 71 Cal. 159, 60 Am. Rep. 527; Freidenburg v. Jones, 63 Ga. 612.

A landlord allowing sewerage to flow from his lot adjoining into cellar of his tenant is liable. Smith v. Faxon, 156 Mass. 589.

And if he fails to comply with the orders of the board of health as to sewer gas in an apartment building he cannot collect rent from a tenant vacating on account of the same. Bradley v. De Gol-

for his use. If he wishes to protect himself against the hazards of subsequently accruing accidents or defects requiring repairs, he must do so by proper covenants in his contract of lease. He takes his leased premises for better or for worse, as an ancient authority aptly characterizes his taking. He takes the premises as he finds them, and he must return them, as nearly as possible, in like condition. This necessarily involves his making repairs on the property during the term of his lease. And all this must be true —all this is true—whether he lease one room or six, the whole or a part of the house. If he rents the whole, the wisdom and necessity of his protecting himself in his contract by stipulating for repairs by his landlord appears to be not less, but greater, than if he rents a part, only. The rule extends to the whole premises, and to every part of the premises. The duty of the tenant to examine the premises, and protect himself by proper stipulations in his contract of lease if danger is suggested by his examination, is the same in case of the leasing of a whole or of part, only. He cannot fix liability upon his lessor by some supposed implied covenant to repair, when he had it in his power to create this covenant expressly in the written contract, and failed to do so.

Affirmed.

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couria, 14 Abb. N. C. 53, 12 Daly, 393, 67 How. Pr. 76.

And if the water pipes controlled by landlord are out of order, and the tenant is injured thereby, rent ceases under New York Act 1860, providing that rent shall cease when property is untenantable. Vann v. Rouse, 94 N. Y. 401.

And the same was held where the tenant's part was overflowed by filth from vault, which was on that or an adjoining lot. Fash v. Kavanagh, 24 How. Pr. 347.

Under New York Act 1860, chap. 345, providing rent shall cease if the building is unfit for occupancy, a tenant is justified in leaving where he is annoyed by explosions, shaking of the building, and cracking of plaster, which the landlord claimed was caused by dynamite placed somewhere to injure him, but probably was from the water pipes and tank. Tallman v. Murphy, 120 N. Y. 345.

A verdict for a tenant on his tender of amount due was sustained where he filed a counterclaim for damages from water from pipes above, in a suit for rent, and the record did not show that the pipes were in repair when rented, and it was questionable whether the jury considered the counterclaim. Colclough v. Niland, 68 Wis. 309.

But it was held in Edgerton v. Page, 20 N. Y. 281, that damages caused to a tenant by water from the landlord above him is not a proper set-off or counterclaim for rent where there is no eviction as the acts of plaintiff are acts of trespass or negligence.

And a landlord is not liable for breach of covenant of quiet enjoyment where the tenant of lower floor was injured by bursting of pipe at the branch on first floor, as the defect existed before the lease was made. But if the water had been disconnected from plaintiff's pipe it would have been different, and injury from escape of water was not pleaded. Anderson v. Oppenheimer, L. R. 5 Q. B. Div. 602, 49 L. J. Q. B. 708.

And a landlord is not liable to a tenant injured by water where the record does not show whether the pipes burst on or off the part occupied by tenant. Simons v. Seward, 22 Jones & S. 406.

Water, pipes, and plumbing used by other tenants.

A landlord is not liable to one tenant for injuries caused by abuse or misuse of water privileges of tenant above. White v. Montgomery, 58 Ga. 204; Mendel v. Fink, 8 Ill. App. 378; Greene v. Hague, 10 Ill. App. 598; McCarthy v. York County Sav. Bank, 74 Me. 315, 43 Am. Rep. 591; Robbins v. Mount, 33 How. Pr. 24; Kenney v. Barns, 67 Mich. 336.

And is not liable for leakage from room above the tenant, where the tenant injured has exempted him from all damages by leakage, and the tenant injured neglected to turn off water running to water closet on the floor above that he had the use of. Taylor v. Bailey, 74 Ill. 178.

But a landlord is bound to keep in condition pipes used in common by several tenants. Fitch v. Armour, 27 Jones & S. 413.

A landlord having notice of misuse of water closet by upper tenants in common is liable, in Georgia, to lower tenants for damages from overflow. Marshall v. Cohen, 44 Ga. 489, 9 Am. Rep. 170.

And is liable to his tenant for injuries from defective water pipes of another tenant. Ingwersen v. Rankin, 47 N. J. L. 18, 54 Am. Rep. 109.

And under N. Y. Laws 1860, chap. 355, providing that tenancy shall cease if premises are untenantble, rent cannot be collected from a tenant who was forced to leave by reason of defective plumbing of other tenant. St. Michaels Prot. Episcopal Church v. Behrens, 10 N. Y. Civ. Proc. Rep. 151.

Water supply.

A landlord cannot cut off water supply pipes. Gans v. Hughes, 38 N. Y. S. R. 430; West Side Sav. Bank v. Newton, 76 N. Y. 616, reversing 8 Daly, 332.

But where no duty rested on the landlord to apportion the water tax, and the tenant of the fourth and fifth floors refused to pay a bill for the whole, and the supply was cut off by the city, and then he had to pay it all and pipe his own part, he was liable for rent as the lease did not guarantee a supply of water. Reynolds v. Meldrum, 33 N. Y. S. R. 664.

And where the water supply was cut off, but the answer did not show that it was on account of a leak in another part of the building, and might have been cut off by some tenant without the landlord's knowledge, the tenant was liable for rent. Coddington v. Dunham, 3 Jones & S. 412.

A landlord leasing a house and land, with a license to use a pump on another tract, is not liable in an action of covenant for nonrepair of the pump. If an action would be it would be an action of case. Pomfret v. Ricroft, 1 Wms. Saund. 4th ed. 322.

For rights of tenants on condemnation, see *note* to Corrigan v. Chicago (Ill.) 21 L. R. A. 212.

For liability in case of fire see *note* to Porter v. Tull (Wash.) 22 L. R. A. 613. L. T.

MARYLAND COURT OF APPEALS.

Richard A. TYSON *et al.*, *Appts.*,
v.
WESTERN NATIONAL BANK OF BALTIMORE.

(77 Md. 412.)

1. **An indorsement "for collection"** will not pass the title to commercial paper to the bank in which it is deposited.
2. **Entering the amount of commercial paper deposited with a bank "for collection" as cash in the pass-book** of the depositor and to his credit on the books of the bank will not pass to the bank the title to the paper if it was not to be an absolute credit but was to be charged back if not collected.
3. **The collection of paper deposited** with a bank indorsed "for collection" after the bank has ceased to do business because of insolvency will not vest the title to the paper in the bank.
4. **A third person can acquire from the bank no title** to commercial paper deposited with an indorsement "for collection."
5. **No judgment can be rendered** in a case submitted to the court for its opinion upon an agreed statement of facts, unless a request for judgment is distinctly made in the agreed case.

(March 16, 1893.)

APPEAL by plaintiffs from a judgment of the Court of Common Pleas in favor of defendant in an action brought to recover damages for the alleged wrongful conversion of the proceeds of a draft and check which belonged to plaintiff. *Reversed.*

The case sufficiently appears in the opinion.

Messrs. **Miller & Bonsal,** for appellants:

When a draft, check, or note is indorsed "for collection for account of" such indorsement is known in law as a restrictive indorsement, and the effect of it is to retain the title to the paper in the indorser.

1 Dan. Neg. Inst. §§ 336, 337; Morse, Banks & Banking, § 593; *Cecil Bank* v. *Farmers Bank*, 22 Md. 148; *National Butchers & Drovers Bank* v. *Hubbell*, 7 L. R. A. 852, 117 N. Y. 384; *Fifth Nat. Bank* v. *Armstrong*, 40 Fed. Rep. 46; *Manufacturers Nat. Bank* v. *Continental Bank*, 2 L. R. A. 699, 148 Mass. 553; *Levi* v. *National Bank of Missouri*, 5 Dill. 107; *Balbach* v. *Frelinghuysen*, 15 Fed. Rep. 683; 2 Morse, Banks & Banking, §§ 583, 586; *First Nat. Bank of Trinidad* v. *First Nat. Bank of Denver*, 74 Dill. 290; *First Nat. Bank of Circleville* v. *Bank of Monroe*, 23 Fed. Rep. 408; *St. Louis & S. F. R. Co.* v. *Johnston*, 133 U. S. 566, 33 L. ed. 683; *Scott* v. *Ocean Bank*, 23 N. Y. 289.

The language of the indorsement is without ambiguity, and needs no explanation, either by parol proof or by resort to usage. It does not purport to transfer the title of the paper or the ownership of the money when received. Both these remain, by the reasonable and almost necessary meaning of the language, in the indorser.

White v. *Miners Nat. Bank of Georgetown, Colo.* 102 U. S. 660, 26 L. ed. 252.

Nor is the effect of the written contracts between the parties made by indorsements and letters, to be altered by the fact that Tyson & Rawls were entitled to check against the credits given them, before the proceeds of the paper actually came into the hands of J. J. Nicholson & Sons.

St. Louis & S. F. R. Co. v. *Johnston*, 133 U. S. 574, 33 L. ed. 686; *Balbach* v. *Frelinghuysen*, *supra; Giles* v. *Perkins*, 9 East, 12, approved in *St. Louis & S. F. R. Co.* v. *Johnston, supra; Fifth Nat. Bank* v. *Armstrong*, and *Levi* v. *National Bank of Missouri, supra.*

The indorsement upon the draft and check gave notice to the appellee that the appellants were the owners, and J. J. Nicholson & Sons merely agents for collection, and therefore the appellee acquired the paper with notice of and subject to the rights of the appellants.

Cecil Bank v. *Farmers Bank, First Nat. Bank of Circleville* v. *Bank of Monroe*, and *Manufacturers Nat. Bank* v. *Continental Bank, supra; Merchants Nat. Bank of St. Paul* v. *Hanson*, 33 Minn. 40; *Bank of the Metropolis* v. *First Nat. Bank of Jersey City*, 19 Fed. Rep. 301; *First Nat. Bank of Chicago* v. *Reno County Bank*, 3 Fed. Rep. 257; *Blaine* v. *Bourne*, 11 R. I. 119, 23 Am. Rep. 429, and *Claflin* v. *Wilson*, 51 Iowa, 15.

If appellee was the sub-agent for collection, Tyson & Rawls could recover.

Cecil Bank v. *Farmers Bank, First Nat. Bank of Circleville* v. *Bank of Monroe*, and *Fifth Nat. Bank* v. *Armstrong, supra;* Morse, Banks & Banking, § 591.

The insolvency of an agent revokes the agency; and when J. J. Nicholson & Sons made an assignment for the benefit of creditors, their agency to collect money for Tyson & Rawls terminated, and the money afterwards coming into the hands of the assignees, from this check and draft, would be held by the assignees in trust for Tyson & Rawls.

See Morse, Banks & Banking, § 248; *Levi* v *National Bank of Missouri*, 5 Dill. 104; *First Nat. Bank of Crown Point* v. *First Nat. Bank of Richmond*, 76 Ind. 561; *Re Havens' Petition*,

NOTE.—The effect of the indorsement of paper "for collection" to prevent the passing of title on a deposit of such paper in a bank, is a question on which the above case fairly represents the current of decisions.

On this subject in harmony with the present case, see National Butchers & Drovers Bank v. Hubbell (N. Y.) 7 L. R. A. 852, and *note;* Freeman's Nat. Bank v. National Tube Works Co. (Mass.) 8 L. R. A. 42, and *note;* also Armstrong v. Boyertown Nat. Bank (Ky.) 9 L. R. A. 553; Manufacturers Nat. Bank of Boston v. Continental Bank of St. Louis (Mass.) 2 L. R. A. 699.

On the more difficult question of the effect of an indorsement of a check "for deposit," on which there has been but little authority, although the custom of making such indorsements is quite general, see Ditch v. Western Nat. Bank of Baltimore, *post*, 164, and *note*.

8 Ben. 309; *First Nat. Bank of Circleville* v. *Bank of Monroe*, 33 Fed. Rep. 408; *Manufacturers Nat. Bank* v. *Continental Bank*, 2 L. R. A. 699, 148 Mass. 559.

Messrs. **Schmucker & Whitelock** for appellee.

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

Tyson & Rawls brought suit against the Western Bank of Baltimore. The facts, so far as they are material, are as follows: The plaintiffs who were bankers in Greenville, North Carolina, for two years before the transactions now in question kept an account with Nicholson & Sons, bankers in the city of Baltimore. They from time to time forwarded by mail to Nicholson & Sons drafts, checks, and notes of different persons, and they were indorsed in this manner: "For collection for account of Tyson and Rawls, Greenville, N. C." Nicholson & Sons would at once pass to the credit of Tyson & Rawls upon their ledger account, as cash, all checks and sight drafts, and would promptly inform them by mail of the amount of such credit. Tyson & Rawls were entitled to check against such credits as soon as they were entered, and Nicholson & Sons treated and used as their own property the sight drafts and checks so credited, in the same manner as if they had been deposited over their counter in the ordinary way; but Tyson & Rawls did not know and did not inquire how Nicholson & Sons treated and dealt with such drafts and checks. If any of the sight drafts or checks which were credited as cash were dishonored by the parties on whom they were drawn, Nicholson & Sons would charge the account of Tyson & Rawls with them and give them notice by mail. When promissory notes or time drafts were mailed to Nicholson & Sons, they were not entered to the credit of Tyson & Rawls until they had been collected. There was no special agreement between these parties in regard to their relations with each other except such as arose from their course of dealing.

On the 9th of January, 1892, Tyson & Rawls forwarded to Nicholson & Sons a check of P. E. Braswell on the State Bank of Commerce, Hendersonville, North Carolina, for $400 payable to the order of Jarvis & Blow. They had discounted this check, and they indorsed it for collection for their account. Nicholson & Sons credited it to them as cash, and so informed them by mail, and indorsed it for value to the Western National Bank of Baltimore. The bank collected the check on or about the 24th of February, 1892, and it retains the proceeds as its own property. On the 11th of January, 1892, Tyson & Rawls forwarded to Nicholson & Sons a sight draft of J. C. Cobb & Brothers on Cobb Brothers & Gillian of Norfolk Virginia for $800. They had discounted this check, and they indorsed it to Nicholson & Sons for collection for their account. Nicholson & Sons credited it to them as cash, and so informed them by mail, and indorsed it for value to the Western National Bank of Baltimore. The bank collected the draft on the 14th of January, 1892, and it holds the proceeds as its own. Nicholson & Sons failed on the 14th of January, 1892, subsequently to their indorsement of the check and draft to the Western National Bank; but they were insolvent at the time they received the check and draft from Tyson & Rawls, and upon a proper investigation of the business, this fact would have been apparent to the surviving partner, who had charge of the affairs of the firm; but it was not known to Tyson & Rawls nor to the Western Bank. Nicholson & Sons had an account with the Western Bank in which the check and draft were credited as cash; they overdrew their account and have never made it good. Tyson & Rawls never checked to the full extent of their credit with Nicholson & Sons, but always kept a balance in their favor, and at the time of the failure had a balance greater than the amount of the proceeds of the check and draft in question. It is admitted that both parties to this suit have acted in good faith in all of their dealings in the matters now in issue. It is well settled that when a customer of a bank deposits money to the credit of his account, the money becomes the property of the bank. The customer is creditor and the bank is debtor, with all the ordinary incidents belonging to that legal relation. There is no fiduciary connection between them. The depositor parts with his money, and the bank contracts an obligation to pay such checks as he may draw to an amount not exceeding the sum deposited. The consideration which the depositor receives for his money is the absolute and unconditional contract by the bank to pay his checks to the extent of his deposit. And the same rule obtains in the case of checks, drafts, and promissory notes, wherever, under the circumstances of the case, it is applicable; that is to say, wherever the bank becomes the owner of the commercial paper, and the customer acquires the unconditional right to draw for the proceeds. When a check, draft, or promissory note is indorsed in blank, or to the order of the bank, and the proceeds credited to the depositor as cash, the bank becomes the owner of the paper by virtue of the indorsement. And, in case it is not paid at maturity, it has the ordinary remedies which belong to the indorsee of instruments of this character which have been dishonored. In the present case the check and draft were deposited with Nicholson & Sons with an indorsement in these words: "For collection for account of Tyson & Rawls." This indorsement was not adequate to pass to Nicholson & Sons the title to these papers. It has been so held by this court, and the Supreme Court of the United States, and other courts. In *Sweeney* v. *Easter*, 68 U. S. 1 Wall. 166, 17 L. ed. 681, it was said: "The words 'for collection' evidently had a meaning. That meaning was intended to limit the effect which would have been given to the indorsement without them and warned the party that contrary to the purpose of a general or blank indorsement, this was not intended to transfer the ownership of the note, or its proceeds." In *White* v. *Miners Nat. Bank of Georgetown, Colo.*, 102 U. S. 660, 26 L. ed. 257, where the indorsement

was "Pay S. V. W. order for account of Miners Nat. Bk. of Georgetown" it was said: "The plain meaning of it [the indorsement] is, that the acceptor of the draft is to pay it to the indorsee for the use of the indorser. The indorsee is to receive it on account of the indorser. It does not purport to transfer the title of the paper or the ownership of the money when received. Both these remain, by the reasonable and almost necessary meaning of the language, in the indorser." The same meaning was attributed to such an indorsement in *Cecil Bank* v. *Farmers Bank*, 22 Md. 148.

It would be superfluous to make further citations on this point. The indorsement did not pass the title, and no other way has been shown in this case, by which it could have been passed. Entering the amounts represented by these papers as cash to the credit of Tyson & Rawls is very far from having such an effect. It was the clear understanding that this was not an absolute and unconditional credit; but that it was to be charged back to the depositors in case the paper should not be paid at maturity. The paper was not sent to Nicholson & Sons to be discounted, or to be purchased by them, but it was intrusted to them as agents to collect it; and Nicholson & Sons could not treat it as a discount or purchase except by making an agreement to that effect with their correspondents. It probably suited their mutual interest and convenience to make these qualified entries. The depositaries probably had sufficient confidence in the pecuniary ability of these depositors to give them a credit for the short time that would intervene before the maturity of sight drafts. It is a very common practice with bankers to deal in this manner with their customers who are in good credit. In the argument this entry was likened to a collection of the commercial paper by the depositary. It was not in point of fact a collection. Nor was it similar in its effects and consequences. When a collection is made the proceeds are placed absolutely and unconditionally to the credit of the depositor and he is no longer under any responsibility on account of the paper deposited; as that question has been irrevocably settled by payment. In point of fact when collected the paper has lost its vitality by the settlement; and satisfaction of all rights which can arise from it. It would have been perfectly competent for Nicholson & Sons to agree with Tyson & Rawls that they would consider this paper as collected, pay them the amount of it, and relieve them from all responsibility on account of it. But no such agreement was made; their contract was entirely different. If the paper had not been paid at maturity, it would have been charged back to Tyson & Rawls. It would be very unjust to hold Tyson & Rawls responsible for the contingency of payment of these instruments and at the same time to hold that they had lost the title to them by a sort of constructive and metaphysical collection. It may be objected that as the check and draft were actually paid at maturity the contingent responsibility of the depositors has not accrued. But we must judge of legal rights by the state of the facts which exist at the time they arise, and not by events which occur afterwards. One circumstance existing at the time will show the value of the cash entry as a consideration for the transfer of the check and draft. Nicholson & Sons were insolvent when the deposit was made, and they knew or ought to have known their pecuniary condition; and as a matter of course that the credit entry of cash was a mere delusion. Upon the whole it appears to us that the title to these papers did not pass to Nicholson & Sons. There has been much apparent conflict between the authorities on the questions which we have discussed. But the conflict is more in appearance than in reality. In most, if not all, of the cases which have held that when checks, drafts, and promissory notes have been deposited with a bank, and credited as cash to the depositor, the title to the negotiable paper has passed, it will be found that it was either indorsed in blank, or made payable to the banker. On the face of the paper he was owner, and in case it was dishonored, he had his remedy against the depositor, as indorser. The opinion in *National Butchers & Drovers Bank* v. *Hubbell*, 117 N. Y. 384, 7 L. R. A. 852, contains a very clear and convincing exposition of the difference between the rights of the banker in case of such deposit, and one where the paper is indorsed for collection. And even in case where a sight draft was deposited, payable to the order of the bank, and was credited as cash, it was held by the Supreme Court of the United States that the title to the draft did not pass, because the accompanying circumstance showed that it was not so intended; and the court said that "the property in notes or bills transmitted to a banker by his customer to be credited to the latter, vests in the banker only when he has become absolutely responsible for the amount to the depositor," and that "such an obligation previous to the collection of the bill can only be established by a contract to be expressly proved, or inferred from an unequivocal course of dealing." *St. Louis & S. F. R. Co.* v. *Johnston*, 133 U. S. 566, 33 L. ed. 683. The terms of the indorsement of the check and draft in this case gave legal notice to all persons receiving them that Tyson & Rawls were owners of the papers, and that Nicholson & Sons were merely agents for collection. *Cecil Bank* v. *Farmers Bank*, 22 Md. 148. The Western Bank could therefore acquire no title by the indorsement, made to it, and is responsible to Tyson & Rawls for the proceeds collected.

This case was submitted to the trial court upon an agreement signed by counsel which begins in the following terms: "It is agreed by the plaintiffs and defendant that this case be tried before the court without a jury, and upon the following statement of facts, hereby agreed upon." If this is the substitution of the court for a jury, as the language seems to indicate, the rulings of the court ought to be brought before us by a bill of exceptions, just as they would be in a jury trial. This point has often been decided. Many of the cases on this question are collected in *Trustees of Methodist Episcopal Church* v. *Browne*,

89 Md. 160. More recent decisions are *McCullough* v. *Biedler*, 66 Md. 283, and *Jackson* v. *Salisbury Comrs.* Id. 459. When the court takes the place of a jury, the circumstance that the facts were admitted can make no difference; because facts may be admitted before a jury, as well as before a court, and in either case the law requires that the specific point or question to which objection is made must be shown by a bill of exceptions. But parties may make a case stated for the opinion of the court. This is a very old practice, and is quite distinct from the right given by the constitution to try a case by consent before the court without a jury. In the former case the court is in the exercise of its inherent functions to decide questions of law submitted to it; all the facts must be stated, and the court cannot draw inferences from them, unless there is an agreement to that effect. In a trial before the court sitting by consent without a jury, it deals with the facts in all respects as a jury would do. In a case stated, it ought affirmatively to appear that it is submitted to the court for its opinion on the law, and that it is requested to render a judgment in accordance therewith. An examination of the numerous cases of this kind which appear in our Reports will show that this is the approved practice in civil cases. We are not now concerned with criminal procedure. In a comparatively recent case in this court (*Brinkley* v. *Hambleton*, 67 Md. 169), the printed volume does not show that this practice was followed; but the transcript of the record shows distinctly that the case was submitted to the court for its opinion, and that it was requested to enter judgment for plaintiff or defendant according as its opinion might be. And there are other cases in which the printed volume omits this portion of the case, stated although contained in the transcript of the record. It has been adjudged so important that this court in *Marine Bank of Baltimore* v. *Merchants Bank of Baltimore*, 12 Gill & J. 498, held that it was error in the trial court to render judgment without this provision. They say "There being no provision in the case stated, as to judgment to be entered, after the court's opinion is expressed on the question submitted, the court can give no judgment, and the cause must be remanded." It is also customary to state that a right to appeal is reserved to each party where an appeal is contemplated. From the peculiar form of the statement of facts in this case, we were in some doubt whether we could consider the questions presented. But as the counsel on both sides regarded it as a case stated, and so argued it; and as, although we feel the necessity of maintaining the established methods of procedure, we are always very unwilling to permit justice to be impeded by matters of form, when it can be properly avoided,—we have thought that it was appropriate to express our opinion on the matters in controversy according to the wish of counsel on both sides. Following the precedent in *Marine Bank of Baltimore* v. *Merchants Bank of Baltimore*, we will reverse the judgment, and remand the case. As the parties now know our opinion, they can settle this controversy without further litigation, if they elect to do so.

Reversed and remanded.

Alvey, *Ch. J.*, concurred:

As the judgment appealed from must be reversed, and the case remanded for a new trial, because of the omission in the case stated to provide for the judgment to be entered, in accordance with the opinion of the court on the facts (*Marine Bank of Baltimore* v. *Merchant's Bank of Baltimore*, 12 Gill & J. 498; *Burgess* v. *Pue*, 2 Gill & J. 254, 291,) I prefer to express no opinion upon the facts contained in the defective statement. A proper decision of the case may depend essentially upon facts that can only be arrived at inferentially, as the case is now presented (*St. Louis & S. F. R. Co.* v. *Johnston*, 133 U. S. 566, 33 L. ed. 683), and the court is not at liberty to make inferences of fact upon a case stated. The court can only declare the law arising upon the facts contained in the statement, as in the case of a special verdict. *Stewart* v. *State*, 2 Harr. & G. 114; *Keeside* v. *Fischer*, Id. 320; *Miller* v. *Negro Charles*, 1 Gill & J. 390; *Hysinger* v. *Baltzell*, 3 Gill & J. 158; *Lewis* v. *Hoblitzell*, 6 Gill & J. 259.

McSherry, *J.*, dissents.

J. S. DITCH *et al.*, *Appts.*,

v.

WESTERN NATIONAL BANK OF BALTIMORE.

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

1. **On indorsement "for deposit" of a check, which is credited as cash by the bank which receives it,** and thereafter by indorsement in the same form is transferred to another bank, which in good faith credits it as cash and pays the proceeds to the former bank, which afterwards makes an assignment for creditors, the title to the check must be held to be in the bank which holds it and has paid for it.

NOTE.—*Indorsement of check "for deposit."*

Notwithstanding the very general practice of indorsing checks "for deposit," the effect of such indorsement has been brought to adjudication in surprisingly few cases.

While these cases do not entirely agree in holding such an indorsement to constitute a retention of title in the depositor, it may be said that they sufficiently establish the rule that such is the effect of the indorsement in the absence of any agreement or practice to the contrary.

Thus in Beal v. Somerville (C. C. App. 1st C.) 17 L. R. A. 291, a deposit by a city treasurer of checks on another bank, indorsed "for deposit," was held not to pass the title to the checks to the bank in which they were deposited, although the depositor was immediately given credit therefor on his passbook, where there was no agreement with him for such credit and no practice or custom which was equivalent to such agreement. Therefore, on the insolvency of the bank in which the checks were deposited, before collecting the checks, the title to the proceeds did not belong to the bank, or its receiver.

The discussion of this case by both the prevailing and dissenting opinions in the above case of DITCH

See also 23 L. R. A. 161.

2. Testimony of a depositor that he regarded a check as deposited for collection is incompetent as a conclusion, where the indorsement was "for deposit."

(*Robinson*, Ch. J., *and Fowler and Roberts*, JJ., *dissent*.)

(March 15, 1894.)

APPEAL by plaintiffs from a judgment of the Circuit Court. No. 2, of Baltimore City in favor of defendant in an action brought to recover the value of a certain check which was alleged to be the property of the plaintiffs. *Affirmed*.

The facts are stated in the opinion.

Messrs. **Richard Bernard** and **Alfred D. Bernard,** for appellants:

Nicholson knew when he accepted the check in controversy that he was hopelessly insolvent, which fact was then unknown to the appellants. Therefore the acceptance of said check was a fraud upon them, and they are entitled to recover it unless the holder thereof shows itself to be a bona fide purchaser for value without notice of the rights of the appellants.

Boone, Banking, § 297; *St. Louis & S. F. R. Co.* v. *Johnston*, 133 U. S. 566, 33 L. ed. 683; *Somerville* v. *Beal*, 49 Fed. Rep. 790.

Apart from the question of the insolvency of Nicholson, the appellants are the owners of the check in question,—Nicholson never being the owner thereof, but merely their agent to collect the same, the title thereto remaining in the appellants until collected.

Beal v. *Somerville*, 17 L. R. A. 291, 15 U. S. App. 14, 50 Fed. Rep. 647; *Manufacturer's Nat. Bank* v. *Continental Bank*, 2 L. R. A. 669, 148 Mass. 553; *St. Louis & S. F. R. Co.* v. *Johnston*, *supra;* 2 Morse, Banks & Banking, §§ 584, 586; *National Commercial Bank* v. *Miller*, 77 Ala. 173, 54 Am. Rep. 50; *Balbach* v. *Frelinghuysen*, 15 Fed. Rep. 675. See also Dan. Neg. Inst. ed. 1891, § 340*a*, *b*, *c*.

If, upon the facts in the record, Nicholson was Ditch & Bro's agent, it follows that the Western Bank was the agent of Nicholson and the relation of the Western Bank to Ditch & Bro. was that of sub agent, therefore Ditch & Bro. are as much entitled to recover the check from one as the other.

There is a plain duty imposed upon the two banks by the transaction, to collect the check if good, to promptly return it if not good. The character of the transaction is shown by both indorsements.

Miller v. *Farmers & M. Bank of Carroll County*, 30 Md. 400; *Wilson* v. *Smith*, 44 U. S. 3 How. 763, 11 L. ed. 820; *Freeman* v. *Exchange Bank of Macon*, 87 Ga. 45.

The restrictive indorsement, "For deposit to the credit of J. S. Ditch & Bro." disclosed the conditions upon which they parted with the check in question and therefore no one can be a bona fide holder thereof for value, without full notice of all the facts growing out of the relation arising from that indorsement.

Freeman v. *Exchange Bank of Macon*, *supra; Beal* v. *Somerville*, *supra; White* v. *Miners Nat. Bank of Georgetown, Colo.* 102 U. S. 658, 26 L. ed. 250; *Blaine* v. *Bourne*, 11 R. I. 119, 23 Am. Rep. 429; *Lee* v. *Chillicothe Branch of State Bank of Ohio*, 1 Bond, C. C. 387.

Any indorsement which shows that the holder of the check did not purchase and pay for it is a restrictive indorsement.

White v. *Miners Nat. Bank of Georgetown, Colo.*, *supra; Power* v. *Finnie*, 4 Call (Va.) 411; *Wilson* v. *Holmes*, 5 Mass. 543, 4 Am. Dec. 75; *First Nat. Bank of Chicago* v. *Reno County Bank*, 3 Fed. Rep. 261; *Lee* v. *Chillicothe Branch of State Bank of Ohio, Beal* v. *Somerville*, and *Freeman* v. *Exchange Bank of Macon*, *supra; Lawrence* v. *Fussell*, 77 Pa. 460.

A non-restrictive indorsement alone gives the right to assume that the indorsee was a purchaser for value; that on the face of the paper he is the owner thereof.

Tyson v. *Western Nat. Bank of Baltimore*, *ante*, 161, 77 Md. 412; *Sweeney* v. *Easter*, 68 U. S. 1 Wall. 166, 17 L. ed. 681.

The account between Nicholson and the Western Bank showed, when the failure was announced, a balance in favor of Nicholson

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v. WESTERN NAT. BANK OF BALTIMORE, seems sufficiently to show that it is to be accepted as correct, where no rights of a bona fide purchaser or transferee for value have intervened.

In Freeman v. Exchange Bank of Macon, 87 Ga. 45, the same indorsement was held legally to import an intention of ownership, in the absence of any extrinsic facts to show a different intent. Therefore, expert testimony to show the meaning of such indorsement was held inadmissible in that case as well as in the above case of DITCH v. WESTERN NAT. BANK OF BALTIMORE.

Neither of these cases excludes the right to consider a custom or course of dealing as bearing on the intention of the parties in respect to such an indorsement, and in the case of National Commercial Bank v. Miller, 77 Ala. 168, 54 Am. Rep. 50, it is expressly held that such an indorsement must be considered in the light of the attendant circumstances and previous dealings, and the court says: "Where a depositor has for some time previously kept a deposit account with the banker, on which he was accustomed to deposit checks payable to him, entries of which were made in his pass-book, and to draw against such deposit, an indorsement, in the absence of a different understanding, is presumptive of more than a mere agency or authority to collect." Here, plainly, the custom of making credits in the depositor's pass-book, and his drawing against such deposits, is a significant fact in respect to his intention to pass title by the depositor. But in this case the bank in which the deposit was made had obtained a certification of the checks, which was held to create a new contract by which the checks were in effect paid, so far as the drawer and indorser were concerned.

These three cases, all of which are discussed in the opinions in the main case, are all that have been found in which an indorsement "for deposit" has been considered, although millions of such indorsements are undoubtedly made every year. The fact that in the present case of DITCH v. WESTERN NAT. BANK OF BALTIMORE the check thus indorsed had been transferred by the bank in which it was deposited with a similar indorsement, to another bank, the latter of which had not only given credit to the other in good faith, but had actually paid to it the proceeds, is a very important feature, which fairly distinguishes this case from the others.

B. A. R.

of $3,500. Down to that time the plaintiff believed Nicholson to be solvent and would have paid and certified all it did pay and certify and $1,000 besides, if Nicholson had not made the last deposit. Therefore there was no special credit given or risk incurred by the plaintiff on the faith of the check in question and there is no equity in the plaintiff's contention.

Miller v. *Farmers & M. Bank of Carroll County*, 30 Md. 401.

The property in notes or bills transmitted to a banker by his customer to be credited to the latter vest in the banker only when it has become absolutely responsible for the amount to the depositor, and such an obligation previous to the collection of the bill, can only be established by a contract to be expressly proved or inferred from an unequivocal course of dealing.

Balbach v. *Frelinghuysen*, 15 Fed. Rep. 675; Newmark, Bank Deposits, § 209; *St. Louis & S. F. R. Co.* v. *Johnston*, 133 U. S. 566, 33 L. ed. 683; *Scott* v. *Ocean Bank*, 23 N. Y. 289; *Freemans Nat. Bank* v. *National Tube Works Co.* 8 L. R. A. 42, 151 Mass. 413.

When the bank is insolvent, the matter is still clearer. It is then a fraud upon the depositor for the bank to receive a check, and if a check indorsed in blank be deposited by a customer ignorant of the bank's condition, and the bank immediately goes into the hands of a receiver, no title whatever passes from the depositor to the bank.

Horwitz v. *Ellinger*, 31 Md. 492; *Tyson* v. *Western Nat. Bank of Baltimore, ante*, 161, 77 Md. 412; *St. Louis & S. F. R. Co.* v. *Johnston, supra.*

Indorsement "for deposit" gives notice that the check is held subject to the rights of depositor against the bank.

Dan. Neg. Inst. § 1595.

It gives notice of the agency title of the bank.

Freeman v. *Exchange Bank of Macon*, 87 Ga. 45; *Beal* v. *Somerville*, 17 L. R. A. 291, 5 U. S. App. 14, 50 Fed. Rep. 647.

It gives notice of the want of consideration between the depositor and the bank.

Cecil Bank v. *Farmers Bank*, 22 Md. 156; *Miller* v. *Farmers & M. Bank of Carroll County*, 30 Md. 397.

Messrs. **Schmucker & Whitelock** for appellee.

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

This case involves a question of considerable importance. Thomas J. Shyrock & Co. drew their check for $187.55 on the Third National Bank of Baltimore, payable to the order of John E. Reese. Reese indorsed it in these words: "Pay to the order of J. S. Ditch & Brother." The next indorsement was in these words.: "For deposit to the credit of J. S. Ditch & Brother," signed "per T. F Cassidy." It was admitted that Cassidy had due authority from Ditch & Brother to make and sign this indorsement. Luther Ditch, a member of the firm of Ditch & Brother, in person deposited this check, together with others, in the bank of J. J. Nicholson & Sons, and they at the same time entered a credit of cash to the amount of all these checks in the deposit books of Ditch & Brother, and also in their own books. Ditch's testimony on this point is as follows: "That he handed his deposit to John R. Nicholson in person. That his firm kept another passbook with Nicholson & Sons, in which accounts were left for collection, on which promissory notes only were entered. That when these promissory notes were paid credit was entered on the regular deposit book. All checks, whether out of town or city checks, were entered on the regular deposit books as cash; on a few occasions checks dated ahead were entered as cash. If necessary, or if they were short of funds, they checked immediately after the deposit was made. They made no special arrangement about checking on deposit. . . . That the paper left for collection, consisting of promissory notes, was not carried to the deposit books until the collection had been made, but all checks were entered in the deposit book when deposited as cash, as if they were so much currency, and they were at liberty to check against such deposits as soon as made, if they desired." Mathew Aiken, general book-keeper for Nicholson & Sons, testified: "that he knew J. S. Ditch & Bro.; that they had two accounts with his bank and a separate pass-book for each account—one a deposit account and the other an account for collection. The collection went to their credit when collected, and were then marked off their collection book and credited on the deposit book. The deposits made by Ditch & Bro. went to their credit on the books of Nicholson & Sons on the same day the deposit was made, and they were credited on the deposit book of Ditch & Bro. at the time the deposit was made;" and also "that the check in question forms a part of a credit of cash of $929.75 to Ditch & Bro. in their deposit book with Nicholson & Sons on January 14, 1892, and that the amount of the credit was so entered on the deposit book at the time the deposit was made, and was carried to their credit on the books of Nicholson & Sons;" and also "that all checks deposited by Ditch & Bro. were entered on their deposit book as cash and subject to immediate withdrawal in currency or anything else."

When Ditch deposited this check it is evident that he did not wish to have the money for it paid into his hands, because if he had wished the money it would have been as easy to obtain it from the Third National Bank as to deposit the check; and secondly, because, according to his own testimony and Aiken's, he could have drawn the money immediately if he had chosen to do so. Instead of the money he preferred a credit with Nicholson & Sons subject to his check; this was in all respects more convenient to him than the possession in hand of currency or coin. And this is what the indorsement plainly meant; the check was to be deposited, and the amount of it was to be placed to the credit of Ditch & Bro. The indorsement was in blank, so far as the name of the indorsee is concerned; but when Ditch handed the check to Nicholson & Sons with the book in which his deposits were entered as cash, he

evidently intended that the deposit should be entered in that book, and that he should receive credit for the amount of the check as cash, and that Nicholson & Sons should be the holders of the check as indorsees in blank. No form of words could have made his meaning plainer. And this meaning is in exact accordance with the indorsement. The indorsement showed that it was to be deposited in a banking house, and that Ditch & Bro. were to receive credit for it; but the name of the banking house was not mentioned; it was left blank. By delivery Ditch designated the bankers with whom it was to give credit. If Nicholson & Sons had paid to Ditch & Bro. the full amount of the check in coin or currency when it was delivered to them, it is supposed that there would have been no question about the nature and effect of the transaction. But they gave Ditch & Bro. what was preferred to the coin or currency; they gave them the unconditional right to get the coin or currency at any time they might see fit to call for it, thus relieving them from the trouble and risk attending the care and custody of it. Now it is extremely difficult to see on what principle or by what process Ditch & Bro. could retain any interest in this check after they had delivered it to a blank indorsee and had received full and valuable consideration for it. It will not be alleged by any one that the banker did not give a consideration, valuable in the eye of the law, and sufficient to maintain the transfer of the check, when he made an absolute and unconditional contract with the depositor to pay his checks to the amount of the deposit. This point was decided in *Tyson* v. *Western Nat. Bank of Baltimore*, 77 Md. 412, *ante*, 161. It has been asked what would be the condition of the bank in case this check should be dishonored when presented for payment. The answer is not difficult. In *Tyson* v. *Western Nat. Bank of Baltimore* the court thought that the bank would have against the depositor the ordinary remedies which belong to the indorsee of dishonored instruments of this character. It could certainly recover from him the amount of the check. And here we may notice a portion of the testimony which has been made the subject of a good deal of comment.

Aiken testified as follows: "It was not the custom of Nicholson & Sons to charge back to the depositors the checks which had been deposited with them and were dishonored. The custom was to have returned the checks to the party and to get the money refunded." John Ditch testified "should any check be returned they (Ditch & Bro.) had always to make them good. That the Nicholsons never bothered themselves about the unpaid checks."

This testimony merely shows that the bank was aware of its legal rights and that depositors paid voluntarily what they could have been compelled to pay by suit at law. Persons engaged in mercantile pursuits would loose all commercial credit and standing if they did not promptly perform their plain and well understood obligations.

In *Tyson* v. *Western Nat. Bank of Baltimore* the draft deposited was indorsed in these words: "For collection for account of Tyson and Rawls, Greenville, N. C." This court held that this indorsement was not adequate to pass to the holders the title to the draft; and that the evidence in the case did not show any other way by which it could have been passed. The court also held that it was the clear understanding between the parties that Tyson & Rawls (the depositors) should not obtain an absolute and unconditional credit in consequence of the deposit. It being our opinion that Nicholson & Sons acquired title to this check, we must declare our carefully considered judgment. If other tribunals for whose learning and ability we entertain the greatest respect have arrived at conclusions different from our own, we do not feel called upon to abandon the deliberate convictions which we entertain. But we do not assume that there is a great contrariety in the opinions of the courts on this question. A great many cases have been brought to judgment; but their facts have been diversified in great variety. It has always been held that the bank and the depositors could make their own contracts. Sometimes they have been made in express terms; and sometimes they have been inferred from the acts and conduct of the parties and the regular and established course of dealing between them. It can readily be seen how broad a field of inquiry has been spread out before the courts and what diversities of facts and combinations of facts would probably be presented for their consideration. Among the great number of cases which have been earnestly pressed upon us, we will cite three in which the effect of an indorsement for deposit was considered. The first is *National Commercial Bank* v. *Miller*, 77 Ala. 168, 54 Am. Rep. 50. In this case the bank brought an action against Proskaner, and sued out a garnishment, which was served on Miller & Co., private bankers, who were alleged to be the debtors of Proskaner. We will state the court's opinion in its own words: "The defendant, in the name of A. Proskaner & Co., agents, opened in January, 1883, a deposit account with the garnishees, who were bankers. On this account the defendant deposited checks payable to A. Proskaner & Co., agents, which were entered in the pass book, and drew checks in the same name 'on funds so deposited.' The check in question was indorsed 'For deposit, A. Proskaner & Co., Agents.' The import and effect of such indorsement must be considered in the right of the attendant circumstances, and of the previous dealings between the parties. Where a depositor has for some time previously kept a deposit account with a banker, on which he was accustomed to deposit checks payable to him, entries of which were made in his pass-book and to draw against such deposits, such an indorsement, in the absence of a different understanding, is presumptive of more than a mere agency or authority to collect. The special purposes for which an indorsement for deposit is made, under such circumstances, may be readily inferred. It was a request and direction to the garnishees to deposit the same to the credit of the defendant, and conferred on them, not only authority to collect, but also authority to put the check in such form, and use it in such manner, as in their judgment and discretion, hav-

ing reference to the condition and necessities of their business, would make it most available to their protection. The effect of the indorsement for the consummation of this purpose is to vest the garnishees with the title to and control of the check. If in such case the check is not paid the banker depends for safety and indemnity on the liability of the drawer, and the security of the indorsement. It appeared that Miller & Co., the garnishees, had presented the check for certification to the bank on which it was drawn, and that it was certified by that bank in these words: "Good for eight thousand dollars." The court says that the certification made a new and distinct contract between the holder and the certifying bank, which thereby became the debtor of the holder; and that the drawer and indorser of the check were released from all liability on it, and that as to them it was paid. The significance of the certification was a question in the case, because after it had been made and after service of the garnishment, the defendant gave notice to Miller & Co., the garnishees, that he revoked their authority to collect it, and that they were forbidden to present it for payment. But as it was already paid in legal effect to Miller & Co., they were the debtors of the defendant, and the notice was not efficacious to change the rights of the attaching creditor or to displace the lien on the debt which he had acquired by service of the garnishment. We have mentioned the certification of the check and its consequences, because these matters were zealously urged in the discussion of this case. But we do not see how they bear any analogy to the facts on which the rights of the parties in the present case depend. The other two cases were thought to be still more decisive.

In one of them, *Freeman* v. *Exchange Bank of Macon*, 87 Ga. 45, the court used this language: "There being in evidence no facts extrinsic to the bill itself and its indorsement to throw light upon the question of title, we are not to be understood as holding that such facts might not exert a controlling influence on the question. Indeed, there is authority for giving them such effect when duly proved." A deposit of paper in bank by a customer, he indorsing it "for deposit," may operate to clothe the bank with title under certain circumstances. *National Commercial Bank* v. *Miller*, 77 Ala. 168, 54 Am. Rep. 50. The other case is *Beal* v. *Somerville*, 50 Fed. Rep. 647, 17 L. R. A. 291, 5 U. S. App. 14.

Checks were deposited in the Maverick National Bank by the treasurer of the city of Somerville: each of them was indorsed "for deposit." The deposit was made about 15 minutes before 3 o'clock in the afternoon; at 3 o'clock of the same day the bank closed its doors and never opened them again for business. At the time of the deposit it was irretrievably insolvent. Beal was appointed its receiver and a bill in equity was filed against him by the city of Somerville. In the bill the facts just mentioned were alleged, and also the following: "The treasurer had for several years made deposits with the bank without any special agreement in regard thereto; there was no agreement that checks deposited should be considered as cash, or that the treasurer could draw against them before collection. The treasurer never drew a check for which his deposit was not sufficient without counting the proceeds of uncollected checks, except in a few instances, on a few occasions, by special arrangement with the bank. There was no express understanding that the checks should be credited to the city immediately on deposit, but they were always so credited on the pass-book at the time of the deposit. . . . It was the practice of the Maverick and the other banks in Boston, in some cases, to allow depositors to draw against checks deposited before such checks were collected, and in some cases not, depending on the bank's opinion of the reliability of the depositors and the makers of the checks." A demurrer was filed, admitting, of course, the facts stated. The court, in its opinion, said, among other things, Beal "fails to show that the city had an absolute right to check against the deposit as soon as made irrevocable by notice from the bank; and that such right did not exist must be received by this court as a matter of judicial knowledge." The decree determined that the checks were the property of the city. We have not made these citations for the purpose of criticising these decisions, nor for the purpose of inquiring whether they sustain or oppose the judgment which we have formed in the case before us. Our object has been to show the great variety in the facts and details of the cases which have been adjudged; and to illustrate a sound juridical principle,—that differing facts may justly lead to differing conclusions of law.

John Ditch testified that he regarded all the checks deposited by him as having been deposited for collection; otherwise, why should they have to make good those which might be returned. The legal character and attributes of the deposit depend upon the indorsement and upon what was said and done at the time the deposit was made, and upon the regular and uniform course of dealing between the parties. The testimony of the witness was his opinion on a question of law. An exception was filed to it and it was undoubtedly incompetent. The check, on the day it was received by Nicholson & Sons, was indorsed by them "for deposit" and deposited in the Western Bank, where they kept an account. It was passed to their credit, subject to their check, and on the same day they largely overdrew their account. Later in the day they made an assignment for the benefit of their creditors, and it became known that they were totally insolvent. Although Nicholson & Sons acquired title to the check in the manner which we have stated, it is quite true that, in a controversy with their trustee, Ditch & Bro. might successfully impeach the transfer for fraud and set it aside. But the question with the Western Bank stands on different grounds. It is a bona fide holder of a negotiable instrument for value without notice of any facts which would invalidate the title of the indorsers from whom they obtained it. All commer-

cial principles and usages require that such a title should be protected.

At the request of Ditch & Bro. the payment of this check was stopped by the order of Shyrock & Co., the drawers. Shyrock & Co. filed a bill of interpleader in Circuit Court No. 2 of the City of Baltimore, and the court required the Western Bank and Ditch & Bro. to litigate between them their respective claims to the ownership of the check. The decree established the title of the Western Bank, and we affirm it.

Decree affirmed with costs.

Fowler, *J.*, dissenting:

While the amount involved in this appeal is not large, yet the questions presented are of some importance. The controversy here, as in the case of *Tyson* v. *Western Nat. Bank of Baltimore, ante*, 161, 77 Md. 412, grows out of the conflicting claims of the Western National Bank of Baltimore, and one of the depositors of Nicholson & Sons, bankers, in that city, who failed several years ago.

The check which is the subject of this litigation, was dated January 13, 1892, and was drawn by Thomas J. Shyrock & Co. on the Third National Bank of Baltimore to the order of John E. Reese, who, on the day of its date, indorsed it to J. S. Ditch & Bro., who on the following day indorsed it as follows: "For deposit to the credit of J. S. Ditch & Bro., per Cassidy." Cassidy is a clerk of Ditch & Bro., and there is no question as to his authority to indorse. So indorsed, this check, with several others, amounting in the aggregate to $929.75, was deposited by one of the firm of Ditch & Bro. in the bank of Nicholson & Sons a short time before noon on January 14, 1892. The deposit was at once credited by the Nicholsons in the passbook of Ditch & Bro., and a similar credit was made upon the books of the former, who at once indorsed the check in question thus: "For deposit, J. J. Nicholson & Sons," and deposited it in the Western Bank, receiving credit for the amount of the deposit as cash, both on their pass-book and also on the books of the Western Bank. It is conceded, of course, that Ditch & Bro. believed the Nicholsons to be solvent when the deposit was made in the latter's bank, and it would seem that the Nicholsons themselves must have been aware that they were not in the solvent condition the appellants believed them to be, for within an hour, or perhaps two, after these deposits were made they had placed on record a deed of trust for the benefit of their creditors, and closed the doors of their bank. On the day of the failure of the Nicholsons, Ditch & Bro. heard of it, and immediately requested Shyrock & Co., the makers of the check, to stop payment. This request was complied with, and the check having been duly protested, the Western Bank sued the makers. Whereupon a bill of interpleader, setting forth the respective claims of the Western Bank and Ditch & Bro. was filed by Shyrock & Co., and a decree was passed by Circuit Court No. 2 of Baltimore City requiring the Western Bank and Ditch & Bro. to interplead—the former as plaintiff and the latter as defendants. In accordance with this decree the Western Bank filed its bill, and Ditch & Bro. answered it. The bank alleged substantially that Ditch & Bro. indorsed the check in question to the Nicholsons, and deposited it with them as cash, and received credit therefor in their account with the Nicholsons, and that the Nicholsons thereby became the owners of the check, and having indorsed it to the Western Bank "for deposit," and having deposited it with and received credit for it as cash by said bank, it became and is the bona fide holder of said check by reason of the facts above mentioned and because the Nicholsons were permitted to draw from the Western Bank the funds represented by said check. The defense which Ditch & Bro. set up in their answer is that they indorsed the check "for deposit to the credit of J. S. Ditch & Bro." to enable the Nicholsons to collect the same in the usual course of business, and receive that character of credit usual to receive when checks are deposited by a customer with a bank for collection. They deny, however, that by such deposit for collection the Nicholsons thereby became the owners of said check or that they had a right to indorse the same to the Western Bank or to any one.

Upon the bill, answer, and testimony the court below decreed that the property in the check in question passed from Ditch & Bro. and vested in the Nicholsons, and that the latter conferred a perfect title upon the Western Bank. From this decree Ditch & Bro. have appealed, and the question is whether the Western Bank has a valid legal title.

The general question of the relations between depositors and banks as regards their respective rights in and title to negotiable paper deposited by the former with the latter, is much embarrassed by a conflict of authority. But after all, as we said in *Tyson* v. *Western Nat. Bank of Baltimore*, the conflict is more apparent than real. It will be found that the views expressed by the highest tribunals in this country and in England, when carefully examined, differ not so much in the principles announced as in the facts to which these general principles have been from time to time applied. In most of the cases in which it has been held that the title to negotiable paper passed to the bank from a depositor it will be found that such paper was indorsed in blank or made payable to the bank. After stating the general rule that when a customer deposits money to the credit of his account, the bank becomes debtor and he is creditor, we said in the case just cited: "The consideration which a depositor receives for his money is the absolute and unconditional contract of the bank to pay his checks to the extent of his deposit. And the same rule obtains in the case of checks . . . whenever, under the circumstances of the case, it is applicable, that is to say, whenever the bank becomes the owner of the commercial paper, and the customer acquires the unconditional right to draw for the proceeds. When a check . . . is indorsed in blank, or to the order of the bank, and the proceeds credited to the depositor as cash, the bank becomes the owner of the paper by virtue of the indorsement."

These quotations from such a recent case are sufficient to indicate our views in regard to the character of paper and the forms of indorsement there considered. But the indorsement in this case is neither an indorsement in blank nor to the bank. It is of a very different character, both in form and effect. Its terms are "For deposit to the credit of J. S. Ditch & Bro." It was contended by Ditch & Bro. that this is a restrictive indorsement, and by the Western Bank that it is partly restrictive and partly absolute—restrictive as to all the world except the Nicholsons, and as to them, absolute as soon as it reached their hands.

If such an indorsement as this can be held to pass title to commercial paper, it must be so either because such is the clear meaning of the words used, or because of some artificial or technical, but well known and settled meaning given to the language of the indorsement by the customs and usage of banks and their customers, which indicates a transfer of title was intended, though not expressed. Of course, it is not, and could not be contended in this case, that there is any such custom, for there is no evidence to sustain any such contention. What, then, is the fair and legal construction of this indorsement? In the first place, we start with the presumption that the depositor does not intend to part with title to his paper, subject to be rebutted only by evidence of an express contract to the contrary, or of facts from which such contracts must be inferred. 1 Dan. Neg. Inst. § 340.

We shall presently consider the effect of the credit given to Ditch & Bro. in anticipation of the collection of the proceeds of the check by the Nicholsons, but before doing so we wish to ascertain the purport of the language of the indorsement itself. It is apparent no words are used to indicate a transfer of title; on the contrary, it is conceded the indorsement here used is for the purpose of destroying negotiability in case of loss or miscarriage of the check. If that be its object, it is difficult to understand how such an indorsement, without something added thereto by special agreement, can be relied upon to establish title either in the Nicholsons or the Western Bank. The plain import of the indorsement would seem to be that the check was deposited for collection. What else could have been the object of the deposit? Certainly not for the purpose of getting an immediate credit, for it is in evidence that Ditch & Bro. not only had no agreement allowing them to draw on uncollected checks, but that in point of fact their deposited checks were always collected before they were actually drawn on, and were not considered cash until collected by the Nicholsons. In the case of *Beal* v. *Somerville*, 50 Fed. Rep. 647, 17 L. R. A. 291, 5 U. S. App. 14, a case strikingly like the one at bar, and in which the indorsement was "For deposit, John F. Cole, Treasurer," the following facts appeared: Cole, the treasurer of the city of Somerville, indorsed the checks as above and handed them to the receiving teller of the Maverick National Bank with a deposit ticket and also his pass-book, and the teller at once credited therein and on the books of the bank the total amount of the checks. When the checks were received by the bank it was irretrievably insolvent, and closed its doors the same day of the deposit at three o'clock.

There was no agreement to allow the customer to draw at once on the proceeds of deposited checks. It was held, irrespective of the question of insolvency, that title to the checks so indorsed did not pass. "The transaction," says the court, Putnam, *J.*, delivering the opinion, "was primarily a deposit of the checks with, secondarily, a duty to be performed concerning them by the Maverick Bank." After stating the general principle that a deposit of money creates the relation of debtor and creditor between the depositor and the bank, the opinion of the court continues: "But with reference to the checks claimed by the city of Somerville, the word by which the transaction is ordinarily described may conveniently have, and therefore should have, its full natural force and meaning. A mere deposit would only require a bank to keep; but a usage requiring the Maverick Bank to do in this case something more has continued so long, and is so notorious and universal, that the law can take judicial notice of it, and it happens that its terms and limitations cannot be mistaken. The bank must use due diligence to collect; and, as collections are completed, the bank no longer holds the avails as bailee, but is authorized to mingle them with its other funds, and thus constitute itself a debtor."

And again "aside from the right of the bank to constitute itself a debtor from the time the checks are converted into cash or its equivalent, instead of a mere trustee or agent, no qualification of the strict legal relations created by a bailment is deducible from the general nature of the transaction, the terms in which it is expressed or the settled custom, or is shown by" the bank. The case just cited is one of much interest and importance and the opinion of the court bears the impress of the most careful consideration and research.

In *Freeman* v. *Exchange Bank of Macon*, 87 Ga. 45, an indorsement precisely like the one we are considering was held to be restrictive. The indorsement was, "For deposit to the credit of S. A. Brown & Co." The indorsers deposited the draft so indorsed in the National Bank of Kansas City, which bank by its cashier indorsed the draft "Pay Exchange Bank or order for collection, account of National Bank of Kansas City." The draft was paid to the Exchange Bank, where the money was attached as the property of S. A. Brown & Co., and it was so held.

The supreme court of Georgia says: "The agency created by the owners of the bill by means of their indorsement had not been fully executed. The Kansas City Bank was still the immediate agent under them, and the Macon (that is the Exchange) Bank was a subagent under it. The latter held the money as a bailee for the ultimate use and benefit of the owners." Again quoting from the same opinion, "The maker of a restricted

indorsement can follow the bill or its proceeds over any number of subsequent indorsements, the terms of his indorsement being notice of his title." And, as we have said, it was held that notwithstanding the depositors S. A. Brown & Co. had indorsed their paper, precisely as the paper in this case was indorsed, title did not pass, and the money attached in the hands of the Exchange Bank was condemned as the property of S. A. Brown & Co.

It would too greatly prolong this opinion if we should examine the many cases in which various forms of indorsements have been held restrictive, and we shall only cite a few of them.

"Pay S. V. W. or order for account of Miners' National Bank of Georgetown;" *White* v. *Miners Nat. Bank of Georgetown Colo.*, 102 U. S. 658, 26 L. ed. 250; "Pay to P. or order only,"—*Power* v. *Finnie*, 4 Call (Va.) 411; "Pay T. W. or order for our use, value received in account."—*Wilson* v. *Holmes*, 5 Mass. 543, 4 Am. Dec. 75; "Pay to the order of W. H. & Co. account,"—*First Nat. Bank of Chicago* v. *Reno County Bank*, 3 Fed. Rep. 261; "Credit my account. J. B. S., Cashier," —*Lee* v. *Chillicothe Branch of State Bank of Ohio*, 1 Bond, C. C. 387.

We think, therefore, that looking at the indorsement itself without regard to any course of dealing between the parties, the language of the indorsement cannot be held to transfer title to the check in question, but, on the contrary, must be held to be restrictive, at least, until the bank has performed its duty and has collected the proceeds of the check.

And this is the view very clearly expressed by Mr. Daniel in his work on Negotiable Instruments, even when the paper is so indorsed as prima facie to transfer title, as, for instance, in blank or to the order of the bank. He says that the collection of checks is generally attended with so little delay that banks are willing to treat them as cash deposits, and allow their customers to draw against them in anticipation of collection—reserving the right to charge back the paper to the customer, if returned unpaid. "Out of this practice," says the author, "has grown the erroneous idea that the bank, without more, becomes the owner of the deposited paper before collection." Exemplified in *Metropolitan Nat. Bank* v. *Loyd*, 90 N. Y. 530. "Later cases," continues the author, "hold, and correctly, as we conceive, that the checks deposited in bank by its customers do not at once become the property of the bank, but that it continues to be the agent of the customer until actual collection—the check in the meantime remaining the property of the depositor." And in *Balbach* v. *Frelinghuysen*, 15 Fed. Rep. 675, one of the cases to which reference is made in the note to the section just cited, it was held that even when the check is indorsed to the bank and credit is given for it as cash on the customer's pass-book and the books of the bank, these facts are not conclusive evidence that title passes to the bank, for two reasons, says the court, (1) Because such credit was only conditional, and if the check should be dishonored, it would be charged back to the customer, which is inconsistent with ownership in the bank; and (2) because this practice of banks to credit such deposits at once and to allow the depositor to draw against them is reckoned by the ablest text-writers as a mere gratuitous privilege. See also *St. Louis & S. F. R. Co.* v. *Johnston*, 133 U. S. 566, 33 L. ed. 683. It would seem to follow that whether we consider the indorsement alone or in connection with the credit given in this case to Ditch & Bro. by the Nicholsons, the result would be the same. For it is conceded here that no absolute credit was given, the Nicholsons always reserving to themselves the right to charge back or return unpaid paper. As between Ditch & Bro. and the Nicholsons, without regard to the restrictive character of the indorsement, no title to the check passed to the latter. No consideration was paid by them and they were, and they knew they were, insolvent when the check was deposited. "The acceptance of a deposit by a bank irretrievably insolvent constituted such a fraud as entitled the depositor to reclaim his draft or the proceeds." Fuller, *Ch. J.*, *St. Louis & S. F. R. Co.* v. *Johnston*, *supra*.

We have neither found nor been referred to any authority which sustains the contention of the appellee, unless the section in Morse on Banks & Banking (sec. 577) cited in the opinion of the learned judge below, can be so considered. But when this section is examined, and especially when it is ascertained that the sole authority (*National Commercial Bank* v. *Miller*, 77 Ala. 168, 54 Am. Rep. 50), which Mr. Morse cites to sustain it, does not seem to support the contention of the appellee, we may well hesitate before adopting the construction which has been placed upon Mr. Morse's language. It would seem more reasonable to construe this section (577) to mean that when a check is indorsed "for deposit," under the circumstances therein set forth, the bank may have the check certified, instead of actually collecting the money. And so the author says in his last clause of the section. In the case just cited (*National Commercial Bank* v. *Miller*) it was held that title passed to the bank for the consummation of the purpose for which the indorsement was made, that is to say, to enable the bank to deposit the proceeds to the credit of the indorser. It is nowhere said in that case that absolute title passed to the bank by virtue of the indorsement alone. But on the contrary the question under consideration was the effect of the indorsement together with the certification of the checks. And having determined that the bank by virtue of the indorsement had the right to have the check certified and that when certified the check was, in contemplation of law, paid, the bank thereupon became the owner of the check and was the debtor of the depositor. In other words the indorsement "for deposit," like the indorsement "for collection," gives the bank the right to collect the proceeds and credit them to the depositor, but in neither case can the bank appropriate to its own use paper so indorsed. Nor does the court, in *National Com-*

mercial Bank v. *Miller*, intimate such a view. On the contrary it held that the bank, "by accepting a certification of the check made it their own, and the relation of debtor and creditor was created." The indorsement "for deposit" passed title for the purpose of certification, and the certification being, in contemplation of law, payment, the depositor's title to the check was transferred to the bank. Without adopting these views, we have referred to them for the purpose of showing that they do not seem to support the contention of the appellee, nor the construction it gives to section 577 of Morse on Banks & Banking.

There is a wide distinction between *National Commercial Bank* v. *Miller* and the case under consideration. There the check was indorsed, deposited, and collected; but here there has been no collection—no payment of the check either in cash or its equivalent. If, however, the section (577) we have just referred to is to have the construction given to it by the appellee, there would be a striking conflict between it and section 584 of the same book, where it is said that when checks are deposited they are taken generally for collection by the bank as agent, and the bank does not owe the amount until the collection is accomplished. The bank may permit, as matter of favor, checks to be drawn before collection and payment, the depositor in the event of non-payment being responsible for the sums so drawn, not by reason of his indorsement, the checks not having ceased to be his property, but for money paid. 2 Morse, Banks & Banking, § 584. In Bolles on Bank Collections, ed. 1893, § 8e, the author cites the case of *Somerville* v. *Beal*, 49 Fed. Rep. 790, to sustain the view that an indorsement "for deposit" with credit and conditional right to draw, transfers title; but this case was taken by appeal to the United States circuit court of appeals, and is reported in 50 Fed. Rep. 647, 17 L. R. A. 291, 5 U. S. App. 14. And in the court last named the contrary doctrine was held and ably maintained by an elaborate opinion from which we have already quoted to show that such an indorsement is restrictive and does not pass title. And in the case of *Metropolitan Nat. Bank* v. *Loyd, supra*, cited by the appellee to sustain its contention, the credit given by the bank to the depositor was an absolute one. "Admitted circumstances," says the court, "show it was the intention of the parties to make the transfer absolute," and "the bank charged itself with a debt absolutely due to Murray," the depositor. But here, as we have seen, there is not only no absolute credit, but "the credit entry of cash was a mere delusion." And, as was said in *Beal* v. *Somerville, supra*, if the appellee bank had shown that the depositor had a legal right to draw against the checks from the moment of the deposit, so absolute that the bank could not lawfully suspend it by notice or otherwise, pending the collection, this would tend to support its position throughout. But on the contrary the provisional or mere pretense of a credit, such as shown in this case, is inconsistent with the notion of ownership of the check in the bank. If, however, the check in question had been indorsed in blank, or to the order of Nicholsons a very different question would have been presented. There the legal effect of such indorsements to pass title to bona fide holders for value, according to the settled rules of commercial law, and the rights of innocent third parties, if any had intervened, would be properly considered, as was done in *Metropolitan Nat. Bank* v. *Loyd*, and in many other cases since. "The views of the Supreme Court of the United States," says Mr. Daniel, 1 Neg. Inst., § 340, "seem to embody the true logic of the question." The bank transmitting the paper indorsed in blank is ostensibly the owner. It has agreed by implied contract arising from usage that the avails shall be applied to balances against it. With this understanding its correspondent undertakes the collection and applies the avails. And then when the contract has been executed it would seem to be in contravention of the universally recognized principle which controls the negotiation of commercial paper to permit a third party who had declared by his indorsement that he had parted with his title to come in and assert it. The same view is expressed by us in *Tyson* v. *Western Nat. Bank of Baltimore*, and constitutes what Putnam, *J.*, in *Beal* v. *Somerville*, calls the doctrine of "reputed ownership," which he says is recognized by the Supreme Court of the United States in *St. Louis & S. F. R. Co.* v. *Johnston, supra*. If, therefore the depositor does not intend to pass title he should not use the forms of indorsement which are universally used for that purpose, but should adopt some other form, such as "for collection," which we held in *Tyson* v. *Western Nat. Bank of Baltimore, supra*, does not, without more, pass title, or "for deposit to credit of," which we think, as used in this case, is equally restrictive. Of course if the depositor is awarded even the gratuitous privilege of drawing in anticipation of collection, and he should avail himself of that privilege, then without regard to the form of his indorsement, he should not be allowed to claim the proceeds of any deposited check. With the proceeds in his pocket he would be estopped. But, as we have seen, that is not this case. It has been suggested it was against public policy and contrary to the interests of commerce to hold this indorsement to be restrictive. But we do not think so. On the contrary, in our opinion, it would be for the best interests of the public, the banks and commerce, if all indorsements except those which are in full or in blank should be declared restrictive. And such was the opinion of *Lord* Tenterden in the case of *Sigourney* v. *Lloyd*, 8 Barn. & C. 622.

In the case just cited, the indorsement was "Pay to Williams, or order, for my use." "I cannot see," says *Lord* Tenterden, "that the interests of commerce will be prejudiced by our holding that such an indorsement is restrictive. On the contrary, I think the interests of commerce will be thereby advanced."

When this case was taken up on appeal, *Lord Chief Justice* Best said: "No incon-

venience can possibly arise to the commercial interests of the country by limiting the operation of an indorsement so expressed. The only effect will be to make persons more cautious in transactions of this nature in the future. Unless the words 'for my use' have no meaning, it is obvious, upon looking at the indorsement, that inquiry was necessary to have been made, and if a meaning can be found for these words, the court must apply them so as to meet the object and intention of the indorser." *Lloyd* v. *Sigourney*, 3 Moore & P. 229. The commercial world is well acquainted with the forms of indorsement universally used to transfer paper, and when these forms are not used, the owner of the paper ought not to be deprived of his interest therein by any course of reasoning, however ingenious it may be.

Our conclusion is, that the legal effect of this indorsement was to give notice to the Western Bank that J. S. Ditch & Brother were the owners of the check, and that the Nicholsons were only agents to collect the proceeds of the same and deposit them to the credit of J. S. Ditch & Brother.

Robinson, *Ch. J.*, and **Roberts,** *J.*, concur.

EXCHANGE BANK OF WHEELING, *Appt.*,
v.
SUTTON BANK.

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

1. The completion of a transfer of credit to the payee of a check indorsed "for collection and credit" by the assignee for creditors of an insolvent bank which just before assignment had charged the check to the maker but had not given credit to the payee will not constitute a payment of the demand for which the check was given.

2. An instrument must be treated as a check which is headed by the name of a bank and a date and over the signature of the cashier directs the payment to the order of a third person of a certain amount of cash while at the bottom of the paper it is directed to a banking firm.

3. Failure of the bank on which a check is drawn and with which it is deposited "for collection and credit" to notify the drawer of its neglect to transfer the credit will discharge him from further liability in case he is injured thereby.

4. The fact that when a bank received a check upon itself "for collection and credit" to another account it was hopelessly insolvent and the same day placed its assets in the hands of trustees for creditors shows that its failure to notify the drawer of its neglect to transfer the credit worked no injury to him which would discharge him from liability for the debt for which the check was given.

(February 8, 1894.)

APPEAL by plaintiff from a judgment of Superior Court of Baltimore City in favor of defendant in an action brought to recover the amount alleged to be due from defendant to plaintiff for certain collections and for which a draft had been sent to plaintiff, the collection of which failed because of the insolvency of the drawee. *Reversed.*

The facts sufficiently appear in the opinion.

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

If the bank is on the point of failure the

NOTE.—*The nature of drafts by one bank on another.*

When a bank draft is made payable at some particular time, or includes some other particular provision which cannot be included in a check, as illustrated by Harrison v. Nicollet Nat. Bank (Minn.) 5 L. R. A. 746, it is unquestionably to be regarded as a bill of exchange; but when one bank makes an absolute order on another to pay a specified sum to the payee, including no provision which would prevent the instrument from being considered a check, if drawn on the bank by an ordinary depositor, the question whether it is to be considered a check or a bill of exchange is one of much importance. Considering the very different rules which apply to checks and ordinary bills of exchange in respect to presentment, notice, and protest, as well as in other particulars, and considering the almost innumerable drafts made every year by banks on each other, it is astonishing that the question whether they are bills of exchange or checks has been considered in so small a number of cases, and that the question seems to be almost absolutely untouched in legal text-books and treatises.

In Roberts v. Corbin, 26 Iowa, 315, 96 Am. Dec. 146, such drafts by one bank on another bank in another state were involved, and the court says that counsel agreed that they should be regarded merely as bankers' checks and not foreign bills of exchange. The question decided was that an assignment for creditors by the bank which drew them, made after they were issued but before they were presented, would not defeat the right of the holder to the money as against the assignee for creditors.

So in German Sav. Inst. v. Adae, 1 McCrary, 501, such an order by a bank on another bank in another state was held, on interpleader between the holder and the assignee for creditors of the drawer, under an assignment made after the draft was drawn but before it was presented, to constitute an equitable assignment of the fund. In this case, however, there is no discussion of the question whether the instrument is to be regarded as a check or as a draft.

In harmony also with the above cases is that of First Nat. Bank of Cincinnati v. Coates, 3 McCrary, 9, in which *Mr. Justice* Miller in an oral opinion held that a draft by one bank on another in another state, which is a mere order to pay absolutely, is a check, and that as against an assignee for creditors of the drawer the check constitutes an equitable assignment of the fund, although notice of the assignment for creditors, which was made after the draft was drawn, was given to the drawee before the draft was presented.

Directly to the contrary of this are other decisions growing out of the same bank failure that was involved in the above case.

Thus in Rosenthal v. Mastin Bank, 17 Blatchf. 318, and Dickinson v. Coates, 79 Mo. 250, 49 Am. Rep. 228, such drafts or checks on banks in other states are denied effect as against a subsequent assignment for creditors by the drawer, of which notice to the drawee is given before the presentment of the drafts. These cases do not, however, discuss the question of the difference between checks and bills of exchange. The draft is spoken of in Dickinson v. Coates as a check, and in Rosenthal v. Mastin Bank it is called a "draft or check," and it is the law of checks which is chiefly discussed.

The case of Dickinson v. Coates, *supra*, was one of

See also 23 L. R. A. 584.

credit which the drawer of the check has at the bank is worthless.

Tyson v. *Western Nat. Bank of Baltimore, ante*, 161, 77 Md. 412.

And even suppose the defendant's credit had been transferred to the plaintiff on the books of J. J. Nicholson & Sons before the failure, how could the defendant make valid payment by a transfer of such credit?

Upon broad principles of justice it would seem that a man should not be allowed to pay a debt with worthless paper, though both parties supposed it to be good.

Thomas v. *Westchester County Suprs.* 4 L. R. A. 477, 115 N. Y. 47.

When the deed of trust was executed the right of Nicholson as a going concern to constitute itself a debtor of the plaintiff at once ceased.

First Nat. Bank of Circleville v. *Bank of Monroe*, 33 Fed. Rep. 408; *First Nat. Bank of Crown Point* v. *First Nat. Bank of Richmond*, 76 Ind. 561; *Levi* v. *National Bank of Missouri*, 5 Dill. 104; Morse, Banks & Banking, § 248*a*.

A check given for an antecedent debt is not an extinguishment of the debt, but only a means of payment. A check is not payment until paid.

Morse, Banks & Banking, §§ 544, 546; Dan. Neg. Inst. § 1623; *Burkhalter* v. *Second Nat. Bank of Erie, Pa.* 42 N. Y. 538; *Blair* v. *Wilson*, 28 Gratt. 165; *Woodville* v. *Reed*, 26 Md. 179.

If the check be not paid and the payee is not negligent, his right of action against the drawer for the debt, which has been merely suspended by the giving of the check, revives, and he may have recourse to the drawer either upon the debt or upon the check, at his option.

Bl[illegible] v. *Wilson, supra; Syracuse, B. & N. Y. R. Co.* v. *Collins*, 3 Lans. 29; *Jobbitt* v. *Goundry*, 29 Barb. 509; Morse, Banks & Banking, § 543.

The acceptance of a security or undertaking of equal degree is of itself no extinguishment of the former debt, and the plaintiff may recover on the original cause of action if the check or note has been lost.

Myers v. *Smith*, 27 Md. 43; *Glenn* v. *Smith*, 2 Gill & J. 493, 20 Am. Dec. 452.

The instrument was a check, and therefore the defendant drawer was not discharged by the failure to protest, not having been injured by such failure.

Bull v. *First Nat. Bank of Kasson*, 123 U. S. 105, 31 L. ed. 97; *Merchants Nat. Bank of Boston* v. *State Nat. Bank of Boston*, 77 U. S. 10 Wall. 604, 647, 19 L. ed. 1008, 1019; *Merchants Nat. Bank* v. *Ritzinger*, 118 Ill. 484; *Harrison* v. *Wright*, 100 Ind. 515, 58 Am. Rep. 805; *First Nat. Bank of Cincinnati* v. *Coates*, 3 McCrary, 9; Dan. Neg. Inst. § 1566; Story, Prom. Notes, §§ 487, 489; Morse, Banks & Banking, § 362.

The drawer of a check is not discharged from liability for the want of notice, unless he has sustained damage or is prejudiced in the assertion of his rights by the omission.

Bull v. *First Nat. Bank of Kasson*, and *Merchants Nat. Bank of Boston* v. *State Nat. Bank of Boston, supra;* Dan. Neg. Inst. § 1587; Benjamin's Chalmers' Dig. art. 258; Story, Prom. Notes, §§ 492, 497, 498; Morse, Banks & Banking, § 421 (*d*); *Moses* v. *Franklin Bank of Baltimore*, 34 Md. 574; *Norris* v. *Despard*, 38 Md. 487; *Clopper* v. *Union Bank*, 7 Harr. & J. 92, 16 Am. Dec. 294.

Notice of non-acceptance of a bill of ex-

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a suit against an assignee for creditors, to whom the funds had been turned over by the bank in another state, while in Rosenthal v. Mastin Bank, *supra*, the suit was in a federal court against the drawer and the drawer's assignee for creditors, as well as the drawee.

In Grammel v. Carmer, 55 Mich. 201, 54 Am. Rep. 363, the court in respect to such bank drafts says it is "not the case of a check, but of bills of exchange," but held that whether or not a check would constitute an equitable assignment without such a draft, in case of the drawer's subsequent insolvency and assignment for creditors before its presentment, such a draft by one bank on another would not give the holder, as against a receiver of the drawer, a right to the funds, except *pro rata* with other creditors.

In Harrison v. Wright, 100 Ind. 515, 58 Am. Rep. 805, such drafts by a bank on banks in other states were held to be merely checks, and not to constitute an equitable assignment of funds which would be effectual on the subsequent suspension of the drawer bank made before presentment of the drafts, and it was therefore held that a receiver of the drawer should not pay such drafts from the assets of the bank except *pro rata* with other debts due to general creditors. Among the holders of these drafts or checks were some who had paid for them by checks on their deposits in the bank, and others who bought the drafts of the bank by paying cash for them, but all were alike held to be entitled merely to their *pro rata* share of the assets in the receiver's hands.

In Merchants Nat. Bank v. Ritzinger, 118 Ill. 484, an order marked "original" by one bank upon another bank in another state to "pay this our first check (second unpaid) to the order of," etc., was held to be merely a check, and not a foreign bill of exchange requiring acceptance notwithstanding the reference to the duplicate order.

That an absolute order drawn by one bank on another in another state is merely a check, so that delay in presenting it will release the liability of an indorser only when the delay causes him injury, is decided in Bull v. First Nat. Bank of Kasson, 123 U. S. 105, 31 L. ed. 97; Planter's Bank v. Merritt, 7 Heisk. 177; Planter's Bank v. Keesee, Id. 200.

But such a draft is a "bill of exchange" within the meaning of the Act of Congress of March 3, 1875, respecting the jurisdiction of federal courts in actions on bills of exchange. Bull v. First Nat. Bank of Kasson, *supra*.

That a bank draft on another bank is a check is also decided in State v. Vincent, 91 Mo. 662, deciding that such a draft is properly described as a "check" in an indictment for forging a check. The court says: "It is none the less a check because drawn by a bank."

These are all the cases in which we have found the question touched upon whether or not a bank draft on another bank in the form of check is to be considered a check. Probably there are other cases in which such drafts have been involved, but it would seem that if so the courts have not had this question raised in respect to them. As the decisions stand, they may be regarded as substantially settling the matter in favor of the doctrine that a draft or order on a bank in the form of a check is not the less a check because it is drawn by a bank.

B. A. R.

change is not necessary where the drawer at the time when presentment should be made had no effects in the hands of the drawee, or no reason to expect that the draft would be honored; because he could not be in any way injured under such circumstances.

Eichelberger v. *Finley*, 7 Harr. & J. 381, 16 Am. Dec. 312; *Orear* v. *McDonald*, 9 Gill, 350, 52 Am. Dec. 709; *Schuchardt* v. *Hall*, 36 Md. 590, 11 Am. Rep. 514; *Cathell* v. *Goodwin*, 1 Harr. & G. 468.

A person who acts within the strict rules of law in the handling of commercial paper will not be held responsible for any loss which may thereby occur.

Syracuse, B. & N. Y. R. Co. v. *Collins*, 3 Lans. 29, affirmed in 57 N. Y. 641; *Burkhalter* v. *Second Nat. Bank of Erie, Pa.* 42 N. Y. 538; *Graham* v. *Morstadt*, 40 Mo. App. 333.

It is proper for a bank holding a check, drawn upon another bank, to send it to the drawee bank for collection.

Indig v. *National City Bank of Brooklyn*, 80 N. Y. 100; *Thomas* v. *Westchester County Suprs.* 4 L. R. A. 477, 115 N. Y. 47.

Mr. **Frank Woods**, for appellee:

The case under discussion turns in favor of appellee upon the important exception to the general rule that, if the creditor parts with the bill received as conditional payment, or is guilty of laches, to the prejudice of the debtor, in not presenting it for acceptance or payment in due time, or in failing to give the debtor due notice of its dishonor, the debtor is discharged.

Glenn v. *Smith*, 2 Gill & J. 493, 20 Am. Dec. 452; *Lewis* v. *Brehme*, 33 Md. 430, 3 Am. Rep. 190.

The drawer of the draft in question had ample funds in the hands of its drawee and a reasonable expectation that its draft would be honored when presented for payment. Such a drawer is everywhere entitled to all the defenses afforded by commercial law to the indorser of negotiable paper.

Tiedeman, Com. Paper, § 310; 2 Dan. Neg. Inst. §§ 1050, 1276; *Orear* v. *McDonald*, 9 Gill, 356, 52 Am. Dec. 703; *Schuchardt* v. *Hall*, 36 Md. 602, 11 Am. Rep. 514; *Brant* v. *Mickle*, 28 Md. 437.

Due presentment and notice of dishonor are necessary in order to charge the appellee.

Tiedeman, Com. Paper, § 334; 2 Dan. Neg. Inst. §§ 970, 971, 1076; 1 Dan. Neg. Inst. § 452; 3 Randolph, Com. Paper, § 1201.

Neither the fact that the draft in question was drawn as a conditional payment of a preexistent debt, nor the fact that on the day it was received by mail by the drawees they were insolvent, affords any valid excuse for appellant's failure to make a legal demand on the drawees for payment, and to protest the draft and give appellee due notice of its dishonor, if it was dishonored.

3 Randolph, Com. Paper, § 1329; 3 Kent, Com. 110; Wood's Byles, Bills & Notes, *206; Story, Bills of Exchange, §§ 326. 347; 2 Dan. Neg. Inst. §§ 1171, 1172; Tiedeman, Com. Paper, § 366; *Orear* v. *McDonald*, 9 Gill, 351, 52 Am. Dec. 703.

The only evidence of presentment for payment is that the draft was by mail forwarded to the drawees by appellant, and that it was received by the drawees and charged on their books to the debit of appellee's account. To say nothing of the manifest tendency of this evidence to prove that the draft was duly honored and paid, it is not sufficient, upon the supposition that the draft was dishonored, to prove such presentment for payment as the law requires, in order to charge appellee as its drawer.

Halls v. *Howell*, 1 Harp. L. 426; *Gillespie* v. *Hannahan*, 4 McCord, L. 504.

A presentment or demand of payment must be made personally upon the acceptor, at his place of business, or at his dwelling house, when his residence is known, or may be ascertained by reasonable inquiry; and cannot be made by a written demand, sent to him through the postoffice.

Story, Bills of Exchange, § 325; *Stuckert* v. *Anderson*, 3 Whart. 116; *McGruder* v. *Bank of Washington*, 22 U. S. 9 Wheat. 601, 6 L. ed. 171; 1 Parsons, Bills & Notes, § 371; 1 Dan. Neg. Inst. § 654; *Phillips* v. *McCurdy*, 1 Harr. & J. 187.

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

This is an action of assumpsit, upon a case stated for the opinion of the court with a request to render a judgment in accordance therewith.

The defendant below, being indebted to the plaintiff for certain collections made by the former, on account of the latter, on the 9th day of January, 1892, mailed to the plaintiff the following instrument of writing, viz.:

The Sutton Bank,
Sutton, W. Va., Jan. 9, 1892.

Pay to the order of J. J. Jones, Esq., cash $936.50 (nine hundred and thirty-six dollars and fifty cents).

T. M. Berry,
Cashier.

To J. J. Nicholson & Sons,
Baltimore, Md.

The plaintiff received it on the 13th following and on the same day forwarded it by mail to the Nicholsons (with whom both parties kept accounts) indorsed as follows: "For collection and credit account of Exchange Bank, Jan. 13th, 1892, of Wheeling, West Va., John J. Jones, Cashier." On the morning of the 14th the paper was received by the Nicholsons, and was stuck upon a file where were generally placed the various checks drawn upon the house in the ordinary course of business. The defendant then had on deposit to its credit with the banking house a sum in excess of $936.50. Later in the day, it was taken from the file and entered to the debit of the defendant's account, but was not then entered as a credit to the account of the plaintiff. On the morning of the 14th, Nicholson & Sons were hopelessly insolvent, and about 1 o'clock of that day made an assignment to the trustees, who, after they had taken possession, entered the check to the credit of the plaintiff; but at the time of the receipt, the Nicholsons did not have in their banking house the amount of the plaintiff's claim in actual cash. The paper is now lost, and it is not known whether it was protested or not; but if it was, no

notice thereof, or of the non-payment was sent to, or received by, either the plaintiff or defendant. A demand was made by the plaintiff on the defendant for payment, on the 7th of June, 1893, and until that day the defendant had no knowledge that it had not been paid. This was the only demand ever made on the defendant by any one.

It is not contended that the treatment of the paper by the Nicholsons, or their trustees, was tantamount to a payment. There was no credit given to the payees for the amount; and, under the circumstances of the case, until this was done, there was no evidence that it had been accepted. Whether it be regarded as a bill of exchange or a check, it did not operate as an assignment, *pro tanto*, of the drawer's funds in the hands of the Nicholsons, until it was accepted. *Moses* v. *Franklin Bank of Baltimore*, 34 Md. 580.

So far as the plaintiff was concerned, there was no evidence that the Nicholsons had accepted the order upon them, and thereby agreed to become responsible to it for the amount. And, apart from this, at the time the paper was drawn, and when received by the Nicholsons, they were hopelessly insolvent; and, under such circumstances, a transfer of credit from the defendant to the plaintiff would have been a mere delusion.

After the assignment they ceased to be a going concern, and neither the firm nor their trustees had the right to make a transfer of credit which was wholly worthless. *Manufacturers Nat. Bank* v. *Continental Bank*, 148 Mass. 553, 2 L. R. A. 699. A check or bill is not a payment until paid—Morse on Banks and Banking, secs. 544, 546; *Lewis* v. *Brehme*, 33 Md. 412, 3 Am. Rep. 190; *Patapsco Ins. Co.* v. *Smith*, 6 Harr. & J. 166—or unless it is accepted as such, or the creditor parts with it, or is guilty of some laches by which injury inures to the drawer. *Glenn* v. *Smith*, 2 Gill & J. 509, 20 Am. Dec. 452.

In this case therefore, unless it can be shown that the plaintiff had been guilty of some negligence, whereby the defendant has been either actually or constructively injured, the paper having been lost, it was not improper to resort to the original cause of action. *Myers* v. *Smith*, 27 Md. 50.

What was the character of the paper offered in evidence? The appellee contends it is a bill of exchange. This court has stated in *Moses* v. *Franklin Bank of Baltimore*, 34 Md. 579, that "a check is denominated a species of inland bill of exchange, not with all the incidents of an ordinary bill of exchange, it is true, but still it belongs to that class and character of commercial paper." And in *Bull* v. *First Nat. Bank of Kasson*, 123 U. S. 105, 31 L. ed. 97, in which an instrument of writing exactly similar to the one in this case was declared by the court to be a check, *Judge* Field, speaking for the whole court, says: "When an instrument is drawn upon a bank, or a person engaged in banking business, and simply directs the payment to a party of a specified sum of money, which is at the time on deposit with the drawee, without designating a future day of payment, the instrument is to be treated as a check. The chief points of difference are, that a check is always drawn on a bank or banks. No days of grace are allowed. The drawer is not discharged by the laches of the holder in presenting it for payment, unless he can show that he has sustained some injury by the default. It is not due until payment is demanded, etc." *Merchants Nat. Bank of Boston* v. *State Nat. Bank of Boston*, 77 U. S. 10 Wall. 647, 19 L. ed. 1019; *Harker* v. *Anderson*, 21 Wend. 375; *Merchants Nat. Bank* v. *Ritzinger*, 118 Ill. 484; *Harrison* v. *Wright*, 100 Ind. 515, 58 Am. Rep. 805; *First Nat. Bank of Cincinnati* v. *Coates*, 3 McCrary, 9; Dan. Neg. Inst. § 1566; Story, Prom. Notes, § 487; Morse, Banks & Banking, § 362.

We do not think what was said by this court in *Hawthorn* v. *State*, 56 Md. 534, is in conflict with the views here expressed. There, as well as in *Moses* v. *Franklin Bank of Baltimore*, *supra*, they hold that a check was a species of bill of exchange, not with all the incidents of an ordinary bill of exchange, but belonging to that class and character of commercial paper; or in other words, as was said by Cowen, *J.*, in *Harker* v. *Anderson*, *supra*, the "bill is the genus and the check is the species;" and therefore Hawthorn was within the terms of the statute, which made it a felony to forge an indorsement on a bill of exchange. The instrument of writing in question in this case must therefore be treated as a check.

On receipt of the check, the plaintiff, with reasonable promptness, forwarded it to the Nicholsons, indorsed "For collection and credit account of Exchange Bank, Jan. 13, 1892, of Wheeling, W. Va.," Such an indorsement constituted them the agents of the plaintiff to collect and credit, and at the same time, as drawees of the check, they were also the agents of the drawers to pay. The plaintiff was therefore responsible for any omission of duty on the part of the Nicholsons in their capacity as collectors. As collecting agents of the plaintiff, it was their duty to do whatever was necessary in respect to demand and notice to the drawer, and for any negligence in regard to this, they would be liable to the plaintiff, and not to the defendant, for such damages as might be occasioned by reason of their neglect. *Montgomery County Bank* v. *Albany City Bank*, 7 N. Y. 459. The evidence is clear that they did not transfer the credit for the amount of the note from the defendants to the plaintiff. If they had done this, other questions would have to be considered here, upon which we are not now called to decide and do not intimate our opinion; and the failure to make such transfer was equivalent to a refusal to accept and pay. Under such circumstances, it was their clear duty to give notice of the non-payment, to the drawer, in order that the drawee might take any necessary steps to protect its interest; and if they failed to do so, and loss ensued by reason of such want of notice, it falls on the plaintiff, and not upon the drawer. A failure, however, to notify the drawer of the non-payment of a check does not always discharge him from liability; it must also be shown that he has either actually or pre-

sumptively suffered some loss or injury therefrom. Dan. Neg. Inst. § 1587, and authorities cited. *Ball* v. *First Nat. Bank of Kasson, supra*. In the case of *Norris* v. *Despard*, 38 Md. 491, it is true this court said, "If the notice be not given, it is a presumption of law that he is injured by the omission," but they explain this remark by adding that "in the application of the principle, courts must inquire into the liabilities of the respective parties to the check for the purpose of ascertaining whether this injury, either actual or presumptive, could take place." And further on, in the same opinion, "it was but just that they should give the defendant notice of the non-payment in reasonable time before they brought their action, or to have shown that the defendant sustained no injury in consequence." *Rhett* v. *Poe*, 43 U. S. 2 How. 457, 11 L. ed. 338; *Eichelberger* v. *Finley*, 7 Harr. & J. 385, 16 Am. Dec. 312; *Schuhardt* v. *Hall*, 36 Md. 602, 11 Am. Rep. 514.

Here it is clear, that at the time the check reached the Nicholsons they were hopelessly insolvent, and did not have in their banking house the amount of the check in actual cash. Their assignment on the same day placed all their assets in the hands of trustees, and definitely fixed the status of any claim the defendant had, or could have upon them. Under these circumstances, we can perceive no way by which, on account of the want of notice, injury to the defendant either "actual or presumptive" could take place.

The judgment below must be reversed.

Judgment reversed and judgment for the appellant for the sum of $1,053.56 with interest from this date until paid and costs.

ALABAMA SUPREME COURT.

Katie CREED *et al.*, *Appts.*,
v.
SUN FIRE OFFICE OF LONDON.

(.........Ala.........)

1. **An insurance company cannot avoid a policy stipulated to be void if the interest of the insured be other than the unconditional and sole ownership** of the property because such interest was not truly stated and the interest of the insured was not that of unconditional and sole ownership, where its agent knowingly and intentionally wrote down the answers differently from those made by the insured and the latter made true and full statements of his interest to such agent.

2. **A simple contract creditor has an insurable interest in a building** belonging to the estate of his deceased debtor which may be subjected to his debt because the personal property is insufficient to pay the debts of the estate.

3. **Plaintiffs in a suit upon an insurance policy are shown to have an insurable interest** by a plea showing that the building and lot insured belonged to the estate of a decedent and that neither of the assured are his legal heirs, and a replication averring that one of the plaintiffs was the widow of the decedent and that he owned no other real estate, followed by the conclusion that she owned a dower and homestead interest, and further averring that the other plaintiff was a creditor of the decedent, stating the amount of her claim, the insufficiency of personal assets to pay the debts, and that there was no other real property belonging to the estate, as such replication shows a remainder interest in the real estate liable for the debts.

(December 19, 1893.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Montgomery County in favor of defendant in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Reversed.*

The defendant pleaded that by the terms of said policy it was provided that the entire policy was to be void if the insured concealed or misrepresented any material fact concerning the insurance, or the subject thereof; and further averred that the insured had concealed a material fact concerning the subject of the insurance, in that the plaintiffs applied for and took out said insurance upon the house described in the complaint as their property, whereas in truth it was, at the time of the taking out of said policy, and at the time of said fire, the property of the estate of one T. W. Creed, who died intestate before the taking out of said insurance policy; and that the said T. W. Creed left surviving him brothers and sisters, heirs at-law, and that neither of the plaintiffs was a sister of the deceased; and that the plaintiffs concealed from the defendant the fact that said house was the property of the said T. W. Creed, deceased; that in and by the terms of the policy sued on in this case it is expressly provided, among other things, that the entire policy, unless otherwise provided by agreement indorsed thereon or added thereto, shall be void if the interest of the insured be other than the unconditional and sole ownership of the property insured; and defendant avers that the said insured took out the said policy upon the said house described in said complaint as their property, and that at the time the said insurance occurred, and at the time the said building was destroyed by fire, the said house was not the property of the said plaintiffs; and defendant further avers that the said policy contains no agreement indorsed thereon or added thereto that the plaintiffs might insure the said property although they were not the sole and unconditional owners of the said property; that in and by the terms of the policy sued on in said complaint it is expressly provided that the entire policy shall be void if the interest of the insured in the

NOTE.—While the above decision is well within established principles of insurance law the application seems to be a new one.

property be not truly stated therein, and defendant avers that the interest of the said insured is not truly stated in the said policy, that the said property is insured as the property of the said plaintiffs, whereas in truth and in fact the said property was not the property of the said plaintiffs; that the said Mattie Flinn had no interest in the said property; that the said house insured formerly belonged to one T. W. Creed, who had died intestate, leaving certain brothers and sisters as his heirs-at-law; that the only interest that the said plaintiff Katie Creed had in and to the said property was the interest which she as the widow of the said T. W. Creed might acquire therein, and the said Mattie Flinn had no interest therein; wherefore this defendant avers that the interest of the said plantiffs, the insured, was not truly stated in the said policy, and that the same is void; that in and by the terms of said policy it is expressly provided that, unless it is provided by agreement indorsed thereon or added thereto, the said policy shall be void if the subject of the insurance be a building on ground not owned by the insured in fee simple; and defendant avers that the subject of insurance in this instance was a building on a certain lot of land near the city of Montgomery, Alabama; that the said lot of land was not at the time of taking out said policy, or at the time of said loss, nor at any time after the taking out of the said policy, owned by said plaintiffs in fee simple, but that, on the contrary, the said ground was owned by the heirs-at-law of one T. W. Creed, then lately deceased; and that plaintiffs were not the heirs-at-law of said T. W. Creed. And defendant further avers that no agreement was indorsed on the said policy, or added thereto, providing that the subject of insurance might be on ground not owned by the insured in fee simple; and that the defendant had no notice at the time of the issuance of said policy, nor at any time prior to the burning of said building, that the plaintiffs did not own the ground upon which the said building was situate. The plaintiffs filed the following replication: "That at the time of taking out the policy of insurance sued on in this cause, Katie Creed, one of the plaintiffs, was the widow of T. W. Creed, then lately deceased, who died seised in fee of the property insured, and that she is still such widow; that as such widow she had and has an interest by way of dower and homestead in the property covered by said insurance; that she had such interest at the time of the application for and the issuance of said policy by defendant; that at the time of the application for and the issuance of said policy, Mattie Flinn, the other plaintiff in this cause, was a large creditor of the estate of T. W. Creed in the amount of, to wit, about two thousand dollars, and that she was such creditor at the time of the burning of said house insured and described in the complaint in this cause, and such claim of said Mattie Flinn has been ever since the taking out of the policy of insurance sued on, and is now, a valid and subsisting demand against the estate of T. W. Creed, deceased; that there is not and was not at the time of the application for and the issuance of the policy sued on in this cause, enough personal property belonging to the estate of said T. W. Creed to pay the debts due and outstanding against said estate. And plaintiffs aver that they applied to one J. B. Trimble, who was at the time of said application the regularly constituted agent of defendant corporation, for said policy on said building; that said J. B. Trimble well knew at the time plaintiffs applied for said policy, and at the time of the issuance and delivery to them by him as such agent of defendant corporation, that the said property so insured was the property of the estate of T. W. Creed, deceased, and that he was at the time of the application for said policy informed of this fact by plaintiffs; that said Trimble, as agent of defendant, well knew at the time of the application for said policy and its issuance, and was then and there informed by plaintiffs, that their only interests in the property so insured was that plaintiff Mattie Flinn was a creditor, as above described, of the estate of T. W. Creed, and that plaintiff Katie Creed was the widow of said T. W. Creed, and as such had a dower and homestead interest in said property; that, so knowing, said J. B. Trimble himself drew up the application for said insurance, received the premium therefor, and turned the policy over to plaintiffs; and that plaintiffs never in any way misrepresented the title to said property to tho defendant, or any of its agents, but that the defendant, with full knowledge as aforesaid, issued said policy to plaintiff." This replication was afterwards amended by averring that the property insured in said policy was the only real property of the estate of said T. W. Creed, deceased. To the replication as amended the defendant demurred on the following grounds: "(1) It is averred in the second plea, and not denied by the replication, that the policy sued on contains a clause and stipulation that it should be void, unless otherwise provided by agreement indorsed thereon, if the interest of the insured should be other than the unconditional and sole ownership of the property insured; and it is shown by the allegations of said replication that the insured were not the unconditional and sole owners of such property, and it is not averred therein that there is any agreement indorsed on said policy that plaintiffs might insure such property although they were not such owners. (2) It is averred in the fourth plea, and not denied by said replication, that one of the terms of the policy sued on is that the same should be void if the interest of the insured in the property be not truly stated in the policy; and it is not shown by said replication that such interest was truly stated. (3) It is shown by said replication that the interest of the insured was not truly stated in the policy. (4) It is not denied that the policy sued on provides that it should be void if the buildings insured were not situate on ground owned by the insured in fee simple, and it is shown by the allegations of said replication they were not such owners. (5) It is shown by the allegations of said replication that plaintiffs had no insurable interest in the property covered by the policy sued on. (6) It is shown by

the allegations of said replication that plaintiff Flinn had no insurable interest in the property covered by the policy sued on. (7) It is shown by the allegations of said replication that the contract sued upon was and is a wagering or gambling contract. (8) It is shown by the allegations of said replication that plaintiff Flinn had no interest in the property covered by the policy sued on, and that the alleged contract insuring the same was and is against public policy, and void. (9) It is not shown by the allegations of said replication that plaintiff Creed had any homestead right in the property covered by the policy sued on. (10) It is shown by the allegations that the property was not subject to the debt of Mattie Flinn."

Further facts appear in the opinion.

Mr. **A. A. Wiley**, for appellants:

If plaintiffs had an insurable interest in said property, the replication, when properly interpreted, "shows a waiver of the condition and constitutes a full answer to the plea."

Brown v. *Commercial F. Ins. Co.* 86 Ala. 194.

The agent, Trimble, knowing the character of the interest which each of the plaintiffs had in or to the property covered by the policy, "himself drew up the application for said insurance, received the premium therefor, and turned the policy over to plaintiffs," and the replication particularly avers that plaintiffs "never in any way misrepresented the title to said property to the defendant, or any of its agents, but that the defendant, with full knowledge, as aforesaid, issued said policy to plaintiffs."

In such case "the defendant will not be permitted to take advantage of the wrongful act, or misconstruction or mistake of its own agent and avoid the policy, the insured being without fault."

Williamson v. *New Orleans Ins. Asso.* 84 Ala. 108; *Alabama Gold L. Ins. Co.* v. *Garner*, 77 Ala. 210; *German Ins. Co.* v. *Miller*, 39 Ill. App. 633; *Herndon* v. *Triple Alliance*, 45 Mo. App. 426; *Follette* v. *United States Mut. Acc. Asso.* 15 L. R. A. 668, 110 N. C. 377; *Gristock* v. *Royal Ins. Co.* 87 Mich. 428.

The term "interest" does not necessarily imply property. The contract of insurance being one of indemnity against losses and disadvantages, an insurable interest may be proved in the insured, without the evidence of any legal or equitable title to the property.

Putnam v. *Mercantile Marine Ins. Co.* 5 Met. 386; *Lazarus* v. *Commonwealth Ins. Co.* 19 Pick. 81; *Hancox* v. *Fishing Ins. Co.* 3 Sumn. 132; *Fenn* v. *New Orleans Mut. L. Ins. Co.* 53 Ga. 579; *Depaba* v. *Ludlow*, 1 Comyn, Rep. 361; *Shannon* v. *Nugent*, Hayes, 536; *Schweiger* v. *Magee*, Cooke & Al. 182; *Keith* v. *Protection Marine Ins. Co. of Paris*, L. R. Ir. 10 Exch. 51.

The objections that the plaintiffs have no insurable interest comes with bad grace from a company that has received premiums on a policy issued with knowledge of the very facts it objects to, now, as insufficient to create an insurable interest.

Currier v. *Continental L. Ins. Co.* 57 Vt. 496, 52 Am. Rep. 134.

Mattie Flinn had an insurable interest in the property. T. W. Creed was dead, and the personal property was insufficient to pay the debts outstanding against the estate. She was his largest creditor, and looked to the property covered by the insurance as her only means of payment, as her indemnity against loss.

Fenn v. *New Orleans Mut. L. Ins. Co. supra.* See also *Ellicott* v. *United States Ins. Co.* 8 Gill & J. 166.

Mrs. Katie Creed, as the widow of the decedent, being in possession of the property at the time the contract was made, and entitled to dower and homestead, had such an interest as was insurable.

Harris v. *York Mut. Ins. Co.* 50 Pa. 341, and cases cited above.

If she alone had an insurable interest, the policy was good as to her interest therein.

1 May, Ins. 3d ed. § 74.

A general creditor of the estate of one deceased, whose personal property left is insufficient for the payment of his debts, has an insurable interest in the sole real estate of the deceased debtor, when it is plain that if it is damaged by fire a pecuniary loss must ensue to the creditor thereby.

1 Arnould, Marine Ins. 229; Bunyan, Life Ins. 16; Hughes, Ins. 30; 1 Marshall, Marine Ins. 115; 1 Phillips, Ins. 2, 107; Sherman, Marine Ins. 93; Parsons, Mercantile Law, 507; Parsons, Cont. 438; Angell, Fire & Life Ins. § 56; Flanders, Fire Ins. 342; May, Ins. 76; *Hancox* v. *Fishing Ins. Co.* 3 Sumn. 132; *Putnam* v. *Mercantile Marine Ins. Co.* 5 Met. 386; *Wilson* v. *Jones*, L. R. 2 Exch. 139; *Buck* v. *Chesapeake Ins. Co.* 26 U. S. 1 Pet. 151, 7 L. ed. 90; *Mapes* v. *Coffin*, 5 Paige, 296, 3 L. ed. 725; *Mickles* v. *Rochester City Bank*, 11 Paige, 118, 5 L. ed. 77, 42 Am. Dec. 103; *Springfield F. & M. Ins. Co.* v. *Allen*, 43 N. Y. 389, 3 Am. Rep. 711; *Herkimer* v. *Rice*, 27 N. Y. 163; *Savage* v. *Howard Ins. Co.* 52 N. Y. 502, 11 Am. Rep. 741; *Clinton* v. *Hope Ins. Co.* 45 N. Y. 454; *Waring* v. *Loder*, 53 N. Y. 581, distinguishing *Grevenmeyer* v. *Southern Mut. F. Ins. Co.* 62 Pa. 340, 1 Am. Rep. 420; *Conrad* v. *Atlantic Ins. Co. of N. Y.* 26 U. S. 1 Pet. 386, 7 L. ed. 189; *Cover* v. *Black*, 1 Pa. 493; *Rohrbach* v. *Germania F. Ins. Co.* 62 N. Y. 47, 20 Am. Rep. 451; 4 Ins. L. J. 737.

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

This is an action by appellants upon a policy of insurance issued for the benefit of plaintiffs, insuring a certain dwelling against loss or destruction by fire. The suit is in the joint name of Katie Creed and Mattie Flinn, the assured. The defendant pleaded several special pleas, upon some of which issue was joined, and to the others a replication was filed by plaintiffs. The court sustained a demurrer to the replication, and, the plaintiffs declining to plead further, judgment was rendered for the defendant.

Several questions have been argued, but the rulings of the court upon the demurrers to the replications present the material questions involved on this appeal. The first is whether, when a policy of fire insurance contains a stipulation that the policy shall be void if the interest of the insured be other

than "the unconditional and sole ownership of the property insured," and the plea avers a state of facts which, if true, shows that the interest of the insured was not truly stated in the policy, and that the interest of the insured was not that of "unconditional and sole ownership," a replication to such plea is good which avers that the policy was procured from an agent of the defendant, authorized to issue policies of fire insurance, to whom the insured, at the time the policy was applied for and received, truly and fully stated their interest in the property to the agent; and that the agent, being fully informed, himself drew up the application for the insurance, received the premium therefor, and, with full knowledge of the facts, turned the policy over to plaintiffs. We have held that if the applicant make full and true answers to the questions contained in the application, and suppresses no material fact which it is his duty to make known, the company will not be permitted to take advantage of the carelessness, inadvertence, or misunderstanding of its agent; the insured being without fault. *Alabama Gold L. Ins. Co.* v. *Garner,* 77 Ala. 210; *Williamson* v. *New Orleans Ins. Aso.* 84 Ala. 106; *Pelican Ins. Co. of New Orleans* v. *Smith,* 92 Ala. 428; *Equitable F. Ins. Co.* v. *Alexander* (Miss.) 12 So. Rep. 25.

Upon the same principle, and for stronger reasons, the company cannot avoid its obligation if its own agent knowingly and intentionally writes down the answers differently from those made by the insured. We think the replication a full answer to the plea on this question.

The next proposition involves a question new in this state. Has a creditor an insurable interest in a building, the property of the estate of his deceased debtor which may be subjected to his debt, the personal property being insufficient to pay the debts of the estate? After much deliberation, our conclusion is that he has an interest which may be insured. We concede and affirm that a simple contract creditor, without a lien either statutory or contract, without a *jus in re* or a *jus in rem,* owning a mere personal claim against his debtor, has not an insurable interest in the property of his debtor. Such contracts are void, as being against public policy. We do not think the principle applies after the death of the debtor, as to property liable for the debt, and which, if destroyed, will result in the loss of the debt. The real estate as well as personal property of a deceased debtor is liable for his debts, but the real estate cannot be subjected to the payment of his debts until after the personalty has been exhausted. After the death of the debtor the debt is no longer enforceable *in personam.* The proceedings to reach the property of the estate of the deceased debtor are *in rem.* The property of the debtor takes the place of the debtor, and becomes, as it were, the debtor. Whoever knowingly receives the property of a deceased debtor, and wrongfully converts it, is answerable to the creditor. 3 Brickell, Dig. p. 464, § 148; Id. p. 465, § 162. The relation of creditor and debtor invests the creditor with an insurable interest in the life of his debtor to the extent of his debt. *Alexander* v. *Sanders,* 93 Ala. 345; 11 Am. & Eng. Encyclop. Law, 319. It would seem upon like principles that, when the property becomes directly subject to proceedings *in rem* for the satisfaction of the debt, the creditor should become invested with an insurable interest in the property. Certainly, if a creditor cannot obtain satisfaction of his debt from the personal property of his deceased debtor, and has a legal right, which cannot be defeated, to enforce its collection by proceedings *in rem* against a building belonging to the estate of the deceased debtor, and if it be true that the destruction of the building by fire would immediately and necessarily result in pecuniary loss, the loss being the direct consequence of the fire, the creditor has an interest in the protection of the building. He has no lien as in the case of a mortgagee nor such lien as the statute may confer on an attaching or execution creditor; but his right to subject the specific property to his debt invests him with an interest but little less, if any, than that of the attaching or execution creditor or mortgagee. In the case of *Herkimer* v. *Rice,* 27 N. Y. 163, the question arose as to whether an administrator of an insolvent estate held an insurable interest in the real estate of the deceased debtor. The court (Denio, *Ch. J.,* rendering the opinion) held that he did, and the conclusion was based in great part upon the proposition, that the creditors had such an interest which the administrator could protect by insurance for them. We think whatever could be done by an administrator for the creditor in this respect could be done directly by the creditor for himself. *Rohrbach* v. *Germania F. Ins Co.* 62 N. Y. 47, 20 Am. Rep. 451. Other reasons might be given, but we are of opinion these are sufficient to show that the creditor of a deceased debtor, whose estate is insufficent to pay the debts, has an insurable interest in the property of the estate, which by law may be subjected by proceedings *in rem* to the payment of the debts. The recovery cannot exceed the amount of the insurable interest.

The next question is whether the pleadings show such an insurable interest. The pleas and the replication appear to have been drawn with technical caution, so far as the rights of Mattie Flinn, the creditor, are affected. The plea shows that the building and lot upon which it is located belonged to the estate of Thomas Creed, deceased, and that neither of the assured are his legal heirs. Upon the death of Thomas Creed the land descended to his legal heirs. Prima facie, upon the fact of the plea, the insured owned no insurable interest. The replication avers that Katie Creed was the widow of Thomas Creed, and that he owned no other real estate, and this statement of facts is followed with the conclusion that she owned a dower and homestead interest. Hers was clearly an insurable interest. Its value is a fact to be ascertained by proof. The replication then further averred that Mattie Flinn was a creditor of Thomas Creed, stating the amount of her claim, the insufficiency of personal assets to pay the debts, and that there was no other real property belonging to his estate. The

interest shown by the plea to be in Katie Creed (dower and homestead) does not include the entire estate. Under the replication there is a remainder interest in the real estate liable for the debts of the estate. The pleadings inform us that the lot and building were in the city of Montgomery. Whether it exceeded in value $2,000, the constitutional limit of the value of the homestead exempt from debts during the lifetime of the widow, does not appear. We are not unmindful of the statutory provision by which, under some circumstances, the fee to the homestead may become vested in the widow and minor children or widow or minor child. The consideration of these questions does not arise upon the pleadings. The court erred in sustaining the demurrer to the replication.

Reversed and remanded.

IOWA SUPREME COURT.

C. SLATER
v.
CAPITAL INSURANCE CO., *Appt.*

(........Iowa........)

1. **A waiver of proofs of loss under a policy upon a building,** made by an adjuster sent by the same company to adjust a loss upon the contents of such building, under a policy held by a firm of which the holder of the former policy was a member, is binding upon the company, in the absence of notice to the insured of any limitation upon the authority of such adjuster.

2. **In an action upon a policy of insurance, evidence as to a loss and adjustment under a policy held by a firm of which the plaintiff was a member,** upon the contents of the building covered by the policy sued on is admissible to show the connection of the two losses and the relation of the parties to the suit in the two transactions, upon the question whether an adjuster who adjusted the loss of the firm had authority to waive proofs of loss under the policy in question.

3. **Upon the trial of an action upon an insurance policy, instructions** that authority from the defendant to a certain adjuster to adjust and settle the loss of a firm of which the plaintiff was a member, would not give him authority to bind the defendant as to the loss of the plaintiff under the policy in question, and that the fact that authority was given him to settle the firm loss is proper to be considered as a circumstance to show the relation existing between defendant and such adjuster, and that from that and from other facts and circumstances shown by the evidence, the jury must say whether such adjuster was authorized to adjust and settle plaintiff's loss or not, are not conflicting or erroneous as regards the defendant.

(January 18, 1894.)

APPEAL by defendant from a judgment of the District Court for Cass County in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of fire insurance. *Affirmed.*

The facts are stated in the opinion.

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

An agent's authority cannot be shown by evidence of his own declarations and statements.

Sax v. *Davis,* 81 Iowa, 692.

It is the duty of a party who deals with an agent to inquire into the nature and extent of his authority and to deal with him accordingly.

Towle v. *Leavitt,* 23 N. H. 360, 55 Am. Dec. 195; *Brown* v. *Johnson,* 12 Smedes & M. 398, 51 Am. Dec. 118; *Baxter* v. *Lamont,* 60 Ill. 237.

Persons dealing with an assumed agent are bound at their peril to ascertain, not only the fact of agency but the extent of authority.

Mechem, Ag. §§ 276-284; *Dickinson County* v. *Mississippi Valley Ins. Co.* 41 Iowa, 286; *Davies* v. *Lyon,* 36 Minn. 427.

Several instances of appointment as special agent are not admissible to prove general agency.

Winch v. *Baldwin,* 68 Iowa, 764; *Green* v. *Hinkley,* 52 Iowa, 633; *Mathews* v. *Gilliss,* 1 Iowa, 242.

Where a person is authorized to sign the name of another to a note for a specified sum, the payee will be charged with knowledge of the extent of such authority and the principal will not be bound beyond it.

Blackwell v. *Ketcham,* 53 Ind. 185; *Stovall* v. *Com.* 84 Va. 246.

Whoever deals with an agent is put on his guard by that very fact and does so at his risk. It is his right and duty to inquire into and ascertain the nature and extent of the powers of the agent.

Chaffe v. *Stubbs,* 37 La. Ann. 656; *Buzard* v. *Jolly* (Tex.) Dec. 20, 1887; Mechem, Ag. §§ 393, 706-716, pp. 288-392; 1 Parsons, Cont. p. 41; *Edwards* v. *Dooley,* 120 N. Y. 540.

An agent to adjust a particular loss cannot bind his principal by acting with reference to another loss.

Hartford F. Ins. Co. v. *Smith,* 3 Colo. 422.

Mr. **L. L. DeLano** for appellee.

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

The plaintiff was the owner of a livery barn at Atlantic, Iowa, on which the policy in suit issued, which is numbered 2,241. The policy issued to the plaintiff. The defendant also issued a policy on the contents

NOTE.—The above case is a somewhat novel application of the doctrine that one who holds another out as his agent with certain powers will be estopped to deny his authority when strangers have dealt with him in reliance upon such representations, which doctrine will be found in cases collected in *notes* to Wheeler v. McGuire (Ala.) 2 L. R. A. 808, and Hubbard v. Tenbrook (Pa.) 2 L. R. A. 823.

of the barn to Slater & Eller, the Slater of the firm being the same person as the plaintiff. The Western Home Insurance Company also issued separate policies on the same property to the same persons. Other companies also issued policies in the same way. On the 3d day of May, 1888, and while the policies were in force, the building and contents were destroyed by fire. The policy issued to Slater & Eller by defendant was numbered 2,239. Notice of loss was given to the company under the two policies. Under the policy in suit, No. 2,241, no proofs of loss were made, and the defense to the suit is based on that fact, so far as concerns this appeal. In avoidance of the failure to make such proofs the plaintiff pleaded a waiver by the defendant.

One E. F. Philbrook was the adjusting agent for the Western Home Insurance Company, and visited Slater & Eller for the purpose of adjusting the loss of that company. On his way he called at the office of the defendant company at Des Moines, and was by its secretary, H. E. Teachout, asked to act for the defendant company with reference to its loss; but there is some conflict as to the extent of his authority to so act. It is the claim of the plaintiff that, under his authority, he could legally bind the defendant as to adjustments under both policies, while it is that of the defendant that he was merely authorized to "adjust or take proofs of loss," under policy 2,239. At the close of plaintiff's direct testimony, and again at the close of the testimony in the case, the defendant moved the court to instruct for a verdict in its favor on the ground that there was no testimony from which the jury could properly find that Philbrook had authority to act for defendant with reference to the loss under the policy in suit. In each case the motion was overruled, of which rulings complaint is here made, and the consideration of the questions thus presented will largely dispose of the questions in the case. It will only be necessary to consider the ruling upon the second motion, because if, in the further progress of the trial, after ruling upon the first motion, the state of the evidence was so changed that such a motion was properly overruled, the first ruling, even if erroneous, was without prejudice.

1. Under the authority granted to Philbrook by defendant's secretary, he so acted that the loss of Slater & Eller was adjusted and paid. His own report to the defendant shows that he not only took proofs of loss, but that he also exercised the authority of adjusting values by agreement, and the company acted upon his report. This fact, with the statement in argument by appellant that he was authorized to "adjust or take proofs of loss," warrants the conclusion with us that he was before Slater & Eller as the company's authorized adjuster. With this relationship fixed, we can more easily apply the evidence as to Philbrook's authority to bind defendant as to the loss under the policy in suit. It will be remembered that other companies than the defendant and the Western Home Company, for which Philbrook acted under the Slater & Eller loss, carried risks on the livery barn; and these other companies and Slater, at the time of this adjustment by Philbrook of the Slater & Eller loss, had agreed upon terms of arbitration, and there were at that time no adjustments under the policy in suit. The facts upon which plaintiff relies to support his plea of waiver are that at the time of the adjustment of the Slater & Eller loss he and Philbrook agreed that no proofs of loss under the policy in suit need be made, and that the claim should abide the result of the arbitration with the other companies, the defendant to pay its proportion of the loss as thus ascertained; and that, relying upon such agreement, no proofs of loss were made; and this suit is for the proportion as fixed by the arbitration. The evidence is conflicting, but the state of it is such that the jury could, as it must, have found that such an agreement was made, and with its finding we should not interfere if, in making such agreement, he could legally bind the defendant. What, then, as between plaintiff and defendant, is the legal effect of the authority granted to Philbrook? The company had sent him to Slater & Eller as their adjuster. Neither the company nor Philbrook intimated that his authority as an adjuster was limited, but, on the contrary, he in the one case authoritatively exercised the usual powers of such an agent. The company had said to both Slater and Eller: "This is my authorized agent. Deal with him as such." In view of the finding of the jury, we may say that Philbrook assumed the same authority for adjustment under one policy as under another. The rule of appellant's contention would require us to hold that Slater, after dealing with him as an authorized adjuster with him and Eller in regard to the loss on the contents of the barn on one policy, could not recognize him as an adjuster on a loss on another policy from the same company to him resulting from the same fire. We think that such a rule should not obtain. Looking to the manner in which the insurance business of the country is transacted, through agents, distant from the home offices of the companies, by which patrons neither see nor know any other than the soliciting agent, who, upon a written application, either issues or procures and delivers the policy, and, after loss, the adjuster, through whom the business of adjustment is carried on, and the consequences of the rule contended for will be apparent. The rules of law are designed to be in harmony with the natural and reasonable conduct of parties in their business intercourse, and with the changed condition in the business intercourse of the country from time to time must come such changes in the laws governing legal rights as will maintain such harmony. Philbrook had been sent to Slater as an adjuster. It is the law that Slater must, at his peril, know of Philbrook's authority to act as such; but with his knowledge that he was an adjuster came the legal right to assume that his power was commensurate with the duties of adjustment between the persons to whom he was sent and the company as to all matters that should reasonably be considered as intended by the company. We think that,

after the adjustment of the Slater & Eller loss by Philbrook, no reasonable person would have doubted his pretended authority to adjust the loss on the barn, particularly in view of the close identity of the losses as to parties and circumstances. It was the act of the company that gave rise to this reasonable belief on the part of Slater by sending Philbrook as adjuster. If an insurance company does not wish to be bound up by so broad a presumption as to the authority of an adjuster, a reasonable and very just rule, as applied to the present method of insurance business, would require that it should impart to the assured the limitations upon his authority, by which means the parties could act upon an equality,—a condition absolutely forbidden by the rule contended for.

The general importance of the rule we are considering will justify a somewhat extended quotation from *Union Mut. L. Ins. Co. of Maine* v. *Wilkinson*, in 80 U. S. 13 Wall. 222, 20 L. ed. 617, where the United States Supreme Court has adopted reasoning somewhat similar to ours with like conclusions. We quote therefrom as follows: "It is well known," said the court "(so well that no court would be justified in shutting its eyes to it), that insurance companies organized under the law of one state, and having in that state their principal business office, send these agents all over the land, with directions to solicit and procure applications for policies, furnishing them with printed arguments in favor of the value and necessity of life insurance, and of the special advantages of the corporation which the agents represent. They pay these agents large commissions on the premiums thus obtained, and the policies are delivered at their hand to the assured. The agents are stimulated by letters and instructions to activity in procuring contracts, and the party who is in this manner induced to take out a policy rarely sees or knows anything about the company or its officers by whom it is issued, but looks to and relies upon the agent who has persuaded him to effect insurance as the full and complete representative of the company in all that is said or done in making the contract. Has he no right to so regard him? It is quite true that the reports of judicial decisions are filled with the efforts of these companies, by their counsel, to establish the doctrine that they can do all this, and yet limit their responsibility for the acts of these agents to the simple receipt of the premium and delivery of the policy; the argument being that, as to all other acts of the agent, he is the agent of the assured. The proposition is not without a support in some of the earlier decisions on the subject; and at a time when insurance companies waited for parties to come to them to seek assurance, or to forward applications on their own motion, the doctrine had a reasonable foundation to rest upon. But to apply such a doctrine, in its full force, to a system of selling policies through agents, which we have described, would be a snare and a delusion, leading, as it has done in numerous instances, to the grossest frauds, of which the insurance corporations receive the benefits, and the parties supposing themselves insured are the victims. The tendency of the modern decisions in this country is steadily in the opposite direction. The powers of the agent are prima facie coextensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals. An insurance company establishing a local agency must be held responsible to the parties with whom they transact business for the acts and declarations of the agent within the scope of his employment as if they proceeded from the principal." The arguments in that case apply with strong, if not with equal, force to the business of fire insurance, and to the duties and authority of agents acting for companies after losses occur. In view of the business zeal and competition of the times, with insurance companies we may say "no stone is left unturned" to secure applications, and to this end agents wait upon desired customers in field and shop and home, to urge their superior claims for patronage. After a loss occurs, agents are promptly on the ground for investigation, conference, and adjustment. Under the business education of the times they are factors by and through which patrons may know and deal with the companies. The agent is the representative of the company. Now, it is certainly a reasonable rule that when an agent approaches a patron who has met with a loss, he may know to what extent he can safely act or deal with him as such agent. The company has that knowledge. If they are to do business upon equal terms, the patron should also have it. It is hardly to be expected that the business of adjustment must await a correspondence between the assured and the company to know the fact. But two other methods are open: First, that the company shall give notice of the authority possessed by its agent; or, second, that the assured may lawfully assume that the agent has authority to transact the business in hand as if possessing general powers for that purpose. Such a rule has full support in *Union Mut. L. Ins. Co. of Maine* v. *Wilkinson*, *supra*, and also in considerations of both public and private good. See, also, as bearing on this question, *Silverberg* v. *Phenix Ins. Co.*, 67 Cal. 36, and to some extent, *American Ins. Co.* v. *Gallatin*, 48 Wis. 36.

There are very many cases in which other, but somewhat kindred, subjects are discussed, wherein, from the reasoning, this position receives support. Of those, see *Morrison* v. *Insurance Co. of North America*, 69 Tex. 353; *Cleaver* v. *Traders Ins. Co.* 71 Mich. 414; *Schomer* v. *Hekla F. Ins. Co.* 50 Wis. 575; *Alexander* v. *Continental Ins. Co. of New York*, 67 Wis. 422, and cases therein cited.

It should be stated that the state of Wisconsin has a general statute on the subject, which controls the decisions of that state to some extent. We think the facts of this case justify the application of such a rule, and that the company is responsible for failure to make the proofs of loss. The evidence and admissions were such that, under the law as

we have expressed it, it was not error to refuse the motion to instruct the jury to return a verdict for the defendant.

3. There is a complaint that the court admitted evidence as to the Slater & Eller loss and adjustment, and it will be seen that we think such testimony was proper, as showing the connection of the two losses, and the relation of the parties to this suit in the two transactions. The court told the jury that "authority from the defendant to Philbrook to adjust and settle the Slater & Eller loss would not give authority to bind the defendant as to the loss of the plaintiff under the policy in question," and of this appellant does not complain; but the court further says: "Still the fact that authority was given him to settle the Slater & Eller loss is proper to be considered by you as a circumstance to show the relations existing at the time between defendant and said Philbrook, and from these and every other fact and circumstance shown by the evidence you must say whether said Philbrook was authorized to adjust and settle plaintiff's loss or not." We see no error in the instruction. The two statements are not in conflict. The first deals with the legal effect, only, of a particular fact, and the latter permits its use with other facts to reach a conclusion. It may be said that the theory on which the court submitted the case differs from the rule announced by us in this: that it required the jury to find as a fact that Teachout authorized Philbrook to act for the company in adjusting the Slater loss, without stating the presumption arising from the fact of his being sent to Slater as the company's adjuster. But appellant cannot complain of the neglect to state a presumption of law against it. We think the effect of the instructions, taken together, was to permit the jury to assume from the manner in which Philbrook was sent, in view of the entire surroundings, the authority to act in the Slater case. While the court did not, in terms, state the rule as to presumptions, it was inferable from the instructions given.

There is no error in the record, and *the judgment is affirmed.*

NEW JERSEY COURT OF ERRORS AND APPEALS.

Lillie A. KEEPERS, *Plff. in Err.*,
v.
FIDELITY TITLE & DEPOSIT CO.
(Two Cases.)

(.........N. J.........)

*1. **The plaintiff's sister, on her death-bed, delivered to the plaintiff the key of a box,** saying: "I give you the box and all it contains." The box was in another room of the house, locked in a closet, the key of which was in possession of the plaintiff's mother, with whom the sister lived. The plaintiff lived elsewhere, and during her sister's life, made no attempt to take possession of the box. *Held,* that there was no such delivery of securities contained in the box as is essential to a valid *donatio mortis causa.*

2. **A will directed that testator's property be divided equally between his daughters,** each to come into possession of her share on arriving at the age of twenty-three years, and that, in case of the death of either before arriving at that age, her children should inherit the parent's share, but, if no issue, then the survivor of the daughters should take the other's share. *Held,* that the will gave the survivor no right to the share of her sister, dying after she had reached the age of twenty-three years.

(*Abbett, J., dissents.*)

(February 26, 1894.)

ERROR to the Circuit Court for Essex County to review a judgment in favor of defendant in actions brought to recover the amount of a savings bank deposit and certain securities and certificates of stock. *Affirmed.*

*Headnotes by DIXON, J.

NOTE. As to sufficiency of constructive delivery to sustain gift *causa mortis*, see Page v. Lewis (Va.) 15 L. R. A. 170, and *note.*

Statement by **Dixon,** *J.:*

The plaintiff, Lillie A. Keepers, brought two suits in the supreme court against the Fidelity Title & Deposit Company,—one, an action on contract, to recover $418.22, the balance of $970 which had been deposited in the Howard Savings Institution by and in the name of Minnie I. Munn; and the other, an action of replevin, to obtain possession of stock certificate No. 2,459, for forty-one shares of the capital stock of the American Insurance Company, a bond made by the plaintiff to Minnie I. Munn for $1,000, and a bond made by John Bernreuther to James T. Van Ness for $400, which had been assigned to Minnie I. Munn. On the trial of these suits, in the Essex circuit, it appeared that all the things in controversy had belonged to the plaintiff's sister, Minnie I. Munn; and the plaintiff testified that her sister, while upon her death-bed, at home, a few hours before she lapsed into final unconsciousness, sent for the plaintiff, who lived elsewhere, and, on the plaintiff's coming into the room, the following incident took place: "My sister turned to my mother, and said 'to get those things for her.' My mother asked, 'What things?' and she replied, 'My things in the bureau.' My mother then brought to her from the bureau drawer a handkerchief, containing some things, and then she asked my mother to leave the room, which she did. My sister then opened the handkerchief, and it contained some jewelry and a little bag. From the bag she took a tiny key, and said to me, 'You see that key.' I said, 'Yes;' and she handed it to me, and said: 'There, that key I have carried in my bosom until it is rusty. It is the key of the box, and that I give to you, and all it contains.' Then she took the handkerchief, with the jewelry in it, and held the four corners

of it up, and passed it over to me, saying: 'There, I give you these. I have no more use for them.'" It further appears that, at that time, the box which this key fitted was in another room of the same house, locked in a closet of which Miss Munn's mother had the key, and that the box contained the savings bank book showing Miss Munn's deposit in the Howard Savings Institution, the stock certificate, and the two bonds, besides many other papers, some of which did not belong to Miss Munn. During Miss Munn's life the plaintiff did not ask her mother for the key of the closet, or make any attempt to assume control over or take possession of the box or its contents, nor did the box and contents ever come into her possession, but they were taken by the defendant company, as the administrator of Miss Munn. On these facts the trial justice ruled that there was not such a delivery of the things in controversy as was necessary to make a valid *donatio mortis causa*. The plaintiff also claimed that the stock of the American Insurance Company and the Bernreuther bond had been the property of her father, and, on the death of her sister, had become hers, by force of the following provision in her father's will: "Item 5. Subject to the foregoing uses and exceptions, I give, devise, and bequeath all my estate . . . to my two daughters, Lillie Alma and Minnie Ida, to be divided between them equally, share and share alike, each one to come into possession of her respective share upon arriving at the age of twenty-three years, and not before; and, in case of the decease of said Lillie or Minnie before they are twenty-three years of age, the children of said deceased shall inherit the parent's share; but, if there be no issue, then the survivor of the two last mentioned sisters shall take the other's share, and upon each respectively arriving at the age of twenty-one years, the interest of her share shall be paid to her direct." Both sisters had passed the age of twenty-three years, and, in the division of their father's estate, the stock and bond had been transferred to Minnie, as part of her share. She died unmarried. The trial justice overruled this claim of the plaintiff. Upon exception taken to these decisions, the present assignments of error are founded.

Mr. **Robert H. McCarter,** for plaintiff in error:

Choses in action belonging to the donor, though unindorsed, or unassigned save by delivery, are the subjects of a *donatio causa mortis.*

Duffield v. *Elwes*, 1 Bligh, N. S. 497; *Rankin* v. *Weguelin*, 27 Beav. 309; *Austin* v. *Mead*, L. R. 15 Ch. Div. 651; *Clement* v. *Cheesman*, L. R. 27 Ch. Div. 631; *Duffin* v. *Duffin*, L. R. 44 Ch. Div. 76; *Ridden* v. *Thrall*, 11 L. R. A. 684, 125 N. Y. 572; *Pierce* v. *Boston Five Cents Sav. Bank*, 129 Mass. 430, 37 Am. Rep. 371; *Hill* v. *Stevenson*, 63 Me. 364, 18 Am. Rep. 231; *Camp's App.* 36 Conn. 88, 4 Am. Rep. 39; *Hewitt* v. *Kaye*, L. R. 6 Eq. 198; *Matthews* v. *Hoagland*, 48 N. J. Eq. 485; *Grymes* v. *Hone*, 49 N. Y. 17, 10 Am. Rep. 313; *notes* to *Ellison* v. *Ellison* and *Ward* v. *Turner*, 1 Lead. Cas. in Eq. 199.

The practical question therefore is, What is a sufficient delivery? It may be actual—a manual possession of the article itself by the donee or his agent—or constructive. If constructive, it must be more than mere words, and more than any symbolic act. A constructive delivery must be something which completely terminates the donor's custody and control of the article donated, and which places it wholly under the donee's power, and enables him without further act on the donor's part to reduce it to his own manual possession.

Pom. Eq. Jur. § 1149; *Cook* v. *Lum* (N. J.) June 8, 1893.

A delivery of a key to a box, chest, or room, is a sufficient constructive delivery of the articles contained in the receptacle, on the principle that the donor thereby parts with all control, and places in the donee's hands the means of reducing the articles into his manual possession.

Bunn v. *Markham*, 7 Taunt. 224; *Smith* v. *Smith*, 2 Strange, 955; *Jones* v. *Selby*, Finch, Prec. in Ch. 300; *Hawkins* v. *Blewitt*, 2 Esp. 622; *Reddel* v. *Dobree*, 10 Sim. 245; *Cooper* v. *Burr*, 45 Barb. 9; *Coleman* v. *Parker*, 114 Mass. 30; *Pink* v. *Church*, 38 N. Y. S. R. 735; *Phipard* v. *Phipard*, 55 Hun, 439; *Miller* v. *Jeffress*, 4 Gratt. 472; *Trenholm* v. *Morgan*, 28 S. C. 268; *Yancey* v. *Field*, 85 Va. 756; *Page* v. *Lewis*, 18 L. R. A. 170, 89 Va. 1; *Crook* v. *First Nat. Bank of Baraboo*, 83 Wis. 31; *Jones* v. *Weakley* (Ala.) 19 L. R. A. 700; *Stephenson* v. *King*, 81 Ky. 425, 50 Am. Rep. 173; *Debinson* v. *Emmons*, 158 Mass. 592; *Basket* v. *Hassell*, 107 U. S. 602, 27 L. ed. 500; *Corle* v. *Monkhouse*, 50 N. J. Eq. 537.

Some text-writers have endeavored to distinguish between the case of bulky articles, incapable of manual tradition, and of a trunk or chest, holding that a key in the one case sufficed but not in the other, and invariably they quote as authorities—

Powell v. *Hellicar*, 26 Beav. 261; *Warriner* v. *Rogers*, L. R. 16 Eq. Cas. 346.

But in both of these the key, instead of being delivered, was expressly and purposely retained by the donor, and on that precise ground the attempted gifts were not sustained.

Mr. **Joyce** for defendant in error.

Messrs. **Riker & Riker** for estate of Minnie I. Munn.

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

The first question for solution is whether the delivery of the key of a box containing valuable papers is sufficient delivery to constitute a valid *donatio mortis causa* of the papers, when the box is not in the presence or immediate control of the donor, and does not pass into the actual possession of the donee during the lifetime of the donor. The leading case on the subject of *donations mortis causa* is *Ward* v. *Turner* (A. D. 1752), 2 Ves. Sr. 431, where *Lord Chancellor* Hardwicke laid down the rule with reference to delivery, which has ever since formed the basis whereon such gifts are supported. After showing that the recognition of *donations mortis causa* by the common law was derived from the civil law, he declared that the civil law had been "received in England, in respect of such donations, only so far as attended with

delivery, or what the civil law calls 'tradition;'" that "tradition or delivery is necessary to make a good *donatio mortis causa.*" He further said: "It is argued that, though some delivery is necessary, yet delivery of the thing is not necessary, but delivery of anything by way of a symbol is sufficient. But I cannot agree to that; nor do I find any authority for that in the civil law, which required delivery in some gifts, or in the law of England, which required delivery throughout. Where the civil law requires it, it requires actual tradition,—delivery over of the thing. So, in all the cases in this court, delivery of the thing given is relied on, and not in the name of the thing. . . . Yet," he added, "notwithstanding, delivery of the key of bulky goods, where wines, etc., are, has been allowed as delivery of the possession, because it is the way of coming at the possession, or to make use of the thing." Although this doctrine has received general approval in the courts of England and of this country, yet some divergence has taken place respecting the facts which may constitute the delivery required. For the purpose of giving effect to the difference mentioned by *Lord* Hardwicke between articles that were bulky and those that were not, it was usually stated in the earlier cases that the delivery must be according to the nature of the thing given such as the thing was reasonably capable of, while in later cases, as if ignoring the ground of the distinction, it has often been asserted that the situation, as well as the nature, of the thing, must be taken into consideration, and only such delivery was requisite as, under all the circumstances, the donor could conveniently make. On this footing, it has, in some instances, been adjudged that delivery of the key was sufficient delivery for a valid *donatio mortis causa* of money or documents locked in a trunk or other receptacle, not within the presence or immediate control of the donor, and not otherwise transferred to the possession of the donee. *Cooper* v. *Burr*, 45 Barb. 9; *Marsh* v. *Fuller*, 18 N. H. 360; *Jones* v. *Brown*, 34 N. H. 439; *Thomas* v. *Lewis*, 89 Va. 1, 18 L. R. A. 170; *Phipard* v. *Phipard*, 55 Hun, 439; *Pink* v. *Church*, 38 N. Y. S. R. 735. That in this respect these cases depart from the view intended to be expressed in the leading case is, I think, manifest by noticing *Lord* Hardwicke's comment on *Jones* v. *Selby*, Finch, Prec. in Ch. 300, and his ruling in *Smith* v. *Smith*, 2 Strange, 955. In *Jones* v. *Selby* the donor had called his cousin, who was his housekeeper, and two of his servants, and said, "I give to my cousin, Mrs. Wetherley, this hair trunk, and all that is contained in it," and delivered her the key thereof; and, on the strength of this, Mrs. Weherley claimed a £500 tally as part of the contents of the trunk. This claim was allowed by the master of the rolls as a valid *donatio mortis causa*, and would have been allowed by *Lord Chancellor* Cowper, on appeal, except for lack of full proof that the tally was in the trunk at the time, and his conclusion that the gift was satisfied by a legacy to the donee given in a will subsequently made by the donor. On this *Lord* Hardwicke's comment was: "The only case wherein such a symbol seems to have been held good is *Jones* v. *Selby*, but I am of opinion that amounted to the same thing as delivery of the possession of the tally, provided it was in the trunk at the time." He thus seems to state that, with regard to the tally, the key was but a symbol, the delivery of which he had just declared to be insufficient, but that the circumstances showed a delivery of the trunk, and consequently of the tally, if in the trunk. *Smith* v. *Smith*, 2 Strange, 955, was a ruling at *nisi prius*, where the plaintiff's intestate, having lodgings in the defendant's house, had brought there furniture and plate, and had said that whatever he brought into those lodgings he did not intend to take away, but gave directly to defendant's wife. Whenever he went out of town, he used to leave the key of his lodgings with the defendant. He having died, probably out of town (see *Bunn* v. *Markham*, 7 Taunt. 224), *Lord* Hardwicke, then chief justice, permitted the jury to find a valid gift. This ruling accords with the view expressed in the leading case upon the idea that the things given were too bulky for actual delivery, otherwise than by leaving them in the defendant's house, and giving him the key of the rooms. The same distinction is clearly noted in *Hatch* v. *Atkinson*, 56 Me. 324, 96 Am. Dec. 464, and other cases.

The opinion that delivery of a key is equivalent to the delivery of documents locked up under the key is not at all supported by the views announced in such cases as *Hawkins* v. *Blewitt*, 2 Esp. 663; *Bunn* v. *Markham*, 7 Taunt. 224, and *Warriner* v. *Rogers*, L. R. 16 Eq. Cas. 340, where the retention of the key by the donor was deemed to negative the claim of a gift; for, to constitute a gift, there must be, besides delivery of the thing, an intention to transfer to the donee complete dominion over it, and the withholding of the key proved that no such intention existed, notwithstanding the fact of delivery. Nor is that opinion, in its general form, fully sustained by cases like *Dobinson* v. *Emmons*, 158 Mass. 592, where the receptacle was in the immediate presence and control of the parties, in a room occupied by the donee, as well as the donor, and where the only external sign of the exclusive possession of the receptacle was the actual possession of the key. Under such circumstances, tradition of the key might be considered tantamount to tradition of the receptacle and its contents, without giving the same force to the tradition of the key when the receptacle was away from the presence of the parties, and in the actual possession of a third person. We are not willing to approve the extreme views which have been adopted in the cases cited. We agree with the sentiment expressed in *Ridden* v. *Thrall*, 125 N. Y. 572, 11 L. R. A. 684, that "public policy requires that the laws regulating gifts *causa mortis* should not be extended, and that the range of such gifts should not be enlarged." When it is remembered that these gifts come into question only after death has closed the lips of the donor; that there is no legal limit to the amount which may be disposed of by means

of them; that millions of dollars' worth of property is locked up in vaults, the keys of which are carried in the owners' pockets; and that, under the rule applied in those cases, such wealth may be transferred from the dying owner to his attendant, provided the latter will take the key, and swear that it was delivered to him by the deceased for the purpose of giving him the contents of the vault,—the dangerous character of the rule becomes conspicuous. Around every other disposition of the property of the dead, the legislative power has thrown safeguards against fraud and perjury; around this mode, the requirement of actual delivery is the only substantial protection, and the courts should not weaken it by permitting the substitution of convenient and easily-proven devices. We think the trial justice properly decided that the evidence would not warrant the jury in finding such a delivery as is essential to a *donatio mortis causa*. Nor was there any error in his ruling that the plaintiff had no title under the will of her father. That instrument made the estate of each of his daughters indefeasible upon her arriving at the age of twenty-three years. Only in case she died before that period and without issue, was there a gift over to her surviving sister. *Van Houten* v. *Pennington*, 8 N. J. Eq. 745.

The judgments should be affirmed.

Abbett, *J.*, dissents.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Samuel M. WATTS
v.
Ellen M. WATTS.

(........Mass........)

A cause of action for divorce in favor of the husband on the ground of the wife's adultery is not barred by failure to set it up as a defense to a suit by the wife for a separate maintenance, in which she obtains a decree.

(February 27, 1894.)

EXCEPTIONS by plaintiff to rulings of the Superior Court for Plymouth County made during the trial of a libel for divorce, which resulted in the dismissal of the libel. *Sustained.*

At the trial it appeared that the libelee was discovered by libelant on June 4, 1892, in the act of adultery. Libelant ejected her from his house and on June 6, 1892, she brought suit for separate maintenance. Libelant defended but offered no evidence of the adultery. August 22, 1892, the probate court entered a decree for libelee, reciting that for justifiable cause she was living apart from her husband. No appeal was taken. The court ruled in this case that that decree was a bar to the maintenance of this libel.

Further facts appear in the opinion.

Messrs. **Simmons & Pratt**, for libelant:

It does not follow because of the failure of the libelant to put in evidence the Adulterous Act of June 4, 1892, that he is concluded by the rule that the judgment of the probate court rendered not only upon the issues there being tried, but upon all that might have been tried in that action is a bar to any subsequent action between the same parties.

1. Because the probate court upon the wife's petition had no authority to decree a judicial separation of the parties. It cannot suspend the marriage status. It affects to a limited extent the rights and duties of the parties, except so far as they are modified by the decree.

Barney v. *Tourtellotte*, 138 Mass. 106.

It might decree a separate maintenance of the libelee for the husband's gross cruelty or confirmed habits of intoxication, but such conduct upon his part is not a license for her to commit adultery.

Lea v. *Lea*, 99 Mass. 496, 96 Am. Dec. 772; *Lyster* v. *Lyster*, 111 Mass. 327; *Franklin* v. *Franklin*, 13 L. R. A. 843, 154 Mass. 515, and cases there cited.

2. The fact determined by the decree is not necessarily inconsistent with the necessary allegation in the libel and it does not therefore fall within the rule laid down in *Miller* v. *Miller*, 150 Mass. 111.

3. It is not to be taken for granted that because the record is silent upon this point, the actions by the wife in the probate court and by the husband in the superior court were for the same cause. On the contrary it may fairly be assumed and argued that the recrimination by way of which the decree was set up consisted in his violence at the time of ejecting her from his house. If they are not for the same cause of action the decree is not a bar to the maintenance of this libel.

Foye v. *Patch*, 132 Mass. 111; *Burlen* v. *Shannon*, 99 Mass. 200, 96 Am. Dec. 733; *Lea* v. *Lea*, *supra*; *Hawks* v. *Truesdell*, 99 Mass. 557; *Cromwell* v. *Sac County*, 94 U. S. 351, 24 L. ed. 195.

Mr. **Chester M. Perry**, for libelee:

(*a*) The probate court had jurisdiction in the matter of the petition of the libelee for separate support and maintenance.

Pub. Stat. chap. 147, § 33.

(*b*) The parties being the same, the decree of the probate court must have the same binding effect as the judgment of any other court having jurisdiction.

Smith v. *Rice*, 11 Mass. 507; *Emery* v. *Hildreth*, 2 Gray, 228; *Pierce* v. *Prescott*, 128 Mass. 140; *McKim* v. *Doane*, 137 Mass. 195; *Miller* v. *Miller*, 150 Mass. 111.

It appears from the bill of exceptions that the libel alleges adultery with one Ford, on the fourth day of June, 1892, and on divers other

NOTE.—The decision in the above case as to the effect, to bar a divorce, of a decree for separate maintenance, in which the wife's adultery is not set up as a defense, seems to be one of first impression.

days and times during the three years next preceding said fourth day of June; and that the libelant ejected the libelee from his house on the said fourth day of June, at which time he discovered her committing adultery with said Ford. The bill of exceptions does not show what the evidence was which the libelant relied on in the defense to the petition of his wife for separate support and maintenance, yet it is certain that the issue there was the wife's conduct during marriage, and it is fair to infer, from the above facts, that his defense to said petition was the adultery of the libelee; and, although it appears by the bill of exceptions that no evidence was offered, at the hearing on said petition for separate support and maintenance, of the particular act of adultery of June 4, 1892, yet it does appear that the libelant alone knew of it, and he cannot now complain of his own laches; and the finding of the probate court that the libelee was living apart from her husband for justifiable cause estops him from again litigating the same issue.

Com. v. *Evans*, 101 Mass. 25; *Thurston* v. *Thurston*, 99 Mass. 39; *Lea* v. *Lea*, Id. 493, 96 Am. Dec. 772; *Lewis* v. *Lewis*, 106 Mass. 309.

The probate court, by its decree that the libelee was living apart from her husband for justifiable cause, has judicially determined the fact that she was guilty of no matrimonial offense that would entitle her husband to a divorce, and the libelant's exceptions cannot be sustained without virtually impeaching the correctness of said decree, which, from motives of public policy, the law does not permit to be done.

Burlen v. *Shannon*, 99 Mass. 200, 96 Am. Dec. 733.

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

In regard to subjects of which the probate court has jurisdiction, and upon parties brought within its jurisdiction, a decree of that court, like a judgment of other courts, is conclusive. *Miller* v. *Miller*, 150 Mass. 111; *McKim* v. *Doane*, 137 Mass. 195; *Pierce* v. *Prescott*, 128 Mass. 140; *Laughton* v. *Atkins*, 1 Pick. 535.

The decree introduced at the trial, being between the same parties as those in the present action, is binding and conclusive upon them in this suit in regard to all matters shown to have been put in issue, or to have been necessarily involved, in the former suit, and actually tried and determined in it. In regard to matters not then in controversy, and not heard and determined, although it is conclusive so far as the final disposition of that cause of action is concerned, it is not conclusive to prevent a determination of them according to the truth, if they are subsequently controverted in a different case. *Foye* v. *Patch*, 132 Mass. 111; *Com.* v. *Evans*, 101 Mass. 25; *Burlen* v. *Shannon*, 14 Gray, 433–437; *Thurston* v. *Thurston*, 99 Mass. 39; *Lewis* v. *Lewis*, 106 Mass. 309; *Burlen* v. *Shannon*, 99 Mass. 200, 96 Am. Dec. 733; *Hawks* v. *Truesdell*, 99 Mass. 557; *Lea* v. *Lea*, Id. 496, 96 Am. Dec. 772; *Cromwell* v. *Sac County*, 94 U. S. 351, 24 L. ed. 195.

It would be a harsh and oppressive rule which should make it necessary for one sued on a trifling claim to resist it and engage in costly litigation in order to prevent the operation of a judgment which would be held conclusively to have established against him every material fact alleged and not denied in the declaration, so as to preclude him from showing the truth if another controversy should arise between the same parties. There might be various reasons why he would prefer to submit to a claim rather than to defend against it. For the purpose of defending that suit he would have his day in court but once, and if he chose to let the case go by default, or with a trial upon some of the defenses which might be made, and not upon others, he would be obliged forever after to hold his peace. But a plaintiff can claim no more than to be given what he asks in his writ. He cannot justly complain that the defendant has not seen fit to set up defenses and raise issues for the purpose of enabling him to settle facts for future possible controversies. In subsequent proceedings which are independent of the original suit, the judgment in that suit is conclusive as evidence, or may be pleaded as an estoppel, only as to those matters which were put in issue and determined; but it is not necessary that these should be particularly mentioned in the pleadings, if they are involved in the issue made up, and if the case is determined upon the trial of that issue. The bill of exceptions in this case shows nothing in regard to the pleadings, further than that there was a petition brought under Pub. Stat., chap. 147, § 33, and that the respondent appeared and defended against it. It appears that no evidence was offered of the act of adultery on June 4, 1892, and we infer that it was not set up in answer to the petition. We must assume that the respondent's pleading was a general denial. Was the question whether the petitioner had committed adultery, as now appears, necessarily involved in the issue made up by an affirmation and denial that she was living apart from her husband for justifiable cause? The grounds of the decree do not appear. Could such a decree have been made upon any possible state of facts, if the petitioner had been known to have committed adultery on June 4, 1892? If so, the decree could not be held to be a bar to a divorce unless the only facts which would render the decree possible are such as would, of themselves, preclude the libelant from obtaining a divorce. The decision that a wife is living apart from her husband for a justifiable cause, made upon a hearing between them on the general issue, conclusively shows that she has not utterly deserted him. *Miller* v. *Miller*, 150 Mass. 111.

Living apart from a husband under such circumstances as to constitute utter desertion, for which a divorce may be granted, is a marital wrong, and cannot be legally justifiable. But facts may be supposed upon which the decision of the probate court might have been made in the present case, even if it was known that the wife was guilty of adultery of which the husband had knowledge. If he had for a long time been guilty of extreme cruelty towards her, and had inflicted serious bodily injury upon her when

he ejected her from his house, and then had asked her to return to his home, and had offered to forgive the adultery if she would come back, she would have been justified in refusing to return, on the ground that she had reason to fear great injury from his cruelty if she continued to live with him. If such facts appeared, the court might well decide that she was justifiably living apart from him on account of his cruelty, notwithstanding her adultery, which he was willing to forgive. It is obvious, therefore, that the decision in her favor on the question whether she was living apart from him for a justifiable cause is not necessarily a finding that she was not guilty of adultery; and upon the record before us it cannot be said that her guilt or innocence was necessarily involved in the issue then tried.

It may be said, however, that the facts above supposed are such as would bar his suit for a divorce, and that therefore such an hypothesis cannot help him in this case. It is true that the extreme cruelty of a libelant is a defense to a libel for a wife's adultery. *Handy* v. *Handy*, 124 Mass. 394; *Cumming* v. *Cumming*, 135 Mass. 386-389, 46 Am. Rep. 476; *Morrison* v. *Morrison*, 142 Mass. 361, 56 Am. Rep. 688. But there may be other causes which would justify her in living apart from him, less than those which would be a ground for a divorce in her favor. Such causes could not be availed of as an answer to his libel for a divorce on the ground of her adultery, although they might warrant this finding of the probate court. Against this proposition it is argued forcibly, by a prominent author, that no cause should be deemed sufficient to justify withdrawal from cohabitation which is not enough to call for a judicial separation. 1 Bishop, Marriage, Divorce & Separation, § 1753. This, until recently, was the law in England, and it is still the law in some of the American states; but it is now held by the English courts that the use of the words "separation without reasonable cause" in the statute in reference to desertion implies that there may be a separation with a reasonable cause which is something less than the causes for which a divorce may be granted. *Yeatman* v. *Yeatman*, L. R. 1 Prob. & Div. 489-491; *Haswell* v. *Haswell*, 1 Swab. & T. 502, 29 L. J. Prob. & M. 21. So, too, a voluntary separation of husband and wife is not there deemed to be against public policy, and articles of separation entered into by a husband and wife are enforced by courts of equity. *Wilson* v. *Wilson*, 1 H. L. Cas. 538; *Besant* v. *Wood*, L. R. 12 Ch. Div. 605; *Hart* v. *Hart*, L. R. 18 Ch. Div. 670. In this commonwealth it has been held that an indenture whereby a husband agrees to pay to a trustee money for the support of his wife, made in contemplation of an immediate separation, which takes place as contemplated, is not void as against public policy. *Fox* v. *Davis*, 113 Mass. 255, 18 Am. Rep. 476. In *Lyster* v. *Lyster*, 111 Mass. 327, *Mr. Justice* Gray says, in giving the opinion of the court: "It has accordingly been held, by a great weight of American authority, that ill treatment or misconduct of the husband of such a degree, or under such circumstances, as not to amount to cruelty for which a wife would be entitled to sue for a divorce against him, might yet justify her in leaving his house, and prevent his obtaining a divorce for her desertion if she did so." See, also, cases there cited.

The statute which we are considering (Pub. Stat. chap. 147, § 33) permits the husband as well as the wife to apply to a court to obtain an order "concerning support of a wife, or the care, custody, and maintenance of the minor children;" thus implying that the provisions of the statute are not alone for the benefit of a wife whose husband has been guilty of misconduct which would be a cause for divorce. If, to obtain the benefit of its provisions, a wife were obliged to show misconduct of the husband which would be a cause for a divorce, it would add but little to the provisions of previous statutes under which, in divorce proceedings, she could obtain orders for alimony, and in regard to the custody and support of minor children. We are of opinion that under this statute the wife may show that she is living apart from her husband for a justifiable cause, without necessarily going so far as to show a cause which would entitle her to a divorce, and that the reasons required to warrant the decree of the probate court in the present case were not necessarily reasons which would preclude a husband from obtaining a divorce for adultery from the wife. Precisely what reasons would justify a wife in withdrawing and living apart from her husband, so as to subject the husband to a liability for her support away from his home, under this statute, it is unnecessary in this case to determine; it is enough if the cause is something less than that required to entitle her to a divorce, and therefore less than that which would be necessary to furnish a bar to her husband's libel for her misconduct, if pleaded by way of recrimination. See *Sturbridge* v. *Franklin*, 160 Mass. 149.

Although ordinarily the question whether she was guilty of adultery would be important evidence on the issue tried in the probate court, the husband might offer to forgive her if she would return, or for other reasons the decision might be made to rest on grounds which would not involve a finding that she was innocent or guilty of that crime. It follows that the judgment of the probate court is not conclusive against the libelant in the present action, and there must be a new trial.

Exceptions sustained.

NEBRASKA SUPREME COURT.

BANK OF COMMERCE, *Plff. in Err.*,
v.
Peter GOOS.

(........Neb.........)

*1. **The damages recoverable for the refusal of a bank to pay a check** drawn upon it by one who has funds with the bank wherewith to make such payment should not exceed such amount as reasonably and fairly, in the natural course of things, would result from such refusal.

2. **General damages are such as the jury may give when the judge cannot point out any measure** by which they are to be ascertained except the opinion and judgment of a reasonable man. Special damages are such as by competent evidence are directly traceable to defendant's failure to discharge his contract obligations or such duties as are imposed upon him by law.

3. **When a party litigant has, by an evasion of the adverse ruling of the court,** intentionally and willfully introduced evidence of facts improper for consideration by the jury, it must be presumed that such improper evidence has had a prejudicial effect, and the verdict should accordingly be set aside.

(February 20, 1894.)

ERROR to the District Court for Douglas County to review a judgment in favor of plaintiff in an action brought to recover damages alleged to have been caused by defendant's wrongful refusal to pay a check. *Reversed.*

The facts are stated in the commissioner's opinion.

Messrs. **Cornish & Robertson,** for plaintiff in error:

It appears that the English courts have decided that an action like the one at bar will lie; that it is an action arising upon contract and not in tort, and that the measure of damages, following the rule in *Hadley* v. *Baxendale*, 9 Exch. 341, is such as naturally result from the dishonor of the check, or such as are reasonably within the contemplation of the parties, and "if the plaintiff is a trader, special damages need not be proved, just as in a case of an action for slander of a person in the way of his trade, or in case of the imputation of insolvency of a trader, the action lies without proof of special damage."

One reason given for the rule in the English cases, is that the payee of a check can bring no action against the bank to recover the amount due thereon, and it is necessary that the depositor have such an action as the present, to protect both himself and the payee of the check.

This court in *Fonner* v. *Smith*, 11 L. R. A. 528, 31 Neb. 107, has departed from the old rule as above stated, and declared that depositor and banker were the same in all respects as other creditors and debtors, and the payee of the check could bring an action direct against the bank.

All the English authorities agree that the action is upon contract, and if so the motive of the bank in refusing to honor the check when it has on deposit funds wherewith to meet it, is not material.

Prehn v. *Royal Bank of Liverpool*, L. R. 5 Exch. 92.

In all other analogous cases of debtor and creditor, on failure of performance, the measure of damages is invariably the interest on the amount withheld.

The damages which may be recovered are such damages as naturally result from the wrongful act, or such as were reasonably within the contemplation of the parties.

Sycamore Marsh Harvester Co. v. *Sturm*, 13 Neb. 210; *Aultman* v. *Stout*, 15 Neb. 586.

A party injured by breach of contract must reasonably exert himself to prevent damage, and cannot unnecessarily enhance the damage.

Dillon v. *Anderson*, 43 N. Y. 231; 1 Sutherland, Damages, p. 148 *et seq.*; *Oliver* v. *Hawley*, 5 Neb. 439; *Long* v. *Clapp*, 15 Neb. 417; *Crete* v. *Childs*, 11 Neb. 252.

Mr. **C. A. Baldwin** for defendant in error.

Ryan, *C.*, filed the following opinion:

By his petition filed in the district court of Douglas county, Neb., Peter Goos alleged that the Bank of Commerce was a corporation carrying on a general banking business, and that as such it invited and received deposits, to be held and paid out upon the checks of its customers; that during the month of September, 1889, the said Goos was a depositor in said bank, and had on deposit in said bank about $3,300 on the 20th of said last-named month. The injuries for which compensation was sought were described in the following language: "Plaintiff says that on the 20th day of September, 1889, and when he so had in said bank said balance of more than $3,300.00, that said bank had so received from plaintiff, as aforesaid, on deposit, and which said money was so held by defendant subject to the order of plaintiff, he drew his check on said bank for the sum of $804.90, payable to the order of the city treasurer of Omaha; that at said date John Rush was the city treasurer of Omaha, and plaintiff delivered said check to said Rush in payment of certain taxes due from the plaintiff to the city of Omaha; that afterwards, on the 23d day of September, the said check was presented to said defendant (Bank of Commerce) for payment, and payment was refused on said check on the pretended excuse that plaintiff had no funds in the bank; and the defendant made no other or different excuse for not honoring and paying said check, and said check was not paid by defendant, and never

*Headnotes by RYAN, C.

NOTE.—Very few decisions have been rendered in this country on the question presented in the above case, as to damages for refusal by a bank to pay a check on a deposit which is applicable thereto. For a full review of the decisions on the subject, see Schaffner v. Ehrman (Ill.) 15 L. R. A. 134, in connection with the *note* to that case.

was, and was returned by said bank to said Rush dishonored and unpaid. Plaintiff says that at the time said check was presented for payment at defendant's bank, and at all times from and after September 20, 1889, plaintiff had on deposit in said bank, subject to his order and to be paid on his checks, more than $3,000.00, and out of which said funds said check should have been paid. Plaintiff says that for the reason that said check was not paid by said defendant when it was so, as aforesaid, presented to said bank for payment, and for no other cause, and without any fault on the part of said plaintiff whatever, the said John Rush filed a complaint with the police court of Omaha, charging said plaintiff therein with the crime of obtaining a tax receipt under false pretenses, and by falsely and feloniously representing to said Rush that he had funds in said defendant's bank subject to be paid on the check of said plaintiff; and, upon said complaint having been so filed, a warrant was issued by the police judge of Omaha for the arrest of said plaintiff, and by authority of said warrant, and upon said complaint, said plaintiff was arrested by the police officers of Omaha, and was taken to the city prison, where said plaintiff was imprisoned with the lowest, filthiest, and most abandoned of human creatures, and plaintiff was kept so imprisoned for a long space of time, to wit, four hours, and was released from his said imprisonment on the condition, only, of giving bail in the sum of $1,200.00 for his appearance at the time fixed by said court for the trial of his case; and plaintiff was compelled to, and did, give said bail, and was thereby released from his said imprisonment. Plaintiff says that when he so gave said check he had, and knew he had, in said bank, subject to his order, a sum of money greatly in excess of the amount of said check, and plaintiff had no notice, or suspicion even, that said check would not be honored and paid; and said check was so given by said plaintiff in good faith, expecting that it would be honored and paid, and said check would have been paid but for the false, wicked, and cruel and illegal act of said defendant, its officers and employés, in refusing to honor and pay the same. Plaintiff says that he was, and for several years last past has been, engaged in the business of keeping an hotel in Omaha, and by so doing formed an extensive acquaintance, in the state of Nebraska and adjoining states, among the traveling public; that plaintiff is also doing an extensive business in various branches of trade, oftentimes requiring an extensive credit to carry on his said business, which, before the occurrence of the events so complained of, he was able to, and did, obtain. Plaintiff says that by reason of the refusal of the said defendant to honor and pay his said check, and his said arrest upon said charge aforesaid, and before the truth or falsity of said charge was known or could be determined, the said charge against him, and the fact of his arrest and imprisonment, was published in the daily papers of Omaha, and sent broadcast over the land in this state and adjoining states, and plaintiff was brought thereby to great and everlasting disgrace and contumely; and plaintiff's character was, by reason of the premises aforesaid, greatly injured, and persons whose confidence he was entitled to and did have before that time, by reason of the acts of said defendant, questioned the integrity of said plaintiff, and refused to give him the financial credit which they had been accustomed to; and, although plaintiff is possessed of a large amount of property over and above all his indebtedness, by reason of the said acts of said defendant his said creditors became clamorous for their pay, and plaintiff has been caused great embarrassment, and has been compelled to make great sacrifices to meet and pay his said creditors,—all of which said state of facts were caused by the said acts of said defendant. Plaintiff says, by reason of said averments and the disgrace brought upon him, he has suffered great distress and pain of mind, and has suffered great loss and damage to his reputation as an honest business man; that he has suffered great pecuniary loss and damage in the manner aforesaid; and he says by reason of the premises he has sustained damages in the sum of $50,000.00." For the sum last named, judgment was prayed.

The answer admitted that the defendant was a banking corporation, and that plaintiff was a customer of said bank, and that on September 1, 1889, plaintiff had on deposit in said bank the sum of $103.50; and the defendant denied all other allegations of the petition. Affirmatively, the defendant answered that about September 20, 1889, plaintiff drew his check on said bank for the sum of $804.90, payable to John Rush, city treasurer of Omaha, which check was presented for payment on the 23d day of said month, and payment thereof was refused, for the reason that the said bank then held a note of Peter Goos, dated August 15, 1889, due, by its terms, in ninety days from its date, and which it had been agreed, as defendant alleged, should be paid out of the proceeds of a mortgage loan (which, at the date of the note, Goos had in contemplation) whenever said loan should be effected. The defendant further answered that, in accordance with said understanding, the amount of the note aforesaid was charged against plaintiff when said loan was effected, and the unearned interest upon said note was credited to the account of Goos, and that this charge was afterwards assented to by Goos, and that, by reason of charging said note against the account of Goos, there was left an insufficient amount to pay his check afterwards given against said account in favor of the city treasurer. The bank, further answering, denied that the filing of the complaint, and the resulting arrest and imprisonment and the publication alleged in the petition, were the actual and necessary consequences of defendant's refusal to pay the check drawn in favor of said city treasurer, and denied that damages on that account were chargeable to the defendant. The matters affirmatively pleaded in the answer were denied seriatim in plaintiff's reply. During the progress of the trial the parties stipulated as follows: "It is agreed by the parties hereto, for the

purposes of this trial, that Peter Goos, at the time his check that he gave the city treasurer for $804.90 was presented for payment, and payment thereof refused, had in the defendant's bank, subject to being drawn by him, $3,625.24, unless the bank was authorized to charge Goos, as the bank did, the amount of his note which was dated August 15, 1889, given for $3,000.00, and due in ninety days from date. If the bank had the right to charge Goos with the amount of that note, as they did charge him, then, at the time the check to the city treasurer was presented for payment, the bank was not liable for dishonoring the check. It is not the intention of this stipulation to admit, on the part of the defendant, that the sum of $3,625.24 was correct, except for the purposes of this action, nor is it the intention of this stipulation to admit any proposition of law, the intention of the parties being simply to save, on this trial, an accounting of these matters." This stipulation restricted the scope of inquiries to the ground upon which the defendant acted in charging the ninety-day note against the account of the plaintiff, whereby arose the insufficiency of funds to pay the check in favor of the city treasurer when it was afterwards presented. The difficulty attending an analysis of the grounds of damage alleged in the petition was met in no way or degree, and to that question our attention must first be directed.

A reference to the averments of the plaintiff, relative to the special damages which he claims the right to recover, will show that plaintiff alleged that he had been keeping an hotel, whereby he had formed an extensive acquaintance, throughout the state of Nebraska and adjoining states, among the traveling public, etc. Following these introductory statements is this language: "Plaintiff says, by reason of the refusal of said defendant to honor and pay his said check, and his said arrest upon said charge aforesaid; and before the truth or falsity of said charge was or could be known or determined, the said charge against him and the fact of his said arrest and imprisonment, was published in the daily papers of Omaha, and sent broadcast over the land in this and adjoining states, and plaintiff was brought thereby to great and everlasting disgrace and contumely, and plaintiff's credit was, by reason of the premises aforesaid, greatly injured," etc. Towards the close of his petition, plaintiff alleged that, by reason of said premises and the disgrace brought upon him, he had suffered great disgrace and pain of mind, and great loss and damage to his reputation as an honest business man, etc. It is evident that the petition was framed upon the theory that the bank was liable for the arrest and imprisonment of plaintiff, and the publication of that fact, whereby his credit was greatly damaged. The trial court, however, very properly held that these matters could not be charged to the bank for the mere refusal to pay the check of the plaintiff; his prosecution and imprisonment, and the published statements in relation thereto, not being the natural result of such refusal. *Sycamore Marsh Harvester Co.* v. *Sturm*, 13 Neb. 210; *Aultman* v. *Stout*, 15 Neb. 586. The action, therefore, as was properly held by the trial court, was maintainable only as one for loss of credit resulting from defendant's refusal to pay plaintiff's check. While this was the theory to which the court sought to limit the trial of the case, the utmost vigilance could not prevent evidence going to the jury of the arrest and imprisonment of plaintiff and of the manner in which these facts were published to the world. The offense charged against Goos, as will be noted in his petition, was that he fraudulently obtained credit by falsely pretending that he had on deposit with the defendant sufficient money to pay the check which he tendered the city treasurer for his taxes. Judge Benecke, one of plaintiff's witnesses, being under examination, was asked as to the arrest of plaintiff, and how he learned of it. In the face of an objection which, in view of the innocent appearance of that question, could not be sustained, this witness answered: "I was sitting in my office on 15th and Douglas, and the newsboys were hallooing on the street, 'All about Peter Goos' arrest,' and I went down the street and bought a newspaper, and to my great astonishment I found that he had given a check to John Rush, the city treasurer, which was not honored." This was followed by other evidence, of the same witness, that the fact just sworn to had a very bad effect upon the credit of plaintiff. In the examination of plaintiff himself he was asked: "What did they say about the matter; what did the boys say,—the newsboys?" Answer: "All about Peter Goos' arrest; giving a forged check." This evidence was given under a ruling of the court that evidence might be given as to what the newsboys said as to the refusal of the bank to pay plaintiff's check, and how that refusal affected his credit. Immediately following this, plaintiff testified that, immediately after his arrest, imprisonment, and the publication above referred to, ten or twelve business men of Omaha, where plaintiff did business, came down that same evening to plaintiff's house, and wanted to settle up with him, and asked him what was the matter. In another part of his evidence plaintiff testified that he was arrested because of the refusal of the bank to pay his check. Again, on re-examination, he was asked why he did not go to the bank in answer to a telephone message, instead of going home, as he did, and he answered: "I did not get the papers; I got arrested; I got pulled in before I reached home." A motion was sustained to strike this out of the record, but that ruling did not probably efface from the minds of the jurors the effect of the testimony. Following this ruling upon the motion to strike from the record the above evidence, plaintiff's counsel offered to prove, without any question pending, that the reason he did not go to the bank was because he was arrested. Upon the final submission of the case the jury was instructed that the fact that Peter Goos had been arrested and imprisoned must not be taken into consideration to enhance his damages. The giving of this instruction was probably all that lay within

the power of the court to do in avoidance of the prejudicial effect of the evidence to which we have just made reference, and yet that evidence must necessarily have had a prejudicial effect upon the minds of the jurors. This result was attained through the mistaken zeal of plaintiff's counsel in his endeavor to avoid the effect of the adverse rulings of the court, as to which, if he was aggrieved, he had an ample remedy otherwise than by circumvention.

At best it is a question more difficult of application than of a general definition to determine what the measure of damages is for the refusal, by a bank, to pay a check, when it has in its hands sufficient funds of the drawer for that purpose. In *Rosewater* v. *Hoffman*, 24 Neb. on page 230, is found the following language: "It is a well-settled rule in this state that punitive, vindictive, or exemplary damages will not be allowed. The only damages recoverable are denominated 'compensatory,' which are in satisfaction of the injury sustained. *Boyer* v. *Barr*, 8 Neb. 70, 30 Am. Rep. 814; *Roose* v. *Perkins*, 9 Neb. 315, 31 Am. Rep. 409; *Riewe* v. *McCormick*, 11 Neb. 263; *Boldt* v. *Budwig*, 19 Neb. 739." In *Brooke* v. *Tradesmen's Nat. Bank*, 69 Hun, 202, it was said that the measure of damages for a refusal to pay a check drawn upon a bank which had sufficient funds of the drawer for that purpose was such damages as might fairly and reasonably be considered as arising from a breach of contract according to the usual course of things. The supreme court of Illinois, in *Schaffner* v. *Ehrman*, 139 Ill. 109, 15 L. R. A. 134, used the following language: "The question, therefore, is, What is the measure of a banker's liability, to a person engaged in trade, for a refusal to pay his check, he having sufficient funds on deposit for that purpose, in the absence of evidence of malice and special injury to the depositor? Authorities are not numerous on the question, but they seem to be uniformly to the effect that more than mere nominal damages are, in such cases, recoverable. The leading case is that of *Rolin* v. *Steward*, 14 C. B. 595. In that case there was no evidence of malice in fact nor of special damages, but the jury were told that they ought not to confine their verdict to nominal damages, but should give the plaintiffs such temperate damages as they should judge to be a reasonable compensation for the injury they must have sustained from the dishonoring of their checks: and the jury accordingly, by their verdict, gave substantial damages, on which judgment was rendered by the trial court. On appeal, all the judges concurred in holding that the directions to the jury were correct; the case being likened to that of a slander of a person in the way of his trade. Williams, *J.*, said: 'I think it cannot be denied that if one who is not a trader were to bring an action against a banker for dishonoring a check at a time when he had funds of the customer in his hands sufficient to meet it, and special damages were alleged and proved, the plaintiff would be entitled to recover special damages; and, when it is alleged and proved that the plaintiff is a trader, I think it is equally clear that the jury, in estimating the damages, may take into their consideration the natural and necessary consequences which must result to the plaintiff from the defendant's breach of contract, just as, in the case of an action for the slander of a person in the way of his trade, the action lies without proof of special damages.' This case was cited with approval in *Prehn* v. *Royal Bank of Liverpool*, L. R. 5 Exch. 92, in which Martin, *B.*, says: 'Now, with respect to damages in general, they are of three kinds: First, nominal. The second kind is general damages, and their nature is clearly stated by Creswell in *Rolin* v. *Steward*, 14 C. B. 595, to be such as the jury may give when the judge cannot point out any measure by which they are to be assessed except the opinion and judgment of a reasonable man.' In Wood's Mayne on Damages (1st Am. ed. § 8, p. 12), the rule is announced, that 'when there may be an injury existing at present, though unascertainable, or to arise hereafter, and for which no further action could be brought, substantial damage might be given at once;' citing the case of *Rolin* v. *Steward*, *supra*. And text-writers, without exception, seem to approve of the rule announced in that case. See Bishop, Non-cont. Law, § 49; 1 Sutherland, Damages, 129. In 3 Am. & Eng. Encyclop. Law, 226, it is said: 'The depositor, by proving special loss, may recover special damages from a bank for its breach of duty; but, if unable to do so, he may recover such temperate damages as will be a reasonable compensation for the injury he has sustained,'—citing authorities. 'Where a bank refuses to honor a check of its depositor without legal cause, the latter is entitled to recover substantial damages.' [5 Gen. Dig. U. S. Ann. 283],—citing *Patterson* v. *Marine Nat. Bank of Pittsburgh*, 130 Pa. 419, and other authorities."

Plaintiff might have relied upon his right to general damages under the above rule, but he did not. Special damages, we believe, are such as, by competent evidence, are directly traceable to a defendant's failure to discharge his contract obligations, or such duties as are imposed upon him by law. The language which we have just quoted at great length probably, as nearly as possible, defines this kind of damages in cases like that under consideration. In the case at bar the attempt to recover special damages was upon allegations and proofs of an unjustifiable dishonor of a check presented by the city treasurer, so confusedly interwoven with the subsequent arrest of the plaintiff, his incarceration, and the newspaper and newsboys' account thereof that it was impossible, in the nature of things, for the jury to segregate and ascertain the amount of damages which were solely traceable to the refusal to pay plaintiff's check, independently of the other circumstances to which we have referred. This confusion of matters which should have been kept distinct seems, by plaintiff, to have been intensified by working in evidence which the court had repeatedly ruled was inadmissible in proof of recoverable damages.

For the reasons given, *the judgment of the District Court is reversed.*

The other Commissioners concur.

MISSOURI SUPREME COURT (Div. 2).

STATE *of* Missouri, *ex rel.* Edward J. ROBB,
v.
William J. STONE.

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

Mandamus will not lie to compel official action, by the governor, whether the act is of the kind regarded as ministerial or otherwise, under constitutional provisions that the three departments of the government shall be distinct and that neither branch can interfere with the duties of the others.

(February 27, 1894.)

ON DEMURRER to an application for a writ of mandamus to compel the governor to order payment of money alleged to be due under a contract for legal services. *Demurrer sustained.*

The facts are stated in the opinion.

Messrs. **Edward Robb** and **Silver & Brown** for relator.

Mr. **Robert F. Walker,** *Atty-Gen.*, for respondent.

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

The relator in this case, Edward J. Robb, was employed by David R. Francis, then governor of the state, as counsel on behalf of the state in the case of the *State of Missouri* v. *Louis Ulrich*, at that time pending in the Supreme Court of the United States. This employment had its origin in an Act of the 36th General Assembly approved March 25, 1891, which authorized and empowered such employment to be made, at and for a sum not exceeding the sum of $500; all disbursements out of the fund thus created to be made upon the order of the governor. By an Act approved March 31, 1893, the general assembly reappropriated said amount for the purpose aforesaid, which act provided that all disbursements under this section should be made by order of the governor, and that counsel fees should be paid "only on determination of suit." The sum which David R. Francis, then governor, agreed to pay relator for his services as counsel in that cause, was the said sum of $500, in consideration of which sum relator agreed to represent the state as counsel in said cause until the determination thereof. After thus entering into such contract, relator duly performed all of its conditions on his part, and discharged his duty as counsel for the state thereunder, until the final determination of said cause, which resulted in Ulrich dismissing his appeal therein on the 15th of May, 1893. No part of the amount appropriated by the general assembly for the payment of counsel fees, and agreed to be paid relator, has ever been paid him. On the 22d day of August, 1893, relator presented his said contract with, and claim against, the state of Missouri, to Gov. William J. Stone, exhibiting to him at the same time all necessary papers, etc., and asked that said sum of $500 be paid to relator, but which sum said governor neglected and refused to order to be paid to relator. Upon these facts thus presented in the petition, relator prays that an alternative writ of mandamus issue, directed to the governor, commanding him, etc. Waiving the issuance of the alternative writ, the governor has entered his appearance herein, and by his counsel has filed a general demurrer to relator's petition, to the effect that the petition does not state facts sufficient, etc.

As the petition states a good contract with, and cause of action against, the state, and the demurrer admits the allegations of the petition to be true, the only question for determination is whether the respondent is amenable to the process of this court in a case of this sort; in other words, whether this court has jurisdiction to entertain this application made by relator. The inquiry thus suggested brings into prominence article 3 of our Constitution, by which it is provided that: "The powers of government shall be divided into three distinct departments—the legislative, executive, and judicial—each of which shall be confined to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any powers properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted." In this instance, we, constituting a portion of the judicial department of the government, are called upon to exercise, or what amounts to the same thing, to control the exercise of, powers belonging exclusively to the executive department of that government. To such action on our part the organic law interposes an insuperable barrier. In addition to the provisions of the organic law quoted, that instrument also declares that: "The supreme executive power shall be vested in a chief magistrate, who shall be styled 'The Governor of the State of Missouri.'" Const. art. 5, § 4. Section 6 of the same article requires that "the governor shall take care that the laws are . . . faithfully executed." Of the same article, section 1 provides that the governor "shall perform such duties as may be prescribed by law." And section 6 of article 14, as a prerequisite to his entering on the duties of his office, prescribes that he "take and subscribe an oath to support the Constitution of the United States and of this state, and to demean himself faithfully in office." Under these plain and comprehensive provisions, it must be apparent that any duty "prescribed by law" for the governor to perform is as much part and parcel of his executive duties as though made so by the most solemn language of the constitution itself. Conceding the validity of any given law, the fact that the duties which it prescribes are merely ministerial cannot take them out of the domain of executive duties, nor make them any

NOTE.—For other authorities in line with the above decision, see note to Hovey v. State (Ind.) 11 L. R. A. 763.

See also 41 L. R. A. 231.

the less those which "properly belong" to the executive department of the government. And should we, by our process, to be able to compel the performance by the governor of such duties, we would, in effect, and to all intents and purposes, be performing those duties ourselves; for there can be no substantial distinction drawn between our assumption of duties pertaining to another department of the government, and our intervention resulting in the compulsory performance of such duties. "*Qui facit per alium,*" etc. Nor does the fact that any duty which the law prescribes for the governor to perform might have been assigned to some other officer, who would have been amenable to the process of this court, alter the conclusion to be reached, or vary the result; for the fact would still remain that the act required to be done was nevertheless an official one, assigned by the legislative department of the government to be performed by the executive department, *eo nomine,*—by the governor, and by him alone,—and therefore, if he is not bound to obey the law in question as governor, he is not bound to act at all, since he only assumed to obey the laws in his gubernatorial capacity, and not otherwise or elsewhere. See *Rice* v. *Austin*, 19 Minn. 103 (Gil. 74), 18 Am. Rep. 330. So that we should manifestly be trenching on the exclusive powers of two separate magistracies of the government, should we assume to exercise jurisdiction in this case.

Abundant authority establishes the position here taken that mandamus will not issue to the governor to compel the performance of any duty pertaining to his office, whether political or merely ministerial; whether commanded by the constitution or by some law passed on the subject. *People* v. *The Governor*, 29 Mich. 320, 18 Am. Rep. 89; *Hawkins* v. *The Governor*, 1 Ark. 570, 33 Am. Dec. 346; *State* v. *Warmoth*, 22 La. Ann. 1, 2 Am. Rep. 712, 24 La. Ann. 351; *State* v. *Board of Liquidation*, 42 La. Ann. 647; *Mauran* v. *Smith*, 8 R. I. 192, 5 Am. Rep. 564; *Rice* v. *Austin, supra; Dennett, Petitioner*, 32 Me. 508, 54 Am. Dec. 602; *Vicksburg & M. R. Co.* v. *Lowry*, 61 Miss. 102, 48 Am. Rep. 76; *State* v. *The Governor*, 25 N. J. L. 331; *State* v. *Drew*, 17 Fla. 67; *Hovey* v. *State*, 127 Ind. 588, 11 L. R. A. 763, which distinguishes or virtually overrules *Gray* v. *State*, 72 Ind. 567; *People* v. *Bissell*, 19 Ill. 229, 68 Am. Dec. 591; *People* v. *Yates*, 40 Ill. 126; *People* v. *Cullom*, 100 Ill. 472; *Jonesboro Fall Branch & Blair's Gap. Turnp. Co.* v. *Brown*, 8 Baxt. 490, 35 Am. Rep. 713; *Bates* v. *Taylor*, 87 Tenn. 319, 3 L. R. A. 316; *State* v. *Towns*, 8 Ga. 360; *Houston, T. & B. R. Co.* v. *Randolph*, 24 Tex. 317; *Hartranft's App.* 85 Pa. 433, 27 Am. Rep. 667; *Mississippi* v. *Johnson*, 71 U. S. 4 Wall. 475, 18 L. ed. 437.

The same views are enunciated by several text-writers. Thus High says: "While, as to purely executive or political functions devolving upon the chief executive officer of a state, and as to duties necessarily involving the exercise of official judgment and discretion, the doctrine may be regarded as uncontroverted that mandamus will not lie, yet as to duties of a ministerial nature, and involving no element of discretion, which have been imposed by law upon the governor of a state, the authorities are exceedingly conflicting, and, indeed, utterly irreconcilable. Upon the one hand, it is contended, and with much show of reason, that as to duties of this character the general principle allowing relief by mandamus against ministerial officers should apply, and the mere fact of ministerial duties having been required of an executive officer should not deter the courts from the exercise of their jurisdiction. Upon the other hand, it is held that under our structure of government, with its three distinct departments,—executive, legislative, and judicial,—each department being wholly independent of the other, neither branch can properly interfere with the duties of the others, and that as to the nature of the duties required of the executive department by law, and as to its obligation to perform those duties, it is entirely independent of any control by the judiciary. While the former theory has the support of many respectable authorities, and is certainly in harmony with the general principles underlying the jurisdiction, as applied to purely ministerial officers, the latter has the clear weight of authority in its favor, and may be regarded as the established doctrine upon this subject." High, Extr. Legal Rem. 2d ed. § 118. Touching this subject, Wood says: "The attempt on the part of some of the courts to interfere with the discharge of executive duties is not only in opposition to our theory of government, and in excess of their power, but also attended with great danger. If the courts may interfere with the discharge of any ministerial duties of the executive department of the government, they may with all; and we should have the singular spectacle of a government run by the courts, instead of the officers provided by the constitution. Each department of the government is essentially and necessarily distinct from the others, and neither can lawfully trench upon or interfere with the powers of the others; and our safety, both as to national and state governments, is largely dependent upon the preservation of the distribution of power and authority made by the constitution, and the laws made in pursuance thereof. If the governor refuses or neglects to discharge his duties, or exceeds his powers in flagrant cases, there is ample remedy by impeachment and removal from office. It is not believed that the courts have the power to discharge his duties for him, or to say what he shall or what he shall not do." Wood, Mandamus, pp. 123, 124. See also Merrill, Mandamus, § 97.

Although the precise point now presented has never been decided in this state, yet in *State* v. *Fletcher*, 39 Mo. loc. cit. 388, the clear intimation is made by this court, speaking through Wagner, *J.*, that there was really no valid distinction between a political and a ministerial act of the governor, when considered with reference to the issuance of a mandamus against him.

There are many respectable authorities, however, which maintain views diametrically opposed to those here advanced. Most

of them will be found collated in the brief filed for relator. *Tennessee & C. R. Co.* v. *Moore*, 36 Ala. 371; *Middleton* v. *Low*, 30 Cal. 596; *Greenwood Cemetery Land Co.* v. *Routt*, 17 Colo. 156, 15 L. R. A. 369; *Gray* v. *State*, 72 Ind. 567; *Magruder* v. *Swann*, 25 Md. 173; *Groome* v. *Gwinn*, 43 Md. 572; *Chumasero* v. *Potts*, 2 Mont. 242; *State* v. *Blasdel*, 4 Nev. 241; *State* v. *Chase*, 5 Ohio St. 528; *State* v. *Nicholls*, 42 La. Ann. 209. In addition to those cited, see *Martin* v. *Ingham*, 38 Kan. 641; *State* v. *Thayer*, 31 Neb. 82.

The fact that the governor has voluntarily submitted himself to the jurisdiction of this court has been pressed upon our attention as a reason why we should pass on or adjudicate the question submitted; and cases have been cited—among them, *Pacific Railroad* v. *The Governor*, 23 Mo. 360, 66 Am. Dec. 673, as showing that, where the governor does not claim his exemption, then this court may adjudicate the matters at issue, and leave the governor to claim his exemption afterwards. But we regard such cases as wrong in theory, and unsafe and unsound in practice. If we have authority to render a judgment, then we have jurisdiction to enforce that judgment by all appropriate process, and need not inquire whether any exemption from that process will be pleaded. If, however, we have no jurisdiction over the chief magistrate, his consent will not confer it on us. We will not "assume a jurisdiction if we have it not." We will not sit as a moot court, and pass upon questions, and enter a judgment thereon which we are powerless to enforce. "For all jurisdiction implies superiority of power. Authority to try would be vain and idle without authority to redress; and the sentence of a court would be contemptible, unless that court had power to command the execution of it." 1 Cooley, Bl. Com. p. 242.

As we do not possess any jurisdiction over the governor, *we shall decline any further discussion of this cause, hold the demurrer well taken, and deny the issuance of the peremptory writ.*

All concur.

MICHIGAN SUPREME COURT.

Charles E. WRIGHT *et al.*

v.

Frank WRIGHT, *Appt.*

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

1. **A contract may be implied and enforced in equity to leave to an adopted child as an heir the property of the adopting parent,** where the proceedings for adoption were taken under a statute which was unconstitutional for defect in its title, but were supposed by the adopting parent as long as he lived to be valid.
2. **A contract to leave property to an adopted child** as an heir is taken out of the statute of frauds by its complete performance on the part of the child.
3. **The rights of a person under an alleged contract to leave him as heir the property of the other party** cannot be determined in proceedings, under Pub. Acts 1887, Act No. 278, to determine who are the legal heirs or legal representatives of such person.

(*Montgomery and Hooker, JJ., dissent.*)

(February 27, 1894.)

APPEAL by defendant from a decree of the Circuit Court for Jackson County in favor of plaintiffs in a suit brought to enjoin waste. *Reversed.*

The facts are stated in the opinion.

Mr. **Thomas E. Barkworth** for appellant.

Mr. **Louis J. Pierson** for appellees.

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

This bill is filed by Charles E. Wright, of Denver, Colo., Edward Wright, of Jackson, Mich., Nettie Hart, of Oakley, Mich., and Elizabeth Pierson, of Chicago, Ill.,—all of whom claim to be the heirs-at-law of Phineas Wright, deceased,—to restrain defendant from committing waste on land of which Phineas Wright died seised, and which complainants now claim to own. The three complainants first named claim an undivided one-half interest in said land as children of Chester Wright, who was the brother of the deceased; and the complainant Elizabeth Pierson claims, as a sister of the deceased, to be entitled to an undivided one-half interest. On the hearing in the court below it was conceded by complainants and defendant that Phineas R. Wright was the owner of this land, consisting of 240 acres, situate in the township of Blackman, Jackson county, this state, and died seised thereof on May 23, 1888, leaving Polly M. Wright (now Polly M. Richardson, by a second marriage) as his widow, but no children surviving him; that after his death, and prior to the filing of this bill, what would amount to legal waste was committed by the defendant, by cutting timber upon the premises, as averred in the bill, to an amount which would confer jurisdiction upon the court to hear and determine,—the complainants agreeing, upon this conceded state of facts, to waive all claim for damages arising out of such waste already committed. The defendant set up in his answer his claim of title to the premises; and upon the hearing in the court below it was shown, in his behalf, that he entered the family of deceased when about one and a half years old, under an agreement entered into between the superintendent of the poor for the county of Jackson and the deceased, said agreement being

NOTE.—As to validity of agreement to pay money or give property after the death of the promisor, see *note* to Krell v. Codman (Mass.) 14 L. R. A. 860.

As to legal status of adopted child, see *note* to Warren v. Prescott (Me.) 17 L. R. A. 435.

P. 196. See also 33 L. R. A. 369; 43 L. R. A. 427.

in the form of an indenture binding him to deceased until he became twenty-one years old; that this indenture was dated January 29, 1868; that his name was then Frank Creer, but subsequently deceased and his wife, acting under the statute then in force, filed their petition in the probate court declaring their intention to make him their heir-at-law, and praying that his name be changed to Franklin P. Wright; that the order was accordingly made on January 30, 1875, defendant being then about eight years old; that defendant remained in the family, and at the time of the death of Phineas R. Wright was twenty-two years and three months old; and that he had performed his duty to his adopted parents faithfully, and given them his entire time, never receiving any compensation for such services. It was testified by Mrs. Richardson on the hearing in the court below that it was understood between her husband (the deceased) and herself that the defendant should, as the result of the adoption, be their heir, and ultimately come into possession of their property, and that it was always so intended. She was asked: "Did that intention continue to your knowledge, during Mr. Wright's lifetime?" *Answer.* "It did." *Question.* "Do you know whether or not Mr. Wright expressed from time to time a belief that that was successfully accomplished by the adoption papers?" *A.* "He told me a number of times that he had seen the lawyers about it, and they all said it was just as safe." *Q.* "State whether or not the defendant, to your knowledge, understood that he was to be the heir-at-law?" *A.* "He expected— He did not know but what he was our child until after Mr. Wright's death."

The witness further testified that there was never any talk between herself and her husband about paying the defendant in any way, and that about three months before Mr. Wright's death he was at a neighbor's house, and was speaking about these heirs coming up to break down this adoption, when he said: "Rather than have it done, he would do most anything, for he intended his property should go to Frank, if he used it up in four weeks after he died." The witness further testified that Mr. Wright meant and expected that Frank would inherit the property, the same as a son, and that he died in that belief. After Phineas R. Wright's death, proceedings were taken under the statute, in the probate court for Jackson county, to determine who were the heirs-at-law. Upon the hearing in that court, the defendant was so adjudged. An appeal was taken to the circuit court, and on the 1st of February, 1890, the proceedings of the probate court were reversed, and the complainants in the present case adjudged the heirs-at-law.

Defendant claims that in effect, and by force of the arrangement actually made, there was an agreement upon the part of Phineas R. Wright to reward him for his services and love and affection as a son, with such property as he might be seised at his death; that defendant, acting under that belief, performed the duties which made up the consideration of the contract, and is therefore entitled to receive his reward; and that equity will enforce this understanding, despite the failure of the law. On the other hand, it is contended by complainants that the case is barren of any proof of contract to will or devise the property to defendant, only as defendant might have inherited it, had there been a law under which he might have been adopted, and had legal proceedings been had under such law to accomplish such purpose; that there is no such thing as adoption known to the common law; that the proofs fail to show an agreement, except the agreement to adopt, which has failed because of the unconstitutionality of the statute; and that the defendant's claim is set up, apparently, to have the court find an agreement to let him have the estate, and then enforce it. It is also contended by counsel for complainants that the order of the circuit court made upon the appeal from the probate court is an adjudication upon the question here in controversy and is *res judicata* as to all matters here involved.

The statute under which defendant was adopted was held unconstitutional in *People* v. *Congdon*, 77 Mich. 357. It is apparent, however, that Phineas R. Wright and his wife supposed that defendant's adoption had been successfully accomplished by the proceedings taken for that purpose. During all these years they treated defendant as their son and heir, and Mr. Wright died in the belief that he would inherit the property the same as an own son would have done. So careful had the parties been to show him their love and affection, that he never knew until after Mr. Wright's death but that they were his own parents. During all these years he had rendered them filial affection, and given them his labor upon the farm, with the belief that at their decease he would inherit all they possessed. We think there may be said to be a contract, impliedly at least, that defendant was to have this property, and that there had been such a performance on the part of the defendant as to take the case out of the operation of the statute of frauds. If this arrangement so solemnly made by Mr. and Mrs. Wright cannot be carried out,—if strangers may now step in and take this inheritance which the defendant has been led to believe would be his,—the defendant would be most outrageously wronged. He has lived since his adoption upon this farm, in the full belief that he was under his own father's roof, and in the full expectation and belief that, as a son and only child, he would inherit it. It would be technical, indeed, to say, from all these circumstances, no contract could be implied which a court of equity would enforce to save the rights of the defendant.

There are two cases arising in the New Jersey equity court which sustain this doctrine,—*Van Dyne* v. *Vreeland* (decided in 1857), 11 N. J. Eq. 370, and *Van Tine* v. *Van Tine* (decided in 1888), reported in 1 L. R. A. 155, in which *Van Dyne* v. *Vreeland*, *supra*, is cited and approved. In the first of these cases, an uncle had made an agreement with the father of an infant child that he would adopt the boy, and after the death of himself and wife all the property should go

to him. There was no formal adoption, but the child lived in the family twenty-five years, assumed their name, and treated them as parents. The court held that there was performance on the part of the child, and the agreement could be enforced. In the latter case, a girl eight years old was adopted by Mrs. Stryker, who assumed the obligation, by parol, with her parents, to treat the girl as her own child, and make her her heir. The girl remained in the family, giving her time and affection to Mrs. Stryker, with the expectation of becoming Mrs. Stryker's heir. The court found that there was a contract with the child, that the contract was performed on her part, and therefore she was entitled to receive the property, which was real estate, as in the présent case. The doctrine of these cases finds support in *Rhodes* v. *Rhodes*, 3 Sandf. Ch. 279, 7 L. ed. 852, and *Sutton* v. *Hayden*, 62 Mo. 101. In *Shahan* v. *Swan*, 48 Ohio St. 25, the supreme court of Ohio expressly recognize the doctrines of these cases. It there said: "Notwithstanding that it is the established rule in Ohio that the payment of the consideration, even in the personal service of the party seeking relief, does not ordinarily constitute such part performance as will take a case out of the operation of the statute, we do not wish to be understood to hold that cases may not arise where specific performance of a contract in parol may be had on the ground that the consideration had been paid in personal services not intended to be, and not susceptible of being, measured by a pecuniary standard." This doctrine is also recognized in *Sharkey* v. *McDermott*, 91 Mo. 647, 60 Am. Rep. 270. We are aware that the principle laid down here is not supported in *Wallace* v. *Rappleye*, 103 Ill. 229, and *Wallace* v. *Long*, 105 Ind. 522, 55 Am. Rep. 222, and some other Illinois and Indiana cases, as well as in *Shearer* v. *Weaver*, 56 Iowa, 578, but we think the better reasons support the conclusions reached by the New Jersey court.

It is contended, however, that in the cases referred to a contract was shown to have been entered into between the party adopting the child and the parent, or some one who had the right and authority to make the contract. We think it has already been sufficiently demonstrated that such a contract is to be found in the arrangement made for defendant's adoption, and the acts of the parties subsequent thereto, and that it has been fully performed on the part of the defendant, so that it is taken out of the operation of the statute. It was expressly held in *Carmichael* v. *Carmichael*, 72 Mich. 76, 1 L. R. A. 596, that a person may enter into a valid agreement by parol, binding himself to make a particular testamentary disposition of his property. In that case, *Van Dyne* v. *Vreeland* was cited with approval.

One other question arises. Are the proceedings had in the circuit court *res judicata?* These proceedings were taken under the provisions of Act No. 278, Pub. Acts 1887, which gives to any person claiming an interest in the lands to which deceased had title at the time of his death the right to apply to the probate court, and gives that court power to adjudicate and determine who are the legal heirs or legal representatives, and entitled to such lands. Section 3 of the Act provides that such "adjudication shall be entered on the journal of said court, and which entry, or a duly certified copy thereof, shall be prima facie evidence of the facts therein found." The inquiry to be instituted under that statute would give the probate court no jurisdiction to determine the questions involved in the controversy here. That proceeding was to determine who were the legal heirs or legal representatives entitled to take. Here the claim set up by the defendant by way of cross-bill is for the enforcement of a contract, which he insists that equitably he is entitled to have enforced against the legal heirs. The probate court had no jurisdiction to hear and determine that question, and, on appeal from the probate court, the circuit court would have no such jurisdiction. *Nester* v. *Ross' Estate* (Mich.) 57 N. W. Rep. 122; *Linneman* v. *Moross' Estate* (Mich.) 57 N. W. Rep. 103.

It follows that *the decree of the court below must be reversed*, and decree entered here dismissing complainants' bill, and finding that the title to the estate of Phineas R. Wright vested, by reason of this contract, at his decease, in the defendant, the same as if he had been the son. By reason of the stipulation between the paries, no costs will be allowed to either party.

McGrath, *Ch. J.*, concurred with **Long,** *J.*

Grant, *J.*, concurring:

Each case of this character stands upon its own peculiar circumstances and facts, upon which relief is granted or denied. The present case forms no exception. Mr. and Mrs. Wright were childless. They desired to adopt some one as heir, who should inherit their property. They first took the defendant under articles of apprenticeship. The adoption superseded these articles, and from that time until the date of his majority the relations existing between them were understood by all to be those of parent and child, and not of apprentice and employer. In no more solemn manner could Mr. Wright and his wife have declared that upon their death defendant should receive their property. It is no reply to this to say that, in his lifetime, Mr. Wright might have made other disposition of his property. He did not do so, and died in the belief that defendant would have it, and that he was his legal heir. They gave defendant their own name, and by their conduct, language, and treatment represented to him that he was their own son. He lived with them upon this understanding until some time past the age of majority. He had a right to rest and act upon the belief that he was the legal heir. So long as his reputed father and mother chose to let him repose in this belief, others had no right to interfere. Equity is clearly with the defendant, and, if relief cannot be granted, it must be because the strict rule of law interferes, and permits the accomplishment of an act of the greatest injustice. Unfortunately, the law

in regard to adoption was found to be unconstitutional because the real object of the act was not expressed in its title. Each party acted in the undoubted belief that the defendant, upon the death of Mr. Wright, would take the property. Can equity give validity to such intention, in the absence of an express contract? I see no reason why it may not. Defendant rendered services upon the faith of his relationship. Those services were accepted in reliance upon such relationship, declared in the most solemn manner. There are no children interested. If there were no collateral heirs, the property would otherwise escheat to the state. While it is true, in the cases cited from New Jersey, that the parties who took the complainants to live with them said that if they would remain they should have their property, still great stress is laid upon facts and circumstances similar to, but not as strong as, some in the present case. As I read those authorities, they are not based solely upon the existence of a promise. This is a case where, in my judgment, equity should declare that to be done which the parties clearly intended. I therefore concur in the opinion of my Brother Long.

Hooker, *J.*, dissenting:

I am unable to concur in the opinion of my Brother Long. The defendant admits the acts which constitute waste, unless he can establish his right to the premises under his answer, which partakes of the nature of a cross-bill. The undisputed testimony shows that he was bound to the intestate in 1868, when an infant of less than two years of age. This imposed upon him the obligation of rendering service to his master until he should reach the age of twenty-one years. In 1875—he having lived with the intestate during the interval—proceedings were had for his adoption under the statute, and with the intention of making him the heir of his foster parents. These proceedings are regular, but unfortunately the act was declared unconstitutional some years later, and hence the defendant did not become the heir of the intestate by force of the statute. If he can be held to have been his heir-at-law, it must be by reason of our ability to find that the intestate made a valid contract to make him such. Whether a man can, in the absence of statutory authority, make another his heir, and procure recognition for him as such, is a question not discussed. If he could, that question is concluded for this case by the adjudication by the circuit court, which, in the proceeding appealed from probate court, in which all of the parties were heard, determined that he was not such heir, and that the complainants were the lawful heirs of the intestate. Accordingly, we find that the defendant is not claiming upon the theory that he is the heir, but upon the theory that he is not the heir, and that he has the right to the specific performance of a contract whereby the intestate undertook and promised to give him his property at death in consideration of service until the defendant should reach his majority, which service he says has been rendered. Unfortunately for him, however, the testimony conclusively shows that the intestate never made any such promise. The indentures of apprenticeship were not pretended to have been based on any such promise. The adoption proceedings contain no more than the consent to make him an heir, the same as the intestate's own children; and if we shall, viewing these proceedings in the light of the unconstitutional law under which they were had, think that the intestate may be held to have promised to make him such heir, there is yet a fatal variance between the contract relied upon and the one proved. Were this an express and unqualified agreement to make him such heir, and were it based on the promise of service to which the intestate was not already entitled, it could not be enforced as a contract whereby the intestate had promised to give to the defendant his property, in consideration of his rendering certain service. The defendant cannot recover upon the theory which he is relying upon. He is precluded by the former adjudication from recovering as the heir, if that could otherwise be permitted, which we do not intimate. The evidence, so far as it appears in the record, shows an intention on the part of the intestate to allow his property to go to the defendant. Whether the complainants could have produced evidence to the contrary, we have no means of knowing, as they appear to have relied upon their legal rights. Perhaps, however, it is fair to infer that they could not, and, if so, it is a hardship upon the defendant to be deprived of the property. But he was under the obligation to render the service to the intestate before the adoption, and he incurred no further obligation by reason of the adoption. It is therefore difficult to see how the case differs from any other *nudum pactum.* The disappointment is one that comes from finding that he has labored under a mistake in relation to his ancestry and ancestral rights. I find no case which holds that proceedings like those shown in this case can be construed into a contract to convey property by will or otherwise, where the evidence conclusively shows that the undertaking was merely to adopt and make an heir of a child, subject to the right upon the part of the foster parent to cut him off as he might his own child, especially where the child adopted was not only ignorant of the transaction, but already under a legal obligation to perform all of the services which constitute the consideration for such agreement. I think the decree of the circuit court was correct, and should be affirmed, with costs.

Montgomery, *J.*, concurred with **Hooker, *J.***

KENTUCKY COURT OF APPEALS

Walter WILLIAMSON, by Benjamin Thomas, His Next Friend, *Appt.*,
v.
LOUISVILLE INDUSTRIAL SCHOOL OF REFORM.

(15 Ky. L. Rep. 629.)

A reform school under the control and oversight of the legislature, which is an agency of the state and maintained by taxation and state aid, is not liable to an action for damages for negligent or malicious injuries to an inmate by its servants or employés.

(January 27, 1894.)

APPEAL by plaintiff from a judgment of the Circuit Court for Jefferson County in favor of defendant in an action brought to recover damages for personal injuries alleged to have been inflicted by the cruel acts of one of defendant's servants. *Affirmed.*

The facts sufficiently appear in the opinion.

Messrs. **George Weissinger Smith** and **Samuel B. Kirby,** for appellant:

Where the defendant corporation has knowledge of the incompetency of its servant it will be liable for the servant's tort even though the defendant would be ordinarily exempt from liability to pay damages out of a trust fund.

NOTE.—*Liability of charitable institution for negligence.*

The decisions are few in which the liability of a charitable corporation for negligence of its officers or agents has been adjudicated.

The earliest case directly in point which we have found is that of Feoffees of Heriot's Hospital v. Ross, 12 Clark & F. 507, in which it is expressly held that no damages can be given out of the fund of a charity hospital. The case was one in which damages were claimed for refusal to receive an applicant. The court follows the case of Duncan v. Findlater, 6 Clark & F. 894, MacL. & Rob. 911, but the latter case was one relating to the liability of trustees under a public road act and therefore related to a kind of public or municipal corporation involving nothing about charity, except so far as municipal corporations, or those engaged in the public service instead of for private gain are all to be considered charitable. The distinction between a charity and a public or municipal corporation was not clearly taken in the above case and has not been kept entirely clear in some of the later decisions; but no attempt is here made to touch the question of the liability of municipal or public corporations, as such, but merely the question of liability as affected by the charitable nature of the enterprise in which a master is engaged.

While the later English cases have held public corporations, such as boards of health, or other local boards, liable for negligence of their servants, we do not find that the case of Feoffees of Heriot's Hospital v. Ross, has been overruled by any case directly relating to a charity.

Following the above case it was held in McDonald v. Massachusetts Gen. Hospital, 120 Mass. 432, 21 Am. Rep. 529, that a hospital corporation, not operated for profit but holding property in trust for the purpose of benefit to the sick, although it had some receipts from paying patients, was not liable for the negligence of its aids.

Again in Benton v. Boston City Hospital Trustees, 140 Mass. 13, 54 Am. Rep. 436, the negligence of the superintendent in respect to the outside stairway of a city hospital, which constituted a charity, maintained by the city and by private donations with some receipts from paying patients, would not make the trustees of the corporation liable for an injury sustained by a person on such stairway while on a visit to a paying patient in order to arrange for the latter's removal from the hospital.

To the same effect it was held in respect to a house of refuge, which constituted a charity, that there was no liability of the institution for an assault by its officers on an inmate, for the property of the institution was contributed solely for benevolent purposes. Perry v. House of Refuge, 63 Md. 20, 52 Am. Rep. 495.

The court expressly approved the rule that damages cannot be recovered from a fund held in trust for charitable purposes, and the decision was based on the authorities above cited.

On the other hand, it was held in Rhode Island in respect to a hospital, that it was liable to a paying patient for negligent treatment, although the hospital was administered largely as a charity, with income derived mainly from endowments and voluntary contributions, and its physicians gave gratuitous services, except for the board and lodging given to those persons who were constantly in attendance. Glavin v. Rhode Island Hospital, 12 R. I. 411, 34 Am. Rep. 675.

The court in this case regards the authority of McDonald v. Massachusetts Gen. Hospital as somewhat impaired by the fact that it was based in part on the case of Holliday v. St. Leonard, 11 C. B. N. S. 192, 8 Jur. N. S. 79, 4 L. T. N. S. 406, the authority of which it considered to be overthrown by later English cases; but the case of Holliday v. St. Leonard was one in respect to the liability for negligence of an employé of a surveyor of highways.

The Rhode Island case holds that a corporation holding property for a charity should not be more highly privileged than corporations created for public purposes holding their property for such purposes; but it says: "It may be that some of the corporate property, the buildings and grounds for example, is subject to so strict a dedication that it cannot be diverted to the payment of damages. But however that may be, we understand that the defendant corporation is in the receipt of funds which are applicable generally to the uses of the hospital, and following the decision in Mersey Docks Trustees v. Gibbs, L. R. 1 H. L. 93, 11 H. L. Cas. 686, 35 L. J. Exch. 225, 12 Jur. N. S. 571, 14 L. T. N. S. 677, 14 Week. Rep. 872, we think a judgment in tort for damages against the corporation can be paid out of them." It is seen therefore that the Rhode Island case treats the case of a charitable corporation as governed by the same rule as that governing public corporations.

There are other cases relating to liability for negligence of officers or employés of a hospital, in which the liability is denied, but these are cases in which the hospital was operated by a municipal corporation, and the exemption from liability is upheld, not on the ground that the enterprise is a charity, but on the broader ground of the exemption of municipal corporations from liability for negligence of officers engaged in public duties.

Such is the case of Richmond v. Long, 17 Gratt. 375, 94 Am. Dec. 461, in which a city was held not liable for the negligence of its agents at a city hospital, resulting in the death of a slave, which was being treated in a hospital.

Likewise in the case of Murtaugh v. St. Louis, 44 Mo. 479, a city is held not liable to a nonpaying pa-

P. 200. See also 23 L. R. A. 581; 25 L. R. A. 602; 27 L. R. A. 296, 840; 28 L. R. A. 394; 31 L. R. A. 224.

McDonald v. *Massachusetts Gen. Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *Perry* v. *House of Refuge*, 63 Md. 20, 52 Am. Rep. 495.

The master is liable even for the malicious tort of the servant, if the tort was committed by the servant in the scope of his authority and while carrying out his master's ends.

Addison, Torts; *Howe* v. *Newmarch*, 12 Allen, 49; *Craig* v. *Lee*, 14 B. Mon. 119.

The corporation though charitable will be responsible for negligence in selecting its servants.

Several American decisions hold that a charitable corporation is not liable for the torts of its servants on the ground that to pay damages out of the trust fund designed to be devoted to the needs of the organization would tend to deprive it of the means to carry out the purposes of the charity.

Fire Ins. Patrol of Philadelphia v. *Boyd*, 1 L. R. A. 417, 120 Pa. 624; *Perry* v. *House of Refuge*, *supra*; *Benton* v. *Boston City Hospital Trustees*, 140 Mass. 13, 54 Am. Rep. 436; *McDonald* v. *Massachusetts Gen. Hospital*, *supra*.

These cases are not based upon statute or common law but rely upon precedent alone.

Feoffees of Heriot's Hospital v. *Ross*, 12 Clark & F. 507; *Holliday* v. *St. Leonard*, 11 C. B. N. S. 192, two English cases, but these English cases were overruled.

Mersey Docks Trustees v. *Gibbs*, L. R. 1 H.

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tient at a city hospital for injuries resulting from negligence and misfeasance of officers.

Again in Ogg v. Lansing, 35 Iowa, 495, 14 Am. Rep. 499, the city was held not liable for the negligence of its sanitary officials, whereby a dangerous disease was communicated to the plaintiff.

The same decision was made in respect to the negligence of selectmen, whereby such a disease was communicated, in Brown v. Vinalhaven, 65 Me. 402, 20 Am. Rep. 709.

And a county is held not liable for the improper treatment of a patient in a county hospital. Sherbourne v. Yuba County, 21 Cal. 113, 81 Am. Dec. 151.

Somewhat akin to these cases is the decision in Clark v. Missouri Pac. R. Co., 48 Kan. 654, to the effect that a railroad company is not liable for alleged negligence of its local surgeon in delaying the amputation of an injured limb of an employé, where it did not appear that the company was under any legal obligation to provide medical or surgical aid for him.

The liability of a physician for negligence, in case of gratuitous services, is considered in Du Bois v. Decker (N. Y.) 14 L. R. A. 429, and *note*.

That a county which employs physicians to attend poor persons is not liable for his negligence in treatment of them is decided in Summers v. Daviess County Comrs. 103 Ind. 262, 53 Am. Rep. 512.

But this decision is based, like those about city hospitals, on the broad ground that public corporations are not responsible for the negligence of their officers in the exercise of governmental powers, and therefore has little bearing on the present question of liability of charitable institutions.

A school district is held in Pennsylvania to be merely a public agency in the administration of the great public charity of education, and therefore not liable for the negligence of its officers, agents, or employés. Ford v. School Dist. of Kendall Borough (Pa.) 1 L. R. A. 607; but this case, although it considers the charitable nature of the enterprise, is based chiefly on the ground of the public character of the corporation, and recites an exception to the doctrine in respect to highways.

A corporation called the fire insurance patrol and supported by voluntary contributions of insurance companies is held in Fire Ins. Patrol of Philadelphia v. Boyd (Pa.) 1 L. R. A. 417, to be a charitable corporation, which is not liable for negligence of its employés in throwing bundles from a burning building, whereby a person on a sidewalk is injured.

But a somewhat similar corporation in Massachusetts, which is organized under a statute giving it power to levy assessments on insurance companies, and giving such companies each a representation and right to vote at the annual meeting of the corporation, is held to be a private corporation and not a public charity, and therefore to be liable for the negligence of its servants in driving through the streets. Newcomb v. Boston Protective Department (Mass.) 6 L. R. A. 778.

The court distinguishes this case from that of Fire Ins. Patrol of Philadelphia v. Boyd, on the ground that in the latter membership was open to everybody, and the expenses were wholly paid by voluntary contribution. This case, however, does not in any way discredit the other Massachusetts cases above cited, but denies the exemption on the ground merely that the corporation is not a charity.

Another Massachusetts case holds the town liable for injuries resulting from negligence in conducting a poor farm, where it is managed not only to support its paupers but also to board paupers of other towns for pay, and to board persons employed on the highways, while the managers were also overseers of highways and selectmen, and the surplus income is used for general town purposes. Neff v. Wellesley (Mass.) 2 L. R. A. 500.

This case is also based on the law applicable to towns rather than that governing charities.

So in Maxmilian v. New York, 62 N. Y. 160, 20 Am. Rep. 468, a city was held not liable for negligence of commissioners of public charity, or of other subordinates, where such commissioners were appointed by the mayor and paid from the city treasury, but were really officers of the state government regulated by state statute. This decision also turns on the law applicable to public corporations, and not that concerning charities.

The claim that a cemetery corporation was a charity within the law exempting a charity from liability for negligence, was made in a Massachusetts case, in which plaintiff claimed damages for burying a stranger in his lot, but the court held that the corporation was not a charity within this rule, although it actually applied its funds to charity to a considerable extent. Donnelly v. Boston Catholic Cemetery Asso. 146 Mass. 163.

A congregational church corporation was held liable for negligence in respect to the condition of a passageway by which a person attending a public meeting at that church in the evening was injured, but nothing was said in the case about an exemption from liability on the ground that the corporation was a charity. Davis v. Central Cong. Soc. of Jamaica Plains, 129 Mass. 367, 37 Am. Rep. 369.

The rule that a municipal corporation is not liable for negligence of its fire department, which is the subject of a *note* to Dodge v. Granger (R. I.) 15 L. R. A. 781, is held applicable also to the acts of a volunteer association of firemen. Torbush v. Norwich, 38 Conn. 225, 9 Am. Rep. 395.

Excluding from consideration the cases incidentally mentioned above, which decide as to the liability of municipal corporations, it will be seen that the clear weight of authority is in favor of the doctrine of the main case, which exempts a charitable institution from liability for negligence of officers or agents. B. A. R.

L. 93, 119; *Foreman* v. *Canterbury*, L. R. 6 Q. B. Div. 214; *Ruck* v. *Williams*, 3 Hurlst. & N. 321; *Gibbs* v. *Liverpool Docks Trustees*, Id. 164.

As those American cases were based upon neither common law nor statute law but upon English precedents, and as those English precedents were overruled, therefore the American decisions are not entitled to much if any weight.

Glavin v. *Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675, holds that charitable organizations are liable for the torts of their servants and disapproves of the Massachusetts cases.

Where a duty not discretionary is imposed upon a municipality it is liable for the tort of its servant in the performance of that duty.

Dill. Mun. Corp. § 752; 3 Am. & Eng. Encyclop. Law, p. 698.

If it is shown that the defendant is a public corporation, then it is not liable for tort. If, on the other hand, it is shown that it is a private corporation, it is liable.

A public corporation is one which has for its object the municipal government of a portion of the people (*e. g.* a city or a county), or which is founded for other public, although they be political purposes, and which belongs wholly to the government.

1 Minor, Inst. 3d ed. *503.

The main distinction between public and private corporations is, that over the former the legislature, as the trustee or guardian of the public interest, has the exclusive and unrestrained control. Private corporations, on the other hand, are created by an act of the legislature, which, in connection with its acceptance, is regarded as a compact, and one which, so long as the body corporate faithfully observes, the legislature is constitutionally restrained from impairing, etc.

Ang. & A. Priv. Corp. 9th ed. § 31.

Private corporations are created for private, as distinguished from purely public purposes, and they are not, in contemplation of law, public because it may have been supposed by the legislature that their establishment would promote, either directly or consequentially, the public interest. They cannot be compelled to accept a charter or incorporating act. The assent of the corporation is necessary to make the incorporating statute operative, etc.

1 Dill. Mun. Corp. §§ 29, 30.

The Louisville Industrial School of Reform is not a public corporation, for as said by Minor, Angell & Ames, and Dillon, all its interests and property must belong exclusively to the government, and it must be entirely controlled by the government. The school of reform may hold, purchase, and convey real estate. It owns the property, not the state. Again, having received its charter, it controls and governs itself.

Perry v. *House of Refuge*, 63 Md. 20, 52 Am. Rep. 495.

Mr. **T. L. Burnett** for appellee.

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

The appellee, the Louisville Industrial School of Reform, was created a body corporate by an Act of the General Assembly in 1854, under the name of the Louisville House of Refuge. Its object and business was to take charge of such youths as might be committed to it, and care for their moral and physical training and education. It was a charity, and its purpose was reformation by training its inmates to habits of industry, and by instilling into their minds the principles of right living, to the end that they might become useful citizens of the state, rather than fill its prisons and poor-houses. The incorporators and their successors are under the control and oversight of the legislature, and are mere instrumentalities of the commonwealth. The state interposed in behalf of neglected and abandoned children within its confines in its capacity of *parens patriæ*, and assumed the guardianship of such children as were committed to the institution. It was an agency of the state, and maintained by taxation and state aid. The appellant, a boy of ten years of age, was committed to the care, control, and restraint of the institution, and his petition, brought by his next friend, Thomas, alleges that without fault on his part one of the servants and employés of the appellee, and known by it to be incompetent and unfit for such service, struck and beat the appellant in such cruel and inhuman manner that he was caused great suffering in mind and body, and was permanently injured and damaged, etc. To this petition a general demurrer was sustained, and the petition dismissed. The correctness of this judgment is the question on this appeal, and, while it has not been determined directly, the general principles are well established. The functions of the institution are governmental. As said in *Farnham* v. *Pierce*, 141 Mass. 203, 55 Am. Rep. 452: "It is a provision by the commonwealth, as *parens patriæ*, for the custody and care of neglected children, and is intended only to supply to them the parental custody which they have lost." In *Perry* v. *House of Refuge*, 63 Md. 20, 52 Am. Rep. 495, it was held that an action does not lie against a state house of refuge for an assault on an inmate by an officer thereof. It is there said: "Youths, in whom the seeds of vice have already germinated, are placed there under proper restraint, so that the growth of crime may be arrested or eradicated in its incipiency. Funds are contributed by individuals impelled by philanthropic motives, and donations are obtained from municipal and state treasuries. These are the funds of the institution, contributed by the managers, not for their own profit or benefit, but solely for the charitable purposes designated by its organic law. . . . Several of the most eminent judges in England expressed themselves with much emphasis in opposition to an allowance of damages out of a fund so held by fiduciary agents;" and the principle determined in a number of English cases, that "damages are to be paid out of the pocket of the wrongdoer, and not from the trust fund," was approved. It is contended that these cases followed the older decisions in England, and that the latter have been since overruled. Be this as it may, the principle

announced seems entirely just and reasonable. If the funds of these institutions are to be diverted from their intended beneficent purposes by lawsuits and judgments for damages for negligent or malicious servants, their usefulness—indeed, their existence—will soon be a thing of the past.

The judgment dismissing the petition is affirmed.

WISCONSIN SUPREME COURT.

Emma ANDERSON, Admx., etc., of Fred Anderson, Deceased, *Respt.*,

v.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA R. CO., *Appt.*

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

1. **Evidence that for a few days after an accident on a railroad trestle trains were run quite slowly** and afterwards the former alleged dangerous speed was resumed is inadmissible on the question of negligence in the speed of the train.
2. **One who, while intoxicated, walked out on a railroad trestle to a position of great peril** and was there killed by a train cannot be held free from contributory negligence.
3. **An implied license to cross a railroad trestle so narrow that there is no room on it outside of a passing train,** and over which at least twelve regular trains cross each day besides special trains and switch engines, is contrary to public policy,—especially where the statutes prohibit walking on railroad tracks, except along public roads.

(*Orton*, Ch. J., *dissents.*)

(February 23, 1894.)

APPEAL by defendant from a judgment of the Circuit Court for Ashland County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Reversed.*

Statement by **Pinney**, *J.:*

This action was brought to recover damages for the death of the plaintiff's intestate, alleged to have been caused by the negligence of the defendant on the 19th of November, 1892. It was alleged that, at the time mentioned, the said Fred Anderson was lawfully traveling along and crossing a portion of the track of the defendant which was used for several years, and down to the time of the accident, with defendant's knowledge and consent, for the purpose of a footway by foot travelers at or near the intersection of Sixteenth avenue west and Third street, in the corporate limits of the city of Ashland; that the defendant, by its servants, etc., carelessly and negligently caused one of its locomotives, with a tender and two passenger cars, to pass over and across said railway track and said traveled way at the rate of about thirty miles an hour, and negligently failed to give any signal by bell or whistle of its approach, so that the said Anderson was unaware of the approach of said engine and cars; and by reason of such fault and negligence of the defendant, while so traveling along said footway upon said railroad, without fault or negligence on his part, said Anderson was struck by said locomotive and killed. And the complaint contained other appropriate averments, and claimed damages in the sum of $5,000. The defendant admitted that Anderson was walking on its track at the time in question, and across one of its bridges, and was struck by a locomotive and train of cars of defendant, and killed, but denied all other material allegations of the complaint. At the trial before a jury, it was testified, in substance, by one Swanson, on the part of the plaintiff, that on the morning in question, about half past 6 o'clock, Anderson came to his house, and they went down town to see if there were any lumber boats in; that they went across the bridge to Swan Swanson's, on Second street, where they had some whisky and hot water to drink, and then went to the bay, and in about half an hour returned to Swanson's, where they had two more drinks of the same kind, talked together, and read a paper, and started for home; that they got another drink at the billiard hall,—straight whisky,—and went right out, thence up Fourteenth avenue, to the railroad, and then took the railroad track west. In going home they went the usual way, and crossed the trestle; "used it all the time. People crossed it most every hour,—men, women, and children. When we got to the trestle, I turned around to look behind, and I looked ahead. Did not see any train, nor hear any bell or whistle sounded, before we got on the trestle. We walked out on the trestle, and the bell was rung. I looked ahead, but did not see any locomotive, and I turned partly around to see if the train was coming on the Northern Pacific track. Saw no train there, and I turned around a little more: Looked behind me again. I did not see any train there. Turned clear back. I looked ahead, and saw the train coming about 200 feet from us. That is the first I saw of it. I said: 'Anderson, the train is coming. We will have to jump.' I leaned myself over the edge of the bridge, and hung onto the bridge. Anderson, as far as I could see, turned sideways to try to get off, and one of his feet slipped, and he got between the ties.

NOTE.—As bearing somewhat upon the question of the implied license to walk along a railroad trestle, on which the judges are not agreed in the above case, see *note* to Central R. & Bkg. Co. v. Rylee (Ga.) 13 L. R. A. 634, in respect to an implied license to go upon a railroad track. Also Chenery v. Fitchburg R. Co. (Mass.) 22 L. R. A. 575.

See also 23 L. R. A. 715; 24 L. R. A. 531; 36 L. R. A. 213.

Then he went down, and did not get away from that place before the train struck him. I did not turn and run back, because I thought I hadn't time. He was dead when I next saw him. The train was the 'Bayfield Scoot.' I knew that train came along every morning about a quarter to ten o'clock. When on the railroad track, did not think of the train. Thought it had got to the depot already. Anderson was walking on the left hand, and I on the right. I think he had hold of my arm. Was about thirty-three feet on the bridge when I heard the bell ring. It is not a fact that Anderson and I were quite full that morning. He was not staggering as he went along with me. He had hold of my left arm. Sometimes, when walking together, he used to take hold of my arm, but not because he was drunk. We were friends. He lived on 16th avenue, in sight of this trestle, near 5th or 6th street. I lived on 4th street, only a short distance from the west end of the trestle. I was not so drunk but what I knew what I was about, and Anderson was not. He was able to walk. The train was running as it usually did. Cannot tell how many miles an hour."

Considerable evidence was given to the effect that it was a common occurrence for everybody to travel over this trestle every day, and all classes of people, at the time of the accident, and had been for some four years; that the ordinary rate of speed in passing over it was about thirty to thirty-five miles an hour. The plaintiff was allowed, against objections of the defendant, to show by one Weed, and also by one Oleson, that, for two or three days or so after the accident, the train ran very slowly over the trestle, and that in a couple of weeks they ran at their former rate of speed again. There was no planking or footway on this bridge; simply the open trestle. They had to step from tie to tie in crossing it. It was 120 feet long, and Anderson was killed 33 feet from the east end, on the east side of Fifteenth avenue, as he and Swanson were going towards the train approaching from the west. The ravine at the deepest point was 23 feet deep. There was another like trestle over a deep ravine to the west, 189 feet long, and the interval between the two was 139 feet—both on the main track or line of defendant, and used by pedestrians to about the same extent. Going west from the east end of the first trestle, there is a curve in the track to the right, and both are embraced in the curve. The view from the east to the westward along the track was somewhat obstructed by a bank of earth and a building. But it was shown that a person in an engine cab, coming from the west, could see persons on the trestle work at the point where Anderson was struck for a distance of 456 feet. That the whole of the man and the entire track could be seen, and the ties distinguished. There was a plank crossing at the east end of the first trestle, and one could go from there down to Third street with a wagon. That Fifteenth avenue, within the limits of which Anderson was struck, had never been opened, nor had Sixteenth, Seventeenth, Eighteenth, and Nineteenth avenues to the westward. The train, at the time of the accident, had not passed all the traveled streets of Ashland. The railroad crossed the avenue nearly at a right angle, and the streets were at right angles with the avenues. The plaintiff having rested, the defendant moved for a nonsuit, on the ground that there was not sufficient proof of negligence on the part of the defendant, and that the plaintiff's intestate was guilty of contributory negligence, but the motion was denied. It was testified on behalf of the defendant, among other things, by the engineer, that the train, at the time in question, was running along at the rate of eight or ten miles an hour. That the first he saw of Anderson was when he was within six or eight feet of him. That he could not see him before from the west end of the trestle, on account of the curve and the engine being in the way, but could see from the east end of the trestle westward 350 feet. That the first information he had that there was anything on the track was when the fireman gave the signal to stop and apply the brakes; and, just about the time he had applied the brakes, the fireman said, "Man on the track!" and then he reversed the engine, and blew the whistle, and reached for the sand lever, and then he saw the man on the track six or eight feet ahead. That he was somewhere between the two trestles, about the middle, when the fireman gave the signal to stop. Made a good stop. Could stop that train at about 150 to 200 feet from getting the signal, when going at the rate of six or eight miles an hour; at twenty miles an hour, about 400 feet; and at thirty-five miles, between 700 and 800 feet. There was testimony on the part of the plaintiff tending to show that the train might have been stopped in a shorter distance. The fireman testified, among other things, that the rate of speed was five or six miles an hour, and he was ringing the bell all the time. When he first saw the men, it was difficult to tell where they appeared to be, on account of the curve. First discovered they were on the trestle when he gave the signal to stop. Was then in view of the whole bridge. It was admitted that no warning had been put up to keep the public off of the bridge, and it was shown that no gates had been put up to keep people from crossing; that there were gates on some streets west of the depot towards the junction. The evidence tended to show that the running time, between Ashland and the junction was fifteen minutes, and the distance four and three tenths miles. The conductor testified, among other things, that on this occasion they were running at about the usual rate of speed after they left the switch where they bring lumber onto the track from the Bay Front line, which it was admitted was 2,250 feet west of the east end of the trestle on which Anderson was killed; and from the plat in evidence it appeared to be somewhat further than that distance from Ashland station to where Anderson was struck. Evidence was given tending to show that, at the time, Anderson was drunk, so that he staggered; and, in rebuttal, to show that he was not drunk; that he had a swaggering gait; that he and Swanson were intimate friends, and sometimes walked arm in arm. Defendant

asked the court to direct a verdict in its favor, on the same grounds that it had moved for a nonsuit, but this was denied. The court charged the jury that: "The evidence of the plaintiff tends to show that the track or trestle had been dedicated to the public at the point where the deceased lost his life, and that there had been no objection to such use made by the defendant. That, if you find that the track at such point had been so dedicated, it was the duty of the defendant to keep a careful lookout when approaching said point with the train, and while crossing the same, and to keep its train, as far as practicable, under reasonable control, so that there would not be any injury done to any person crossing which might be prevented by due caution on the part of the defendant. That it was the duty of the engineer and fireman, if you find that this point was used by the public as alleged, to keep a careful outlook to avoid injury to any person crossing the said point which could be prevented by said outlook. The fact, if it be a fact, that Anderson was under the influence of intoxicating liquors did not relieve the defendant in any particular, but could only be considered for the purpose of showing that there was contributory negligence on the part of the deceased; for the defendant, if there were no contributory negligence on the part of the deceased, would be liable even if the deceased were intoxicated at the time he lost his life, the same as it would be if he were sober." The jury found a general verdict for the plaintiff in the sum of $5,000, and also that, at the time of the accident, the train was running seventeen miles per hour.

Messrs. **Tompkins & Merrill** and **S. L. Perrin**, for appellant:

Both these men had lived near this bridge for years, knew that trains were continually and frequently crossing the same, and that this particular train was due about this time. It was negligence upon their part not to take immediate steps to put themselves in a place of safety as soon as they heard the alarm of the bell.

Schilling v. *Chicago, M. & St P. R. Co.* 71 Wis. 255; *Hansen* v. *Chicago, M. & St. P. R. Co.* 83 Wis. 631; *Schmolze* v. *Chicago, M. & St. P. R. Co.* Id. 659; *Liermann* v. *Chicago, M. & St. P. R. Co.* 82 Wis. 286; *Carney* v. *Chicago, St. P. M. & O. R. Co.* 46 Minn. 220; *Beck* v. *Portland & V. R. Co.* (Or.) Nov. 29, 1893.

Deceased knew that the train was then due, that the bridge was not constructed for use as a footway, and that it was not necessary to use it as such; he was clearly guilty of some want of ordinary care in going where he did at that time. He was cognizant of the usual rate of speed of the train and of the dangers incident to the use of the bridge as a footway.

Wright v. *Boston & A. R. Co.* 142 Mass. 296; *Grethen* v. *Chicago, M. & St. P. R. Co.* 22 Fed. Rep. 609, 19 Am. & Eng. R. R. Cas. 342; *Morgan* v. *Pennsylvania R. Co.* 7 Fed. Rep. 78; *Johnson* v. *Boston & M. R.* 125 Mass. 75; *Illinois Cent. R. Co.* v. *Godfrey*, 71 Ill. 500, 22 Am. Rep. 112; *Nicholson* v. *Erie R. Co.* 41 N. Y. 526; *Studley* v. *St. Paul & D. R. Co.* 48 Minn. 249.

The court allowed the plaintiff to introduce evidence that the trains were run slower immediately after the accident than before. This is certainly error.

Lang v. *Sanger*, 76 Wis. 71; *Baird* v. *Daly*, 68 N. Y. 547; *Castello* v. *Landwehr*, 28 Wis. 524.

Messrs. **John F. Dufur** and **Cate, Jones & Sanborn** for respondent.

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

1. The plaintiff's contention was that the defendant had been guilty of negligence in running its train at a dangerous and unlawful rate of speed, and in not keeping a proper outlook, and for failure to give timely warning of the approach of the train. It was error, we think, to admit the testimony of the witnesses Weed and Oleson to the effect that for a few days after the accident, the defendant ran its trains over the trestle quite slowly, and afterwards ran them at its former alleged dangerous rate of speed, of 30 or 35 miles an hour. The tendency of the testimony was to show, by implied admission, that the defendant habitually, down to the time of the accident, had been guilty of negligence, in not using reasonable and ordinary care towards those who crossed the trestle, and towards the plaintiff's intestate as well; that the conduct of the defendant after the accident was an implied admission of fault on its part, and it soon after, in disregard of its alleged duties, returned to its former dangerous, if not reckless, course of conduct. The question is the same in principle as in the case where an injury has been caused by defective machinery or an insufficient highway, and repairs have been made immediately or soon thereafter. A party may have exercised all the care which the law required, and yet, after an accident, he may think it well to use additional caution or safeguards: and it is unjust to hold that the fact that he had done so is an admission of previous negligence, or that his return to previous methods evinced a disposition to persist in a negligent and dangerous course of conduct. *Castello* v. *Landwehr*, 28 Wis. 530; *Lang* v. *Sanger*, 76 Wis. 75; *Morse* v. *Minneapolis & St. L. R. Co.* 30 Minn. 465; *Columbia & P. S. R. Co.* v. *Hawthorne*, 144 U. S. 202, 207, 36 L. ed. 405, 406; *Shinners* v. *Proprietors of Locks & Canals*, 154 Mass. 168, 12 L. R. A. 554.

2. The question whether a party injured or killed on the track was drunk at the time, and whether his being drunk was contributory negligence, is, as a rule, a question of fact for the jury. The court stated to the jury that the fact, if it was a fact, that the plaintiff's intestate was under the influence of intoxicating liquors at the time he lost his life, "did not relieve the defendant in any particular, but could only be considered for the purpose of showing that there was contributory negligence on his part," adding: "For the defendant, if there were no contributory negligence on the part of the deceased, would be liable even if the deceased were intoxicated at the time he lost his life." This instruction, as given, is somewhat obscure and contradictory, and fails to express the idea

the court probably intended to convey. The instruction left the jury to infer that, although drunk when he went into this position of great danger, as detailed in the evidence, the defendant might be liable "the same as it would be if he were sober." The instruction was not called for by the facts, and was, we think, misleading. We do not think that the plaintiff's intestate can be held free from contributory negligence if he was intoxicated, and in that condition walked out upon the trestle to a position of great peril to life or limb, and, in attempting to cross it, lost his life at the time and under circumstances given in evidence, and about which there is really no dispute. The instruction left it to the jury to conclude that there could be a recovery, although he was drunk at the time, and it was therefore misleading and erroneous, and it was erroneous in leaving the jury to conclude that there could be any recovery at all.

3. Walking upon the track of a railway has been held in many cases to be negligence *per se*, and sufficient to defeat a recovery in case of injury to the party by a passing train (*Moore* v. *Pennsylvania R. Co.* 99 Pa. 301, 44 Am. Rep. 106; *Bresnahan* v. *Michigan Cent. R. Co.* 49 Mich. 410; *McClaren* v. *Indianapolis & V. R. Co.* 83 Ind. 319; *Harty* v. *Central R. Co. of New Jersey*, 42 N. Y. 468; *Tennenbrock* v. *Southern Pacific Coast R. Co.* 59 Cal. 269; *Yarnall* v. *St. Louis, K. C. & N. R. Co.* 75 Mo. 575); but in general it is held that the question as to such an act, in the event of any injury, is one proper to go to the jury. Beach, Contrib. Neg. § 211; *Townley* v. *Chicago, M. & St. P. R. Co.* 53 Wis. 626; *Johnson* v. *Chicago & N. W. R. Co.* 56 Wis. 274. Courts universally characterize such an act as dangerous, and "a civil wrong of an aggravated nature, as it endangers not only the trespasser, but all who are passing and being carried over the road." *Philadelphia & R. R. Co.* v. *Hummell*, 44 Pa. 375, 84 Am. Dec. 457. The use of a railroad is exclusively for its owners, or those acting under its authority, and the company is not bound to the exercise of any active duty of care or diligence towards mere trespassers on its track, to keep a lookout to discover or protect them from injury, except that, when discovered in a position of danger or peril, it is its duty to use all reasonable and proper effort to save and protect them from the probable consequences of their indiscretion or negligence. The company is also bound to provide for a careful outlook, in the direction in which a train is moving, in places where people, and especially children, are likely to be on the track, as in and about station grounds, depots, and regular crossings. This rule has been laid down in *Townley* v. *Chicago, M. & St. P. R. Co.* 53 Wis. 626, and *Whalen* v. *Chicago & N. W. R. Co.* 75 Wis. 654, and other cases; but its limit is best understood in view of the character of the places where the injuries in such cases occurred, that is to say, such as are above indicated. The rule, manifestly, has no application to the main track of the company in other places; for, as to them, it is not bound to act upon the assumption that the public or wayfarers will trespass upon its rights. But after discovery that a party is on its track, and in a position of danger, it is bound to the exercise of reasonable and appropriate care to prevent his injury even though wrongfully on its track, and to take as prompt and active measures as possible, if the person is helpless or unconscious or unable to escape. It has frequently been held in this and other states that where the grounds of a railway are used by pedestrians for a considerable time without objection, or with acquiescence on the part of the company, a pedestrian crossing over the same thereby becomes a licensee, and is no longer to be considered as a mere trespasser, acting at his peril, and that it is the duty of the company to exercise increased prudence and caution in operating its road at such point, and to keep a reasonably vigilant lookout to prevent injury or accident to those so crossing its grounds. *Townley* v. *Chicago, M. & St. P. R. Co.* 53 Wis. 626; *Whalen* v. *Chicago & N. W. R. Co.* 75 Wis. 656; *Davis* v. *Chicago & N. W. R. Co.* 58 Wis. 646, 46 Am. Rep. 667; *Delaney* v. *Milwaukee & St. P. R. Co.* 33 Wis. 67; *Johnson* v. *Lake Superior Terminal & Transfer R. Co.* 86 Wis. 64.

In all these cases the injury occurred at the station or on the depot grounds or yard where parties would naturally resort and cross over the same, and where the agents and servants of the company could exercise a proper degree of care and watchfulness under the circumstances; but we have not met with any case, in which the point was necessary to the decision, where it has been held that a license can be implied from such acts of frequent use by pedestrians or wayfarers of the main track or bridges or trestles distant from such places as a pathway for travel, though we find that in other states the rule of implied license has been applied to parties frequently crossing the track at particular points, other than regular crossings. In the case of *Hooker* v. *Chicago, M. & St. P. R. Co.*, 76 Wis. 542, it was reasonably clear, and was so found, that the company was guilty of negligence that caused the accident; and it appeared that "from a point 1,168 feet north of the bridge on the west side of the track, at the height of an engine cab, the whole track could have been plainly seen southward through the bridge, and to Main street beyond, without any obstruction whatever." The case was rightly decided, and whether the injured party was a licensee or not was not material or necessary to sustain the judgment. In the *Davis Case*, 58 Wis. 646, 46 Am. Rep. 667, the party injured was walking between the main track and a side track, across a public street, when he was injured by the explosion of the boiler of a locomotive that had been left unattended on a side track. In the case of *Mason* v. *Missouri Pac. R. Co.*, 27 Kan. 83, 41 Am. Rep. 405, where the company had constructed a trestle or bridge over a creek and street on the plat of a city, and where the street had not been graded or improved, with a span of 160 feet over a stream of 65 feet wide, and 30 feet above the water, and there were no railings to the trestle or bridge, and no foot planks on it, and the only way

of crossing was by stepping from tie to tie, and the railway company was constantly using the track for the operation of its engines and cars, it was held that, in an action by a person injured while crossing the bridge by a collision with a hand-car, no license could be implied from the custom of foot passengers to cross over the bridge, and evidence to show such user was held to have been properly stricken out. In *Tennenbrock* v. *Southern Pacific Coast R. Co.*, 59 Cal. 269, in a similar case, it was held that one injured while walking over the bridge or trestle by a train was guilty of contributory negligence. In the present case the defendant company had done nothing to invite or induce the public to use this trestle for a footway. It was on the main track, over which at least twelve regular trains crossed each day, and there were occasionally special trains, and trains and switch engines besides passed over it from the Bay Front track to bring lumber upon the main line. It was impossible to meet or have a train pass one on the trestle without almost certain death, or the greatest possible injury to the pedestrian. It was not planked over in any part, and was so narrow as to leave no room on it outside of a passing train, and was so built as rather to repel than induce or invite foot travel over it. If the deceased was intoxicated, that was his own fault; and, if not, there was still less excuse for his being on the trestle. It did not become any the less dangerous on account of the frequency of its use, and we think that it would be contrary to sound public policy and a due regard to the safety of passengers over the road and operatives to hold that there can be any implied license to use the track along or between the rails or over trestles or other bridges as a way for foot travel. But the statute of the state has declared the public policy of the state upon this subject beyond cavil or dispute. It is provided by Rev. Stat., § 1811, that "it shall not be lawful for any person, other than those connected with or employed upon the railroad, to walk along the track or tracks of any railroad, except when the same shall be laid along public roads or streets; provided, that this section shall not be construed to prevent any person from driving across any such roads from one part of his own land to another." "This legislation is justified," it was held in *McDonald* v. *Chicago, M. & St. P. R. Co.*, 75 Wis. 128, in construing the previous clause of the same section, as "not only being for the protection of the lives and property of those owning and engaged in the operation of the railroad, but also for the protection of the lives of those traveling upon it;" and a violation of the act was held to be contributory negligence. The consequence is that the plaintiff's intestate was a trespasser and unlawfully upon the trestle bridge at the time he came to his death. There could be no license that would be of any avail to allow him or others to walk over and along the track upon this bridge. The law forbids such use of the track, and makes the alleged implied license relied on nugatory, and of no avail. Any other conclusion would entirely defeat the manifest purpose of the statute, and render it wholly inoperative. The company was only bound to exercise the care and caution towards the deceased that they are required to exercise in the case of a trespasser, after it has been discovered that he is on the track, and in a position of probable or actual peril. It follows from these views that the instructions of the circuit court in respect to the right of the plaintiff's intestate to cross the trestle bridge, and the duty of the defendant towards him while crossing, were erroneous. Upon the case as made by the plaintiff, we think that the plaintiff's intestate, at the time he was killed, was guilty of negligence contributing to the result. Comment on the facts is unnecessary. They speak for themselves. The evidence on the subject of contributory negligence is clear and decisive. For these reasons the judgment of the circuit court must be reversed.

The judgment of the Circuit Court is reversed, and the case is remanded for a new trial.

Orton, *Ch. J.*, dissenting:

The undersigned respectfully dissents from the decision or intimation in this case that a person walking along a railroad track, and injured by a passing train, cannot set up and prove an implied license of the company for his walking in such a place, except where the track shall be laid along a public road or street. The Statute (Rev. Stat. § 1811) which makes it unlawful for any person to walk along the track of any railroad has been in force since 1872, and yet there have been in this court numerous cases since that time, in which it is held that, notwithstanding that statute, a person so injured may set up an implied license of the company to show that he was not a trespasser. The last case in which it has been so held was that of *Johnson* v. *Lake Superior Terminal & Transfer R. Co.*, 86 Wis. 64. The opinion was written by the same learned justice. The person injured was walking along the center of a switching track when injured by the train, the most dangerous track of the railroad. The question of the plaintiff's implied license to walk there was submitted to and found by the jury, and this was approved by this court. To now hold otherwise will overrule a great many cases of this court, which ought to stand protected by the maxim, "*stare decisis et non quieta movere.*"

RHODE ISLAND SUPREME COURT.

William ELLIOTT
v.
NEWPORT STREET R. CO.

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

1. **A trolley railway company should foresee the possible danger** to which passengers on the foot-boards of its cars may be exposed by slight movement of the body, when trolley poles are placed from ten to twelve inches from the edge of the foot-board.

2. **A passenger is not bound to anticipate the danger** and be on the lookout for trolley poles while riding with permission on the foot-board of a street-car, unless he has knowledge of the proximity of such poles to the track.

3. **It is not prima facie the fault of a passenger** where he is injured by riding on the foot-board of a trolley car.

(November 8, 1893.)

APPLICATION by plaintiff for a new trial, after verdict in favor of defendant, in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Granted.*

The facts are stated in the opinion.

Messrs. **Patrick J. Galvin** and **Charles Acton Ives**, for plaintiff, in support of the motion:

It is not *per se* negligence for passengers to ride upon the platform or foot-board of crowded street-cars or railway cars, and when in such position even voluntarily, the care required of the passenger is only increased to the extent of the obvious, and naturally to be expected dangers connected with the position; but if the position be taken with the consent or invitation expressed or implied of the carrier, the normal duty of the carrier is in no way abated.

Bowie v. *Greenville Street R. Co.* 69 Miss. 196; *Germantown Pass. R. Co.* v. *Walling*, 97 Pa. 55, 39 Am. Rep. 796; *Topeka City R. Co.* v. *Higgs*, 38 Kan. 375; *City R. Co.* v. *Lee*, 50 N. J. L. 435; *Spooner* v. *Brooklyn City R. Co.* 54 N. Y. 230, 13 Am. Rep. 570; *Fleck* v. *Union R. Co.* 134 Mass. 480; *Geitz* v. *Milwaukee City R. Co.* 72 Wis. 307; *Clark* v. *Eighth Ave. R. Co.* 36 N. Y. 135, 93 Am. Dec. 495; *West Philadelphia Pass R. Co.* v. *Gallagher*, 108 Pa. 524; *Lehr* v. *Steinway & H. P. R. Co.* 118 N. Y. 556.

It is not even negligence *per se* for passengers to board or leave moving cars, and when they do so the question of contributory negligence is in most cases for the jury.

Murphy v. *Union R. Co.* 118 Mass. 228; *Spooner* v. *Brooklyn City R. Co. supra*; *Nolan* v. *Brooklyn C. & N. R. Co.* 87 N. Y. 73, 41 Am. Rep. 345; *Lehr* v. *Steinway & H. P. R.* and *Fleck* v. *Union R. Co. supra.* See also Booth, Street Railway Law, §§ 336, 337, and cases there cited.

The maintenance of a line of poles by the carrier close to its car tracks is not one of the obvious and naturally to be expected dangers against which a passenger standing on the platform of, boarding, or alighting from a moving car is bound to protect himself.

See *North Chicago Street R. Co.* v. *Williams*, 140 Ill. 275, and cases there cited.

In *Clark* v. *Eighth Ave. R. Co.*, *supra*, a verdict was sustained against the carrier for injuries sustained by a passenger who was driven against a cart by a horse-car of the defendant, on the steps of which the passenger was by the implied permission of the conductor, the car being crowded.

In *Spooner* v. *Brooklyn City R. Co. supra*, a passenger was standing upon the foot-board along the side of a sleigh of the defendant and was in precisely the position and under almost the precise circumstances of the plaintiff in this case, he was injured by the sleigh running close to a passing vehicle for which he was not looking out and a direction of nonsuit was reversed.

See also *Craighead* v. *Brooklyn City R. Co.* 123 N. Y. 391; *Gray* v. *Rochester City & B. R. Co.* 61 Hun, 212.

Messrs. **Darius Baker, David S. Baker, Jr.**, and **William C. Baker** for defendant, *contra.*

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

This is an action of trespass on the case to recover damages for personal injuries alleged to have been sustained by defendant's negligence. The case was tried at the March term of the supreme court for Newport county. When the testimony on the part of the plaintiff had been submitted to the jury, the court directed a verdict for the defendant. The plaintiff thereupon excepted to the direction, and filed this petition for a new trial. The testimony shows that the plaintiff was injured September 1, 1892, while riding on one of the defendant's electric cars in Newport. The facts attending the injury were these: The plaintiff boarded the car a few minutes past 8 o'clock in the evening, at the foot of Touro street, on Spring street, with the intention of riding to Morton Park, in the southern part of the city. The car was an open one, with seats running crosswise, and with steps or foot-boards on each side lengthwise of the car. This car had in tow another car. All the seats in both cars, and also the platforms, were filled with passengers, and passengers were standing on the foot-boards. The plaintiff took a position on the foot-board of the first car, on the left hand or easterly side of the car as it was going south, between the second and third seats from the rear end of the car, standing with his face turned towards the opposite side of the car, and holding onto the two stanchions supporting the roof of the car on either side of him. Instead of standing on the foot-board,

NOTE.—As to the difference in the care required of passengers on railroad and street-cars, see the decisions as to how far placing the arm on the window sill is negligence in the respective classes of cases collected in the *note* to Richmond & D. R. Co. v. Scott (Va.) 16 L. R. A. 91.

P. 208. See also 27 L. R. A. 279; 33 L. R. A. 69; 41 L. R. A. 836; 44 L. R. A. 157; 45 L. R. A. 108.

the plaintiff might have stood, if he had seen fit, between the seats inside of the car. Shortly after the car had started, while the plaintiff was reaching for his money to pay his fare, he was thrown from the car by coming in contact with a trolley pole, fell to the ground, and was run over by the wheels of the car in tow. No objection was made by the conductor to the plaintiff's standing on the foot-board, nor was he warned that there was any danger in doing so. Between Touro and Franklin streets the defendant's track ran close to the curbstone on the easterly side of Spring street. The cars were propelled by the trolley system. Between Touro and Franklin streets the poles supporting the trolley wire were located on the edge of the curbstone, so that the distance from the rail to the inner side of the pole varied from 26 to 28 inches. The distance between the inside of the poles and the outer edge of the foot-board of a passing car varied from 10 to 12 inches; the distance in the case of the pole by which it is alleged the plaintiff was struck being 10¼ inches. The plaintiff did not know of the location of the pole at the point where he was injured. He did not notice any poles from the time he got onto the car until he was struck, and could not have seen them, in the position in which he stood, because they were behind him. He had never ridden over that part of the defendant's road prior to the accident, and was familiar with the street only as he had occasionally driven through it. From the point where the plaintiff got onto the car, to the point where he was thrown off, the car had passed eight poles, that by which the plaintiff was struck being the ninth.

The question raised by the plaintiff's exception is whether, on these facts, the court was justified in directing a verdict for the defendant. To have warranted the direction it must have clearly appeared,—so clearly that the court could say as a matter of law,—either that the defendant was not negligent, or that the plaintiff was guilty of negligence which contributed to the accident. We do not think that either of these propositions was sufficiently clear to warrant the court in taking the case from the jury, and directing a verdict for the defendant. Common carriers of passengers are required to do all that human care, vigilance, and foresight reasonably can, in view of the character and mode of conveyance adopted, to prevent accident to passengers. *Tuller* v. *Talbot*, 23 Ill. 357, 76 Am. Dec. 695; *Meier* v. *Pennsylvania R. Co.* 64 Pa. 225, 3 Am. Rep. 581; *Topeka City R. Co.* v. *Higgs*, 38 Kan. 375; *Philadelphia & R. R. Co.* v. *Derby*, 55 U. S. 14 How. 468, 486, 14 L. ed. 502, 509. It is a matter of common knowledge that railway companies daily undertake to carry, as did the defendant on the occasion in question, passengers greatly in excess of the seating capacity of their cars; that they stop their cars and take on passengers so long as there is standing room on platforms or foot-boards, and collect fares from those on platforms or foot-boards as well as from those within the cars. Ought not the defendant, in view of the rule prescribing the duty of carriers of passengers to have foreseen the possible danger to which passengers on the foot-boards of its cars might be exposed by a slight turn of the body sidewise, or by a slight inclination of it backward, in consequence of the proximity of its track to its trolley pole at the point where the plaintiff was injured? We think so. *North Chicago Street R. Co.* v. *Williams*, 140 Ill. 275; *Topeka City R. Co.* v. *Higgs*, *supra*; *Gray* v. *Rochester City & B. R. Co.* 61 Hun, 212; *Lehr* v. *Steinway & H. P. R. Co.* 118 N. Y. 556.

But the question which has been chiefly argued is whether, on the facts recited, it sufficiently appeared that the plaintiff was guilty of contributory negligence to justify the direction of the court. The defendant concedes that it is not negligence *in se* for a passenger to ride on the foot-board of an open car, but contends that, as the outside of a car is obviously more dangerous than the inside, it is incumbent on any one who rides there to exercise care commensurate with the danger. This proposition is doubtless correct. But we do not assent to the defendant's further contention that, if the passenger is injured while riding on the foot-board, it is prima facie his own fault. Undoubtedly, by the law of this state, the burden is on him who sues for an injury to show that he was in the exercise of due care, and the question whether he was in the exercise of due care is to be considered with reference to the fact that he was riding in a dangerous situation. But the question of contributory negligence is generally for the jury, the exceptions being where the facts are not controverted, or it clearly appears what course a person of ordinary prudence would pursue, or where the standard of duty is fixed, or the negligence is clearly defined and palpable. *Clarke* v. *Rhode Island Electric Lighting Co.* 16 R. I. 463, 465; *Chaffee* v. *Old Colony R. Co.* 17 R. I. 658, 663. A passenger who rides on the foot-board of a car necessarily takes on himself the duty of looking out for and protecting himself against the usual and obvious perils of riding there,—such, for instance, as injury from passing vehicles, or by being thrown off by the swaying or jolting of the car; assuming, of course, proper management of the car, and proper construction and condition of the road. We do not think, however, that the danger of being hit by a trolley pole is such a peril as a passenger whom the railway company has undertaken to carry on the foot-board of its car is bound to anticipate and be on the lookout for, unless, indeed, it appear that the passenger had knowledge of the close proximity of the track to the trolley pole. He has a right to assume that the railway company has performed its duty in so constructing its road that its passengers, even on the foot-boards of its cars, riding there by its permission, shall not be exposed to injury by the unsafe construction of its road. *City R. Co.* v. *Lee*, 50 N. J. L. 435, 439. The testimony does not show that the plaintiff knew of the close proximity of the defendant's track to its trolley poles. Moreover, the accident occurred in the evening, when, on account of the darkness, the danger of being struck by

the pole would not be so apparent as in the daytime. Nor does the testimony show that the posture of the plaintiff on the foot-board was an unusual one, or any movement of his which would naturally expose him to danger. The defendant's counsel argues that it is a necessary inference from the fact that he was struck that he was leaning backward at a considerable angle. The plaintiff's testimony was that he was in the act of taking his fare out of his pocket. The defendant's counsel, in argument, stated that the plaintiff illustrated his testimony by raising his arm as though to take his money out of his vest pocket. If this be so, the plaintiff's elbow, as he stood with his back to the trolley poles, would naturally project several inches beyond the line of his body, and a slight inclination would suffice to bring it into contact with a pole only ten and a half inches from the edge of the foot-board. The fact that the plaintiff had already safely passed eight poles gives probability to the theory that the accident was due to the lifting of his arm in the manner stated.

Plaintiff's petition for a new trial granted.

NEBRASKA SUPREME COURT.

SINGER MANUFACTURING CO., *Plff. in Err.*,
v.
Charles R. FLEMING.

(........Neb.........)

*1. **The act to provide for the better protection of the earnings of laborers,** servants, and other employés of corporations, firms, or individuals engaged in interstate business. (Laws 1889, chap. 25), is not in conflict with the constitution of Nebraska, either as being broader than its title or as being prohibited class legislation.

2. **Nor does the act seek to impose a penalty for the benefit of an individual.** The recovery provided for in the act of the debt, costs, expenses, and attorney's fee is simply a recovery of compensatory damages, and not a penalty.

3. **Whether the act is valid in so far as it makes its violation a crime** is not decided; that portion of the act not being so connected with the rest as to affect the validity of the whole act.

4. **Nor is the act in conflict with section 1 of article 4 of the Constitution of the United States,** requiring that full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.

5. **A foreign corporation having a place of business in Nebraska,** which institutes, in another state, attachment proceedings, and seizes the earnings of a citizen of Nebraska, exempt under the laws of Nebraska, is subject to the operation of the act; the contract out of which the proceedings arose having been made in Nebraska, and being here performable.

6. **While under the laws and decisions of Iowa, a judgment in a proceeding by foreign attachment,** whereby earnings of the defendant, a resident of Nebraska, earned in Nebraska and payable there, are seized and applied to the payment of the defendant's debt, must be treated as within the jurisdiction of the Iowa courts, still, the *situs* of said earnings, for the purpose of determining the right to exemption, is Nebraska.

*Headnotes by IRVINE, C.

(March 6, 1894.)

ERROR to the District Court for Douglas County to review a judgment in favor of plaintiff in an action brought to recover the amount of a debt, costs and expenses, which had been collected by defendant in violation of the Nebraska statutes. *Affirmed.*

The facts are stated in the commissioner's opinion.

Messrs. **Breckenridge, Breckenridge & Crofoot,** for plaintiff in error:

The penalties provided are clearly beyond the scope of, and not indicated by the title of the act, for no protection in any legitimate, lawful sense is given any debtor, by subjecting his creditor to penalties, forfeitures, and fines.

White v. *Lincoln,* 5 Neb. 505; *Ex parte Thomason,* 16 Neb. 238; *Messenger* v. *State,* 25 Neb. 674; *Touzalin* v. *Omaha,* 25 Neb. 817.

Legislative authority cannot reach the life, liberty, or property of the individual, except when he is convicted of crime.

Atchison & N. R. Co. v. *Baty,* 6 Neb. 37, 29 Am. Rep. 356.

Exemplary or punitive damages are not allowed in this state, in an action for a tort; and attorneys' fees, which in such an action can be regarded only in the nature of punitive damages, ought not to be recovered.

Ibid.; Winkler v. *Roeder,* 23 Neb. 706, and authorities cited in both cases.

A similar statute in Indiana was said to have been "enacted to promote the public welfare, and not to redress merely private grievances."

Uppinghouse v. *Mundel,* 103 Ind. 238.

By the common-law rule of comity in force throughout the United States, each state extends to all duly incorporated foreign corporations a legal right to carry on business within its jurisdiction. It may therefore be said to be a general rule, that a corporation can legally carry on its business in the usual way, and by the usual agencies, wherever it may find it convenient and profitable to do so.

Morawetz, Priv. Corp. § 958.

NOTE.—The statute in the above case seems to be in advance of those in other jurisdictions as a means of protecting a debtor against a foreign garnishment, which is permitted in some of the states as shown by the note to Illinois Cent. R. Co. v. Smith (Miss.) 19 L. R. A. 577. The same note also contains decisions upon other means which have been adopted to secure the same end.

See also 26 L. R. A. 445; 36 L. R. A. 549.

Corporations are citizens and residents of the state under the laws of which they were created, and they cannot, by engaging in business in another state, acquire a residence there.

Fales v. *Chicago, M. & St. P. R. Co.* 32 Fed. Rep. 673; *Germania F. Ins. Co.* v. *Francis*, 78 U. S. 11 Wall. 210, 20 L. ed. 77; *Ex parte Schollenberger*, 96 U. S. 377, 24 L. ed. 854; *Baltimore & O. R. Co.* v. *Koontz*, 104 U. S. 5, 26 L. ed. 643.

A corporation cannot acquire a residence in a state, otherwise than the one in which it is incorporated.

Booth v. *St. Louis Fire Engine Mfg. Co.* 40 Fed. Rep. 1; *Bensinger Self-Adding Cash Register Co.* v. *National Cash Register Co.* 42 Fed. Rep. 81.

This action is for a tort, certainly not being founded upon contract, and the tort, if any was committed, was committed in Iowa. The proceeding was innocent and legal in Iowa, and if it is a tort here, it is tortious because the Nebraska statute has made it so.

In order to maintain an action of tort, founded upon an injury to person or property, and not upon a breach of contract, the act which is the cause of the injury and the foundation of the action must at least be actionable or punishable by the law of the place in which it is done, if not also by the law of the place in which redress is sought.

LeForest v. *Tolman*, 117 Mass. 109.

The legislative authority of every state must spend its force within the territorial limits of the state.

Cooley, Const. Lim. 5th ed. p. 151.

The money collected in Iowa in satisfaction of the judgment there, was not property in this state, for wherever the domicil of defendant in error may have been, when the court in Iowa, by its regular procedure, acquired the custody of the money, it was assuredly property in Iowa and subject to the control of the court, and the fact that it may have been due for wages earned in Nebraska makes no difference.

Mooney v. *Union Pac. R. Co.* 60 Iowa, 346.

State laws have no extraterritorial validity. The moment a state attempts to lay its hands upon the rights of those whose domicil and whose affairs are beyond its boundaries, its acts are null.

Black, Constitutional Prohibitions, § 120.

Where at the place of commission the act is legally innocent, it cannot be elsewhere made a delict (tort) for the principle of territorial sovereignty would be infringed.

Wharton, Conf. L. § 478.

The judgment infringes upon the "full faith and credit" clause of the Federal Constitution.

A nonresident, or a foreign corporation may have an attachment in the courts of Iowa against a nonresident, upon precisely the same grounds and upon the same conditions as a resident.

Mooney v. *Union Pac. R. Co. supra.*

The Supreme Court of the United States characterizes legislation which permits this as "enlightened."

Green v. *Van Buskirk*, 74 U. S. 7 Wall. 139, 19 L. ed. 109.

Exemptions under the laws of Nebraska cannot be pleaded in the courts of Iowa, and will not be allowed there.

Mooney v. *Union Pac. R. Co. supra.* See also *Broadstreet* v. *Clark*, 65 Iowa, 670; *Harwell* v. *Sharp*, 8 L. R. A. 514, 85 Ga. 124; *Jenks* v. *Ludden*, 34 Minn. 482; *Warner* v. *Jaffray*, 96 N. Y. 248, 48 Am. Rep. 616.

It is generally held that in the courts of a state, any citizen of that state may be enjoined from resorting to the courts of any other state for the purpose of evading the exemption laws of his own state.

See *Cole* v. *Cunningham*, 133 U. S. 107, 33 L. ed. 538, and cases cited.

But the courts of a state will enjoin only citizens of that state from so doing.

Hervey v. *Rhode Island Locomotive Works*, 93 U. S. 664, 23 L. ed. 1003; *Walworth* v. *Harris*, 129 U. S. 355, 32 L. ed. 712.

Messrs. **Kennedy, Gilbert & Anderson** for defendant in error.

Irvine, *C.*, filed the following opinion:

The plaintiff in error is a corporation organized under the laws of the state of New Jersey. It has a place of doing business styled a "general agency," at Denver, Colo. It has also agencies in Iowa and Nebraska, and does business in both of those states. The agents there report to the general agent at Denver. The defendant in error is a resident of Nebraska, the head of a family, and an employé of the Union Pacific Railway Company, whose lines extend into both Iowa and Nebraska. Fleming bought from the Singer Company a sewing machine upon credit. The agent of the Singer Company in Omaha, after some efforts to collect the bill, returned it to the general agent at Denver, who in turn sent it to the agent in Council Bluffs, Iowa. The agent at Council Bluffs brought an action in Pottawattamie county, Iowa, against Fleming, on behalf of the Singer Company proceeding by process of foreign attachment, and garnished the Union Pacific Railway Company. The result of this proceeding was that wages of Fleming, to the amount of $38.05, due him from the railroad company, were seized by the Iowa court, and appropriated to the payment of the judgment there rendered against Fleming. Fleming then instituted this action in Douglas county, Neb., under section 531c-531f of the Code of Civil Procedure to recover from the Singer Company the debt so garnished, with costs, expenses, and attorney's fees. The wages reached by garnishment were earned within sixty days prior to the commencement of the action in Iowa. Judgment was rendered in favor of Fleming in the district court of Douglas county in the sum of $95.55 and costs, from which the Singer Company prosecutes error. No question is raised as to the sufficiency of evidence to support a judgment for that amount, but the judgment is sought to be reversed upon three grounds: First, that the statute under which the action was brought is contrary to the constitution of Nebraska; second, that it conflicts with section 1 of article 4 of the Constitution of the United States, requiring that full faith and credit shall be given in

each state to the public acts, records, and judicial proceedings of every other state; third, that, if the law be constitutional, it does not apply to foreign corporations.

The statute referred to is as follows: "That it be, and is hereby declared, unlawful for any creditor, or other holder of any evidence of debt, book account, or claim of any name or nature against any laborer, servant, clerk, or other employé of any corporation, firm, or individual, in this state, for the purpose below stated, to sell, assign, transfer, or by any means dispose of any such claim, book account, bill, or debt of any name or nature whatever, to any person or persons, firm, corporation, or institution, or to institute in this state, or elsewhere, or to prosecute any suit or action for any such claim or debt against any such laborer, servant, clerk, or employé by any process seeking to seize, attach, or garnish the wages of such person or persons earned within sixty days prior to the commencement of such proceeding for the purpose of avoiding the effect of the laws of the state of Nebraska concerning exemptions. That it is hereby declared unlawful for any person or persons to aid, assist, abet, or counsel a violation of section one of this Act for any purpose whatever. In any proceeding, civil or criminal, growing out of a breach of sections one or two of this Act, proof of the institution of a suit or service of garnishment summons by any persons, firm, or individual, in any court of any state or territory other than this state or in this state to seize by process of garnishment or otherwise, any of the wages of such person as defined in section one of this Act shall be deemed prima facie evidence of an evasion of the laws of the state of Nebraska and a breach of the provisions of this Act on the part of the creditor or resident in Nebraska causing the same to be done. Any persons, firm, company, corporation, or business institution guilty of a violation of sections one or two of this Act shall be liable to the party injured through such violation of this Act, for the amount of the debt sold, assigned, transferred, garnished, or sued upon, with all costs and expenses and a reasonable attorney's fee, to be recovered in any court of competent jurisdiction in this state; and shall further be liable by prosecution to punishment by a fine not exceeding the sum of two hundred dollars and costs of prosecution."

1. Three arguments are made upon the proposition that the statute is in conflict with the constitution of Nebraska. In the first place, it is said that the act is broader than its title. The title is as follows: "An Act to Provide Better Protection for the Earnings of Laborers, Servants and Other Employés of Corporations, Firms, or Individuals Engaged in Interstate Business." We are somewhat at a loss to appreciate the argument based on this proposition. It seems to be the theory of counsel that that portion of the act which provides for the recovery of the debt, costs, expenses, and attorney's fee, and which enacts a penalty for the violation of the law, is not expressed in the title. These features are not distinctly expressed; but the title to the act need not amount to an analysis or complete abstract of its text. It is sufficient if the title, by general language, fairly expresses its subject matter. Where a bill has but one general object, it will be sufficient if the subject is fairly expressed in the title. *People* v. *McCallum*, 1 Neb. 182; *State* v. *Ream*, 16 Neb. 681. The title of this Act is comprehensive. Merely to declare the doing of certain acts unlawful would be nugatory, unless the act itself, or other provisions of the law, provided a redress for injuries inflicted by reason of its violation. Without the section providing a remedy, the act would not provide "for the better protection of the earnings" of the persons sought to be protected. Both a substantial enactment of law and a remedy for its violation are fairly included in the title, and the act would not be complete in the absence of either provision.

It is next urged that the act is unconstitutional because imposing a penalty which does not go to the school fund. The last section of the act undertakes to provide two remedies. One is that the person violating it shall be liable, by prosecution, to punishment by fine. It is not necessary to here consider whether that portion of the act is valid. If it is, the fine imposed is like all other fines in criminal cases, and is not subject to the objections urged. If it be not valid, the whole act is not, therefore, unconstitutional. Where a part of an act is void, and a part in its nature valid, the whole is not void unless it appears, from an examination of the act itself, that the invalid portion was designed as an inducement to pass the valid, so that the whole, taken together, will warrant the belief that the legislature would not have passed the valid portion alone. *State* v. *Lancaster County Comrs.* 6 Neb. 474; *State* v. *Lancaster County Comrs.* 17 Neb. 85; *Trumble* v. *Trumble* (Neb.) 55 N. W. Rep. 869. But counsel say the provision permitting the recovery not only of the debt, but of costs, expenses, and attorney's fees, is in the nature of a penalty; and we are cited, upon that subject, to *Atchison & N. R. Co.* v. *Baty*, 6 Neb. 37, 29 Am. Rep. 356. In that case an act was held void because it sought to give, to the owner of livestock injured upon a railroad, double the value of his property. This double recovery was clearly in the nature of a penalty. It has no element of compensation, but, in the statute we are considering, the damages awarded are purely compensatory. Nothing is allowed by way of vindictive damages or as a penalty, but the injured party is made whole by being permitted to recover the amount of money wrongfully taken from him, together with the exact costs and expenses by him incurred, and a reasonable attorney's fee which is also an item of expense for which he should be compensated, and which, probably, would have been included as costs and expenses, even though not otherwise expressed. The law is for none of the reasons urged in conflict with the constitution of Nebraska.

2. Is the act in conflict with the Constitution of the United States? It is said, in support of this proposition, that the courts of

Iowa have held that a nonresident of Iowa or a foreign corporation may have an attachment in that state against a nonresident upon precisely the same grounds, and upon the same conditions, as a resident. The case of *Mooney* v. *Union Pac. R. Co.*, 60 Iowa, 346, is cited as sustaining that contention. The case cited certainly goes that far; and that case, and later cases which might have been cited, carry the doctrine further, and go to the extent of holding that a citizen of Nebraska may sue another citizen of Nebraska in the courts of Iowa, and obtain jurisdiction by attaching and garnishing the wages earned by defendant in Nebraska, and there payable to him by a railroad company which happens to operate in both states; and that in such case the defendant, being a nonresident of Iowa, is not entitled to the benefits of the Iowa exemption laws, and that the Iowa courts will not, even upon principles of comity, give effect to the Nebraska exemption laws, and that by such a device the defendant is absolutely deprived of his exemptions under the law of either state. The question presented is whether the courts and the legislature of this state are required, in order to give full faith and credit to the judicial proceedings of Iowa, to sanction such a proceeding. We think not. The section of the Federal Constitution referred to requires, not only that full faith and credit shall be given to the judicial proceedings of another state, but also that full faith and credit shall be given to the public acts of such state. The laws of Nebraska make sixty days' wages of laborers, mechanics, and clerks, who are heads of families, exempt from attachment execution and garnishee proceedings. Where the wages are earned in Nebraska, and are there payable to the laborer residing there, Nebraska is the *situs* of the debt. *Wright* v. *Chicago, B. & Q. R. Co.* 19 Neb. 175; *Mason* v. *Beebee*, 44 Fed. Rep. 556. As pointed out in the case of *Mason* v. *Beebee*, last cited, there is a marked distinction between the *situs* of a chose in action for the purpose of jurisdiction and its *situs* for determining the rights of the parties thereto. The case of *Mason* v. *Beebee* contains a well-reasoned discussion of the whole subject by *Judge* Shiras. The opinion is too long to quote entire, and the whole of it is so closely applicable to the case at bar that we could not select one portion as more proper for citation than the rest. Suffice it to say that the case of *Mooney* v. *Union Pac. R. Co.* is there discussed *in extenso*, its fallacies laid bare, and the monstrous injustice and disregard of the laws of other states which would result, from following the *Mooney Case* are there demonstrated. If the *situs* of the debt was Nebraska, and not Iowa, then it follows that no legislative or judicial interposition in Iowa could rightfully sustain the jurisdiction of Iowa courts in such a case. If the courts of Iowa should seek to prosecute a citizen of Nebraska who does not come within their jurisdiction, and to reach over into Nebraska, and take from this state the property of that citizen here located, can any one for a moment urge, or seriously consider, that our legislature and courts, in order to give full faith and credit to the judicial proceedings of Iowa, must stand idly by and countenance such a proceeding? Must we permit our laws to be nullified and evaded, in order to sustain the courts of another state in overreaching their jurisdiction, in refusing to exercise the comity elsewhere accorded sister states, and in seizing the property in Nebraska of citizens of Nebraska who have not brought themselves within the lawful reach of Iowa courts? To quote from the brief of the plaintiff in error a citation from Black on Constitutional Prohibitions: "The moment a state attempts to lay its hands upon the rights of those whose domiciles and affairs are beyond its boundaries, its acts are null." And to quote again from that brief: "Where, at the place of commission, the act is legally innocent, it cannot be elsewhere made a delict;" a principle which, if correct, must give rise to another principle,—that, where at the place of commission the act is legally wrong, it cannot be elsewhere made right. The decision of the Supreme Court of the United States in no wise militates against this view. In *Green* v. *Van Buskirk*, 72 U. S. 5 Wall. 310, 18 L. ed. 600, 74 U. S. 7 Wall. 139, 19 L. ed. 109, the decision, so far as it is applicable to this case, we think directly tends to support our view. In that case one Bates, a citizen of New York, owned certain iron safes in Chicago, upon which he gave a mortgage to Van Buskirk and others, which was executed and delivered in New York. The laws of Illinois required for the validity of a chattel mortgage, as against third persons, that it should be recorded, and the property delivered to the mortgagee. These conditions were not complied with. The laws of Illinois further permitted attachments against a nonresident debtor. A creditor of Bates sued by attachment in Illinois, and levied upon and sold the safes. Van Buskirk then sued this creditor in New York state, and the creditor pleaded in bar the attachment proceedings in Illinois. The New York courts held that the transaction was governed by the laws of New York, and the case was then taken by writ of error to the Supreme Court of the United States, which held that the attaching creditor had been denied a privilege accorded him by the Constitution of the United States; that the property, to wit, the safes, were situated in Illinois; and that the Illinois law must govern them. That is precisely the position of the defendant in error here. His property which was seized was in Nebraska, and subject to the jurisdiction of our courts, and not those of Iowa.

In *Cole* v. *Cunningham*, 133 U. S. 107, 33 L. ed. 538, it was held that it was not in violation of the Constitution of the United States for a court in one state, in which proceedings have been begun to distribute the estate of an insolvent debtor among his creditors, to enjoin a creditor of the insolvent, a citizen of the same state, from proceeding to judgment and execution in a suit against the insolvent in another state by an attachment of his property which property the insolvent law of the state of the domicil of the parties required the debtor to convey to his assignee.

It is true that in *Cole* v. *Cunningham* there was a strong dissenting opinion by *Mr. Justice* Miller, concurred in by *Justices* Field and Harlan; but the dissent there was upon the ground that the opinion of the majority was contrary to *Green* v. *Van Buskirk*, the *situs* of the debt in *Cole* v. *Cunningham*, which it was sought to reach by attachment, being in the state where the attachment was levied, and not in the state of the residence of the parties, where the injunction was granted. So that, taking either the majority opinion or the dissenting opinion in *Cole* v. *Cunningham*, we think that the case lends force to the views we have expressed. Even the courts of Iowa have refused to apply to their own citizens the rules which they seek to enforce extraterritorially against the citizens of other states, and have restrained a citizen of Iowa from prosecuting a suit by attachment in Minnesota against another citizen of Iowa by garnishment reaching a debt due for wages earned in Iowa. *Teager* v. *Landsley*, 69 Iowa, 725. As said by *Judge* Shiras in *Mason* v. *Beebe*: "Is it consistent for the courts of Iowa to forbid, by injunction, its own citizens from suing in Illinois for the purpose of evading the exemption laws of Iowa, and at the same time entertain suits by citizens of Illinois brought here for the purpose of evading the exemption laws of Illinois?" If full faith and credit have, in these proceedings, not been given to the public acts, records, and judicial proceedings of another state, it is certainly not the legislature or courts of Nebraska which have been in fault. The conclusion reached does not conflict with the decision in *Chicago, B. & Q. R. Co.* v. *Moore*, 31 Neb. 629. It was there held that earnings so seized in Iowa could not be recovered from the garnishee, the Iowa courts having acquired jurisdiction so far as to require the garnishee to pay the money, and the judgment binding the parties to that extent. It is for that reason that a cause of action arose against the creditor for wrongful proceedings in evasion of our exemption laws.

Finally, it is urged that, if the law be constitutional, it cannot be made to apply to foreign corporations. It is stipulated in the bill of exceptions that the Singer Sewing-Machine Company was and has continued doing business in Nebraska. It is stipulated that the debt out of which the controversy arose was contracted in Nebraska. As said by this court in *Turner* v. *Sioux City & P. R. Co.* 19 Neb. 241: "There is great force in the argument that the exemption existing where a debt is contracted is a vested right *in rem*, which follows the debt into any jurisdiction in which an action may be brought; that is, that the law in force when and where a debt is contracted should govern as to the rights of the creditor and debtor in that case." See, on this subject, *Dorrington* v. *Myers*, 11 Neb. 388; *De Witt* v. *Wheeler & W. Sewing Mach. Co.* 17 Neb. 533. It is only upon a principle of comity that a foreign corporation is permitted to here do business. When it does come here and do business, it does so with reference to our laws. It claims the rights and privileges of our laws, and it cannot evade its obligations. It would be monstrous to permit a foreign corporation to hold property here, to conduct business here, to enforce contractual rights obtained under our laws, and at the same time to avoid the contractual obligations imposed by the same laws.

But it is said that the judgment complained of grew out of an act committed elsewhere, and innocent where it was committed. The general principle is conceded that the law of the place where an act is done determines its validity; but the tort complained of was not committed in Iowa. The tort consisted in seizing property in Nebraska, exempt under the laws of Nebraska. The plaintiff in error was enabled to do this by instituting proceedings in another state. But the tort consisted not in instituting those proceedings in Iowa. A suit might rightfully be begun there *in personam* had Fleming brought himself within the jurisdiction of the Iowa courts. No action would have arisen had the property attached been situated in Iowa, or in a state other than Nebraska; but the wrong was in seizing the debt situated in Nebraska, payable in Nebraska, to a citizen of Nebraska. The statute in this respect is not confined to actions begun in another state, but extends to every attachment or garnishment of exempt wages, whether the proceeding be instituted in this state or elsewhere. It is true that, if the proceeding had been instituted in Nebraska a partial redress could have been had by way of defense in the original action; but that consideration only affects the quantum of damages. The tort—the cause of action—would have been precisely the same. There is no question raised as to the jurisdiction of the court over the person of the plaintiff in error. It has committed an act here which is a tort, and it must here answer for that tort. A somewhat similar question was presented in the case of *O'Connor* v. *Walter* (Neb.) 55 N. W. Rep. 867. It was there said: "In extending credit, every one dealing with the head of a family must take into account this right of exemption, and, presumably, in every extension of credit, this right is recognized. It therefore in no way operates to the injury of the law-abiding creditor. The rapacity which respects neither implied contract obligations nor statutory enactments must, in damages, respond for this, as for any other act of misappropriation."

We neglected, perhaps, in the proper place, to notice one objection to the act, but it is one which can be appropriately noticed in closing,—that is, that the act is "a vicious example of class legislation;" and *Atchison & N. R. Co.* v. *Baty*, 6 Neb. 37, 29 Am. Rep. 356, is cited in support of that proposition. The act under discussion in that case applied to one class only, and there was, perhaps, no basis, founded upon any reasonable distinction, for selecting that class as the recipient of that peculiar privilege. Here the case is different. The act we are now considering applies to every one who falls within the purview of the law exempting wages. The validity of that exemption cannot be doubted, and, if it were proper for the legislature to

provide that exemption, then it certainly was also proper for the legislature, by appropriate action, to enforce the rights so granted. The mischief to prevent which the act was passed is a matter of common knowledge. An extensive and thriving business was being conducted by the institution of suits precisely similar to that out of which this action arose, and having for their sole object the evasion of the laws of this state. The act was passed to prevent, and should be so construed as to prevent, the continuance of this infamous business. It is perhaps only fair to say that neither the representatives of the corporation in Nebraska nor counsel for the corporation engaged in this case is shown to have had any part in the Iowa proceedings.

Judgment affirmed.

MICHIGAN SUPREME COURT.

Alfred WOLCOTT, Relator,
v.
John W. HOLCOMB, *Respt.*

(97 Mich. 361.)

1. The words "any asylum" at which persons are kept at public expense, within the meaning of the constitution, providing that residence for voting purposes shall not be changed by staying in such institutions, includes a soldiers' home supported by the state.

2. The residence of an elector is not changed by reason of his presence and support in a soldiers' home, which is maintained by the state, for disabled and depend-

NOTE.—*Acquiring residence as a voter while attending school or public institution.*

Inmates of soldiers' homes, or occupants of government posts.

Some of the states, as in the main case, have a constitutional provision to the effect that a residence is not gained or lost by reason of employment in the service of the United States, or state, nor while a student at a seminary, nor while kept at an almshouse or asylum.

This leaves the question to be determined by evidence outside of the fact of presence at such institution, although a residence may be gained there.

It is generally held that the inmates of a soldiers' home do not acquire the right to vote by reason of their residence in such institutions, but there are many things to be considered in regard to the qualifications of a voter as to his acquiring a new residence: abandonment of his former residence, and the intention to make a change, are all factors in determining the question of his right to vote. People v. Hanna (Mich.) Jan. 26, 1894; Silvey v. Lindsay, 107 N. Y. 55, reversing 42 Hun, 116.

Nor does he acquire a new residence by being in the government service at a certain place. People v. Holden, 28 Cal. 123; People v. Riley, 15 Cal. 48.

Residence on lands ceded to the United States for navy yards, forts, and arsenals does not give the right to vote at state elections in such territory. Opinion of the Justices, 1 Met. 580; Re Highlands, 48 N. Y. S. R. 795.

And the inmates of a soldiers' home in Ohio on land the exclusive jurisdiction of which is vested in the United States government, are not entitled to vote at the state elections, notwithstanding the provision of 64 Ohio Laws, 149, to the effect that this act shall not prevent the inmates from voting, as the legislature could not confer the right of suffrage upon persons whose legal status is fixed as nonresidents. Sinks v. Reese, 19 Ohio St. 306, 2 Am. Rep. 397.

But where the United States relinquishes to the state jurisdiction over that place, the persons who resided in the state asylum at that time and for a year next preceding an election, are regarded as residents of Ohio for the entire year, notwithstanding the fact that part of the year was while jurisdiction was in the United States. Renner v. Bennett, 21 Ohio St. 431.

Inmates of almshouses and hospitals.

A pauper inmate of a poorhouse does not acquire thereby residence in a township in which a poorhouse is located, so as to enable him to vote there. Clark v. Robinson, 88 Ill. 498; Dale v. Irwin, 78 Ill. 170; Esker v. McCoy (Ohio) 6 Am. L. Rec. 694; Covode v. Foster, 4 Brewst. (Pa.) 414.

But in the case of Re Elk Twp. Election, 14 N. J. L. J. 263, it was held that an aged man who had been for a year or two working for farmers in that township, and whose only home was the county poorhouse in that township, was entitled to vote in that place.

And a voter who left his place of residence with no intention of ever returning, and finally went to another township to the county infirmary, with the intention to remain there permanently, having no family and no other home, with no intention of removing, and having no settlement in any township, is entitled to vote where such infirmary is situated. Mallannee v. Hills, 2 Week. L. Bull. 61.

So where there is no constitutional or statutory provision against an inmate of an almshouse acquiring a residence at such place, he may change his residence from his township and adopt and select one where the almshouse is located as his residence, if he is a voter and has no family in another township. Sturgeon v. Korte, 34 Ohio St. 525.

Persons at hospitals under treatment do not thereby obtain a residence there for the purpose of voting. Election Law, 9 Phila. 497.

Students.

A student at college, who is there for the sole purpose of obtaining an education, does not thereby necessarily acquire the right to vote at that place. Allentown Contested Election Case, 8 Phila. 575; Rep. of Jud. Comm. Cush. Mass. Election Cases, 436; Vanderpoel v. O'Hanlon, 53 Iowa, 246, 36 Am. Rep. 216.

And is not entitled to vote there, unless it was his intention to remain permanently, or for some indefinite time, although he abandoned his father's house as his home after he was of age, and intended to make the place where the college was situated his only home while he was to remain there. State v. Daniels, 44 N. H. 383.

And, if students come to college for no other purpose than to receive an education, intending to leave after graduating, they do not acquire a residence at that place. Fry's Election Case, 71 Pa. 302, 10 Am. Rep. 698.

There must be evidence of complete abandonment of the former residence: but absence from it will be regarded as temporary, and too much weight should not be attached to declarations of present or future purpose by a student after the

See also 25 L. R. A. 399; 27 L. R. A. 330.

ent soldiers, under a constitutional provision that "no elector shall be deemed to have gained or lost a residence by reason of being employed in the service of the United States or in this state, nor while a student at any seminary of learning, nor while kept at any almshouse, or any asylum at public expense, nor while confined in any public prison."

3. Inspectors of election have no right to reject a ballot offered by a registered voter who tenders the oath prescribed by statute, where the statute says that if the person challenged shall take such oath "his vote shall be received."

(*Hooper*, Ch. J., *and Long*, J., *dissent.*)

(November 10, 1893.)

APPLICATION by the prosecuting attorney for Kent County for a writ of mandamus to compel defendant, a justice of the peace, to entertain the complaint of Uriah Carpenter against the board of election inspectors of the first precinct of Grand Rapids Township for refusal to receive his ballot, and to proceed to a determination of his right to vote. *Granted.*

Statement by **Grant,** *J.:*

The principal question presented in this case is whether the inmates of the Soldiers' Home, situated in the township of Grand Rapids, in Kent county, are entitled to vote in that township. Section 5, article 7, of the Constitution, reads as follows: "No elector shall be deemed to have gained or lost a residence by reason of his being employed in the service of the United States, or in this state, nor while a student at any seminary of learning, nor while kept at any almshouse or any asylum at public expense, nor while confined in any public prison." The Soldiers' Home was erected under Act No. 152, Pub. Acts 1885, entitled "An Act to Authorize the Establishment of a Home for Disabled Soldiers, Sailors and Marines in the State of Michigan." By the act, $100,000 was appropriated from the general fund in the state treasury for its erection and equipment, and $50,000 for the purpose of maintaining it for the years 1885 and 1886. It has since been supported by annual appropriations made by the legislature. Section 11 of the Act provides the conditions for admission to the home, which are as follows: "All applicants must be honorably discharged soldiers, sailors, or marines who served in the army or navy of the United States in the war of the Rebellion, or in the Mexican war; they must be disabled by disease, wounds, or otherwise; must have no adequate means of support; must be incapable of earning their living, and otherwise dependent upon public or private charity." The board of managers is, by the same section, empowered to adopt rules and regulations to govern the admission of applicants. Among the rules adopted by the board for such admissions is one requiring the applicant to show, by satisfactory evidence, "that he has no relations of sufficient ability to maintain him, who are legally liable for his support under the laws of the state of Michigan." Another rule provides that he must produce "the certificate of the supervisor of the township or ward in which the applicant resides, the county clerk or judge of probate of the county in which he

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question of residence is raised; there must be other satisfactory evidence tending to show abandonment. Lower Oxford Contested Election, 11 Phila. 641.

And in the case of Granby v. Amherst, 7 Mass. 1, it was said that a student of a college does not change his domicil by his occasional residence at college. But this was not the question involved in the case.

But the fact that a student has continued to reside in the place of the college for a period of seven years, supporting himself by his own efforts and procuring a transfer of registration as a voter, voting there and never voting at any other place, shows a bona fide intention to abandon the former residence. Shaeffer v. Gilbert, 73 Md. 66.

And proofs of change of domicil so as to overcome the presumption of the continuance of the prior domicil, concurring with an actual residence of the student in the town where the public institution is situated, will be sufficient to establish his domicil, and give him a right to vote in that town. Opinion of the Justices, 5 Met. 587.

And a student who had formed the purpose of making W. his home for an indefinite period, when twenty-four years of age, and who was taxed there, and voted there for several years, is entitled to claim that place as his residence, although attending a theological institution in Massachusetts. Sanders v. Getchell, 76 Me. 158, 49 Am. Rep. 606.

And in Pedigo v. Grimes, 113 Ind. 148, it was held that where voters after entering the state university determine that place should be their residence, they have a right to vote there if their intention was formed and acted upon in good faith.

And it was held in Putnam v. Johnson, 10 Mass. 488, that a student at a theological institution, of age, qualified, and not under his father's control, is entitled to vote at the place of such college, notwithstanding it may not be his expectation to remain there forever. In this case, he had left his father's family several years before, and had become a resident of S. where he was taxed and permitted to vote; his father had ceased to support him, and he was at S. preparing himself for an independent living when he removed to the town where the theological seminary was, which, as he was on a charitable foundation, required a residence of three years.

If students abandon their former home and come to the town where the seminary is situated, to make that town their residence, leaving to the future to determine whether they shall enter a profession or some other business in that town, they acquire a residence there. *Re* Ward, 29 Abb. N. C. 187.

And under Ill. Rev. Stat. 1874, providing that a permanent abode is necessary to constitute a residence, students who are entirely free from parental control and regard the place of the college as their home and have no other to which to return in case of sickness or domestic affliction, are entitled to vote there. Generally, however, undergraduates of colleges are no more residents of a town in which they pursue their studies than mere strangers. Dale v. Irwin, 78 Ill. 170.

In the case of Warren v. Board of Registration, 2 L. R. A. 203, 72 Mich. 398, it was stated that the provisions of the Michigan constitution in regard to acquiring and losing a residence while a student, do not prevent persons from becoming residents if such is their purpose and if they are able to choose; but that was not the question involved in that case.

The cases concerning the right of soldiers and sailors to vote are not included in this note. I. T.

resides, that he has carefully examined the proofs, that to the best of his knowledge and belief they are true and satisfactory to him, and that the applicant is a proper person for admission." The act further provides that no applicant shall be admitted who has not been a resident of the state for one year next preceding the date of the passage of the act, unless he served in a Michigan regiment, or was accredited to the state of Michigan. Uriah Carpenter, the inmate of the home whose right to vote is here in question, was at the time of his application and admission, in 1887, a resident of the township of Woodstock, in Lenawee county. In his application he made affidavit that he was a resident of that township, and upon it is indorsed the certificate of the supervisor that he was then an "actual resident" thereof. His vote was challenged and rejected on the ground that he was not an elector in the township of Grand Rapids.

Mr. **Moses Taggart**, with *Mr.* **Alfred Wolcott**, *Prosecuting Attorney*, for relator:

Carpenter's registration as an elector, in itself, constituted prima facie evidence of legal residence, and all the essentials entitling him to vote.

Harbaugh v. *People*, 33 Mich. 241.

The importance of the intention of a person as to where his legal residence shall be in offering to vote at an election is strongly emphasized, in *Warren* v. *Board of Registration*, 2 L. R. A. 203, 72 Mich. 402, the court saying: "It is equally true that temporary abode in a city or ward does not make a person an elector. Unless the person coming in does so with the honest and settled intention of obtaining a new domicil, he gains no rights."

The case of *High, Appellant*, 2 Dougl.(Mich.) 523, quoting Story's Conflict of Laws, defines a domicil to "be the habitation fixed in any place, without any intention of removing therefrom."

Presence makes a prima facie case of legal residence, and shifts the burden of proof.

Kennedy v. *Ryall*, 67 N. Y. 386.

No authority of the highest court of any state has gone so far as to hold it impossible for any one in attendance upon an institution of learning, or an inmate of a soldiers' home, from becoming a legal resident therein.

Putnam v. *Johnson*, 10 Mass. 488; *Re Ward*, 29 Abb. N. C. 187; *Sanders* v. *Getchell*, 76 Me. 159, 49 Am. Rep. 606; *Sinks* v. *Reese*, 19 Ohio St. 312, 2 Am. Rep. 397; *Renner* v. *Bennett*, 21 Ohio St. 431; *People* v. *Riley*, 15 Cal. 48; *People* v. *Holden*, 28 Cal. 123; *Dupuy* v. *Wurtz*, 53 N. Y. 562.

Vanderpoel v. *O'Hanlon*, 53 Iowa, 248, 36 Am. Rep. 216, involved the right of a student at the state university, at Iowa City, to vote there or at a former residence, and it was held to be simply a question of intent, whether he had changed his former residence, "that the intent and fact must concur," citing,—

Opinion of the Justices, 25 Met. 587; *Fry's Election Case*, 71 Pa. 302, 10 Am. Rep. 698; *Hinds* v. *Hinds*, 1 Iowa, 36; *State* v. *Mennick*, 15 Iowa, 123. See also *Sanders* v. *Getchell, supra; Shaeffer* v. *Gilbert*, 73 Md. 66.

The Statute of 1891 is so clear as to the duty imposed upon the board of inspectors of election, both as to the administration of oaths to parties offering to vote who are challenged, and as to the duty of the board when such oath has been administered, that it would seem impossible for members of such board to be lacking in knowledge as to what it imperatively requires.

People v. *Cicott*, 16 Mich. 283, 97 Am. Dec. 141; *Goetcheus* v. *Matthewson*, 61 N. Y. 420; *People* v. *Bell*, 119 N. Y. 175; *Spragins* v. *Houghton*, 3 Ill. 377; *State* v. *Robb*, 17 Ind. 536; *People* v. *Pease*, 30 Barb. 588; *Gillespie* v. *Palmer*, 20 Wis. 544; *People* v. *Gordon*, 5 Cal. 235; *Com.* v. *McHale*, 97 Pa. 397, 39 Am. Rep. 808.

Mr. **Henry J. Felker** for respondent.

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

The Soldiers' Home is purely eleemosynary in character. To hold otherwise would be contrary to sound legal principle and good sense. The title to the act shows it. It is not the character of the beneficiaries, nor the cause of their inability to earn a living, nor the reason for granting the bounty, which determines whether such an institution is charitable in its character. An institution established and maintained for the support of indigent persons who became blind or deaf in the service of their country or state is as much eleemosynary as one established for the support of those who are born blind or deaf, or who have become so from other causes. All institutions in this state, established and maintained at the public expense, for the care, education, and support of the unfortunate, belong to this class of institutions, and are included in the term "asylum," used in the above clause of the constitution. It is immaterial whether they are called "schools," "retreats," "homes," or "asylums." It is equally immaterial what the feeling is which prompts their erection and maintenance. An "asylum" is defined by Webster to be "an institution for the protection or relief of the unfortunate." Such is its meaning as used in the constitution. It follows that one's entry and residence in such an institution partake of the same character as the institution itself, and are likewise eleemosynary in character. One entering them cannot, under the constitution, gain or lose his residence. Inmates of the home enter it for one purpose, only, and the constitution solemnly and clearly declares that their status as to residence when they enter must control while they remain there. When Mr. Carpenter entered the home, he was a legal resident of the town of Woodstock. He entered the home upon his own application, solely as a beneficiary, and a resident of that township, to accept a well-bestowed and deserving charity. He did not by this act lose his residence there, and his intent is wholly immaterial. To permit his intent to control would result in the practical annulment of this provision of the constitution. The mischief intended to be avoided is as apparent in this case as in any. The inmates of the home own no home, pay no local taxes, do no work in or for the benefit of the municipality, and have no pecuniary interest in its local affairs. In fact, they

have no connection with, and stand in no relation to, the local municipal government. They occupy state property, and are exclusively under the control and management of the state.

The provision of our constitution was evidently copied from that of New York, for the two are identical in language. The court of appeals of that state, in an opinion concurred in by the entire court, held that the inmates of the Soldiers' Home of that state were not entitled to vote in the municipality where the home was located. *Silvey* v. *Lindsay*, 107 N. Y. 55. The facts in that case and in this are substantially identical. After stating the facts, the court says: "These reasons satisfied the conscience of the plaintiff [the inmate], and enabled him to say he was a resident of Bath, but in reality they bring the case within the prohibition of the constitution. He could not gain a residence by being an inmate, which means nothing more than his presence in the home; and, excluding that, there is nothing in the case to show that a residence in Bath had been acquired. It follows that he had not lost the right to vote in the place of his legal residence,—New York. As to that city, he is to be regarded as temporarily absent and his residence as a citizen is still therein. We have no doubt that the institution in question is within the purview of the constitutional provision. It is an asylum supported at the public expense, and its members are within the mischief against which that provision is aimed,—the participation of a body of unconcerned men in the control, through the ballot box, of municipal affairs, in whose further conduct they have no interest, and from the mismanagement of which, by the officers their ballots might elect, they sustain no injury." This language is applicable to the present case, and we quote it with approval. But it is insisted that that case still leaves the question open to depend upon the intention of the elector, by reason of the following language: "But the question in each case is still, as it was before the adoption of the constitution, one of domicil or residence, to be decided upon all the circumstances of the case. The provision (art. 2, § 3) disqualifies no one; confers no right upon any one. It simply eliminates from those circumstances the fact of presence in the institution named, or included within its terms. It settles the law as to the effect of such presence, and as to which there had before been a difference of opinion, and declares that it does not constitute a test of a right to vote, and is not to be so regarded. The person offering to vote must find the requisite qualifications elsewhere." Mr. Carpenter, as above stated, was a resident and elector in the township of Woodstock, which was then his domicil of citizenship, when he made his application, and was admitted to the home. There was no indication in his application of any intention to change his residence for the purpose of voting, or for any other purpose than that for which the home was established. In his complaint against the respondent, he states that he had always lived with his father prior to his death, in 1887; that he was unmarried; that, by the death of his father, the home was broken up; that since that time he had had no home with any relative or friend; and "that he always intended, and in fact made, the township of Grand Rapids, and that part of it in which the Soldiers' Home is located, his home, subsequent to his entry therein." His father was living at the time he entered the home. If he entered as a resident of Woodstock, and that was then his actual residence, can he gain a new residence while kept in this asylum at public expense, except in violation of this plain provision of the above article? Would not this be losing one residence, and gaining another, while kept in an asylum at public expense? In the New York case, the inmate had been in the home for six years, and swore that it was his intention, at all times, to make his residence in said institution, so long as he should be permitted to do so. Is Mr. Carpenter's statement, in fact, any stronger than this? Does he swear to any residence or domicil of citizenship, aside from that which attached to him as an inmate of the home? That case gives us no light upon the requisite qualifications, which must be found elsewhere. It determined the one question before the court, and held that one who had been for six years an inmate, and who swore that he intended to remain there the rest of his life, if permitted to do so, was not an elector in the township where the home was located. If the inmate was a resident of the township where the home is located, at the time of his admission, the requisite qualifications of an elector would be found in that fact, and his right to vote would be undoubted.

We are of the opinion that the terms, "by reason of," and "while," were understood by the framers of the constitution to have a different meaning. In the former case, the intention would very largely, if not entirely, govern the question of domicil, while in the latter it would not. It was clearly the intention of the former provision to give the citizen the right, if he chose, to carry his residence with him to the place where he was employed in the service of the United States or of the state, and in that latter case it seems equally clear that it was the intention not to give that right. What object, otherwise, could there have been in the use of these two terms? While the results of the adoption of one construction of the fundamental law of the state are not conclusive, nor of much force, where the construction is otherwise clear, still they are important considerations in determining the intent and purpose of the law. If the construction contended for by the relator be correct, it follows that all the inmates of county almshouses and of prisons and jails are electors, at their option, in the townships and cities where those institutions are located. In the township of Haukin, in Wayne county, where the almshouse of that county is located, there were, in the year 1891, 1,851 male inmates,—more than twice the whole number of voters in the township. Ann. Rep. Supt. Poor, 1891, p. 2. Furthermore, students in all institutions of learning, although they are in

attendance there for the sole purpose of obtaining an education, might, at their own will, become electors in the places where such institutions are located. We think the constitution prohibits a change of residence, under such circumstances, and that, when one's presence in any of the institutions named is due to the sole purpose of receiving the benefits conferred, his former residence must be considered his domicil, for citizenship.

We are cited to the language of *Mr. Justice* Campbell in *Warren* v. *Board of Registration,* 72 Mich. 398, 2 L. R. A. 203. That language is conceded to be a dictum. It is not, therefore, binding in this case. It has often been said by this and other courts that the language of a decision must be construed with reference to, and confined to, the facts of that case. The sole question in that case was whether the lodging room or boarding place of the voter should govern. Applied to that question, the language was appropriate, and the reasoning conclusive.

No question of disfranchisement is involved. The inmates of the home are no more disfranchised than were the soldiers when absent from their domicils, and in the army. The people, in that case, amended their constitution, providing that they might cast their votes when absent from home, in the service of their country. So, in this case, the people may amend their constitution, either making these inmates electors in the township where the home is located, or providing for casting their ballots at the home, to be counted in the township from which they came.

Another question, of no little importance, is also involved. Are inspectors of election clothed by the law with judicial, or only ministerial, functions? Have they the right to reject a ballot, when the voter is registered, and tenders the oath prescribed by the statute? Mr. Carpenter was registered, took the prescribed oath, and tendered his ballot, which the inspectors refused to receive. Section 24, Act No. 190, Laws 1891,* determines the conditions under which a challenged voter may have his vote received. This section is the same as those in former laws, and was referred to in *People* v. *Cicott,* 16 Mich. 302, 97 Am. Dec. 141, where it was said that "the inspectors cannot reject a registered voter, who takes the proper oath." The statute is clearly mandatory. It says that, "if the person so challenged shall take such oath, his vote shall be received." Inspectors are sometimes partisan, and sometimes corrupt, and the clear purpose of the act is to take from them all discretionary and judicial power, and confer upon them a purely ministerial function. The qualification of the voter is no concern of theirs. Upon taking the oath, his vote must be received. If he swear falsely, the law provides a way to deal with him. Mr. Cooley states the rule as follows: "Where, however, by the law under which the election is held, the inspectors are to receive the voter's ballot if he takes the oath that he possesses the constitutional qualifications, the oath is the conclusive evidence on which the inspectors are to act, and they are not at liberty to refuse to administer the oath, or to refuse the vote after the oath has been taken. They are only ministerial officers, in such a case, and have no discretion but to obey the law, and receive the vote." Cooley, Const. Lim. 4th ed. 777. For this reason, it was the duty of the respondent to entertain the complaint, issue a warrant, and proceed to an examination.

The writ must issue.

McGrath and **Montgomery,** *JJ.*, concurred with **Grant,** *J.*

Hooker, *Ch. J.*, dissenting:

I cannot concur in the proposition that article 7, section 5, of the Constitution of this state should be construed as to deprive a citizen of his right to choose his own residence, or to compel him to avail himself of the privileges of asylums or schools, at the cost of a citizen's privileges, by requiring him to retain a former residence, unaccessible, and to which he does not intend to return. It should not be assumed that those who inhabit almshouses or asylums are unworthy people, or that they have no interest in elections, or that they are disqualified from discharging the duties of the citizen understandingly and properly. It cannot be claimed that these men are disfranchised because, under the section, no one is denied the right to vote at his residence. Inmates formerly residing in the township where the asylum is situated do not lose their residences by reason of being such inmates, and, clearly, others retain their residences and the right to vote at their former domicils, if they choose to do so. The only reason given for the construction contended for is that these classes are undesirable voters at the place of the asylum; that they pay no taxes, do no work for the benefit of the municipality, and have no interest in local affairs. The same may be said of many persons in all localities, and was probably as true of these before their admission as after. It is as true of those admitted from the locality of the asylum, who may vote under this section, as of those who come from a distance who may not vote, under this construction. It never has been a requisite to electoral rights that the citizen should pay taxes, do work for the benefit of the municipality, or evince interest in municipal affairs. Nor does the right depend upon a wise, or even honest, exercise of the privilege of the ballot. Doubtless, there are many whose votes could be dispensed with, to the profit of all local municipalities, and the state as well, but the electoral franchise is based upon broader principles. There is no man so poor or low that he is not richer and manlier for his political equality, and the ballot is essential to the protection of the rights of all classes. Immediately a class or race is disfranchised, its members are deprived of an equal chance with their fellows.

*If any person offering to vote shall be challenged, as unqualified, by any inspector, the chairman of the board of inspectors shall declare to the person challenged the constitutional qualifications of an elector, and shall tender to him such one of the oaths enumerated therein as he may claim to contain the grounds of his qualification to vote, and, on his taking such oath, his vote shall be received.

This proposition is so important a part of the foundation of our institutions that it should not be eliminated or weakened by any unnecessary construction of a constitution based upon civil liberty and political equality. Under this construction, a student who goes to our state university for a term of years, abandoning his residence, taking his family with him, residing in a house of his own, with no intention of living elsewhere after his education shall be finished, cannot gain a residence there, or lose his former one. It cannot be said that he is an undesirable voter, that he has no interest in local concerns, or that he is not a taxpayer there. The true construction of this section should be just what its language imports, *i. e.* that being kept in an almshouse, or attendance at college, or service in the employment of the United States, or the navigation of the lakes or high seas, does not work a change of residence, against the intention or desire of the individual. I have an acquaintance, the intelligent master of a great lake steamer, who is at home only occasionally; who comes home the day before election to vote,—a right which this section secures to him,—though absent most of the year. Will it be said that he cannot change his residence so long as his employment continues? It would seem that these things cannot have been intended, and that the rule indicated is the reasonable one, viz, that the section was designed for the benefit of, and to enlarge and protect the rights of, these classes, not to deprive them of privileges common to all. The opinion of the late *Mr. Justice* Campbell is in accord with this view, as appears from a dictum in the case of *Warren* v. *Board of Registration*, 72 Mich. 401, 2 L. R. A. 203, where he cites this section after stating that: "Our own constitution is full on this subject, where it lays down expressly, what would perhaps be implied, that certain continuous presences or absences shall have no effect on elective residences." And he adds: "These provisions do not prevent such persons from becoming residents, if such is their purpose, and if they are able to choose."

The case of *Silvey* v. *Lindsay*, 107 N. Y. 55, which is relied upon as authority by counsel for respondent, is reconcilable with this view, and does not appear to go to the extent of holding the doctrine contended for. In that case, a vote was rejected because the voter did not show himself to be a resident of the township. His vote being challenged, he answered as follows: "I answer that I reside in the town of Bath, for the reason that I was admitted an inmate of the New York Soldiers' and Sailors' Home, in this town, by the authorities thereof, in the year 1880, and have remained such inmate from that time to the present, with the intention, at all times, of making my residence in said institution, so long as I shall be permitted to remain such inmate. At the time of my admission to said institution, I was an honorably discharged soldier of the United States, and a resident and voter of the city of New York. I therefore answer that I am a resident of the town of Bath. In becoming an inmate of said institution, I intended to change my residence from the city of New York to the fifth election district of said town of Bath." It will be observed that after stating the facts of his former residence, and his admission to the Soldiers' Home, and his intention of making his residence in said institution as long as he should be permitted, he argues, "I therefore answer that I am a resident of the township of Bath." The opinion says: "It is obvious that his narration of an intention to change his residence to Bath, and his assertion that he resided in Bath, can be accepted only as conclusions from the circumstances detailed in connection with them. They were his conclusions, and the defendants, in view of his whole statement, were not bound by them. They were bound by the facts stated, and were required to say, upon those facts, whether the plaintiff was qualified in the necessary particular; and, undoubtedly, they were to determine the question at their peril. The constitution, in the section referred to *supra*, specifies the qualifications necessary to the elective franchise, and provides who shall have the right to vote; and one duly qualified cannot be deprived of that right by an inferior tribunal. But the Constitution also provides (art. 2, § 3): 'For the purpose of voting no person shall be deemed to have gained or lost a residence, by reason of his presence or absence, while employed in the service of the United States; nor while engaged in the navigation of the waters of this state, or of the United States, or of the high seas; nor while a student of any seminary of learning; nor while kept at any almshouse or other asylum at public expense; nor while confined in any public prison.' And the decision of the inspectors of election was that, in their opinion, the intending voter was in Bath as a mere inmate of the institution, and for a temporary purpose, and not as a resident of the voting district, or with intent to make the town a fixed or permanent place of residence, and so it would seem. His presence there was eleemosynary in its character. He was there as a dependent, because he had no means of support, or relatives to maintain him, and liable to be discharged whenever the board of trustees were satisfied that he was of sufficient ability or means to support himself. Rules and regulations of the home. As to the home, he was a beneficiary, and nothing else. As to Bath, his residence was a beneficiary's residence, and no other. His relations were not with the village, but with the institution, which was situated within its borders. His intention to remain was conditioned upon, and limited to, the duration of the charity which he enjoyed. His intention to remain in Bath depended upon his expectation to remain at the home. This gave no residence, for he was there only in the character of a beneficiary, for a temporary purpose. His only intention, in going to Bath, was to be an inmate of the home; and it was only as such inmate that his residence was to be continued. He was not there as a citizen changing his residence, but as an object of well-bestowed and deserving charity. He was, as is clear upon his statement, present in Bath, and at the institution, because

he was then kept (that is, supported) at public expense. 'I reside in Bath,' he says, 'for the reason that I was admitted to the home as an inmate.' He continues there with the intention of making his residence in the institution 'so long,' he says, 'as I shall be permitted to remain an inmate.' These reasons satisfy the conscience of the plaintiff, and enable him to say that he was a resident of Bath; but, in reality, they bring the case within the prohibition of the constitution. He could not gain a residence by being an inmate, which means nothing more than his presence in the home; and, excluding that, there is nothing in the case to show that a residence in Bath had been acquired. It follows that he has not lost the right to vote in the place of his legal residence,—New York,—for the provision of the constitution in question also declares that he shall not lose his residence by reason of such presence in the institution. As to that city, he is to be regarded as temporarily absent, and his residence as a citizen still therein. We have no doubt that the institution in question is within the purview of the constitutional provision (art. 2, § 3) above referred to. It is an asylum supported at the public expense, and its members are within the mischief against which that provision is aimed,—the participation of an unconcerned body of men in the control, through the ballot box, of municipal affairs, in whose further conduct they have no interest, and from the mismanagement of which, by the officers their ballots might elect, they sustain no injury." If this language should create the impression that the section of the constitution does more than to negative an implication of a change of domicil from the fact of residence in the institution, the next paragraph of the opinion settles the question, clearly showing that the court did not intend to hold that inmates of a soldier's home could not acquire a residence in the locality of the home, and, to my mind, clearly implying that, had the voter stated that he entered said home with the intention of abandoning his former domicil, and making a new one in the locality of the home, the decision would have been different, and that, instead of supporting respondent's contention, the case contains a plain dictum to the contrary. It is as follows: "But the question in each case is still, as it was before the adoption of the constitution, one of domicil, or residence, to be decided upon all of the circumstances of the case. The provision (art. 2, § 3) disqualified no one, confers no right upon any one. It simply eliminates from those circumstances the fact of presence in the institution named, or included within its terms. It settles the law as to the effect of such presence, and as to which there had before been a difference of opinion, and declares that it does not constitute a test of a right to vote, and is not to be so regarded. The person offering to vote must find the requisite qualifications elsewhere. We think, therefore, the question submitted by the parties, viz.: 'Did James Silvey gain a residence in the town of Bath, so as to entitle him to vote at said town meeting, by reason of his presence as an inmate of said institution?'—should have been answered in the negative; and it is so answered by this court."

In my opinion, the writ should issue as prayed.

Long, *J.*, concurred with **Hooker**, *Ch. J.*

NEW YORK COURT OF APPEALS.

PEOPLE of the State of New York, *Respt.*,
v.
Carson J. SHELDON *et al.*, *Appts.*

(139 N. Y. 251.)

An organization of coal dealers intended to prevent competition in prices, in pursuance to which the price of coal is raised, is a conspiracy condemned by N. Y. Penal Code, § 168, making it a misdemeanor to conspire to commit any act injurious to trade or commerce: and raising the price of coal is a sufficient overt act.

(October 3, 1893.)

APPEAL by defendants from a judgment of the general term, of the Supreme Court, Fifth Department, affirming a judgment of the Court of Sessions for Niagara County convicting them of conspiring to commit acts injurious to trade, and also affirming an order denying a motion for new trial. *Affirmed.*

Statement by **Andrews**, *Ch. J.:*

Appeal from the affirmance by the general term, fifth department, of judgment of conviction in the Niagara county sessions on indictment for conspiracy. The indictment set forth an agreement between the defendants and others, comprising all the retail coal dealers in the city of Lockport, except one, entered into in March, 1892, to organize the Lockport Coal Exchange, which agreement was as follows:

"Constitution and By-Laws,

"Name. The name of this exchange shall be the Lockport Coal Exchange.

"Objects. The objects of this exchange shall be to foster trade and commerce in coal, wood, and all the products appertaining to the same; to protect and secure freedom from unjust and unlawful exactions; to diffuse accurate and reliable information as to the retail coal trade, and of the responsibility and standing of customers, and other matters, among its members, for their mutual protection and benefit; to settle differences between its members; to produce uniformity and certainty in the customs and usages of such trade; to promote a more enlarged and

NOTE.—In connection with the valuable discussion in the above case of the criminal law as to conspiracy to affect trade, see the extensive discussion of the same question in Queen Ins. Co. v. State (Tex.) 22 L. R. A. 483; and State v. Phipps (Kan.) 18 L. R. A. 657.

See also 24 L. R. A. 428.

friendly intercourse between merchants and dealers in coal and wood; and to provide, establish, and maintain such rules and regulations as may be proper and necessary for the mutual co-operation, interest, and protection of the retail dealers in coal and wood in the city of Lockport, and in furthering the coal trade interests generally. It shall be the duty of all members to strictly obey all the provisions of the constitution, by-laws, and resolutions of the exchange, and permit to the secretary the free exercise of the duties imposed upon him in enforcing them.

"Officers. The officers of the exchange shall be a president and a vice-president, who shall be elected by the exchange, and who shall be members of the exchange, and also a secretary and treasurer, elected by the exchange. The officers shall hold office for the term of one year, and until their successors are elected and shall have duly qualified; and any officer may be removed from office by the five-sixths vote of all the members of the exchange, at any regular or special meeting thereof.

"Committees. There shall be such committees as the president or the board of trustees may from time to time designate.

"President and Vice-President. The president shall preside at all meetings of the exchange, or, in his absence, the vice-president. In the absence of the president and vice-president, a presiding officer shall be chosen from the members of the exchange. The president shall be, *ex officio*, a member of all committees.

"Secretary. The secretary shall not be a member of the exchange, nor in any manner personally interested in the coal trade. He shall be elected by at least a five-sixths vote of all the members of the exchange at a regular or special meeting, due notice of said intended election having been sent by mail to each member, at his regular business address, at least five days previous to the meeting. The secretary shall keep a record of the meetings of the exchange, a register of its members, officers, and committees, and conduct all correspondence of the exchange, and perform such other duties in connection with his office as may be imposed upon him by the exchange. He shall instantly investigate all charges preferred against the members of the exchange, on all well-founded suspicions, without fear or favor, and conduct the investigation, both to obtain proof, and when presented before the exchange, and shall render his decision in each case to the exchange within ten days from the date on which charges are made, unless further time is given him by the exchange. He shall be permitted to see any portion of the books of any member, when in pursuit of evidence of wrongdoing, and may demand an affidavit, when he thinks necessary to refute or sustain a specific charge. He shall also collect material for, and compile, a list of persons who are poor pay, for the mutual protection and benefit of the members of the exchange. He shall also be the keeper of the seal of the exchange, and receive such salary as may be determined upon by the exchange. Before the secretary shall enter upon the duties of his office, he shall make oath that he will honestly and fearlessly perform the duties prescribed by the constitution and by-laws, and that he will keep, in honor and secrecy, any and all information by him acquired, regarding the business of the various members, as he from time to time may investigate them, except any facts connected with any violation of the laws of the exchange which the exchange or any member is entitled to know. If practicable, the secretary shall be a notary public. The secretary shall not disclose to any member of the exchange any information regarding any investigation, while he is making the same.

"Treasurer. The treasurer, who shall also be the secretary, shall have charge of the funds of the exchange, disburse the same on the order of the board of trustees, countersigned by the president, and shall report at all regular meetings, and his accounts shall be open for proper inspection at all proper times. He shall give bonds for the proper protection of the exchange.

"Membership. The exchange shall be composed of active and associate members. Active members shall comprise any retail coal dealer, firm, or company who has a yard or dock, and the usual appliances for doing a coal business, in the city of Lockport. Associate members shall comprise any individual, company, or firm that sells coal in the villages around Lockport, and who approves the objects of, and agrees to co-operate with, the exchange. Associate members shall pay an annual fee of five dollars, and shall have all the privileges of active members, except the right of voting.

"Discipline. If a member is charged with violating any provision of these by-laws, or any rule or resolution of the exchange, or of being guilty of conduct unbecoming a member, or prejudicial to its interests, or of giving short weight or overweight, he shall be summoned before the secretary to answer the charge. If, upon the charge and defense being heard by the secretary, he shall decide to sustain the charge, the member shall be declared 'in default;' and the member shall be considered to be 'in default' until five sixths of all the members, at a regular or special meeting, shall vote to reinstate him as a member of the exchange, in good standing. A member who shall be declared 'in default' shall absolutely and irrevocably forfeit all rights to all money, property, or other value held by the exchange, as its own or in trust, and shall also forfeit all rights of membership in the exchange, unless he be reinstated in good standing; and no member shall be so reinstated except by a five-sixths vote of all members of the exchange at a regular or special meeting assembled after proper notice, and only after depositing with the treasurer $100 as fee for renewal of membership. When a member shall be accused by the secretary, in any open meeting of the exchange, of having violated any provision of this constitution and by-laws, or of any resolution, and evidence is lacking to absolutely refute or sustain the charge, it shall be obligatory upon such member to make proper affidavit that he has in no instance sold or delivered

coal for which he has not received the full price at which the majority of the other members were selling coal of the same size at the same time, and that he has not, directly or indirectly, given any rebate, commission, or other concession equivalent to cash, thereby actually reducing the established market price made by the Lockport Coal Exchange, and that not less than two thousand and not more than two thousand pounds have, in his knowledge, been sold by himself, his partner, or his employés, or delivered as a ton. Resignations shall be made in writing to the president or secretary, and be referred to the board of trustees for their action; but no resignation will be accepted until all dues, fines, charges, and penalties against such member shall have been paid and settled. When the exchange, or secretary thereof, shall declare a member 'in default,' the secretary shall notify every member of the exchange by mail, and such notice shall be authoritative. When a member defies the exchange by presistent wrongdoing, and is declared 'in default' and persistent, the secretary shall notify the shippers of coal to the Lockport market that the said member is 'in default' and persistent, and for this reason is not entitled to the privileges of membership in the Lockport exchange.

"Election of Members. A candidate for membership shall be proposed in writing by a member at a regular meeting of the exchange, and be recommended by two members in good standing, and at the next succeeding regular meeting be voted upon. A two-thirds vote of the members of the exchange shall be requisite to elect.

"Price of Anthracite Coal. The price of coal at retail shall, as far as practicable, be kept uniform, and it shall require a five-sixths vote of all members of the exchange, at any meeting, to advance or reduce the retail price of coal, and no price shall be made at any time which amounts to more than a fair and reasonable advance over wholesale rates, or that is higher than the current prices of the exchanges at Rochester or Buffalo, when figured upon corresponding freight tariff; but at no time shall the price of coal at retail exceed one dollar above the costs of the same at wholesale, except by the unanimous vote of all the members of the exchange. All votes upon the price of coal shall be *viva voce*. The sale of coal shall be through the nominal channels of the trade. Soliciting shall be discouraged, and no club orders of associated buyers, to reduce prices, shall be considered or accepted. No member shall employ any person temporarily to solicit orders, either on salary or on commission, and no signs indicating, 'Orders taken for coal,' shall be displayed at groceries or other 'outside places,' and no habitual orders for second parties shall be received or filled when sent in by such agencies, whether on commission or other form of reciprocity, or only as a matter of friendship. Except that each member may have one place for taking orders, in addition to his regular yard office.

"Meetings. The annual meeting of the exchange shall be held on the first Monday of April of each year. The regular meeting shall be held on the first Monday of each month. Special meetings may be called by the president, or upon the written request of three members, which request shall be sent to the secretary, stating the object of such meeting; and the notices of any special meeting shall state the object of the same, and no other business shall be transacted at such meeting. At all meetings of the exchange, seven members shall constitute a quorum; but this shall not authorize them to transact any business which, under the constitution and by-laws, requires the vote of a greater number of the members. Any member may be represented at a meeting by an authorized person connected with his business, and such person shall be entitled to the privileges of such member. Any vacancies in any of the official positions of the exchange shall be filled by the board of trustees, when ordered by the president (or in his absence by the vice-president), within two weeks after such vacancy occurs, or as soon thereafter as practicable.

"Membership Fee. There shall be a membership fee of one hundred dollars to be paid to the secretary by each member at the time of signing the constitution and by-laws, and during the first week of each month the further sum of five dollars for current expenses. At the end of the year, upon vote of the exchange, there shall be returned to such member the full amount of such monthly payment so paid in by the members, less the proper proposition due for each member for the current expenses of the exchange, which amount shall be deducted from each by the secretary. Any member of the exchange, retiring from the coal business in Lockport in good standing with the exchange, shall be entitled to receive from the treasurer the original amount paid in by said member for membership,—that is, one hundred dollars,—less any assessment for expenses or dues that may properly belong to such member to pay, upon filing an affidavit with the secretary that the said member has absolutely withdrawn from all direct or indirect interest in coal business in Lockport, and that during his term of membership he has not violated any of the provisions of the constitution and by-laws or resolutions of the Lockport Coal Exchange.

"Order of Business. At all meetings of the exchange, the order of business shall be: Calling of roll; reading of minutes; proposal of membership; reports of committees; communications, bills, or notices; unfinished business; miscellaneous business. This order of business may be suspended at any meeting of the exchange by a vote of two thirds of the members present.

"Records and Minutes. The minutes and records of the exchange shall be open at all times to the inspection of members.

"Amendments. This constitution and by-laws may be amended by an affirmative vote of five sixths of the members of the exchange at a regular meeting, provided that notice of such proposed amendment shall have been presented in writing at a previous regular meeting.

"We, the undersigned, agree to abide by the above constitution and by-laws of the

Lockport Coal Exchange. James Lennon & Son. Angevine & Hoover. P. H. Tuohey. Charles Whitmore & Co. J. Marc. Fowler. Sheldon N. Cook. Upson & Stevens. E. S. Brown. M. W. Carr. Ferrin Bros. Co., Inc. M. McManus. Edward B. Jelly."

The indictment, among other things, alleged that the agreement constituted an unlawful conspiracy to raise, increase, and augment the rates and prices of coal, at retail, in the city of Lockport, and to destroy free competition among the signers of the agreement and others, in the sale of coal in said city, and to compel the consumers of coal to pay therefor the prices fixed by the coal exchange. It alleged that, in pursuance of said conspiracy, the defendants and others, members of said exchange, organized the same, elected officers, and by resolution did "fix, determine, and establish the rate and price of anthracite coal at retail, in said city, at four dollars and seventy-five cents per ton for egg, chestnut, stove, and grate coal, and three dollars and seventy-five cents per ton for pea coal, and other higher rates for small quantities of the same; said rates and prices so fixed, determined, and established being over seventy-five cents per ton higher and in advance of the then market price of such coal at retail in said city." The indictment alleged an unlawful intent, and concluded by an averment that the "conspiracy as aforesaid, so carried into execution as aforesaid, is of grievous injury to trade and commerce, prejudicial to the public good and welfare, against the form of the statute," etc. The proof established the execution of the agreement as alleged; the organization of the exchange by the election of officers; the fixing of the price of coal at an advance beyond the then market price, which price was thereafter charged therefor; the notification of the wholesale dealers, by the secretary, of the organization of the exchange, with the names of the members. Other facts are set forth in the opinion.

Mr. **E. M. Ashley,** for appellant:

The agreement between the members of the Lockport Coal Exchange sought to regulate the prices merely, for which the members of that association should sell coal. They did not seek to limit the supply, they did not endeavor to close the field of operation against the public. They employed no coercive measures. They did not interfere with the rights of any person outside their association, who was trading in coal. It was no combination to prevent any other dealer from exercising his right to sell for less than the price fixed for them. It was a mutual agreement amongst themselves to stop a cutting of prices which threatened them all with ruin, and restore the condition of affairs that existed before the war of prices had begun. Such an agreement carried out is not a conspiracy.

Master Stevedore's Asso. v. *Walsh*, 2 Daly, 1.

A partnership would not be illegal on account of any number of associates, no matter how great, or a large number of persons unconnected in business might legally agree to charge uniform prices.

Richardson v. *Mellish*, 2 Bing. 229; *Chappel* v. *Brockway*, 21 Wend. 157.

Upon the old cases an additional element has been engrafted, in effect that no such agreement shall contemplate the withdrawal from market, or the limiting of the supply, of any article of necessity which is the subject of general trade. The reason of this rule is, that such an agreement, when carried out, affects the trade, not only of those who agree together, but of all persons engaged in the business, and as it shortens or limits the general supply, it is a general restraint of trade and affects the entire field of operations.

Diamond Match Co. v. *Roeber*, 106 N. Y. 473, 60 Am. Rep. 464; *Leonard* v. *Poole*, 4 L. R. A. 728, 114 N. Y. 371; *Arnot* v. *Pittston & E. Coal Co.* 68 N. Y. 558, 23 Am. Rep. 190.

Where the provision of a noncompetitive agreement, although extending to all branches of the business, do not tend beyond measures of self protection, or threaten the public interest in a distinctly appreciable manner, the statute is not infringed.

Leslie v. *Lorillard*, 1 L. R. A. 456, 110 N. Y. 519.

Mr. **P. P. King,** *Dist. Atty.*, for respondent:

When any two or more persons combine to do any act injurious to trade and commerce, they are each guilty of a misdemeanor. These defendants confessedly combined to overthrow and destroy competition among themselves in the retail coal business in the city of Lockport, and are each, therefore, properly convicted of conspiracy.

Penal Code, § 168, subd. 6; *People* v. *Fisher*, 14 Wend. 19, 28 Am. Dec. 501; *Hooker* v. *Vandewater*, 4 Denio, 349, 47 Am. Dec. 258; *Arnot* v. *Pittston & E. Coal Co.* 68 N. Y. 558, 23 Am. Rep. 190; *Clancey* v. *Onondaga Fine Salt Mfg. Co.* 62 Barb. 395; *Watson* v. *Harlem & N. Y. Nav. Co.* 52 How. Pr. 348; *Murray* v. *Vanderbilt*, 39 Barb. 141; *People* v. *North River Sugar Ref. Co.* 9 L. R. A. 33, 121 N. Y. 582; *Keene* v. *Kent*, 4 N. Y. S. R. 431; Wright & Carson, Criminal Conspiracy, 180; *De Witt Wire-Cloth Co.* v. *New Jersey Wire-Cloth Co.* 16 Daly, 529; *Marsh* v. *Russell*, 66 N. Y. 292; *Leonard* v. *Poole*, 4 L. R. A. 728, 114 N. Y. 371.

The courts of our sister states recognize the value and importance of free competition in articles of trade and emphatically condemn any combination formed for the purpose of overcoming and destroying it.

Central Ohio Salt Co. v. *Guthrie*, 35 Ohio St. 666; *St. Louis* v. *St. Louis Gaslight Co.* 70 Mo. 69; *Santa Clara Valley Mill & Lumber Co.* v. *Hayes*, 76 Cal. 387; *Anderson* v. *Jett*, 6 L. R. A. 390, 89 Ky. 575; *Morris Run Coal Co.* v. *Barclay Coal Co.* 68 Pa. 173, 8 Am. Rep. 159.

There was nothing to prevent that exchange from gradually, from time to time, forcing up the price of coal, little by little, that it might not attract public attention or put the people in alarm, until it reached an exorbitant figure; and in cold winter weather, when everybody must have fuel to live, there was nothing to prevent this combination from committing the

most outrageous extortion upon the people in the price of coal. They destroyed competition; and thereafter trade in coal did not freely exist. This was sufficient to invoke the power of the law.

United States v. *Goldberg*, 7 Biss. 175.

The unlawful combination is the gist of the crime of conspiracy, and proof of any act toward carrying the conspiracy into effect is an overt act.

Com. v. *Hunt*, 4 Met. 111, 38 Am. Dec. 347; *United States* v. *Goldberg*, *supra*.

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

Section 168 of the Penal Code makes it a misdemeanor for two or more persons to conspire (subd. 6) "to commit any act injurious to the public health, to public morals, or to trade or commerce, or for the perversion or obstruction of public justice, or of the due administration of the laws." The Revised Statutes contained a similar provision. 2 Rev. Stat. p. 692, § 8, subd. 6. The fact that the defendants subscribed the constitution and by-laws of the Lockport Coal Exchange, and participated in its management, was not controverted on the trial. Nor was there any dispute that the object of the organization was to prevent competition in the price of coal among the retail dealers, acting as the Lockport Coal Exchange, by constituting the exchange the sole authority to fix the price which should be charged by the members, individually, for coal sold by them. Nor is there any dispute that, in pursuance of the plan, the exchange did proceed to fix the price of coal, and that the parties to the agreement were thereafter governed thereby in making sales to their customers. Nor is it questioned that the price first established was 75 cents in advance of the then market price, and that there was afterwards a still further advance. The defendants gave evidence tending to show (and of this there was no contradiction) that before and at the time of the organization of the exchange the excessive competition between the dealers in coal in Lockport had reduced the price below the actual cost of the coal and the expense of handling, and that the business was carried on at a loss. It was not shown that the prices of coal, fixed from time to time by the exchange, were excessive or oppressive, or were more than sufficient to afford a fair remuneration to the dealers. The trial judge submitted the case to the jury upon the proposition that if the defendants entered into the organization agreement for the purpose of controlling the price of coal, and managing the business of the sale of coal, so as to prevent competition in price between the members of the exchange, the agreement was illegal, and that if the jury found that this was their intent, and that the price of coal was raised in pursuance of the agreement to effect its object, the crime of conspiracy was established. The correctness of this proposition is the main question in the case.

If the confederacy into which the defendants entered was an act "injurious to trade or commerce," irrespective of its results in the particular case, then there is no difficulty in maintaining the conviction. If a combination between independent dealers, to prevent competition between themselves in the sale of an article of prime necessity, is, in the contemplation of the law, an act inimical to trade or commerce, whatever may be done under and in pursuance of it, and although the object of the combination is merely the due protection of the parties to it against ruinous rivalry, and no attempt is made to charge undue or excessive prices, then the indictment was sustained by proof. On the other hand, if the validity and legality of an agreement having for its object the prevention of competition between dealers in the same commodity depend upon what may be done under the agreement, and it is to be adjudged valid or invalid according to the fact whether it is made the means for raising the price of a commodity beyond its normal and reasonable value, then it would be difficult to sustain this conviction, for it affirmatively appears that the price fixed for coal by the exchange did not exceed what would afford a reasonable profit to the dealers. It was said by Parker, *Ch. J.* (*Lord* Macclesfield), in his celebrated judgment in *Mitchel* v. *Reynolds*, 1 P. Wms. 181, which was the case of a bond taken from the defendant on the sale by him to the plaintiff of the lease of a bake house, claimed to be void as in restraint of trade: "In all restraints of trade, where nothing more appears, the law presumes them bad. But if the circumstances are set forth that presumption is excluded and the court is to judge of these circumstances, and to determine accordingly; and if, upon them, it appears to be a just and honest contract, it ought to be maintained." If this agreement, and what was done under it, is to be judged as an isolated transaction and its rightfulness is to be determined alone upon the particular circumstances, whether it did or did not produce an injury to trade, we might well hesitate. The obtaining by dealers of a fair and reasonable price for what they sell does not seem to contravene public policy, or to work an injury to individuals. On the contrary, the general interests are promoted by activity in trade, which cannot permanently exist without reasonable encouragement to those engaged in it. Producers, consumers, and laborers are alike benefited by healthful conditions of business. But the question here does not turn on the point whether the agreement between the retail dealers in coal did, as matter of fact, result in injury to the public, or to the community in Lockport. The question is, Was the agreement one, in view of what might have been done under it, and the fact that it was an agreement, the effect of which was to prevent competition among the coal dealers, upon which the law affixes the brand of condemnation, and which it will not permit? It has hitherto been an accepted maxim in political economy that "competition is the life of trade." The courts have acted upon and adopted this maxim in passing upon the validity of agreements, the design of which was to prevent competition in trade, and have held such agreements to

be invalid. It is to be noticed that the organization of the "exchange" was of the most formal character. The articles bound all who became members to conform to the regulations. The observance of such regulations by the members was enforced by penalties and forfeitures. A member accused by the secretary of having violated any provision of the constitution or by-laws was required to purge himself by affidavit, although evidence to sustain the charge should be lacking. The shippers of coal were to be notified, in case of persistent default by the member, that "he is not entitled to the privileges of membership in the exchange." No member was permitted to sell coal at less than the price fixed by the exchange. The organization was a carefully devised scheme to prevent competition in the price of coal among the retail dealers, and the moral and material power of the combination afforded a reasonable guaranty that others would not engage in the business in Lockport except in conformity with the rules of the exchange. The cases of *Hooker* v. *Vandewater*, 4 Denio, 349, 47 Am. Dec. 258, and *Stanton* v. *Allen*, 5 Denio, 434, 49 Am. Dec. 282, are, we think, decisive authorities in support of the judgment in this case. They were cases of combinations between transportation lines on the canals to maintain rates for the carriage of goods and passengers, and the court, in those cases, held that the agreements were void, on the ground that they were agreements to prevent competition; and the doctrine was affirmed that agreements having that purpose, made between independent lines of transportation, were, in law, agreements injurious to trade. In those cases it was not shown that the rates fixed were excessive. In the case in 5 Denio, the judge delivering the opinion referred to the effect of the agreement upon the public revenue from the canals. This was an added circumstance, tending to show the injury which might result from agreements to raise prices or prevent competition. See also, *People* v. *Fisher*, 14 Wend. 10, 28 Am. Dec. 501; *Arnot* v. *Pittston & E. Coal Co.* 68 N. Y. 558, 23 Am. Rep. 190.

The gravamen of the offense of conspiracy is the combination. Agreements to prevent competition in trade are, in contemplation of law, injurious to trade, because they are liable to be injuriously used. The present case may be used as an illustration. The price of coal now fixed by the exchange may be reasonable, in view of the interests both of dealers and consumers, but the organization may not always be guided by the principle of absolute justice. There are some limitations in the constitution of the exchange, but these may be changed, and the price of coal may be unreasonably advanced. It is manifest that the exchange is acting in sympathy with the producers and shippers of coal. Some of the shippers were present when the plan of organization was considered, and it was indicated on the trial that the producers had a similar organization between themselves. If agreements and combinations to prevent competition in prices are, or may be, hurtful to trade, the only sure remedy is to prohibit all agreements of that character. If the validity of such an agreement was made to depend upon actual proof of public prejudice or injury, it would be very difficult, in any case, to establish the invalidity, although the moral evidence might be very convincing. We are of opinion that the principle upon which the case was submitted to the jury is sanctioned by the decisions in this state, and that the jury were properly instructed that, if the purpose of the agreement was to prevent competition in the price of coal between the retail dealers, it was illegal, and justified the conviction of the defendants.

There is a single remaining question. The trial judge was requested by the defendants' counsel, in substance, to charge that the overt act required to be proved to sustain a conviction for conspiracy must be one which might injuriously affect the public, and that the act of the defendants in raising the price of coal was, of itself, not such an overt act as was required. The request was, we think, properly refused. The offense of conspiracy was complete at common law on proof of the unlawful agreement. It was not necessary to allege or prove any overt act in pursuance of the agreement. 3 Chitty, Crim. L. 1142; *O'Connell* v. *Reg.* 11 Clark & F. 155. In this state this rule of the common law was changed by the Revised Statutes; and, with certain exceptions, it was provided that no agreement should be deemed a conspiracy "unless some act beside such agreement be done to effect the object thereof by one or more of the parties to such agreement." 2 Rev. Stat. p. 692, § 10. And this principle was re-enacted in the Penal Code, § 171. The object of the statute was to require something more than a mere agreement to constitute a criminal conspiracy. There must be some act in pursuance thereof, and done to effect its object, before the crime was consummated. A mere agreement, followed by no act, is insufficient. The overt act charged in the indictment, and proved, was the raising of the price of coal. The raising of the price of coal by a dealer, unconnected with any conspiracy, is not unlawful; but if there is a conspiracy to regulate the price, and that conspiracy is unlawful, then raising the price is an act done to effect its object, whether the price fixed is reasonable or excessive. The object of the statute is accomplished when it is shown that the parties have proceeded to act upon the agreement, and done anything towards effecting its object. We think there is no error in the record, and *the conviction should therefore be affirmed.*

All concur.

CONNECTICUT COURT OF COMMON PLEAS (Fairfield County).

Frederick MEAD
v.
Hugh STIRLING.

(62 Conn. 586.)

1. **The remedies afforded by the Constitution, laws, and regulations of the order must be exhausted** before a worshipful master and presiding officer of a local lodge of ancient, free, and accepted masons can invoke the aid of the courts against the grand master of the grand lodge of the state to prevent suspension.
2. **Wrongful acts for the prevention of which injunctions will be granted** are those which affect property or its healthful and beneficial use, and never those which affect reputation merely.
3. **An allegation of irreparable injury,** without stating the facts on which it is based, is not sufficient for an injunction.
4. **An allegation of irreparable injury to financial credit,** without stating that plaintiff has any credit, or needs any credit, or is engaged in any occupation in connection with which credit would be convenient, is insufficient to obtain an injunction.
5. **The fact that a person cannot be reinstated in his office** in the masonic order by reversal of a judgment of suspension until after the term of his office has expired is not ground for an injunction against the suspension, the office not being one of profit.
6. **The fact that the grand master of a lodge, who is to try the question of misrepresentation** as ground for the suspension of a worshipful master of a local lodge, is also the complainant, is not sufficient ground for an injunction from the courts to prevent the exercise of such quasi judicial authority.

(November Term, 1892.)

ON DEMURRER to an application for an injunction to restrain defendant from suspending petitioner from his office as worshipful master of a masonic lodge. *Demurrer sustained.*

The facts are stated in the opinion.

Messrs. **L. Warner** and **J. B. Hurlbutt** for plaintiff.

Messrs. **M. W. Seymour** and **G. W. Wheeler** for defendant.

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

The complaint herein alleges, in substance, that the plaintiff is worshipful master and presiding officer of a local lodge of ancient free and accepted masons, to which office he was elected on an undesignated day in December, 1891, for the term of one year thereafter, and until his successor should be chosen. That said office is one "of honor and position in the lodge and in the order generally outside of the lodge." That the defendant is grand master of the Grand Lodge of Masons of Connecticut, within the jurisdiction of which said local lodge is. That the plaintiff, at a communication of his lodge, truthfully and fairly stated to its members the substance of a certain important conversation relative to their order which he had theretofore held with the defendant, and received and submitted for their consideration, as he believed he was bound to do, certain resolutions, with preambles, which were thereupon offered. That on the day of the date of the complaint, between the hours of 11 and 12 o'clock in the forenoon, the plaintiff received a summons from the defendant, acting as grand master, to appear before him on the next day at 10 o'clock in the forenoon, to show cause why he should not be suspended from his said office "for having made the statement and receiving said resolutions, charging said statement to be a willful misrepresentation of said conversation." That the defendant proposes to himself determine the question of veracity between them, and "to judge the plaintiff upon such finding, and suspend him from his said office; in other words, to act as judge in his own cause, and further the carrying out" of an ulterior point which he had in view. That, in making the statement complained of, the plaintiff violated no masonic obligation or pledge or any rule of gentlemanly and proper conduct or intercourse. That the defendant has no authority by any masonic law, constitution, or by-law of the grand lodge to try and depose the plaintiff from his said office of honor and trust. That by masonic rules and law the plaintiff is entitled to a trial before an unbiased tribunal of his peers, upon testimony of competent witnesses, and upon charges properly preferred. That no charges have been preferred against the plaintiff or served upon him, as masonic law and rules require. That until charges have been preferred, the defendant, neither as grand master nor in any other capacity, has jurisdiction or authority to suspend the plaintiff as he threatens to do. That the plaintiff has no remedy except by injunction from a court of equity. That the only redress which the plaintiff would have from a decision of the defendant, acting in his capacity of grand master, would be by an appeal, through him, to the Grand Lodge of Connecticut, over which he presides, which "would not, by reason of the bias and determined disposition of the defendant to accomplish his purpose, have before it, to give the plaintiff that fair position before his fellows in his order that he is entitled to, the full question and attendant circumstances which the grand master and himself propose to try, but simply the decision of the grand master." That the grand lodge does not meet until January, 1893, after the plaintiff's term of office has expired; "so that no order of reinstatement upon an overruling of the decision of the

NOTE.—The above is a somewhat novel application of the doctrine of exclusiveness of the remedies afforded by voluntary associations.

For a collection of cases upon this subject see *note* to Canfield v. Knights of Maccabees (Mich.) 13 L. R. A. 625.

See also 41 L. R. A. 720.

grand master can be made, or adequate relief to the plaintiff be granted." And the apprehended damage is then stated as follows: "That an order of suspension of the plaintiff by the defendant would disgrace the plaintiff in the opinion of all regular masons, work him an irreparable injury to his reputation, character, and business, and be published in masonic circles, and otherwise most extensively circulated, injuring his financial credit, and be an impeachment of veracity." An injunction is claimed restraining the defendant from hearing and determining as to the guilt of the plaintiff, and from suspending him from his said office. It will be observed that no specific allegation is made that a grand master has jurisdiction to suspend a worshipful master. On the contrary, the opposite would seem to be really claimed in the complaint. But the case was argued by both parties upon the assumption that such jurisdiction in fact existed, and as if it had been so alleged. The questions herein will therefore be considered as if it affirmatively appeared that the defendant had jurisdiction over the subject-matter in dispute, or, in other words, that he had authority to suspend the plaintiff for a sufficient cause properly proved. If the defendant had no jurisdiction in the premises in any event, then, of course, an injunction would be plainly unnecessary, and should not be granted. To this complaint the defendant demurs, virtually, on three grounds: (1) Because the plaintiff and defendant are bound to conform to the constitution, laws, and regulations of the order to which they both belong; and the remedies thereby afforded, as indicated in the complaint, must first be exhausted before recourse can be had to this tribunal. (2) Because no property rights of the plaintiff are alleged to be threatened by the defendant, and, this being so, the first ground of demurrer is certainly valid, even if invalid otherwise. (3) Because no facts showing such irreparable damage as would warrant an injunction are set forth in the complaint.

Although the circumstances in which the civil courts can be called upon to afford relief where property rights are not threatened must be rare indeed, still it seems to be well settled that, if any such in fact exist, the remedies within the order must first have been exhausted before other relief can be obtained. Accordingly, inasmuch as the plaintiff expects to be deprived merely of "an office of honor and position" in his order, with which no pecuniary emoluments or property benefits are alleged to be connected, the first ground of demurrer might well be disregarded, and the second considered in its place. But a few cases decided by tribunals in high repute hold that the same is true even where property rights are involved, and that, therefore, the first ground of demurrer is well taken also. If the first be sound, the second certainly must be, and therefore those cases will be briefly considered.

Bacon, in his work on Benefit Societies & Life Insurance (sec. 104, top of page 127), says: "There is a great array of judicial authority in favor of the proposition that, where members are expelled from religious societies, social clubs, benevolent societies, and other voluntary organizations incorporated or unincorporated, the judicial courts will not interfere to reinstate them, or to revise the judgment of expulsion, until the expelled member has exhausted all the remedies available to him within the organization itself, by appealing to a higher judicatory provided by the rules of the society, or otherwise." The same rule would of course apply with far greater force to a case of threatened suspension from a mere office in the order, and therefore authorities sustaining the proposition just quoted will control the case at bar. In the case of *Lafond* v. *Deems* (1880), 81 N. Y. 507, it was sought to dissolve a voluntary charitable association, and divide its assets, on the ground that the misconduct of its members and their mutual bitterness of feeling and irreconcilable hostility made a winding-up of its affairs and division of its assets necessary. The rules of the order provided for the trial of its members for misconduct, and in that connection for appeals from one tribunal to another within the order. These remedies have not been tried. The court denied the application, and said: "As the members who are claimed by the plaintiffs to have been chargeable with a violation of the rules of the association were not called upon to answer so as to correct the evils complained of, and as the power to remedy the same was ample and complete, the plaintiffs are not in a position to seek the interposition of a court of equity. . . . Courts should not, as a general rule, interfere with the contentions and quarrels of voluntary associations so long as the government is fairly and honestly administered, and those who have grievances should be required, in the first instance, to resort to the remedies for redress provided by their rules and regulations. This had not been done in the case considered, and under such circumstances no action lies. None of the authorities cited by the plaintiff's counsel sustain the position that the remedy is at law or in equity, unless there is well-grounded cause for complaint; and even then an opportunity should be given to correct the cause of complaint within the organization where it can be properly done." I understand this to mean that, even if there is "well-grounded cause for complaint" on account of the methods adopted or the result reached by the first tribunal, still the means provided by the rules of the organization for the correction of such errors must first be pursued, before recourse can be had to the courts of the state. And if it be answered that the complaint shows that an appeal from the threatened action of the defendant to the grand lodge could not avail the plaintiff, because of the defendant's "bias and determined disposition" to be unfair to the end, still it surely must be an adequate and proper reply to say that the demurrer cannot be taken to admit that such a court of appeals is unable to and will not rectify any unfairness of the defendant at any stage of the case. Its disposition and ability to do so will be presumed, and, according to this authority must first be

tested. In *Poultney* v. *Bachman* (1883), 31 Hun, 49, the plaintiff sued the treasurer of a lodge of odd fellows to recover benefits, and recovered judgment in the lower court. The general term, in reversing this judgment, says (page 53): "Again, there is another very important question, namely, whether the plaintiff has any right to bring this action until he has exhausted all remedies by appeal to the superior authorities of the society. . . . It may well be said that the contract, whatever it may be on the part of the lodge, includes in itself a provision for the decision by the appellate tribunals of the society of the matter in dispute; and therefore it may be argued that not until these appellate tribunals have decided against the plaintiff can he say that he has been injured. . . . Without discussing the question whether or not the decision of the highest appellate tribunals of the society is conclusive, we are of the opinion that the contract into which the plaintiff entered requires him first to seek redress within the society itself by carrying the question to the highest tribunal, for it is evident that every part of the constitution and lawful by-laws enter into his contract, and are to be considered therewith." It should be noticed that the rules of the order in this case, as stated and referred to in the report, do not require dissatisfied members to appeal. They only provide for and permit appeals, which the case, in common with others, treats as equivalent to a requirement. In *Oliver* v. *Hopkins* (1887), 144 Mass. 175, the plaintiffs, as members of a subordinate council of the Order of United American Mechanics, sued the defendants in equity, as officers of the state council, to recover possession of certain property formerly belonging to the subordinate council, which had been appropriated by the state council after a decree, by annulling the charter of the subordinate council, which decree was claimed to be illegal. An appeal from this decree of the state council was allowed by the rules of the order to the national council, but no appeal had been taken. The court says: "Until the plaintiffs have exhausted the remedies prescribed in the constitution and laws of the national council, this bill in equity cannot be maintained. . . . We are of opinion that the judgment of this court cannot be invoked by the plaintiffs until they have first sought the relief for which they pray from the tribunal provided by the association to try and determine questions of this nature." The case of *Chamberlain* v. *Lincoln* (1880), 129 Mass. 70, is an action of the same general character as the above, relates to property rights, and is similarly decided. In *McAlees* v. *Supreme Sitting Order of The Iron Hall* (Pa. 1888), 13 Atl. Rep. 755, a member of the defendant order sued it for benefits without first exhausting the remedies provided by the rules of the order in that connection. The court says: "We have often held that a member of a beneficial society must resort for the correction of an alleged wrong to the tribunals of his order, and that the judgment of such tribunals, when resulting fairly from the application of the rules of the society, is final and conclusive." This, of course, means that the society remedies must be pursued to their very end first, and that ultimate unfairness alone can be remedied by outside tribunals. In a dissenting opinion in a similar case in the same court, *Mr. Justice* Green and an associate say (agreeing in this particular with the majority of the court) that "it is, of course, the duty of the members to exhaust the remedies afforded by the constitution and by-laws of his order or association before resorting to the courts." *Sperry's App.* 116 Pa. 391. Actions brought by a shareholder against the officers of his corporation are in important respects akin to the cases under consideration, and in such actions it is held that he "must show to the satisfaction of the court that he has exhausted all the means within his reach to obtain within the corporation itself the redress of his grievances or action in conformity to his wishes." *Hawes* v. *Oakland* (1881), 104 U. S. 450, 26 L. ed. 827.

It ought to be added to what has already been said that respectable adjudications exist wherein it appears to be held that, even when property rights are involved, the ultimate decision of the tribunals of the order having jurisdiction not only must be sought, but, when obtained, is final and binding upon the party, even if "not in accordance with its by-laws, or for causes that had no foundation in fact." *Schmidt* v. *Abraham Lincoln Lodge* (1886), 84 Ky. 490; *Hall* v. *Supreme Lodge K. of H.* (1885), 24 Fed. Rep. 450.

The cases above cited, together with many others in them referred to, are usually quoted as precedents for the doctrine that all remedies within the order must be first exhausted, even if property rights are involved. If they are good law, the first ground of demurrer is, of course, well taken. But although of great, and possibly of controlling, weight, they are not everywhere followed. The doctrine, however, that, where property rights are not threatened, the remedies within the order must first be exhausted, seems to be universally accepted (as has been already stated), which would make the second ground of demurrer unquestionably effective. No decision to the contrary was referred to by the plaintiff. A leading case in which the doctrine of the cases hereinbefore cited is questioned, but the rule relied upon in the second ground of demurrer conceded, is *Bauer* v. *Samson Lodge, K. of P.* (1885), 102 Ind. 262, in which the plaintiff sued for benefits. The defendant claimed that he should have first proceeded through its committee on appeal and grievances, which had jurisdiction to grant him the relief asked for. The court says: "The reasonable rule is that such an organization may provide methods for redressing grievances and deciding controversies, and may compel members to resort to the prescribed method of procedure before invoking the power of the courts, but that it may not entirely prohibit members from suing to recover benefits accruing to them under the by-laws of the organization. Men voluntarily enter such organizations, and, in becoming members, subscribed to their laws;

and, if these laws make provision for trying controversies, the member aggrieved must pursue the course prescribed before resorting to the courts to enforce his claims. There is no valid reason why he should not be compelled to do what he has agreed, and the harmony and efficiency of such organizations require that all measures provided and required by their by-laws should be exhausted before appealing to the courts to settle the controversy. . . . Claims for money due by virtue of an agreement are unlike mere matters of discipline, or questions of doctrine or of policy, and are not governed by the same rules. . . . One who asserts a claim to money due upon a contract occupies an essentially different position from one who presents a question of discipline or of policy, or of doctrine of the order or fraternity to which he belongs. All the decisions, from first to last, recognize a broad distinction between the two classes of cases, and the one before us belongs to a class where property rights are involved, and is a member of a class cognizable by the courts." The case of *People* v. *Board of Trade* (1875), 80 Ill. 134, a leading case in that state, seems to hold, not only that, unless property rights are involved, the plaintiff must pursue his remedy within the order first, but also that he is confined to that. The question under consideration does not appear to have been decided in our own state. The general subject was incidentally referred to in *Connolly* v. *Masonic Mut. Ben. Asso.*, 58 Conn. 557, 9 L. R. A. 428, but none of the expressions therein used contravene the position taken in the second ground of demurrer.

To briefly recapitulate, then, we have a case in which it is alleged that a superior officer in the order of Masons, having jurisdiction over the subject of the removal of inferior officers, proposes to remove such an inferior officer in an irregular way, and after a partial trial, from which order of removal an appeal lies, by the rules of the order, to a superior tribunal, and to prevent which primary removal an injunction is sought. Upon authority and upon reason it would seem both necessary and eminently proper that the plaintiff should emerge into the domain of the state courts, if at all, from the confines of this order, and not *per saltum* from its midst. The diligence with which he searches in his complaint after the darkest possible colors in which to paint his impending future would seem to indicate that in all ordinary cases he himself conceives such to be the rule, but believes that the peculiar hardships of his case justify an exception. Right here the third ground of demurrer takes issue with him. The authorities which lay down the rule above proved do not exempt cases of exceptional hardship from it. If such an exception should be made, the defendant claims that this is not such a case, and, further, that, to justify the extraordinary remedy prayed for herein, a case of threatened irreparable injury must be alleged, whatever the rule in other cases may be. While it is difficult to understand how the plaintiff can possibly know what the grand master will eventually do, and while it is impossible to believe that the grand lodge cannot accord to him a fair trial upon appeal if it wishes so to do, which wish is not denied, still certain broad and definite assertions are made in that connection, which to some extent, although I think not to all, must be taken to be admitted *pro forma* by the demurrer. Even then the defendant claims that a case of "great and irreparable mischief, where adequate relief cannot be had at law" (*Whittlesey* v. *Hartford, P. & F. R. Co.* 23 Conn. 433), is not made out. I am also of that opinion. The wrongful acts for the prevention of which injunctions will be granted are those which affect property, or its healthful or beneficial use, and never those which affect reputation merely. The only allegations of an apprehended injury to property are that the threatened act will (1) "work him an irreparable injury to his . . . business;" and (2) "be published in masonic circles, and otherwise most extensively circulated, injuring his financial credit." As to the first, it is enough to say that an allegation of "irreparable injury" is never sufficient. "It is well established that the mere allegation of irreparable injury will not suffice to warrant an injunction, but the facts must appear on which the allegation is predicated, in order that the court may be satisfied as to the nature of the injury." High, Inj. § 34; *Carlisle* v. *Stevenson*, 3 Md. Ch. 499; *Waldron* v. *Marsh*, 5 Cal. 119. As to the second, it should be remarked at the outset that the allegation is argumentative, and not direct, and "merely argumentative allegations or inferences from the facts stated will not suffice to meet the requirements of the rule." High, Inj. § 34. It is nowhere alleged that the plaintiff has any credit, or needs any credit, or is engaged in any occupation in connection with which credit would be even convenient. That he has in fact ample credit is doubtless true. It simply is not so alleged, and therefore does not legally so appear. Clearly, such allegations of apprehended injury are insufficient to bring the plaintiff within the familiar rule relative to injunctions, or to take him without the rule first above considered. If it be sought to infer the danger of substantial or exceptional damage from the earlier allegations of the complaint, it is not easy to see how the publication of the exact facts could possibly injure the plaintiff, or why a garbled or untrue statement of them—the probability of which is not alleged—might not be adequately offset by a counter publication of the truth, while the knowledge that the decree of suspension had been appealed from should, and doubtless would, operate to suspend the judgment of those whose conclusions could ever be of weight or work an injury. The fact that a judgment of reversal by the grand lodge, owing to lapse of time, could not reinstate him in his former office, affects his enjoyment of that office only, which is not one of profit.

The defendant, in his argument, claimed that the position and character, from acting in which he was sought to be enjoined, was judicial, or at least quasi judicial, and that

injunctions will not be granted to restrain one so acting. This aspect of the matter is not presented by the demurrer, but was considered by the plaintiff, and merits notice. In *Gregg* v. *Massachusetts Medical Soc.* (1872), 111 Mass. 185, 15 Am. Rep. 24, the plaintiff sought to restrain the officers and "Board of Trial" of the defendant society from trying and expelling him from its membership, whereby pecuniary injury would be inflicted upon him. The court, in the course of its opinion, says: "Injunctions issue against parties, and not against courts. And the jurisdiction in this respect has legal limits which apply to proceedings in all courts and tribunals. The general principle is that a court of chancery is not the proper tribunal to correct the errors and irregularities of inferior tribunals, and that in ordinary cases the court should not interfere. . . . The plaintiffs have cited no authority, and we have not been able to find any, which extends to a case like the present, where the inferior tribunal has jurisdiction of the subject-matter, and the object of the bill is to correct and restrain alleged irregularities in the pleadings and procedure, or in the constitution of the body of triers. In this respect a court of chancery has no more power over the proceedings of a court of special and limited jurisdiction than over the proceedings of courts of general jurisdiction. They might as well issue an injunction to restrain and correct irregularities that are alleged to have occurred in the superior court . . . as in this case." This case, with those herein cited and others of a similar character which may readily be found, would seem to substantiate the defendant's claim. Whatever the remedy may be, it does not seem to be by injunction against the trier. If it be said that in the case at bar the complainant and the trier appear to be one and the same person, it may be applied that such must often be practically the case in contempt proceedings in our state courts, where it would hardly be claimed that irregularities of procedure could be restrained by injunction.

The demurrer is sustained and the foregoing reasons therefor, by request of the defendant, are ordered on file.

INDIANA SUPREME COURT.

CHICAGO & INDIANA COAL R. CO.,
Appt.,
v.
Joseph R. HALL.

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

1. A railroad company formed by consolidation of others, one of which was organized by purchasers of a railroad on foreclosure, is bound by the obligation of the original company to pay for land which it appropriated under a parol license and agreement to pay therefor.

2. A license and agreement under which land is taken for a railroad, with agreement to pay its value, dispense with the writ of *ad quod damnum*, allowed by Rev. Stat. 1881, § 3903, even if this remedy would otherwise be exclusive.

NOTE.—*Liability of a consolidated railroad company for the debts of its predecessor.*

A consolidated railroad company is liable on an implied assumption, for the debts and obligations and torts of the constituent companies. Louisville, N. A. & C. R. Co. v. Boney, 3 L. R. A. 435, 117 Ind. 501; Paine v. Lake Erie & L. R. Co. 31 Ind. 283; Indianapolis, C. & L. R. Co. v. Jones, 29 Ind. 465, 95 Am. Dec. 654; Columbus, C. & I. Cent. R. Co. v. Powell, 40 Ind. 37; Chicago, R. I. & P. R.Co. v. Moffitt, 75 Ill. 524; Coggin v. Central R. Co. 62 Ga. 685; State v. Baltimore & L. R. Co. 77 Md. 489.

Other cases also hold that the consolidated company is liable for the obligations of the original companies, without giving the reasons for imposing such liability. Philadelphia v. Ridge Ave. Pass. R. Co. 143 Pa. 444; Root v. Oil Creek & Allegheny River R. Co. 31 Phila. Leg. Int. 140; Lake Shore & M. S. R. Co. v. Hutchins, 37 Ohio St. 282.

Where there was a transfer by one to the other, and a creditor claimed a consolidation and liability, it was held that the first was dissolved, and that a court of equity would consider the assets as a trust fund, to be followed into the hands of a purchaser if he was not bona fide for a good consideration. Powell v. North Missouri R. Co. 42 Mo. 63.

And under an act authorizing "a complete or partial union, and either of joint or separate or absolute, or limited liabilities to third parties," and the union made no provision limiting liabilities to third parties, the effect would be that the new company assumed all the liabilities of the old. Cayley v. Cobourg P. & M. R. & Min. Co. 14 Grant, Ch. 571.

And in Cashman v. Brownlee, 128 Ind. 266, it was stated that the consolidated company assumes all the liabilities of the original companies; but this was not the question involved in that case.

And a part of a statute of consolidation, repealing all the provisions of their charters not included in the act, which charters imposed a liability for care of streets, was held invalid as not embraced in the title of the act and the liability of the former attached to the new company. Ridge Ave. Pass. R. Co. v. Philadelphia, 124 Pa. 219.

A railroad employing an attorney for services in relation to the construction of the connecting line, built with a view to consolidation or operation by the former, will be liable for the same. St. Louis & S. F. R. Co. v. Kirkpatrick (Kan.) Oct. 7, 1893.

As to implied liability, see also Berry v. Kansas City, Ft. S. & M. R. Co. *infra*, and heading "Pleading and practice."

Although a purchaser of a consolidated road under decretal sale takes the same free from the conditions, imposed by a county in granting aid to one of the companies, that trains should stop at a station, the new company, by common law and statute, is bound to stop sufficient trains to do the business required. People v. Louisville & N. R. Co. 120 Ill. 48.

These cases fully sustain the doctrine of liability asserted in the main case.

See also 27 L. R. A. 369; 30 L. R. A. 823; 35 L. R. A. 444; 44 L. R. A. 786.

3. A common-law remedy is not taken away by a statutory remedy for the same right, unless the statute expressly denies it, or is so clearly repugnant to the exercise of it as to imply a negative.

4. A license coupled with an interest is irrevocable.

(September 22, 1893.)

APPEAL by defendant from a judgment of the Circuit Court for Tippecanoe County in favor of plaintiff in an action brought to recover compensation for land taken from plaintiff, over which defendant's road was built. *Affirmed.*

The facts are stated in the opinion.

Messrs. **S. H. Spooner** and **W. H. Lyford**, for appellant:

This case was a common-law action for damages resulting from the alleged tortious act of the defendant. Unless the allegations of the complaint establish the wrongdoing of appellant, this action, which presupposes a wrong, cannot be maintained.

Defendant's predecessor was put in lawful possession of appellee's land, under an express license, appellee postponing damages until after the road was constructed.

Could plaintiff revoke a license granted as this was, and after the expenditure of large sums of money, and the building of a railroad under such license? If he could not, then the license was a continuing, irrevocable, valid authority for all acts done by the original company or its successors, in consonance with that license. Where a licensee relying upon the grant, has with the knowledge of the licensor expended large sums of money, although the license was a naked parol one, it cannot be revoked.

Buchanan v. *Logansport, C. & S. W. R. Co.* 71 Ind. 265; *Miller* v. *State*, 39 Ind. 267; *Lane* v. *Miller*, 27 Ind. 534; *Ogle* v. *Dill*, 55 Ind. 130; *Snowden* v. *Wilas*, 19 Ind. 10, 81 Am. Dec. 370; *Stephens* v. *Benson*, 19 Ind. 367.

Can a suit be maintained that is predicated upon a wrong, which this rule says under the facts of this case cannot exist? We say: If there was a contract for the damages which would accrue to you by the building of this road, sue on the contract; or, if there was no contract, then proceed under the *ad quod damnum* statute, and have your damages assessed in the way provided by the statute.

Stowell v. *Flagg*, 11 Mass. 364; *Summy* v. *Mulford*, 5 Blackf. 202.

The consent of defendant in this case was as effective as a legislative authority would have been, and is as perfect a protection to appellant as though it had taken this land without prior compensation under a constitutional statutory authority. The doing of what the law gives one the right to do cannot be imputed as a tort.

Dill v. *Bowen*, 54 Ind. 208.

If the theory of the complaint was not to recover damages for tort, but was for the recovery of a debt created by an agreement between plaintiff and defendant, then under the well-settled rules of law, from the facts alleged in the complaint, he could not recover against this defendant. The agreement for the pay-

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Assumption of liability by contract.

A consolidated railroad company assuming the debts of the original companies is liable thereon for damages to lands caused by one of the constituent companies. Smith v. Los Angeles & P. R. Co. 98 Cal. 210.

Or for labor performed for a prior company. Western U. R. Co. v. Smith, 75 Ill. 497.

And it is bound by an agreement, allowing other roads to use a right of way. Joy v. St. Louis, 138 U. S. 1, 34 L. ed. 843.

Where the contract of consolidation provided that the new company shall not be liable but that the property received by it shall be liable and that the original companies shall continue in existence in order to adjust all claims, a creditor of one of the original companies must reduce his claim to a liquidated demand before he can enforce such claim against the consolidated company. Whipple v. Union Pac. R. Co. 28 Kan. 474.

But under such a consolidation, a contract for the exchange of land, entered on the books of the constituent company, is binding on the new company. McAlpine v. Union Pac. R. Co. 23 Fed. Rep. 168, affirmed Union Pac. R. Co. v. McAlpine, 129 U. S. 305, 32 L. ed. 673.

And this consolidated company is liable in equity for the debt of the former to the extent of assets received, where the former has ceased to exist. Harrison v. Union Pac. R. Co. 13 Fed. Rep. 522; Harrison v. Arkansas Valley R. Co. 4 McCrary, 264.

And an agreement of consolidation that the bonds of one of the constituent companies shall be "protected" gives a lien good against all persons except subsequent purchasers without notice. Tysen v. Wabash R. Co. 15 Fed. Rep. 763; Compton v. Wabash, St. L. & P. R. Co. 45 Ohio St. 592.

But where the consolidated company had previously purchased a franchise and roadbed under a deed of trust, assuming only liability on a construction contract, it was not liable for other debts. Houston & T. C. R. Co. v. Shirley, 54 Tex. 125.

And a contract made by the former Missouri Pacific Railroad Company to use Pullman cars on its road and on roads controlled by it, is binding on the present Missouri Pacific Railroad Company, only as to all roads owned or controlled at the time of consolidation. Pullman Palace Car Co. v. Missouri Pac. R. Co. 115 U. S. 587, 29 L. ed. 499.

A creditor of one of the constituent companies cannot attach a debt due to it, where his claim accrued after consolidation, and the contract of consolidation bound the new company for the debts of the former companies. Bishop v. Brainerd, 28 Conn. 289.

Statutory liability.

Where the statute of consolidation preserves the rights of the creditors of the constituent companies, the new company is liable for the debts and torts of the original companies. Warren v. Mobile & M. R. Co. 49 Ala. 582; New Bedford R. Co. v. Old Colony R. Co. 120 Mass. 397.

And in adding to the liability imposed on a consolidated company by Taylor's Kan. Stat., par. 1268, such company is liable for the debts and torts of the old companies in the absence of stipulations to the contrary. Berry v. Kansas City, Ft. S. & M. R. Co. (Kan.) Nov. 11, 1893.

And a successor of a railroad company cannot claim the benefits of the acts of succession without also being subject to the liabilities imposed by the act. Montgomery & W. P. R. Co. v. Boring, 51 Ga. 582.

Bondholders of the consolidated company are bound by an unrecorded contract of an original company, to have a flag station and allow use of land to grantor of right of way, where the statute

ment of damages was with the agents of this company's predecessor, and this company is not liable for the ordinary debts of that company.

Lake Erie & W. R. Co. v. *Griffin*, 92 Ind. 487; *Gilman* v. *Sheboygan & F. du L. R. Co.* 37 Wis. 317; *Lake Erie & W. R. Co.* v. *Griffin*, 107 Ind. 471; *Indiana, B. & W. R. Co.* v. *Allen*, 113 Ind. 581; *Midland R. Co.* v. *Smith*, Id. 233; *Campbell* v. *Indianapolis & V. R. Co.* 110 Ind. 490; *Chicago & G. S. R. Co.* v. *Jones*, 103 Ind. 386; *Buchanan* v. *Logansport, C. & S. W. R. Co.* 71 Ind. 265; 2 Rorer, Railroads, §§ 741, 750, 751.

Appellee has mistaken his remedy, assuming he has a cause of action as alleged, and should have proceeded, if he had a valid claim, by the writ of *ad quod damnum* as provided by the statute.

The statutory remedy was exclusive.

Kimble v. *White Water Valley Canal Co.* 1 Ind. 287; *Conwell* v. *Hagerstown Canal Co.* 2 Ind. 589; *Null* v. *White Water Valley Canal Co.* 4 Ind. 435; *Lafayette & I. R. Co.* v. *Smith*, 6 Ind. 249; *Leviston* v. *Junction R. Co.* 7 Ind. 599; *New Albany & S. R. Co.* v. *Connelly*, Id. 32; *Pittsburgh, Ft. W. & C. R. Co.* v. *Swinney*, 97 Ind. 599; *Lake Erie & W. R. Co.* v. *Kinsey*, 87 Ind. 514.

Where the railroad company, without the consent of the owner, takes possession of his real estate, the owner may resort to any or all the usual remedies known to law, and where the owner does consent, and the company takes possession under his license, he cannot avail himself of all of these remedies; and if this is true, then he must be restricted to some one remedy. The remedy provided by the statute under the *ad quod damnum* act is ample, and will protect to the fullest extent the interests of the landowner. This being true, he is not remediless, if he is not permitted to avail himself of any but this ample and sufficient remedy.

Louisville, N. A. & C. R. Co. v. *Beck*, 119 Ind. 124; *Louisville, N. A. & C. R. Co.* v. *Soltweddle*, 116 Ind. 258; *Graham* v. *Columbus & I. Cent. R. Co.* 27 Ind. 260, 89 Am. Dec. 498; *Bravard* v. *Cincinnati, H. & I. R. Co.* 115 Ind. 1; Lewis, Em. Dom. § 607, and cases cited.

Mr. **John R. Coffroth**, for appellee:

In *Lake Erie & W. R. Co.* v. *Griffin*, 107 Ind. 464, the court said: "In such case, the appellant's liability does not rest upon the judgment against the old corporation, but upon the principle that, having adopted and ratified the original appropriation, it is bound in equity and good conscience to make compensation."

"He who derives the advantage ought to sustain the burden."

Broom, Legal Maxims, 706.

The original company had acquired, by license, the right to build its road upon the land in question, without being guilty of trespass, or remitted to the writ of *ad quod damnum;* and the measure of damages was afterwards to be ascertained by agreement; and when appellant took possession of appellee's land, it affirmed the agreement, and, in equity, made itself liable to pay the damages.

Lake Erie & W. R. Co. v. *Kinsey*, 87 Ind. 514; *Bloomfield R. Co.* v. *Grace*, 112 Ind. 128;

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consolidating preserves all the rights of the creditors of the original companies. Mobile & M. R. Co. v. Gilmer, 85 Ala. 422.

The New York Act of 1869 saved the rights of all creditors and bondholders of any company embraced in the consolidation authorized by the act, and the respective status of each separate company as respects creditors and bondholders was unimpaired. Vilas v. Page, 106 N. Y. 439.

A consolidated railroad company is personally liable on a mortgage bond and coupon of the former company, under N. Y. Laws 1869, chap. 917, providing that the rights of all creditors and liens upon the property of either shall be preserved, and all debts and liabilities incurred by either of said corporations, except mortgages shall attach to the new one as if it had incurred the debt. Polhemus v. Fitchburg R. Co. 123 N. Y. 502, affirming 50 Hun, 397, in effect overruling Janes v. Fitchburg R. Co. 50 Hun, 310.

In Miller v. Lancaster, 5 Coldw. 514, it was stated that the consolidation of companies pursuant to an act of the legislature imposing liabilities on the new, implies as between the companies the acceptance of the liabilities as declared by the act. But this was not the question involved in that case.

But where a statute protects the creditors of the old company in consolidation, the creditor having a remedy at law, cannot sue in equity to enforce a mere legal right. Arbuckle v. Illinois Midland R. Co. 81 Ill. 429.

In Shaw v. Norfolk County R. Co., 16 Gray, 407, it was held that a statute providing that a constituent company shall not be released from liabilities by consolidation, and providing that all the privileges, property, and liabilities imposed on the two shall appertain to the united corporation as if acquired under an original charter, does not require the assumption of liabilities incurred by the former companies, but confers the privileges and imposes the obligations of all railroad companies under the general law, and the company acquiring the franchise of another, subject to the rights of its creditors, might also purchase the outstanding bonds and hold them like any other creditor, or pay and discharge them to relieve their own from the mortgages.

And a consolidated company is not liable for the debts of a former company on an act passed after consolidation, which act made consolidated companies liable for prior debts of old companies, and where the company creating this debt had been sold under a deed of trust prior to consolidation. Hatcher v. Toledo, W. & W. R. Co. 62 Ill. 477, 6 Am. Ry. Rep. 405.

As to statutory liability, see "Liens and priorities."

Liens and priorities.

A prior lien against an original company is not lost or prejudiced by consolidation. Hamlin v. Jerrard, 72 Me. 62; Rutten v. Union Pac. R. Co. 17 Fed. Rep. 480.

And this is so where the consolidating act preserved their rights. Spence v. Mobile & M. R. Co. 79 Ala. 576.

And a vendor's lien on one of the original companies is binding on the property of the company in the hands of the consolidated company. North Carolina R. Co. v. Drew, 3 Woods, C. C. 692.

A purchaser of land at judicial sale, on a judgment against the consolidated company, will not acquire a superior title over a purchaser under a subsequent judgment on a prior unrecorded mortgage made by one of the original companies, of which the consolidated company had notice by implication, and assumed all the liabilities of the former. Mississippi Valley Co. v. Chicago, St. L. & N. O. R. Co. 58 Miss. 846.

Lake Erie & W. R. Co. v. *Griffin, supra; Bloomfield R. Co.* v. *Van Slike*, 107 Ind. 480; *Indiana, B. & W. R. Co.* v. *Allen*, 113 Ind. 308.

The remedy by *ad quod damnum* is not exclusive.

Cincinnati, H. & I. R. Co. v. *Clifford*, 113 Ind. 467; *Harshbarger* v. *Midland R. Co.* 131 Ind. 177; *Lane* v. *Miller*, 23 Ind. 104; *Summy* v. *Mulford*, 5 Blackf. 202; *Toney* v. *Johnson*, 26 Ind. 382; *Pittsburgh, Ft. W. & C. R. Co.* v. *Swinney*, 97 Ind. 586; *Indiana, B. & W. R. Co.* v. *Allen*, 113 Ind. 581; *Midland R. Co.* v. *Smith*, Id. 233; Lewis, Em. Dom. § 607, *note*.

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

This suit was instituted in the Benton circuit court, but on change of venue was tried in the Tippecanoe circuit court. The first

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A statute of consolidation providing that "all rights of creditors and all liens upon the property of either of said corporations shall be preserved unimpaired" clearly distinguishes debts secured by liens from debts not so secured, and does not create a lien in favor of bonds of one company not secured before consolidation and issued thereafter. Wabash, St. L. & P. R. Co. v. Ham, 114 U. S. 587, 29 L. ed. 235.

A sale of a consolidated railroad was ordered, as a whole, where mortgage liens were on the several original roads, the decree providing for an equitable distribution of the proceeds according to the liens. Gilbert v. Washington City, V. M. & G. S. R. Co. 33 Gratt. 586.

As to liens, see also Compton v. Wabash, St. L. & P. R. Co. 45 Ohio St. 592; and Tysen v. Wabash R. Co. 15 Fed. Rep. 763.

Pleading and practice.

A complaint against a consolidated company on a debt of a prior company, alleging such liability and the consolidation and the resulting liability of the consolidated company, was sufficient. Collins v. Chicago, St. P. & F. du L. R. Co. 14 Wis. 492.

And the same was held, where it did not state the implied liability of the consolidated company. Cleveland, C. C. & St. L. R. Co. v. Prewitt (Ind.) 54 Am. & Eng. R. R. Cas. 198.

And failure to allege that the tort was committed by one of the constituent companies in a petition against the consolidated company will be disregarded on appeal. Indianapolis, C. & L. R. Co. v. Jones, 29 Ind. 465, 95 Am. Dec. 654.

After consolidation where the new company is liable for the debts of the old, an action therefor must be brought against the new one by name. Indianola R. Co. v. Freyer, 56 Tex. 609.

And an action on a note made by one of the prior companies may be against the new company by its new name, where the consolidation act so provides. Columbus, C. & I. Cent. R. Co. v. Skidmore, 69 Ill. 566.

But it was held in Selma, R. & D. R. Co. v. Harbin, 40 Ga. 706, and Marquette, H. & O. R. Co. v. Langton, 32 Mich. 251, that some showing must be made setting out such facts as will indicate a liability of the consolidated company for a debt of one of the prior companies.

Where companies are consolidated pending an action against one of them, and the new company is liable for the debts of such constituent company, the petition may be amended setting up the consolidation and alleging the liability of the new company. Kinion v. Kansas City, Ft. S. & M. R. Co. 39 Mo. App. 574; Jeffersonville, M. & I. R. Co. v. Hendricks, 41 Ind. 48.

And in the latter case it was held that such amendment did not state a new cause of action as affected by the statute of limitations. See Boardman v. Lake Shore & M. S. R. Co. *infra*.

And such an amendment was proper. Texas & P. R. Co. v. Murphy, 46 Tex. 360, 26 Am. Rep. 272.

This was on the ground that the presumption is that the new company succeeds to all the rights, powers, and privileges of the former,—citing Stephenson v. Texas & P. R. Co. 42 Tex. 162.

And an order allowing plaintiff to file a supplemental complaint bringing in the new company, which had assumed all of the contracts, liabilities, and obligations of the original companies, was properly granted. Prouty v. Lake Shore & M. S. R. Co. 85 N. Y. 272.

Although an order made on a motion substituting a new company after a report of a referee as to liability of old, was error as the liability of the new one must be on its assumption of liabilities of others, and not by a summary process of a motion to insert the name as defendant—where such company did not participate in the proceedings before the referee. Prouty v. Lake Shore & M. S. R. Co. 52 N. Y. 363.

The writ was properly amended so as to show that the proper party defendant to an action against a railroad company as common carrier was the consolidated company, which was confessedly liable for the loss, as this amendment simply held in court the party already brought there under a wrong name. Hosford v. New York Cent. & H. R. R. Co. 47 Vt. 533.

An action against a company does not abate by reason of its consolidation with another company. Baltimore & S. R. Co. v. Musselman, 2 Grant, Cas. 348; East Tennessee & G. R. Co. v. Evans, 6 Heisk. 607; Gale v. Troy & B. R. Co. 51 Hun, 470.

And in Mississippi the plaintiff in an action pending is not prejudiced by a consolidation of the defendant with another company, as the original corporation exists as to him until after judgment, and he can take judgment against the same by its former name. After judgment *scire facias* may be the appropriate remedy to charge the new corporation on its legal obligation, but he cannot have *scire facias* until after judgment. Schackleford v. Mississippi Cent. R. Co. 52 Miss. 159.

But it was held in Kansas, O. & T. R. Co. v. Smith, 40 Kan. 192, that all proceedings by or against the original company by its original name after consolidation, in an action then pending, are void as the company ceases to exist, and an appeal by the original company in condemnation proceedings was dismissed; and section 40 of the Code providing that in case of transfer of interest the action may be continued in the name of the original party, was held inapplicable, as that part of the section only applies where such original party still exists.

The obligation to pay, by the consolidated company, does not give priority on the calendar of the court, under N. Y. Code, § 791, subsec. 8, giving priority to an action against a corporation founded upon a note or other evidence of debt for the absolute payment of money. Polhemus v. Fitchburg R. Co. 113 N. Y. 617.

A foreign corporation cannot plead the statute of limitations and where there is a consolidation, and in New York the statute does not run until the date of consolidation. Boardman v. Lake Shore & M. S. R. Co. 84 N. Y. 157. See Jeffersonville, M & I. R. Co. v. Hendricks, 41 Ind. 48.

Matters relating to, "Liability of purchasing railroads;" "Liability of lessee;" "Rights of stockholders;" "Exemption from taxation",—are omitted from this note. I. T.

paragraph of complaint is a common action for ejectment. This was dismissed before trial. The second paragraph is substantially as follows: "And said plaintiff above named, further complaining of defendant above named, says that he is now, and for ten years last past has been, the owner in fee of the following real estate in Benton county, Indiana, to wit, the southeast quarter of section 7, township 24 north, range 7 west, containing 160 acres, and at the time of the happening of the grievances hereinafter complained of he was, and for a long time prior thereto had been, using all of said land as one farm; that on the —— day of August, 1881, the Chicago & Great Southern Railway Company, a corporation organized under and by virtue of the laws of the state of Indiana in that behalf enacted, desired to construct its road through a part of said land, to wit, the southwest quarter thereof, and applied to plaintiff to pay him for a right of way through the same; that plaintiff then informed said company that it would be impossible for him to state what damage the construction of the road through his premises would be to him or his land until the same was constructed; that thereupon it was agreed between plaintiff and said company that the latter should construct its road across plaintiffs' said land, and that as soon as said road was completed said company would pay him the damages occasioned; that pursuant to said agreement said company, in 1882, constructed its road over the southwest quarter of said real estate, occupying a strip fifty feet wide, beginning sixty-six and one-half rods north of the southwest corner of said 40-acre tract; thence in a southeasterly direction through said premises, leaving the same at a point 78¾ rods east of the southwest corner thereof, which is now occupied and covered by the roadbed of this defendant; that defendant afterwards operated its trains over the same, thereby greatly injuring and damaging plaintiff, in this; that the strip of land is, and was at the time it was taken, of the value of $300; that plaintiff's said farm of 160 acres is cut into two pieces, thereby decreasing the value thereof, and the fields are carved into odd and inconvenient shapes, requiring a large amount of additional fencing, greatly interfering with the use of said farm in raising and handling stock, and rendering the property liable to be burned, to plaintiff's damage in the sum of $2,500; that said Chicago & Great Southern Railway Company refused to pay said damages, though he demanded the same, and said license theretofore given said company became and was revoked by plaintiff; that on November 1, 1890, and April 9, 1883, said company executed to John C. New, trustee, two certain deeds of trust upon all the franchises, rights, and privileges, and all the real and personal property of said company, of every kind and character, the first one to secure the payment of 2,000 bonds, each for the sum of $1,000, which said mortgages were duly recorded in the Record of Mortgages in the recorder's office of said Benton county, the first one on November 23, 1881, in Record 11, page 455; that afterwards Henry H. Porter, holder of a majority of said bonds so issued, brought an action against said maker and others, in the United States circuit court for the district of Indiana, to foreclose said mortgage, but this plaintiff was not a party thereto; that such proceedings were had in said court; that on February 16, 1886, a decree of foreclosure was entered, and on March 27, 1886, said Chicago & Great Southern Railway Company, its property, franchises, etc., was sold by William P. Fishback, master commissioner, under order of said court, at public auction, and that said Porter purchased the same, and received a deed therefor by order of said court, and said New, trustee as aforesaid, also conveyed the property covered by said deeds to said Porter on April 20, 1886; that afterwards Porter, together with others, organized a company for the purpose of operating the said railway, said company being organized under and by virtue of the laws of the state of Indiana in that behalf enacted, under the name of the Indiana Railway Company, and said Porter conveyed and transferred to the last-named company the property, rights, and privileges so purchased by him; that the Chicago & Indiana Railway Company was a railway company duly organized under the laws of Indiana in that behalf enacted; that afterwards said Indiana Railway Company and said Chicago & Indiana Coal Railway Company were consolidated, said consolidated company taking the name of the last-named company, and said company is now occupying the last above described real estate of plaintiff under and by virtue of said proceedings, and none other; that after said Chicago & Great Southern Railway Company had constructed its track across plaintiff's aforesaid land, it used, occupied, and enjoyed said premises, and operated its trains over the same, for more than two years, and that defendant company is now, and for more than one year last past has been, using, occupying, and enjoying the same, and operating its trains over it, without right, and during all of said time has unlawfully kept the plaintiff out of possession thereof; that said Chicago & Great Southern Railway Company is, and was at the time of the foreclosure and sale, and ever since has been, insolvent; that prior to the commencement of this suit he demanded of defendant the payment of said damages to his land, but it failed and refused to pay the same, and he then demanded possession of said real estate, and revoked the license under which it was using, occupying, and enjoying said land. Wherefore, plaintiff demands judgment for $5,000, for the recovery of said land, and all other proper relief." To the second paragraph of complaint, appellant answered—Firstly, the statute of limitations of six years; and, secondly, a special plea. A demurrer to each of these answers was filed, overruled to the first, and sustained to the second. The record recites that the appellant did file answers and interrogatories; that appellee did file demurrers to these answers; but neither of them is in the record, and the record also recites the ruling of the court thereon. But subsequently the ruling upon the demurrer to these answers was vacated, and appellant thereupon filed

its two paragraphs of answer,—the only ones in the record. To these paragraphs a demurrer was filed, which was overruled as to the first, and sustained as to the second, but to this ruling there was no exception saved by appellant. The record reads as follows: "And the court, being sufficiently advised, now sustains the said demurrer to the fourth paragraph of answer to the second paragraph of complaint, to which ruling of the court the plaintiff then and there excepted. The court now overrules the demurrer to the second paragraph of answer to the first paragraph of complaint, and also now overrules the demurrer to the third paragraph of answer to the second paragraph of complaint, to which rulings of the court, and each of them, upon each of said demurrers, the plaintiff then and there excepted; and the plaintiff now files his reply to the second paragraph of answer to the first paragraph of complaint." The errors assigned are as follows: Firstly, the complaint does not state facts sufficient to constitute a cause of action; secondly, the court erred in overruling defendant's demurrer to the second paragraph of complaint; thirdly, in sustaining demurrer to fourth paragraph of answer to the second paragraph of complaint; fourthly, in overruling defendant's motion to set aside default taken against appellant, and to vacate judgment; fifthly, in overruling defendant's motion for a new trial. This cause was tried by the court, and judgment rendered on the second paragraph of complaint, the first paragraph having been eliminated from the cause before trial.

Counsel for appellant discuss the sufficiency of the complaint under its first assignment of error, and upon the overruling of the demurrer to the second paragraph of the complaint, on the theory that the complaint seeks to recover for a tortious appropriation of plaintiff's lands by defendant company, and as the facts disclosed by it clearly put defendant's predecessor in lawful possession of appellee's land, under an express license, appellee postponing damages until after the road was constructed, appellant was not a wrongdoer, and for the occupancy up to this time could not have been sued in an action founded upon tort, and that having entered upon a parol license, upon the faith of which appellant expended large sums of money in constructing and equipping the road, the licensor will be held estopped from revoking the license until the licensee can be placed *in statu quo*, and hence that at no time could appellant have become a trespasser. Counsel quote from *Indiana, B. & W. R. Co.* v. *Allen*, 113 Ind. 308, in which the court says: "What we affirm is that acquiescence after public rights have intervened will prevent a landowner from destroying the line of road by wresting possession of a part of it from the company. . . . A citizen who has stood by until after the completion of a line of road has involved public interests shall not be allowed to sever the line, and destroy its efficiency, by wresting possession of a part of it from the company." It is *stare decisis* that a license, coupled with an interest, is irrevocable. *Campbell* v. *Indianapolis & V. R. Co.* 110 Ind. 490; *Evansville & T. H. R. Co.* v. *Nye*, 113 Ind. 223; *Chicago & G. S. R. Co.* v. *Jones*, 103 Ind. 386; *Louisville, N. A. & C. R. Co.* v. *Soltweddle*, 116 Ind. 257; *Buchanan* v. *Logansport, C. & S. W. R. Co.* 71 Ind. 265; *Lake Erie & W. R. Co.* v. *Michener*, 117 Ind. 465; 2 Rorer, Railways, §§ 741-751. "The doing of what the law gave her a right to do cannot be imputed as a tort." *Dill* v. *Bowen*, 54 Ind. 208. The authorities above cited and relied upon by appellant would be entirely pertinent to the first paragraph of complaint in ejectment, had it remained in the record, or to an action for trespass, but we think counsel are mistaken in their claim that appellant is charged as a trespasser, and by inadvertence misconstrue the pleading. The correct theory of the complaint is the one adopted by the trial court, viz.: it is a statement of facts to show the creation of an equity to damages for the taking and use of land to show that the old company entered, constructed, and operated its road over the land in dispute by consent of plaintiff, without payment of damages occasioned thereby, which were to be ascertained and paid when the road was built. The pleading negatives every fact inconsistent with the integrity of this equity, and shows circumstantially the relation of all the parties to this strip of land, and that plaintiff is without compensation. It does not seek to recover for a breach of agreement made by the old company and the plaintiff, but for a breach of equitable duty laid on the defendant by force of the facts that it has taken his land, and is using and holding it, in the same plight as its predecessor held it, and that plaintiff is entitled to, and is without, compensation. The new company is enjoying the easement under the conditions of the old company, and the benefits and burdens incident to its use are inseparable, in the absence of any relevant act or omission of the defendant. The equitable principle applicable here, as in many other cases, is that he who derives an advantage ought to sustain the burden. Mr. Brown says: "A man will be bound by that which would have bound those under whom he claims *quoad* the subject-matter of the claim, and no man can, except in certain cases, which are regulated by the statute law and the law-merchant, transfer to another a better right than he himself possesses. The grantee shall be in no better condition than he who made the grant." This doctrine was fully recognized in *Lake Erie & W. R. Co.* v. *Griffin*, 107 Ind. 464, in this statement: "On the former appeal of this cause we held that if this averment were true it showed the appellant's election to adopt the original appropriation of appellee's premises by its entry upon, use, and occupation of, such premises, for the purposes of its railroad." We then said: "In such case the appellant's liability does not rest upon the judgment against the old corporation, but, upon the principle of having adopted and ratified the original appropriation, it is bound, in equity and good conscience, to make compensation, for the right of the appellees for compensation for their property is protected by the constitution, and it will not do to say that their unsatisfied judgment

against the old, insolvent corporation affords them any compensation. The maxim applies '*Qui sentit commodum, sentire debit et onus.*'" In *Louisville, N. A. & C. R. Co.* v. *Boney*, 117 Ind. 501, 3 L. R. A. 435, the court says: "Where a consolidation of railroad companies takes place, in pursuance of the statute, the corporation into which the original companies are merged becomes liable for all the valid debts and obligations of the consolidated company, and a judgment *in personam* may be rendered against it therefor." The same doctrine is declared in *Cleveland, C. C. & St. L. R. Co.* v. *Prewitt* (Ind.) 33 N. E. Rep. 367, and cases there cited. This is now settled law. The averments of the second paragraph of complaint, concerning what is styled a revocation of appellant's license and the demand for possession, are mere surplusage, in view of the chief line of averments to which we have referred.

But the learned counsel for appellant urge with much vigor another reason why this demurrer should have been sustained, viz., assuming that appellee has a cause of action, he should have proceeded by the writ of *ad quod damnum*, as provided by statute, and that, having misconceived his action, he must fail here; that it is a common-law remedy, and the statute provides an ample remedy, of which appellee could avail himself, to the exclusion of the common-law remedy. Counsel insist that he is probably restricted to the one specified in the statutes, and that it is exclusive. The statutory remedy is provided for in section 3953, Rev. Stat. 1881, and is in this language: "If, from any cause, there shall be any failure of the right of way, or when the title thereto has not been acquired, upon which any railroad of this state is now constructed, it shall be lawful for the company owning the road, or for the party owning such lands upon which any part of the road is constructed, to apply to the proper court for the writ for the assessment of damages, and have the damages which the owner of said property has sustained, or may sustain by reason of the taking, use, and occupancy thereof by the company for the construction and maintenance of said road; and upon the assessment and payment of the company of the damages which may be assessed or awarded, the title to such property shall vest absolutely in the company for the purposes of the said railroads," etc. In this case the appellant insists upon the broad proposition that, when any work of a public character is authorized by an act of the legislature, and a mode of obtaining compensation for private property to be taken for its construction is specifically pointed out, such compensation must be sought in the way prescribed by the act, and not otherwise. On the other hand, appellee contends that the method thus pointed out by the statute is cumulative, and does not defeat or take away the common-law remedy. It will be observed that the language of the statute is: "It shall be lawful for the company owning the road, or for the party owning such lands, upon which any part of the road is constructed, to apply to the proper court for the writ for assessment of damages," etc. It does not specify that it shall be so done, but it designates no plan other than the writ for such assessment. In no analogous cases under this statute has the point ever been decided adverse to appellee, but the court has on several occasions expressed dicta in relation to the matter in ejectment suits and actions for trespass. In *Louisville, N. A. & C. R. Co.* v. *Beck*, 119 Ind. 124, which was a possessory action, the court says "that a landowner who stands by, without demanding compensation, until a railroad company has so far completed and put in operation its road as to involve the public interest, can neither enjoin the company, nor maintain ejectment to recover his land. The only remedy left to the landowner, in such a case, is to proceed, within the proper time, to have his damages assessed and enforced against the railroad company. This rule is founded upon the general principles of public policy, as well as upon the provisions of section 3953, Rev. Stat. 1881." In *Pittsburgh, Ft. W. & C. R. Co.* v. *Swinney*, 97 Ind. 599, the court says: "The accepted doctrine now is that where a railroad company, or other corporation possessing similar powers, takes possession and enters into the use of real estate without the consent of the owner, and without taking the necessary means to acquire the title it assumes to assert, the owner may resort to any or all of the usual remedies known to the law for the protection of his estate in the property." The doctrine thus expressed, appellant claims, leaves, by implication, the converse of the rule, namely, that where the owner does consent, and the company takes possession under his license, he cannot avail himself of all these remedies, but must be limited in his remedies to one or more of them. In *Cincinnati, H. & I. R. Co.* v. *Clifford*, 113 Ind. 467, also a possessory suit, the court says: "The counsel for appellant are in error in assuming that the only remedy to the landowner is that given by statute. He is not confined to that remedy, but, in the proper case, may prosecute an action for damages or possession." In *Harshbarger* v. *Midland R. Co.*, 131 Ind. 177, which was an action to recover for lands appropriated by defendant company, and acquiesced in by the owner, the court says: "It is a right of action existing in the owner at the time of the appropriation and the creation of the right of action separate and distinct from the land. The right of action occurred at the time when the ancestor might have maintained an action for damages, or instituted proceedings to have his damages assessed." In *Lane* v. *Miller*, 22 Ind. 104, the court says: "The objection made to the complaint is that, as the law on the assessment of damages has given a person whose lands are injured by the erection of a milldam a remedy by writ of assessment of damages, he is confined to that remedy, and cannot resort to his action at common law." In *Snowden* v. *Wilas*, 19 Ind. 10, 81 Am. Dec. 370, a query is raised whether he should not be confined to the statutory remedy, but the point has never been decided by this court. In *Summey* v. *Mulford*, 5 Blackf. 202, the point, after full examination, was ruled the other way. In *Toney* v. *Johnson*, 26 Ind. 382, a milldam

case, the court says: "It is insisted that the demurrer to the complaint should have been sustained, on the ground that the remedy provided by statute excludes any other proceeding. Such has not been the view taken by this court. From the organization of this court, actions like the present have been sustained. The distinction between statutes which are exclusive, and those which simply provide a cumulative remedy, is stated in *Lang* v. *Scott*, 1 Blackf. 405, 12 Am. Dec. 257. If a statute is introductory of new rights, which did not before exist in the country, and prescribes a penalty for their violation, the persons claiming under the act must depend for the security of the right thus claimed upon the provisions therein specified. When there is a pre-existing right at common law, and an affirmative statute intervenes, inflicting a new penalty, the law is otherwise." In *Indiana, B. & W. R. Co.* v. *Allen*, 113 Ind. 583, the court uses this language: "Our conclusion is, that acquiescence does defeat the action of ejectment, unless there are countervailing facts, or some element which nullifies the force of the acquiescence. We do not assert that it will defeat any action where only compensation is sought. . . . Compensation he may recover, possession he cannot. To the recovery of just compensation his rights are confined." These various opinions expressed by judges on points that did not necessarily arise in most of those cases, and were not directly involved in them, seem somewhat conflicting; but, taking the language employed in section 3953, "it shall be lawful for the company owning the road, or the party owning the lands. . . . to apply to the proper court for the writ of assessment," etc., excludes the idea that the common-law right of action for damages is abrogated, and supports the theory that the statute furnishes him this remedy in addition to the one with which he was vested under the common law. But, for the purposes of this case, we do not regard it necessary to decide this question. If appellant had preferred the writ of assessment, it also had a right to invoke the aid of the statute, from its very terms, and thereby avoid the direct suit for damages, of which it complains. The license, according to its theory, not having estopped appellee from asserting a claim under the writ, appellant would not be deprived of the benefits of the statutory remedy. To be denied by statute a remedy possessed before its enactment, its terms should be express, or so clearly repugnant to the exercise of it as to imply a negative. Parties are not compelled to avail themselves of statutory privileges, where they agree among themselves to adjust their own controversies in a different manner. The law fosters and encourages compromises and settlements of questions in dispute, in lieu of litigation, where conscionable terms can be agreed upon. The machinery of statutory law is at times cumbersome and unwieldy, and the administration of justice under it quite expensive. If, to avoid costs of litigation, they waive its provisions, and agree on a cheaper and more direct plan, looking to equitable relief, courts should uphold and enforce its provisions. In this case, as stated, appellant's predecessor applied to appellee, before the road was constructed, to pay him for this right of way. Appellee then informed the company that he could not tell the extent of his damage until the road was constructed. Thereupon, it was agreed that the company might construct its road across appellee's land, and when completed it would pay the damage occasioned. It occurs to us that by force of this license and agreement the parties dispensed with the writ of *ad quod damnum*, and agreed that the damages should be ascertained by mutual stipulation. If the original company had remained in possession, it could have been compelled to pay. Appellant got no better title under the foreclosure proceedings than its predecessor had. Why should it not be compelled to do justice to the wronged landowner? The original company had acquired the right to build its road upon the land in question without being guilty of trespass, or remitted to the writ of *ad quod damnum*, and the measure of damages, as suggested, was afterwards to be ascertained by agreement. When appellant took possession of appellee's land, it affirmed the agreement, and, in equity, made itself liable to pay the damages. "Acquiescence on the part of the landowner, though acting as a waiver of his right to maintain ejectment, is by no means a waiver of his right to damages such as would have been recovered in a regular condemnation proceeding." 19 Am. & Eng. Encyclop. Law, 860. Appellant is possessed of a license which, being irrevocable, renders it as secure in its possession as an easement, and "an easement once acquired becomes a privilege in favor of the dominant estate, and a burden imposed upon the servient estate, and subsequent grantees take it subject to the privilege or burden." Ballard, Real Estate Statutes, § 366. The appellant does not discuss the sufficiency of the evidence to sustain the finding, and the question is therefore waived.

Judgment affirmed.

NORTH DAKOTA SUPREME COURT.

Julius ROSHOLT, *Appt.*,
v.
Thea MEHUS, *Respt.*

(........N. Dak........)

*1. **Where a married woman leaves the home of herself and husband,** the title to which was in the husband, and remains away nearly three years before claiming any homestead interest in the property, but the husband remains in constant occupancy of the land, keeping his home thereon, such absence alone will not constitute abandonment by the wife of her homestead rights. Whether or not, in such a case, a wife could, under any circumstances, forfeit her homestead rights under our statute, not decided.

2. **In divorce proceedings it is competent for the court to assign the homestead to the innocent party,** either absolutely or for a limited period; but, where the decree in the divorce proceedings is silent upon the question, the homestead will, upon the dissolution of the marriage, remain in possession of the party holding the legal title thereto, discharged from all homestead rights or claims of the other party.

*Headnotes by BARTHOLOMEW, *Ch. J.*

(January 8, 1894.)

APPEAL by plaintiff from a judgment of the District Court for Steele County in

Effect of divorce on homestead rights.

Husband's claim to homestead, where decree of divorce is silent.

A husband liable for the support of his children does not lose his homestead rights in his land by reason of a divorce. Redfern v. Redfern, 38 Ill. 509; Byers v. Byers, 21 Iowa, 268; Biffle v. Pullam, 114 Mo. 50.

And in Doyle v. Coburn, 6 Allen, 71, it was held that a husband does not lose his homestead rights even where the custody of the child is awarded to the mother, as he may adopt other members of his household; and it is not lost by death or absence of wife and children, and it is for the benefit of the husband as well as the wife.

And the same was held in Woods v. Davis, 34 Iowa, 264, where the custody of the children was awarded to the wife, but the husband was still liable for support of his children.

These cases fairly support the doctrine announced in the main case.

But where the homestead is given to a "head of a family," and the husband has no family of his own dependent on him residing on the land, and his wife has the care and support of their child, a finding that he has abandoned the idea of having a homestead for a family, and had ceased to be the head of a family after his divorce, will be sustained. Cooper v. Cooper, 24 Ohio St. 488.

And under N. H. Laws 1868, chap. 1, giving a homestead to a "wife, widow, and children" where the custody of the children was awarded to her, his interest was subject to levy for her judgment of alimony—as his or her family did not occupy the same. Wiggin v. Buzzell, 58 N. H. 329.

And under Indiana 2 Rev. Stat. 1876, providing for exemption on "a debt growing out of or founded upon a contract, express or implied," there is no exemption to the husband on a judgment for alimony in favor of the wife. Menzie v. Anderson, 65 Ind. 239.

After divorce, a husband may convey to his former wife his interest in the homestead, and a mortgage made by her on the same after such conveyance will be valid. Grupe v. Byers, 73 Cal. 271.

A husband who believed he was divorced, and married another woman and then made a mortgage on the homestead, and after foreclosure sale obtained a decree of divorce from his first wife, cannot claim his homestead as against the purchaser. Trout v. Rumble, 82 Mich. 202.

Wife's claim to homestead, where decree of divorce is silent.

A divorced wife has no claim on her husband's homestead where the decree of divorce makes no disposition of the same. Heaton v. Sawyer, 60 Vt. 495; Stahl v. Stahl, 114 Ill. 375.

And the same was held where she was in fault, and the statute provided that any estate granted by the laws of this state to the husband and wife in the property of the other, shall be forfeited by the party at fault, in a divorce. Rendleman v. Rendleman, 118 Ill. 257.

In this case the divorce was rendered in Kansas, but the jurisdiction of that court was sustained.

So where she had not made any homestead declaration, as required by the statute, she could not resist a mortgage foreclosure on the same. Bunnel v. Stockton, 83 Cal. 319.

But under Mo. Rev. Stat., § 2689, providing that a married woman may file her claim to a tract of land occupied as a homestead if she is abandoned by her husband, and after such claim the husband cannot sell it, a claim so filed will protect the rights of the wife as against the husband's creditors even if she afterwards obtains a divorce, where she is the head of a family. Blandy v. Asher, 72 Mo. 27.

And under Mass. Gen. Stat., chap. 107, § 40, providing that on dissolution of marriage for any cause except adultery, the wife shall be entitled to the possession of her estate, she may recover property deeded to her, and in the possession of her former husband, although the deed contained a statement that it was to be held by him as a homestead, but the habendum clause was to her and to her heirs. Dunham v. Dunham, 128 Mass. 34.

In Whetstone v. Coffey, 48 Tex. 269, it was held that a divorced wife is not precluded from asserting her claim to community property occupied as a homestead, and sold by her husband without her consent, although the decree of divorce did not dispose of the community property.

And under Tex. Rev. Stat., art. 2864, providing that in a decree of divorce the court may divide the estate of the parties, but that nothing shall be construed, to compel either party to divest him or herself of the title to real estate, and the court makes no order in regard to the community property occupied as a homestead, the divorced wife residing thereon may claim one half thereof as against her former husband's creditors. Kirkwood v. Domnau, 80 Tex. 645.

And the same was held in Craig v. Craig, 31 Tex. 203, but the other part of the decree, awarding the other half of the property to the child, was erroneous.

It was held in Sellon v. Reed, 5 Biss. 125, that where the wife resided on the homestead at the time of divorce, and by the decree was awarded the care of the child, and thus continued as the head of the family, and alimony was not awarded in lieu of the homestead, she may retain the same as against a grantee of her former husband. This decision seems against the weight of authority,

See also 40 L. R. A. 750.

favor of defendant in a proceeding to determine adverse claims to certain real estate. *Reversed.*

The facts are stated in the opinion.

Messrs. **F. W. Ames** and **Carmody & Leslie,** for appellant:

No order being made in the decree of divorce which dissolved the status, regarding the homestead, its disposition after the divorce must be as directed by statute, and Nelson having no lawful wife to join him in the deed, he was free to convey by his deed alone. This would certainly pass the legal title, even if a homestead right did exist.

Stahl v. *Stahl,* 114 Ill. 375; Waples, Homesteads & Exemptions, 265, § 6, and cases cited.

Our statute evidently contemplated that the homestead should remain with the owner of the fee simple, if he is in possession and continues his home thereon, or be disposed of by the court in the decree of divorce, as provided in section 2585 of Complied Laws. If not so disposed of, the dissolution of the marriage dissolves all rights growing out of the relation of marriage, such as dower, etc., and they not being reserved in the decree are lost.

Wiggin v. *Buzzell,* 58 N. H. 329; *Heaton* v. *Sawyer,* 60 Vt. 495; *Kirkwood* v. *Domnau,* 80 Tex. 645.

No reason exists why all such rights could not be adjusted in the divorce suit.

Byers v. *Byers,* 21 Iowa, 268.

Mr. **J. H. Bosard,** for respondent:

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although based on Vanzant v. Vanzant and Bonnell v. Smith, *infra,* but in these latter cases the wife was awarded the homestead in the divorce decree.

Decree awarding homestead.

Generally the court in rendering the decree of divorce may make an equitable distribution of the property, and may award the homestead to one of the parties. Lowell v. Lowell, 55 Cal. 316; Snodgrass v. Snodgrass, 40 Kan. 494; Cole v. Cole, 27 Wis. 531; Harran v. Harran, 85 Wis. 299; Cole v. Cole, 23 Iowa, 433; Brandon v. Brandon, 14 Kan. 342; Webster v. Webster, 64 Wis. 438.

And a decree of divorce awarding to the wife to "have and hold her present homestead as alimony, with the right to rent the same until the youngest child becomes of age," is valid, as the question of alimony is discretionary. Jolliff v. Jolliff, 32 Ill. 527.

And where the wife was awarded the custody and care of the children and the homestead, she was entitled to the same as against her husband's creditors. Vanzant v. Vanzant, 23 Ill. 536; Bonnell v. Smith, 53 Ill. 375.

And under Tennessee Code, § 2946, providing that the title to the homestead shall be vested, by decree of the court granting the divorce, in the wife, and after her death it shall pass to the children, where the property is held by husband and wife as joint owners as tenants by entireties, and the decree gives it to her, she may assert her claim to the same, as against his creditors. Shelton v. Orr, 12 L. R. A. 514, 89 Tenn. 82.

Under Texas constitution and statutes giving to a citizen, a homestead free from the power of any court to devest him of the same, the court may decree in divorce, that the wife may have the use of his homestead, but it cannot give her more than a life estate in the same. Tiemann v. Tiemann, 34 Tex. 522.

And the court has power to make a decree that the alimony awarded is a lien on the homestead, where it may give the homestead to the wife. Blankenship v. Blankenship, 19 Kan. 159; Daniels v. Morris, 54 Iowa, 369; Hemenway v. Wood, 53 Iowa, 21.

A homestead established on community property may be divided in decree of divorce by the court the same as other common property. Trigg v. Trigg (Tex.) Dec. 3, 1891; Gimmy v. Doane, 22 Cal. 635.

And in Richey v. Hare, 41 Tex. 336, it was held that if community property decreed to be divided in a divorce was a homestead, it was not subject to sale by community creditors, but if not a homestead it was liable for community debts contracted before the institution of the divorce suit.

In Zapp v. Strohmeyer, 75 Tex. 638, it was held that where the homestead was divided by the court, and the decree did not give the custody of the children to either, and the children except one remained with the mother, and this one sometimes visited his father, the part allotted to the father was exempt from execution for costs in the case, and the court said that "the head of the family, or the two heads of families that there may be after the divorce, are entitled to hold their homestead against the forced sale, without regard to the causes of divorce; provided, that as to creditors who were such at the date of the divorce not more than two hundred acres of the existing homestead will be included in the exemptions to both." This decision asserting that a homestead may be split in a divorce suit, and two homesteads then exist, is novel, although the reasoning of the court on the facts of the case appears plausible.

But in Shoemake v. Chalfant, 47 Cal. 432, it was held that a decree dividing the homestead "severed the sort of joint-tenacy of the parties in the homestead premises, which had been created by the homestead declaration, the residence of the parties, etc., under the provisions of the homestead act. It also destroyed the right of survivorship. . . . The family, for whose benefit the provisions of the homestead act was mainly designed, was severed by the decree, and neither the husband nor the wife is entitled to reside on that portion of the homestead premises which was allotted to the other. All the principal qualities of the homestead estate, except that of exemption from liability for debts, etc., having been destroyed by the decree, the latter in our opinion, was also destroyed. The decree was as effectual in its results as would have been a declaration of abandonment." This evidently is on the ground that the homestead right in that state is a joint tenacy.

Under Cal. Code, § 146, providing that if the homestead has been selected from the community property, it may be assigned to the innocent party, either absolutely or for a limited period, the court cannot create a trust in assigning it but must assign it absolutely or for a limited period. Simpson v. Simpson, 80 Cal. 237.

Or if the wife has obtained the title and the decree is silent, she may retain the homestead. Burkett v. Burkett, 3 L. R. A. 781, 78 Cal. 310.

And under this statute the court may set aside to the innocent party the homestead, leaving to the other party all other property heretofore owned by the parties as community property. Boyd v. Boyd (Cal.) Jan. 14, 1893.

And the court may even award the homestead to the guilty party, where all claim to the same is released by stipulation of the other party in the case, decreeing divorce. Stockton v. Knock, 73 Cal. 425.

In this note cases where the parties had separated but no divorce was granted, are omitted. L. T.

When the respondent was divorced from her husband and given the custody of the children she became the head of the family.

Thompson, Homesteads, & Exemptions, § 82.

A wife who has been granted a divorce and given custody of the child, is the head of the family, and as such is entitled to the homestead.

Sellon v. *Reed*, 5 Biss. 125, 21 Myer's Fed. Dec. 639; *Byers* v. *Byers*, 21 Iowa, 268; *Vanzant* v. *Vanzant*, 23 Ill. 536; *Bonnell* v. *Smith*, 53 Ill. 375; *Brandon* v. *Brandon*, 14 Kan. 342; *Rendleman* v. *Rendleman*, 118 Ill. 257.

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

This action was brought to determine adverse claims to a quarter section of land in Steele county. It was heard on an agreed statement of facts, from which the court made two conclusions of law: First, that plaintiff was not the owner in fee simple of the land; and, second, that defendant was entitled to the possession of the land. The judgment simply dismissed the complaint on the merits, with costs. Plaintiff appeals, and assails the conclusions as not warranted by the facts. On June 10, 1882, one Torkel Mehus, husband of the respondent, Thea Mehus, obtained a patent to said land under the federal homestead law. Torkel Mehus and respondent continued to reside on said land as their homestead until May, 1887. At that time there were living three minor children, the issue of their marriage. In May, 1887, the respondent, Thea Mehus, taking her minor children with her, left the said Torkel Mehus, and has not lived with him since that time. Torkel Mehus continued in possession of the land, and made his home thereon until the sale thereof hereinafter mentioned. In January, 1890, the respondent, as the wife of Torkel Mehus, and in behalf of herself and her minor children, attempted to file a declaration of homestead under sections 2458 and 2459, Comp. Laws, and the declaration was recorded in the office of the register of deeds of Steele county. In October, 1890, she brought an action of divorce against Torkel Mehus, on the ground of his adultery; and in January, 1891, the district court granted her a decree absolute on that ground, and gave her the custody of the three children. In her complaint she prayed the allowance of a reasonable sum for maintenance of herself and children out of the property of her said husband. The decree gave her a gross sum of $250, and $20 per month for the support of herself and children. No order whatever was made relative to the homestead, nor was it mentioned in the complaint. On the 9th day of September, 1891, Torkel Mehus executed a warranty deed of said premises to the appellant, Rosholt. Appellant was a purchaser for value, with no notice of any claim of respondent upon the land, except the constructive notice given by the record of the homestead declaration and the record in the divorce proceedings. Appellant claims under the deed, and respondent claims a homestead interest in the land.

What was the condition of this land as to the homestead character at the time of the rendition of the divorce decree? We think it was the homestead of Torkel Mehus and his family, including this respondent. The legal head of the family had remained in constant occupancy of the land as his home. This preserved its homestead character. The actual presence of the wife is not required for the inception or preservation of the homestead right, so long as the husband is the head of the family. *Johnston* v. *Turner*, 29 Ark. 280; *Williams* v. *Swetland*, 10 Iowa, 51; *Bradford* v. *Central Kansas Loan & T. Co.* 47 Kan. 587.

Without holding that a wife can forfeit her homestead interest in her husband's home, or estop herself from claiming the same by anything short of a contract, but assuming such to be the law, it is yet certain that this record shows no such forfeiture or estoppel. The record does not disclose when the adultery upon which respondent based her action for divorce occurred. If prior to her leaving home, her absence would not imperil her rights (*Earle* v. *Earle*, 9 Tex. 630); but, if subsequent, yet it does not appear that she left her home and abandoned all intention to return. It does not appear that she left the jurisdiction, or attempted to establish a home elsewhere. Her effort to file a declaration of homestead would indicate an intention to return. It has grown to be familiar law that, in the absence of express statutory provisions, absence from the homestead for any reasonable time will not amount to abandonment when the *animus revertendi* always exists, and no other home is created. We repeat, respondent's homestead right existed at the date of the rendition of the decree of divorce, but it so existed by virtue of the fact that she was a member of the family of Torkel Mehus, who, with his family, had established his home and their home thereon, and whose occupancy had been continuous. Her rights were in no manner strengthened by the fact that she attempted to place a declaration of homestead on record. Such declaration does not create homestead rights (*Cole* v. *Gill*, 14 Iowa, 527; *Yost* v. *Devault*, 9 Iowa, 60); nor do we think, although we do not find the point ruled, that it takes the place of continuous occupancy after the inception of the homestead, except where, as in Minnesota, there is an express statutory provision to that effect. But even then, we suppose, the statute in no manner affects the question of actual abandonment, but might, in a subsequent contest, shift the burden of proof. In this state, when the head of a family owns land in excess of the amount allowed by law for a homestead, and the land is in one body, and the family resides thereon, the homestead may be selected in any form that may be desired up to the quantity allowed by law as a homestead. Recording a declaration of homestead gives notice to all purchasers, and all parties dealing with or extending credit to the owner, of the exact land claimed as a homestead. This, we think, is the main, and perhaps exclusive, reason for the provision because a failure to make and file the declaration does not render the home-

stead liable in execution. It only devolves upon the officer holding the execution the duty of selecting, platting, and recording the homestead. But since respondent's homestead rights rested exclusively upon the fact that she was a member of the family of Torkel Mehus, and since the divorce effectually severed that relation, it follows that her homestead right was destroyed, unless preserved by the statute or the decree. That decree severed the family relation theretofore existing between Torkel Mehus and Thea Mehus. She was no longer a member of his family. She was neither his wife nor his widow, and could claim none of the homestead rights given by law to the wife or widow. The occupancy which created and had preserved for her a homestead right in that land ceased instantly when she ceased to be a member of the family of Torkel Mehus.

But it is claimed that, by virtue of a new relation then created, the homestead right devolved upon her. It is urged that when respondent was divorced from her husband, and given the custody of the minor children, she became the head of the family, and that under such circumstances, when the wife is the meritorious cause of the divorce, she does not, by obtaining a divorce, forfeit her homestead right. The position thus broadly taken does not meet our approval. Whatever support it has in the books originated in *Vanzant* v. *Vanzant*, 23 Ill. 536. In that case the complainant was the divorced wife, who had been given the custody of the minor children. After asserting her right to the homestead as against the defendant, who was a creditor of the husband, the court says: "The spirit and policy of the homestead act seem to demand this concession, and to regard the complainant, for this purpose, as a widow and the head of a family." The court immediately adds: "But there are other circumstances disclosed by the record which fortify the claims of the complainant to the enjoyment of this property. In the first place, it is abundantly proved that the property was purchased with her own means, and, in the next place, that the court decreeing the divorce assigned it to her as alimony, and for which she holds the deed of the master in chancery, executed under the decree of the court." It is proper to add, also, that the premises, at the time of the divorce, were in the possession of a tenant, who immediately attorned to the divorced wife, and the court held that to be equivalent to actual occupancy by her. This case was followed by *Bonnell* v. *Smith*, 53 Ill. 375, where, also, the wife obtained the divorce and custody of the children, and was decreed the homestead absolutely as alimony, and the court, without discussing the matter, stated: "She therefore held it in a double right,—as alimony, under the decree of the court, and as her homestead, by operation of the statute." In this state a decree of divorce which granted to the meritorious wife the homestead absolutely as alimony would forever protect her possession, except in the enumerated cases, where a homestead is liable, irrespective of any construction of the homestead law. But in *Sellon* v. *Reed*, 5 Biss. 125, also 21 Myer's Fed. Dec. 639, and which arose in Illinois, the decree in the divorce case made no such disposition of the homestead. The fee was in the husband, or we so gather from the case. In the divorce action the meritorious wife obtained custody of the child and alimony in gross. Nothing was said about the homestead. She was in possession, and remained in possession with the child, and she was held entitled to possession, as against her divorced husband's grantee. The case is ruled on the *Vanzant Case*. These cases have been pressed upon us with much confidence, as being a construction by able courts of a homestead law not materially different from our own. The question is now raised for the first time in this jurisdiction. Its decision will announce a rule of property to be followed hereafter. That rule should be supported by sound judicial reasons. We are forced to say, when it is sought to carry the rule indicated in *Vanzant* v. *Vanzant* to the extent that is here claimed, that it fails to find support in sound reason, and is entirely unnecessary for the protection of the family. It is true that the homestead estate is created for the benefit of the family, and not for the benefit of the husband and father. *Fore* v. *Fore*, 2 N. Dak. 260. And it is true that courts liberally construe homestead laws, for the purpose of effectuating their wise and beneficent intentions, to the end that no family, through the misfortune of poverty or the death of its legal head, may be deprived of shelter, and where the homestead consists of a farm, as in this case, of support. But all the reasons which have induced the law to favor the wife or widow in the matter of homestead rights are entirely absent in cases of divorce. There is no action known to the law wherein the entire property of both parties is brought more directly within the grasp and control of the chancellor than the action for divorce. In this action the chancellor reviews not only the marital rights and wrongs of the respective parties, but their financial status and financial needs. He requires absolute information as to the number, age, and condition of all minor children. He knows it is the duty of the husband and father to support the family and educate the children. He knows that, in case of the death of the husband and father, the law places its hand upon so much of his property as constituted his homestead, and devotes it exclusively to the accomplishment of those purposes which it was the duty of the husband and father to accomplish while living. Where a divorce *a vinculo* is granted to an innocent wife, and she is given the custody of minor children, it is the duty of the chancellor, so far as the circumstances will permit,—and his power in that respect is plenary,—to compensate the innocent family for every right it has lost by reason of the legal separation from an offending husband and father. Under our statute, the court may in such cases require the husband to give security for any payments ordered to be made to the wife, or for the maintenance of the family; or the court may place the entire estate of the husband in the hands of a receiver, in order to secure such payments or maintenance, and the homestead, as such, is specially placed in the control of the court.

The Statute says (Comp. Laws, sec. 2585): "The court, in rendering a decree of divorce, may assign the homestead to the innocent party, either absolutely or for a limited period, according to the facts in the case and in consonance with the law relating to homestead." It would appear from this language that the legislature, so far from intending that the homestead should pass to the innocent party by virtue of the statute alone, thought it necessary to give the court express power to so dispose of it by decree. We are entirely unable to see any good reason why, after the chancellor, in the exercise of the broad and liberal discretion in him vested, has given the innocent family every protection the circumstances admitted or their needs required, the law should then step in, and transfer to them, at the expense of the husband, another and very material estate, to wit, the homestead owned and theretofore occupied by him. Particularly must this be true when, as in this case, the decree of divorce casts upon the husband the continuing duty of supporting that family, by compelling him to pay a certain monthly payment. It is not to be believed that the law will then grasp the very property out of which the husband must realize the money to make those payments, and transfer it to the family, and yet hold him for the payments. We deem it better for the innocent party, better for the fee owner, better as a rule of property, that the interests of the respective parties in the homestead should be fixed by the decree in the divorce proceeding; and, when that decree is silent, the homestead, like all other realty, must remain in the possession of the party holding the record title, discharged of all homestead rights and claims of the other party; and this we deem the result of the better authorities. *Heaton* v. *Sawyer*, 60 Vt. 495; *Wiggin* v. *Buzzell*, 58 N. H. 329; *Biffle* v. *Pullam*, 114 Mo. 50.

The district court for Steele county will reverse its judgment, and enter a decree granting the relief prayed for in the complaint.

Reversed.

All concur.

Corliss, *J.*, concurring:

The respondent, in effect, claims that she had the right, after she had ceased to be the wife of the owner of the property used by them both as a homestead, to eject her former husband therefrom, notwithstanding the fact that he owned the fee. A homestead right is not property which can be sold. It possesses no value independent of the right to possession. If the respondent has a homestead right in the property in question, she has a right to occupy the premises, and she has no other or different right. She can occupy them during the balance of her life. Her right of possession is inconsistent with the husband's right of occupancy. They are divorced. The family tie is broken. Unless they remarry, it is contrary to public policy that they should live together under the same roof. The divorce was granted because the court decided that they ought not to inhabit the same home. The homestead right survives the divorce. *Doyle* v. *Coburn*, 6 Allen, 71; *Biffle* v. *Pullam*, 114 Mo. 50. In whom is it vested? It cannot belong to both parties. While the family was a unit, it belonged to the family; but, after the union of the family had been destroyed, the homestead right must then have vested exclusively in either the husband or the wife. How can it be claimed that the decree of divorce vested it exclusively in the former wife? That decree, so far from transferring the right from the husband to the wife, struck from under her the very foundation of her claim to a homestead right. This right was given to her as a wife, and after his death she might enjoy it as a widow. After the divorce, she was not his wife, and could never be his widow. The right was given to her because of the duty of the husband to provide her with a home. After the divorce the husband, as such, owed her no such duty. He thereafter owed her no duty whatever as husband. He had ceased to be her husband. Whatever a wife can claim from her former husband after divorce is not as his wife, but under the terms of the decree of divorce itself. If this gives her the homestead, she can have it. If this gives her alimony, she can have it. But she can have no more. If the decree gives her neither the homestead nor alimony, she is entitled to nothing. Her former husband is no longer bound to furnish her a home. But the decree of divorce in this case did in fact require the husband to pay the respondent monthly alimony for her support. The word "support" embraces not only food, fuel, and raiment; it also includes shelter,—a home to live in. The husband is ordered by the court not to provide her a home, much less to surrender up to her his own home. He is directed to furnish her with a certain amount of funds, with which she is to procure a home for herself. Must the husband, in addition, yield up to her his own home? The mere granting of a divorce cannot work a destruction of the husband's rights, and vest them exclusively in the former wife. Nor is it material that the divorce was for the husband's guilt. There is no statute which in the remotest manner warrants the rule that the husband's guilt should of itself, when followed by a divorce, work the destruction of his homestead right in favor of his former wife. His guilt is a circumstance which will weigh heavily with the chancellor in regulating, by his decree, the future duty of the guilty husband to the woman he has wronged. It will lead the chancellor to give the wife the amplest possible support out of the husband's estate and earnings. Frequently it will constrain the court to award to her the homestead, especially when, as in this case, the wife is given the custody of the children. Our statute expressly authorizes the court to do this: "The court, in rendering a decree of divorce, may assign the homestead to the innocent party, either absolutely or for a limited period, according to the facts in the case, and in consonance with the law relating to homesteads." Comp. Laws, § 2585.

This statute is conclusive against the the-

ory of respondent that the mere fact of a granting of a divorce assigns the homestead right to the innocent party. The statute declares that this assignment must be embodied in the decree itself. The best possible time to settle all such matters is when all the facts and circumstances are before the court granting the divorce,—the number, age, and sex of the children; the value of the estate of the husband; his capacity to earn money; the degree of his guilt; the position of the parties in society; and such facts as bear upon the questions who should have the custody of the children, and whether it will be better to allow the wife to live on the homestead, or be supported by the husband elsewhere. There is no danger that denying to the mere granting of a decree of divorce for the husband's guilt the effect to assign the homestead right to the wife will work her any injustice. She can and will be fully protected in and by the decree. There is nothing in the fact that the decree awarded to the respondent the custody of the children. When, in such a case, the decree is silent on the point, the father is bound to support the minor children in the wife's custody the same as before divorce. They are still his minor children. The divorce in this case recognized this duty. It required the husband to pay the wife alimony for the support, not only of herself, but of the children intrusted to her care. She was to be paid money by the father to provide a home for them, as well as for herself. So far as the children themselves are concerned, it is clear that their rights depend upon the will of their parents, or the one who is entitled to the homestead. The consent of a child is not necessary to the alienation or abandonment of the homestead. The father having conveyed the fee to another, and thereby destroyed his homestead right, the derivative right of the children was by this conveyance destroyed; the consent of the mother to the conveyance being no longer necessary, she having ceased to be the father's wife. The statute gives the wife or widow the homestead right in her husband's real estate used by them as a home. When there is neither a wife nor a widow to claim a joint right with a husband, he is the sole owner of such homestead right when he is the owner of the property itself. This is true of the wife, also, as to property owned by her. Her husband's homestead rights in such property cease when he ceases to be her husband, unless continued in him by the decree of some court of competent jurisdiction.

INDIANA SUPREME COURT.

Harry M. SPRINGER, by His Next Friend, William G. Springer, *Appt.*,
v.
Norman S. BYRAM *et al.*

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

1. **On appeal from a general term decision, which held that the overruling of a motion for a new trial by the special term was erroneous,** the court is not restricted to the particular points or reasons considered by the general term as the basis of its decision, but may uphold it on other grounds presented by an assignment of errors in the general term, if the conclusion was correct.
2. **Disinterested bystanders may testify to statements of a party made in their presence,** although they were made to his physician, in respect to the manner in which his injuries were received.
3. **Slight differences between the phraseology of a motion for a new trial and that of a bill of exceptions** relating to testimony will not prevent the consideration of a question as to the exclusion of the testimony, if the evidence be referred to with such certainty as to call the attention of the court to it and to the ruling in relation thereto, so that the judge cannot mistake the matter.
4. **Statements of the brother of an injured person, made in his presence** in an ambulance immediately after the injury as to the manner in which it was received and that it was the fault of no other person, may be proved against the injured person in an action for such injuries.
5. **Evidence that a newsboy had previously been refused permission to ride in an elevator** is permissible in an action by him for injuries received on such elevator, claiming the rights of a passenger, where the rules of the establishment excluded newsboys from the elevator.
6. **A newsboy who attempts to ride in a passenger elevator after he has notice of the rule that newsboys are not allowed to ride** although they are permitted to enter the building to ply their vocation, is a trespasser as to any use of the elevator so as to defeat his right to recover for injuries received in such attempt.

(February 15, 1894.)

APPEAL by plaintiff from a judgment of the General Term of the Superior Court for Marion County reversing a judgment of the Special Term in his favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. **William V. Rooker** and **Hezekiah Dailey,** for appellant:

The duty of the court at general term is thus defined by statute: It shall, if the judgment of the court at special term be not affirmed,

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NOTE.—The question of the contributory negligence of children is one upon which courts will never get fully in accord. The above case is in some degree analogous to the case of children trespassing on turntables upon which question the authorities are fully collated in a *note* to Fort Worth & D. C. R. Co. v. Robertson (Tex.) 14 L. R. A. 781.

enter of record the error or errors found therein and remand said cause to the special term with instructions as to said errors, etc. (Rev. Stat. 1881, § 1360). The statute is mandatory.

When this court is advised by the presence of the opinion of the court at general term or when the record is so made up as to show the error or errors found, it proceeds thereupon to consider the errors found by the general term. It considers nothing else.

McWhinney v. *Briggs*, 85 Ind. 535.

Since parties have the right of appeal from the general term they must exercise that right if they would not be bound. And if, having failed to make their objections in the statutory way, this court treats them as having acquiesced in the action of the general term they will not be heard to complain that their objections to the special term record were not sufficient without a proper appeal to carry through the general term judgment and into this court.

Bartholomew v. *Preston*, 46 Ind. 286; *McWhinney* v. *Briggs, supra.*

This appeal involves only so much of the special term record as the general term acted on in a way objectionable to the appellant.

A motion for a new trial on the ground that particular evidence was excluded cannot be supported by showing that other and different evidence was excluded.

Bruker v. *Kelsey*, 72 Ind. 56; *Pittsburgh, C. & St. L. R. Co.* v. *Wright*, 80 Ind. 185; *Sertel* v. *Graeter*, 112 Ind. 118; *Choen* v. *State*, 85 Ind. 212; *Powers* v. *State*, 87 Ind. 152; *Indianapolis & C. Gravel Road Co.* v. *Christian*, 93 Ind. 361; *Brown* v. *Muncie Nat. Bank*, 110 Ind. 323.

The bill of exceptions imports absolute verity.

Ryam v. *Burkam*, 42 Ind. 525; *Jelley* v. *Roberts*, 50 Ind. 8; *Longworth* v. *Higham*, 89 Ind. 354.

And when any other part of the record conflicts with the bill of exceptions the bill of exceptions must prevail.

State v. *Flemons*, 6 Ind. 279; *Carmichael* v. *Shiel*, 21 Ind. 68.

The court did not err in excluding the evidence of the brother because he was not shown to be the agent of the plaintiff (*Francis* v. *Edwards*, 77 N. C. 271; *Galbreath* v. *Cole*, 61 Ala. 139; *Central Branch Union Pac. R. Co.* v. *Hatham*, 22 Kan. 41); nor was it shown that the brother's declaration was any part of the *res gestæ*.

Pittsburgh, C. & St. L. R. Co. v. *Wright*, 80 Ind. 184.

Nor was it shown that the declarations of the brother were in any manner binding on the plaintiff or such as that he should give to them any notice whatsoever.

Goetz v. *Bank of Kansas City*, 119 U. S. 560, 30 L. ed. 518; *Vicksburg & M. R. Co.* v. *O'Brien*, 119 U. S. 104, 30 L. ed. 301; *Union Ins. Co. of Philadelphia* v. *Smith*, 124 U. S. 423, 31 L. ed. 505.

An invitation in the technical sense of the word will be inferred where there is a common interest or mutual advantage; as, for instance, there is an implied invitation to the public generally to enter business houses for the purpose of transacting business.

Beach, Contrib. Neg. p. 55, citing cases.

There could under all the circumstances of the case have been no doubt that the plaintiff was on the premises under such conditions that the defendants owed to him some obligation to exercise care.

Nave v. *Flack*, 90 Ind. 207, 46 Am. Rep. 205; *Hawkins* v. *Johnson*, 105 Ind. 33, 55 Am. Rep. 169; *Wabash, St. L. & P. R. Co.* v. *Locke*, 112 Ind. 410; *Bennett* v. *Louisville & N. R. Co.* 102 U. S. 584, 26 L. ed. 237; *McKone* v. *Michigan Cent. R. Co.* 51 Mich. 601, 47 Am. Rep. 596; *Bennett* v. *Louisville & N. R. Co.* 102 U. S. 580, 26 L. ed. 236; *Low* v. *Grand Trunk R. Co.* 72 Me. 313, 39 Am. Rep. 331; *Davis* v. *Central Cong. Soc. of Jamaica Plains*, 129 Mass. 367, 37 Am. Rep. 368; *Tobin* v. *Portland, S. & P. R. Co.* 59 Me. 183, 8 Am. Rep. 415; Shearm. & Redf. Neg. § 704, cases cited; Cooley, Torts, 2d ed. pp. 356, 718; *Brosnan* v. *Sweetser*, 127 Ind. 5.

In the absence of such apparent danger as would deter a prudent man, one seeking admission to or egress from a moving car has a right to rely upon that superior knowledge which the law presumes those to possess who are placed in charge of cars and their passengers or of other dangerous machinery.

Louisville & N. R. Co. v. *Kelly*, 92 Ind. 371, 47 Am. Rep. 149; *Lake Erie & W. R. Co.* v. *Fix*, 88 Ind. 381, 45 Am. Rep. 464; *Nave* v. *Flack*, 90 Ind. 205, 46 Am. Rep. 205; *Pennsylvania Co.* v. *Hoagland*, 78 Ind. 203; Beach, Contrib. Neg. p. 72, §§ 52, 53; *Louisville & N. R. Co.* v. *Crunk*, 119 Ind. 542; *Cincinnati, W. & W. R. Co.* v. *Peters*, 80 Ind. 179; *Bennett* v. *Louisville & N. R. Co. supra*; *McIntyre* v. *New York Cent. R. Co.* 37 N. Y. 287; *Pennsylvania R. Co.* v. *McCloskey*, 23 Pa. 526; *Foy* v. *London, B. & S. Coast R. Co.* 18 C. B. N. S. 225; Shearm. & Redf. Neg. 4th ed. § 520.

Defendants cannot complain that we apply the rule to a machine so much less dangerous than a train of cars as that they deemed it justifiable on their part to place a boy without experience in charge thereof instead of requiring its operation to be done by a man of experience and tested prudence as railroads do.

See *Conner* v. *Citizens Street R. Co.* 105 Ind. 67, 55 Am. Rep. 177.

While the plaintiff remained helpless on the floor in the position in which he fell, the car continued to ascend until it had gone up some seven feet and while it was so ascending it could have been stopped in any space of eight inches or at the utmost in eighteen inches with perfect ease and security. During all the time of the ascent, the plaintiff's situation was known to the elevator conductor yet he made no effort to stop the car until the boy began to scream and then he stopped in a space of six or eight inches.

The case comes clearly within the principle of "the proximate cause."

Wright v. *Brown*, 4 Ind. 95, 58 Am. Dec. 622; *Indianapolis & C. R. Co.* v. *Caldwell*, 9 Ind. 399; *Nave* v. *Flack*, 90 Ind. 211, 46 Am. Rep. 205; *Ohio & M. R. Co.* v. *Hecht*, 115 Ind. 449; *Terre Haute & I. R. Co.* v. *Buck*, 96 Ind. 365, 49 Am. Rep. 168; *Louisville, N. A. & C. R. Co.* v. *Lucas*, 6 L. R. A. 193, 119 Ind. 592.

In jure causa proxima non remota spectatur.

Broom, Legal Maxims, 2d ed. 165; Cooley,

Torts, 2d ed. pp. 73, 816; Bishop, Non-cont. L. § 1086; Shearm. & Redf. Neg. 4th ed. 1, § 94, and *notes;* Beach, Contrib. Neg. § 10; 73 Am. & Eng. Encyclop. Law. p. 428, and cases; 4 Wait, Act. & Def. p. 718; *Williamson* v. *Barrett*, 54 U. S. 13 How. 109, 14 L. ed. 73; *Milwaukee & St. P. R. Co.* v. *Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Inland & S. Coasting Co.* v. *Tolson*, 139 U. S. 558, 35 L. ed. 272; *Radley* v. *London & N. W. R. Co.* L. R. 1 App. Cas. 754; *Scott* v. *Dublin R. Co.* 11 Ir. C. L. Rep. 377; *Austin* v. *New Jersey S. B. Co.* 43 N. Y. 82, 3 Am. Rep. 663; *Lucas* v. *New Bedford & T. R. Co.* 6 Gray, 72, 66 Am. Dec. 406; *Northern Cent R. Co.* v. *State*, 29 Md. 420, 96 Am. Dec. 545.

The existence of knowledge that a thing may be dangerous does not bar recovery.

Toledo, W. & W. R. Co. v. *Brannagan*, 75 Ind. 490; *Huntington* v. *Breen*, 77 Ind. 29; *Murphy* v. *Indianapolis*, 83 Ind. 76; *Nave* v. *Flack*, 90 Ind. 205, 46 Am. Rep. 205; *Howard County Comrs.* v. *Legg*, 93 Ind. 525, 47 Am. Rep. 390; *Porter County Comrs.* v. *Dombke*, 94 Ind. 72; *Gosport* v. *Evans*, 112 Ind. 138; *Lake Shore & M. S. R. Co.* v. *Pinchin*, 112 Ind. 595; *Richmond* v. *Mulholland*, 116 Ind. 174; *Evansville & T. H. R. Co.* v. *Crist*, 2 L. R. A. 450, 116 Ind. 451.

Only proximate negligence will defeat a recovery.

16 Am. & Eng. Encyclop. Law, p. 428, topic 6 and cases cited.

Plaintiff had the right to presume when he undertook to enter the elevator that the defendants had done their duty in the selection of a competent elevator conductor, and that they would continue to do such acts as their duty in the premises imposed upon them.

Evansville & T. H. R. Co. v. *Crist, supra; Indianapolis, P. & C. R. Co.* v. *Pitzer*, 109 Ind. 186, 58 Am. Rep. 387.

The following persons shall not be competent witnesses:

Physicians as to matter communicated to them as such by patients in the course of their professional business or advice given in such cases.

Rev. Stat. 1881, § 491, par. 4; *Masonic Mut. Ben. Asso.* v. *Beck*, 77 Ind. 210, 40 Am. Rep. 295; *Pennsylvania Mut. L. Ins. Co.* v. *Wiler*, 100 Ind. 100, 50 Am. Rep. 769.

As to an insane person or a child less than ten years of age the statute bears upon the person; as to the physician it bears upon the subject-matter, to the end that "the secrets of the sick chamber cannot be revealed."

The law does not permit spies or detectives to hover about the sick chamber to obtain from the delirium or the incoherent utterances of the afflicted, material on which to fabricate a story that will do them service.

Pennsylvania Co. v. *Marien*, 7 L. R. A. 687, 123 Ind. 421.

The person of the physician is so remotely contemplated by the law that the physician cannot for himself use the rule of the statute as a personal prerogative.

Masonic Mut. Ben. Asso. v. *Beck*, 77 Ind. 207, 40 Am. Rep. 295; *Excelsior Mut. Aid Asso.* v. *Riddle*, 91 Ind. 87; *Pennsylvania Mut. L. Ins. Co.* v. *Wiler*, 100 Ind. 99, 50 Am. Rep. 769. See also *Williams* v. *Johnson*, 112 Ind. 274; *Carthage Turnp. Co.* v. *Andrews*, 103 Ind. 139, 53 Am. Rep. 653; *Heuston* v. *Simpson*, 115 Ind. 62; *Ætna L. Ins. Co.* v. *Deming*, 123 Ind. 391. See *Edington* v. *Mutual L. Ins. Co.* 67 N. Y. 185; *Edington* v. *Ætna L. Ins. Co.* 77 N. Y. 564; *Pierson* v. *People*, 79 N. Y. 424, 35 Am. Rep. 524; *Grattan* v. *Metropolitan L. Ins. Co.* 92 N. Y. 274, 44 Am. Rep. 372; *Briggs* v. *Briggs*, 20 Mich. 34; *Grand Rapids & I. R. Co.* v. *Martin*, 41 Mich. 667; *Scripps* v. *Foster*, Id. 742; *Fraser* v. *Jennison*, 42 Mich. 224; *Page* v. *Page*, 51 Mich. 88; *Dotton* v. *Albion*, 57 Mich. 576; *Collins* v. *Mack*, 31 Ark. 684; *Johnson* v. *Johnson*, 14 Wend. 637; *Allen* v. *Public Administrator*, 1 Bradf. 221; *People* v. *Stout*, 3 Park. Crim. Rep. 670; *Gartside* v. *Connecticut Mut. L. Ins. Co.* 76 Mo. 446, 43 Am. Rep. 765, 16 Cent. L. J. 253.

The Supreme Court of the United States held that the statute looked to the subject-matter rather than to the persons.

Connecticut Mut. L. Ins. Co. v. *Union Trust Co. of New York*, 112 U. S. 253, 28 L. ed. 709.

The word "attorney" embraces an attorney's clerk.

Indianapolis v. *Scott*, 72 Ind. 203.

The rules of construction applicable to the paragraph as to physicians was the same as that which applied to attorneys.

Masonic Mut. Ben. Asso. v. *Beck*, 77 Ind. 210, 40 Am. Rep. 295; *Pennsylvania Mut. L. Ins. Co.* v. *Wiler*, 100 Ind. 99, 50 Am. Rep. 769.

The court has declared that the statute as to physicians was entitled to a broad construction.

Masonic Mut. Ben. Asso. v. *Beck*, 77 Ind. 209, 40 Am. Rep. 295.

If necessity extended the rule of law to include the assistance of an attorney how reasonable that it should likewise extend the rule to include the assistance of a physician.

Messrs. **Stubbs & Averill** for appellees.

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

This is an action for personal injuries alleged to have been sustained by the appellant while being transported in a passenger elevator in a public office building owned and operated by the appellees. The facts disclosed by the record in this cause, briefly stated, are these: In November, 1889, the appellees, Byram and Cornelius, were the owners of an office building situated on East Market street, in the city of Indianapolis. The north half of this building was four stories in height, including the basement, and the south half but three stories. The building was known as the "Thorpe Block," and was rented for office purposes to attorneys, and persons of other occupations. Each half of the block was provided with convenient stairways, giving access to each floor of the block; and in the north half was also situated a passenger elevator, in use for the convenience and benefit of appellee's tenants, and also giving access to each of the four floors of the block. The elevator was propelled by hydraulic pressure, and moved in a shaft built for that purpose, next to the west wall of the building. This shaft was

separated from the halls on the several floors by sliding doors of open wire, the rest of the opening off the several halls being protected by either wirework or paneled woodwork. The elevator was operated by a person employed by the appellees for that purpose, who controlled its movements by means of a rope which opened and closed the valves of the hydraulic apparatus, and which passed through the car near the door of ingress and egress. The appellant, Harry M. Springer, was a boy of the age of twelve years and six months, attending the public schools, and selling newspapers in the afternoons. On the 23d day of November, 1889, the appellant was in the Thorpe block, and on what is known as the "second floor," and attempted to enter the elevator. In making this attempt, he fell partly upon the floor of the elevator, and was carried up and against the framework over the door, receiving injuries, to recover damages for which this action was brought. Appellant's complaint is in three paragraphs: First, charging negligence of defendants in the use of their property and premises in the matter complained of; second, charging willful and wanton disregard of plaintiff's situation by the defendants while he was on and using their property and premises; third, charging defendants with negligence as carriers of the plaintiff. Each paragraph shows that plaintiff was rightfully on the premises, and each also charges a resulting injury to the plaintiff without his fault. A demurrer for want of facts was filed to the second and third paragraphs of the complaint, and overruled, and defendants answered in general denial. Upon these issues the cause was tried at the March term, 1891, of the superior court of Marion county, before a jury, which returned a verdict for the appellant. Appellees filed a motion for a new trial, which was overruled, and judgment was rendered and entered on the verdict. From this judgment at special term appellees appealed to the general term of the superior court, where the judgment at special term was reversed for error in overruling appellees' motion for a new trial. From this judgment of reversal at the general term the appellant has appealed to this court, and by proper assignment of error has presented for review the correctness of the decision of the court in general term in reversing the judgment of the special term, and directing a new trial of the cause.

From the opinion of the court in general term, it appears that the only question presented by the assignment of errors in general term, which was considered and determined by the court, was the action of the court in special term in overruling appellee's motion for a new trial. The overruling of that motion by the court in special term was held to be erroneous, and the assignment of error made in this court presents for review all matters properly assigned as errors in the motion for a new trial. Appellant's brief proceeds upon the theory that the only matters which this court can consider on this appeal are the particular points or reasons in the motion for a new trial, which the opinion of the court in general term shows were expressly considered by that court, and which that opinion shows were the basis of the action of the general term in reversing the judgment at special term. To this theory we cannot give assent. Clearly, it was not incumbent upon the court in general term, after it had found an error for which the judgment in special term should be reversed, to investigate the sufficiency of the remaining reasons for a new trial, and pass upon the questions as to whether or not they were, severally, well taken. The instructions of the general term, as shown by its judgment, required the court in special term to sustain the defendant's motion for a new trial. This, we think, clearly indicates the error for which the judgment was reversed, and appellant's assignment of error in this court brings to us for review all the questions properly presented by appellees' motion for a new trial. In other words, the judgment of the court in general term sufficiently shows the decision of that court to have been that there was error of the court in special term, in refusing to sustain the motion, as stated, of the appellees for a new trial. A new trial was ordered upon a consideration of the errors assigned by the appellees in general term, viz.: "Third, the court in special term erred in overruling appellants' motion for a new trial of this cause." The general term found this assignment of error well taken, and sustained it as a whole, not in piecemeal, and there was no ruling of the court in general term upon which these appellees had any reason to assign cross-errors. The questions presented to the general term were those presented by the assignment of errors in that court.

In the case of *Wesley* v. *Milford*, 41 Ind. 416, it is said: "The appeal to this court being allowed from the judgment of the general term only, we think it must follow that whatever errors are assigned in this court must be predicated upon the assignment of errors in the general term, and the action of that court in general term thereon." This being so, it is clear that the action of the court in general term upon the errors assigned in that court is what this court passes upon, and not the several and particular matters which may have been embraced and covered by the assignments of error in the special term. To present to this court questions which were presented in the motion for a new trial, and to separate and set apart for the consideration of the court a portion of the reasons assigned in such motion, is equivalent to presenting to this court for the first time, as grounds for reversal, matters which must be assigned as reasons for a new trial. The appellant's assignment of error in this court, and his complaint here, is "that said general term of said court erred in reversing the judgment of the special term of said superior court, and remanding said cause for another trial to said special term." The question is not whether the reasons given by the court are sound or unsound, but rather, upon a consideration of the matters presented by the assignment of errors in the general term, did the court reach a right conclusion, and enter a judgment to which these appel-

lees were entitled upon the errors assigned in that court?

The first assignment in appellees' motion for a new trial embraces alleged errors of law occurring and excepted to by the defendants at the time, and comprised in subdivisions A to S, inclusive. The first three subdivisions each relate to the correctness of the ruling of the trial court in excluding the testimony of the two witnesses Scott and Goth with reference to a conversation sought to be proved between the appellant and Dr. Sutcliffe, in the ambulance, almost immediately after the accident, in the presence and hearing of the witnesses interrogated in reference thereto, and included the statement of the appellant as to the manner in which his injuries were received. The objection to the offered testimony was sustained upon the theory that it was incompetent to prove a conversation between a physician and his patient. In defining who are incompetent to testify, section 497, Rev. Stat. 1881, reads: "Third. Attorneys, as to confidential communications made to them in the course of their professional business, and as to advice given in such cases." "Fourth. Physicians, as to matter communicated to them, as such, by patients, in the course of their professional business, or advice given in such cases." It has been held that communications made through a third person from a client to a solicitor are privileged, if otherwise entitled to be so; also, whoever represents a lawyer in conference or correspondence with the client is under the same protection as the lawyer himself. The privilege extends to the attorney's clerk, interpreter, assistant attorney, or other agent, while in the discharge of his duty. 19 Am. & Eng. Encyclop. Law, 131, 132. At common law, confidential communications made by a patient to a physician are not privileged. The common law in this state has been changed by statute, *supra*. It was said in *Masonic Mut. Ben. Asso.* v. *Beck*, 77 Ind. 203, 40 Am. Rep. 295, that the object of these statutes seems to be to place the communications made to physicians in the course of their professional employment upon the same footing with communications made by clients to their attorneys in the course of their employment. "The privilege may attach notwithsanding the presence of third persons in the" sick-room, where the consultation is had. *Cahen* v. *Continental Ins. Co.* 9 Jones & S. 296. If the attending physician calls in another physician for consultation, the communications made to the latter are privileged. *Ætna L. Ins. Co.* v. *Deming*, 123 Ind. 384; *Raymond* v. *Burlington, C. R. & N. R. Co.* 65 Iowa, 152; *Renihan* v. *Dennin*, 103 N. Y. 573, 57 Am. Rep. 770. Where there are two physicians, the patient does not, by calling one of his physicians as a witness, waive his privilege to object to the testimony of the other. *Pennsylvania Mut. L. Ins. Co.* v. *Wiler*, 100 Ind. 92, 50 Am. Rep. 769; *Mellor* v. *Missouri Pac. R. Co.* 105 Mo. 455, 10 L. R. A. 36; *Record* v. *Saratoga Springs*, 46 Hun, 448.

Communications made by a patient to his physician, for the purpose of professional aid and advice, are privileged, because intended to be private and confidential, and can never be divulged without the consent of the patient; it being the privilege of the patient, and not of the physician: The privilege of exemption from testifying to declarations made and facts actually known is extended to a physician who derives his knowledge from the communications of a patient who applies and makes disclosures to him in his professional character. The immunity extends to all such facts, whether learned directly from the patient himself, or acquired by the physician through his own observation or examination. 7 Am. & Eng. Encyclop. Law, 508. Neither can disclosures be made by other persons whose intervention is strictly necessary to enable the parties to communicate with each other. In *Cotton* v. *State*, 87 Ala. 78, the court says: "The rule as to the inviolability of professional confidences applies, as between attorney and client, only to communications made and received for the purposes of professional action and aid; and the secrecy imposed extends to no other persons than those sustaining to each other the confidential relationship, except the necessary organs of communication between them, such as interpreters and their own agents and clerks." Further it does not extend. It is settled law that if parties sustaining confidential relations to each other hold their conversation in the presence and hearing of third persons, whether they be necessarily present as officers, or indifferent bystanders, such third persons are not prohibited from testifying to what they heard. *Cotton* v. *State*, 87 Ala. 75; *House* v. *House*, 61 Mich. 69; *Re McCarthy*, 55 Hun, 7; *Com.* v. *Griffin*, 110 Mass. 181; *Hoy* v. *Morris*, 13 Gray, 519, 74 Am. Dec. 650; *Oliver* v. *Pate*, 43 Ind. 132, on page 142; Whart. Crim. Ev. § 398; 1 Lawson, Rights, Rem. & Pr. § 147.

From the record it appears that the witnesses Scott and Goth, whose testimony was rejected or excluded by the court, were employés of one C. E. Kregelo, an undertaker of the city of Indianapolis, who sent an ambulance to convey the appellant to his home, and these witnesses were in charge of it. It does not appear from the transcript that they were in the employ of either the physician or the injured party, or that even their principal was attending him for hire. Scott and Goth were, for aught that appears, disinterested bystanders, and were competent to testify, and the weight of their statements was to be determined by the jury.

Counsel for appellant seek to shut out the consideration of this question because of slight differences between the phraseology of the motion for a new trial and that of the bill of exceptions relating to the testimony offered to be proved by the appellees. The offer on the trial is in these words: "Now, we offer to prove, may the court please, by this witness [Scott], that in the ambulance, in the presence of this witness and Dr. Sutcliffe and of Mr. Goth, this boy, the plaintiff in this case, stated that he attempted to get on the elevator while it was in motion, and that that was the way in which he got hurt,

and, further, that nobody was to blame; that his brother said that nobody was to blame except himself; that it was his own fault; that he tried to get on the elevator while it was in motion; and that he was playing in the halls at the time, and had been playing about the elevator." The words, as made in the motion for a new trial, are: "We offer to prove . . . that in the ambulance, in the presence of this witness and Dr. Sutcliffe and Mr. Goth, this boy [the plaintiff in this case] stated that he attempted to get into the elevator while it was in motion, and that that was the way he got hurt, and, further, that nobody was to blame except himself; that it was his own fault; that he was hurt in trying to get into the elevator while it was in motion; and that he was playing in the halls at the time, and had been playing about the elevator." In the late case of *Ohio & M. R. Co.* v. *Stein*, 133 Ind. 243, 19 L. R. A. 733, it is said: "It is not the practice, and it is not incumbent on a party, in a motion for a new trial, to set out in detail a verbatim copy of the evidence admitted over objection, or offered and refused, or a verbatim statement of the objections made to its introduction. It is sufficient if the evidence be referred to with such certainty as to call the attention of the court to it, and to the ruling in relation thereto, so that the judge could not mistake the matter, and the ruling alluded to and complained of by the party filing the motion." We also cite *Clark* v. *Bond*, 29 Ind. 556, 557; *Meyer* v. *Bohlfing*, 44 Ind. 238, 239. We think the statement of the offered evidence in the motion for a new trial was sufficiently explicit to inform the court of the question sought to be raised by the motion. The matter offered to be proved in the trial court was not objectionable because it sought to incorporate a statement of the brother, made in the ambulance in the presence of the appellant. "If statements are made in the presence and hearing of a person, affecting his rights, and under such circumstances as call for a reply, what he said, or if he failed to say anything, may be proven, as in the nature of an admission." *Pierce* v. *Goldsberry*, 35 Ind. 317; *Puett* v. *Beard*, 86 Ind. 104; *Surber* v. *State*, 99 Ind. 71; *Broyles* v. *State*, 47 Ind. 251; *Conway* v. *State*, 118 Ind. 482. In Rice on Evidence (vol. 1, p. 424), the author says: "The act or declaration of another person, and within the observation of a party, and his conduct in relation thereto, is relevant, if, under all the circumstances of the case he would have been likely to have been affected by the act or the declaration."

Subdivision F calls in question the ruling of the court in sustaining the appellant's objection to the following question propounded to Earl Spain, a witness, called on behalf of appellees: "If, at any time,—say the week before the day he was hurt,—he tried to get into the elevator, tell the jury what you said to him." Appellees then offered to prove by the witness, in answer to the above question, that "about a week before this accident occurred the appellant did try to get in, and asked to get in the elevator, and was then told that he would not be allowed to, that newsboys were not allowed to ride in that elevator, and that he could not, and that he did, in spite of that injunction, get in, and was put out." This evidence was excluded on the ground that it was not material and competent, under the issues in this case. The only issue tendered by the complaint was that of negligence. Under the allegations of the complaint charging negligence, it was incumbent upon the appellant, in order to charge the appellees with a breach of duty towards him, to show that he was rightfully attempting to use the elevator in the Thorpe block. If his attempted use of that elevator was wrongful, then, the only legal duty on the part of the appellees was not to willfully injure him. If it was necessary for appellant to show that he was rightfully attempting to use the same, then, clearly, appellees had the right to have any evidence which tended to show that appellant was not rightfully engaged in its use go to the jury, under the general denial. It will be observed, from a reading of the several paragraphs of the complaint, that it charges these appellees, as carriers of passengers, with a breach of duty on their part, as such, in this: that "plaintiff was invited by the defendants to enter said elevator, and be transported therein." Under the issue tendered by the complaint, it was only necessary for the appellant to show an implied invitation on the part of the appellees for him to enter and be transported therein and, if this be true, then certainly it was competent for appellees to show that appellant was notified of the fact, prior to the accident, that newsboys were not allowed to ride in the elevator, and that he could not do so. If, as a matter of fact, he had been so warned,—if he knew that appellees did not allow newsboys to ride in the elevator,—in what respect was there a rightful attempt on his part to use the elevator contrary to the knowledge which he had? The mere fact that he was permitted to enter the building and ply his vocation as newsboy, cannot, alone, be held to bind the appellees to carry him in their elevator, whether they wished or not. It would be just as reasonable to conclude that if a person were admitted upon a train of cars as a passenger, and provided with a passenger car, he could insist upon and be at liberty to ride in the baggage car, or upon an engine, or occupy a berth in a sleeper without a permit. If the appellees had a rule with respect to their elevator, by which they required the person in charge to refuse its use to newsboys in the building, such a rule would have to be brought to the attention or knowledge of the boy, in some way, before he would be bound by such rule; but we think it is clear that, after he has been apprised of appellees' rule to the effect that he cannot be carried in their elevator, it would be binding upon him. This rule has been uniformly sustained in the case of common carriers of passengers, and where a passenger has taken a position upon a train contrary to known rules of the carrier to the contrary, and has been injured in consequence of the violation of such rule, it has been held, without exception, we believe, that there was no right of recovery. It has also been frequently held that, where a person

is invited to ride upon a train of cars by an employé who had no authority to give such invitation, the party accepting the same was either a trespasser or a mere licensee, to whom the carrier owed no duty to exercise care. *Waterbury* v. *New York Cent. & H. R. R. Co.* 21 Blatchf. 314, 17 Fed. Rep. 671; *Eaton* v. *Delaware, L. & W. R. Co.* 57 N. Y. 382, 15 Am. Rep. 513; *Duff* v. *Allegheny Valley R. Co.* 91 Pa. 458, 36 Am. Rep. 675; *Woodruff* v. *Bowen* (Ind.) 22 L. R. A. 198; *Pennsylvania R. Co.* v. *Langdon*, 92 Pa. 21, 37 Am. Rep. 651; *Hickey* v. *Boston & L. R. Co.* 14 Allen, 429; *Gulf, C. & S. F. R. Co.* v. *Campbell*, 76 Tex. 174; *Faris* v. *Hoberg*, 134 Ind. —; *Fluker* v. *Georgia R. & Bkg. Co.* 81 Ga. 461, 2 L. R. A. 843; *Robertson* v. *New York & E. R. Co.* 22 Barb. 91; *Chicago, M. & St. P. R. Co.* v. *West*, 125 Ill. 320; *Cooper* v. *Lake Erie & W. R. Co.* (decided at the present term), (Ind.) 36 N. E. Rep. 272.

Under the issues, it was certainly a material fact, which the appellees had a right to show, whether or not this appellant had knowledge, a week before the injury, of the fact that newsboys were not allowed in the elevator. It tended to negative any proof that he might have offered showing that he was rightfully attempting to ride at the time of the accident complained of, and also tended to show that as to any use of the elevator, he was a trespasser. The refusal of the court at the special term to admit this testimony deprived appellees of a valuable element of their defense,—that there was no invitation to appellant to ride, and that he was not permitted to do so. It was harmful error to sustain appellant's objection to the question, and exclude the evidence offered.

Subdivision Q of the first reason for a new trial challenges instruction No. 3, and, indeed, the whole series of instructions is criticised by the appellees; but this opinion has already been extended beyond the limits intended, and we will not consider the objection presented to the instructions.

We think the decision of the court in general term reversing the judgment of the special term correct, and *it is affirmed.*

MISSOURI SUPREME COURT (In Banc).

William SCHMITZ, by His Next Friend, Anton Schmitz, *Respt.*,
v.
ST. LOUIS, IRON MOUNTAIN & SOUTHERN R. CO., *Appt.*

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

1. In an action by a child for injuries sustained at a railway crossing, in attempting to cross between cars standing on the crossing, evidence that plaintiff saw others cross before him, and that there was no flagman at the crossing, is admissible on the issue of defendant's negligence in starting the train without warning.

2. A deposition of a witness taken by plaintiff and filed in the suit is properly excluded on plaintiff's objection that the witness is present, upon defendant's offering it in evidence, under the implication contained in Rev. Stat. 1889, § 4461, which makes no provision for the reading of the deposition of a witness not a party to the suit who is present at the trial.

3. A railroad company which leaves a train standing for several minutes upon a much-used street crossing, with a slight space between the cars, as if to invite passage between them, is bound to use reasonable care in closing up the opening to avoid injury to one who is attempting to cross, although he has placed himself in such relation to the train that under other circumstances he would be regarded as a trespasser.

4. A child who, by reason of his want of knowledge, is not guilty of negligence in attempting to follow the example of adults in passing between cars standing upon a street crossing, may recover damages if injured by the negligence of the company.

5. In an action for personal injuries sustained at a street crossing by the pushing of cars together while plaintiff was passing between them, the company's failure to ring the bell or sound the whistle before moving the cars, although not constituting a statutory cause of action, is properly considered in determining whether the company exercised due care in moving the cars.

6. A party cannot on appeal complain of an error in giving an instruction at his own instance and request.

7. The giving of an instruction assuming that it was a railway company's duty to keep a flagman at a street crossing, whereas the statute imposes no such duty, is not ground for reversal, where the company could not have been prejudiced thereby because the evidence clearly shows that it did have a flagman at such crossing.

8. Ignorance of danger by reason of his youth and inexperience may properly be considered on the question of the contributory negligence of a child in attempting to pass between cars standing on a street crossing.

9. Mental anguish of a boy nine years old, consisting of grief and sorrow over the loss of his limb and becoming a cripple for life, is a proper element of damages in an action by him for injuries sustained by the alleged negligence of a railway company at a highway crossing.

10. Prospective damages by the impairment of plaintiff's capacity for earning a livelihood after his majority is

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NOTE.—Upon the general rule as to negligence in passing between or under cars, see *note* to Central R. & Bkg. Co. v. Rylee (Ga.) 13 L. R. A. 634. See also Rumpel v. Oregon S. L. & U. N. R. Co. (Idaho) 22 L. R. A. 725, in which an adult was held to be precluded by his negligence in attempting to crawl under a standing train from recovering for injuries caused by the starting of the train although no warning was given.

a proper element in an action for personal injuries by a minor nine years old, although his petition contains no specific allegation in regard thereto and there is no direct evidence on the subject.

11. In the absence of any objection in the lower court as to the amount of damages allowed by the jury such question cannot be raised for the first time on appeal.

(*Sherwood, J., dissents.*)

(December 4, 1893.)

APPEAL by defendant from a judgment of the Circuit Court for Warren County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. **H. S. Priest** and **H. G. Herbel**, for appellant:

The court erred in excluding the deposition of Frank Furley offered by defendant, which had been taken by plaintiff and filed in this case.

Schmick v. *Noel*, 64 Tex. 406.

The court erred in overruling defendant's demurrers to the evidence interposed at the close of plaintiff's case and of the whole case.

Atchison, T. & S. F. R. Co. v. *Plaskett*, 47 Kan. 107; *Corcoran* v. *St. Louis, I. M. & S. R. Co.* 105 Mo. 399; *Rushenberg* v. *St. Louis, I. M. & S. R. Co.* 109 Mo. 112; *Hudson* v. *Wabash Western R. Co.* 101 Mo. 31; *Stillson* v. *Hannibal & St. J. R. Co.* 67 Mo. 671; *Dahlstrom* v. *St. Louis, I. M. & S. R. Co.* 96 Mo. 102; *Andrews* v. *Central R. & Bkg. Co.* 10 L. R. A. 58, 86 Ga. 192, 46 Am. & Eng. R.R. Cas. 171; *Bird* v. *Flint & P. M. R. Co.* 86 Mich. 79; *Lewis* v. *Baltimore & O. R. Co.* 38 Md. 588, 17 Am. Rep. 521; *Lake Shore & M. S. R. Co.* v. *Pinchin*, 112 Ind. 592, 31 Am. & Eng. R. R. Cas. 428; *Sherman* v. *Hannibal & St. J. R. Co.* 72 Mo. 66, 37 Am. Rep. 423, *Rodgers* v. *Lees*, 12 L. R. A. 216, 140 Pa. 475; *Waldhier* v. *Hannibal & St. J. R. Co.* 71 Mo. 514; *Kelley* v. *Barber Asphalt Co.* 14 Ky. L. Rep. 256; *Dlauhi* v. *St. Louis, I. M. & S. R. Co.* 105 Mo. 645.

The court erred in refusing the instructions asked by defendant.

Stewart v. *Clinton*, 79 Mo. 614, *Corcoran* v. *St. Louis, I. M. & S. R. Co.* 105 Mo. 405; *Rushenberg* v. *St. Louis, I. M. & S. R. Co. supra.*

The court erred in giving the instructions asked by plaintiff.

Stephens v. *Hannibal & St. J. R. Co.* 86 Mo. 227; *O'Brien* v. *Loomis*, 43 Mo. App. 29; *Mateer* v. *Missouri Pac. R. Co.* 105 Mo. 354; *Gurley* v. *Missouri Pac. R. Co.* 93 Mo. 450; *Zimmerman* v. *Hannibal & St. J. R. Co.* 71 Mo. 476; *Ohio & M. R. Co.* v. *Pearcy*, 128 Ind. 197; *Mellor* v. *Missouri Pac. R. Co.* 10 L. R. A. 36, 105 Mo. 462; *Wilburn* v. *St. Louis, I. M. & S. R. Co.* 36 Mo. App. 215.

The court erred in overruling defendant's motion for a new trial because of the errors in instructions and the excessiveness of the verdict.

Sharp v. *Kansas City Cable R. Co.* 114 Mo. 94; *Gurley* v. *Missouri Pac. R. Co.* 104 Mo. 233; *Parsons & P. R. Co.* v. *Montgomery*, 46 Kan. 120.

Mr. **Seneca N. Taylor**, for respondent:

It was not error for the court to admit the testimony of plaintiff, and other witnesses, of the fact that about one hundred persons had passed over, and between the disconnected draw-bars, in the situation they were in, when plaintiff attempted to cross over, and that, too, during the ten or fifteen minutes he stood waiting to pass over:

1. Because it was proper as showing the environment immediately before, and at the time plaintiff attempted to cross over the disconnected draw-bars, and also as showing the reasonableness for active diligence on the part of the defendant.

Fiedler v. *St. Louis, I. M. & S. R. Co.* 107 Mo. 645; *Barker* v. *Hannibal & St. J. R. Co.* 98 Mo. 50.

2. Because the action of others on the same occasion was a part of the *res gestæ* and tended to show what others deemed prudent in a like situation.

Twomley v. *Central Park N. & E. R. Co.* 69 N. Y. 158, 25 Am. Rep. 162; *Galena & C. U. R. Co.* v. *Fay*, 16 Ill. 568, 63 Am. Dec. 323; *Kleiber* v. *People's R. Co.* 14 L. R. A. 613, 107 Mo. 254.

The court did not err in refusing to allow defendant to read the deposition of Frank Furley, because he was present in court at the time the same was offered, ready to be examined, having been duly subpenaed in the case.

Rev. Stat. 4462; *Schmitz* v. *St. Louis, I. M. & S. R. Co.* 46 Mo. App. 392; *Priest* v. *Way*, 87 Mo. 28.

The court did not err in overruling defendant's demurrers to the evidence. On the case made by the evidence, according to the great weight of authority, it was properly submitted to the jury.

Schmitz v. *St. Louis, I. M. & S. R. Co. supra; Hilz* v. *Missouri Pac. R. Co.* 101 Mo. 53; *Wilkins* v. *St. Louis, I. M. & S. R. Co.* Id. 93; *Gurley* v. *Missouri Pac. R. Co.* 104 Mo. 227; *Mateer* v. *Missouri Pac. R. Co.* 105 Mo. 320; *Fiedler* v. *St. Louis, I. M. & S. R. Co.* 107 Mo. 651; *Grant* v. *Baltimore & P. R. Co.* 2 McArth. 277; *Rauch* v. *Lloyd*, 31 Pa. 358, 72 Am. Dec. 747; *Fitzpatrick* v. *Baltimore & O. R. Co.* 35 Md. 32; *McMahon* v. *Northern Cent. R. Co.* 39 Md. 438; Shearm. & Redf. Neg. 4th ed. §§ 92, 479; *Baum* v. *Fryrear*, 85 Mo. 151; *Karle* v. *Kansas City, St. J. & C. B. R. Co.* 55 Mo. 484; *Werner* v. *Citizens R. Co.* 81 Mo. 368; *Petty* v. *Hannibal & St. J. R. Co.* 88 Mo. 306; *Keim* v. *Union R. & Transit Co.* 90 Mo. 321; *Huckshold* v. *St. Louis, I. M. & S. R. Co.* 90 Mo. 555; *O'Connor* v. *Missouri Pac. R. Co.* 94 Mo. 150; *Dunkman* v. *Wabash, St. L. & P. R. Co.* 95 Mo. 241; *Kelly* v. *Union R. & Transit Co.* Id. 284; *Sullivan* v. *Missouri Pac. R. Co.* 97 Mo. 118; *Chicago, B. & Q. R. Co.* v. *Stumps*, 69 Ill. 409; *Savannah & M. R. Co.* v. *Shearer*, 58 Ala. 672; *Robinson* v. *Western Pac. R. Co.* 48 Cal. 409; *Kellogg* v. *Chicago & N. W. R. Co.* 26 Wis. 223, 7 Am. Rep. 69; *Correll* v. *Burlington, C. R. & N. R. Co.* 38 Iowa, 120, 18 Am. Rep. 22; *Klanowski* v. *Grand Trunk R. Co. of Canada*, 57 Mich. 525; *Humphreys* v. *Armstrong County*, 56 Pa. 204; *Filer* v. *New York Cent. R. Co.* 49 N. Y. 47, 10 Am. Rep. 327; *Foly* v. *Railroad Co.* 18 C. B. N. S. 225; *Clayards* v. *Dethick*, 12 Q. B. 495.

2. Moreover, defendant, by offering evidence after its demurrer was overruled, thereby waived it, and cannot now insist that the court erred, even if in fact it did, which I deny.

Bowen v. *Chicago, B. & K. C. R. Co.* 95 Mo. 275; *Kelly* v. *Union R. & Transit Co.* Id. 279; *McPherson* v. *St. Louis, I. M. & S. R. Co.* 97 Mo. 253; *Hilz* v. *Missouri Pac. R. Co.* 101 Mo. 36.

3. Passing through the gap between the cars in a public street under the circumstances shown in this case, was not negligence *per se.*

Wilkins v. *St. Louis, I. M. & S. R. Co.*, *Grant* v. *Baltimore & P. R. Co.*, *Rauch* v. *Lloyd*, *Fitzpatrick* v. *Baltimore & O. R. Co.*, and *McMahon* v. *Northern Cent. R. Co. supra;* Shearm. & Redf. Neg. 4th ed. §§ 92, 479; *Schmitz* v. *St. Louis, I. M. & S. R. Co. supra.*

Where a boy uses the care reasonably to be expected from one of his years and capacity, he is not guilty of contributory negligence, and whether or not he did use such care is a question for the jury.

Schmitz v. *St. Louis, I. M. & S. R. Co. supra; Kempinger* v. *St. Louis & I. M. R. Co.* 3 Mo. App. 581; *Boland* v. *Missouri R. Co.* 36 Mo. 484; *O'Flaherty* v. *Union R. Co.* 45 Mo. 71, 100 Am. Dec. 343; *Koons* v. *St. Louis & I. M. R. Co.* 65 Mo. 592; *Donoho* v. *Vulcan Iron Works*, 75 Mo. 401; *Saare* v. *Union R. Co.* 20 Mo. App. 211; *Hudson* v. *Wabash Western R. Co.* 101 Mo. 23; *Williams* v. *Kansas City, S. & M. R. Co.* 96 Mo. 275; *Dowling* v. *Allen*, 102 Mo. 213; *Washington & G. R. Co.* v. *Gladmon*, 82 U. S. 15 Wall. 401, 21 L. ed. 114; *Sioux City & P. R. Co.* v. *Stout*, 84 U. S. 17 Wall. 657, 21 L. ed. 745; *Kansas Cent. R. Co.* v. *Fitzsimmons*, 22 Kan. 686, 31 Am. Rep. 203; *Hydraulic Works Co.* v. *Orr*, 83 Pa. 332.

Active diligence was due from defendant to use reasonable care and precaution not to injure children on the street, though climbing over its disconnected draw-bars. Defendant's instructions refused to state the reverse, and were properly refused.

Wilkins v. *St. Louis, I. M. & S. R. Co.* 101 Mo. 93; *Hilz* v. *Missouri Pac. R. Co.* 101 Mo. 53; *Frick* v. *St. Louis, K. C. & N. R. Co.* 75 Mo. 595, 5 Mo. App. 439; *Gurley* v. *Missouri Pac. R. Co.* 104 Mo. 227; *Harlan* v. *St. Louis, K. C. & N. R. Co.* 65 Mo. 24; *Dunkman* v. *Wabash, St. L. & P. R. Co.* 95 Mo. 232; *Scoville* v. *Hannibal & St. J. R. Co.* 81 Mo. 440; *Kelley* v. *Hannibal & St. J. R. Co.* 75 Mo. 140; *Welsh* v. *Jackson County Horse R. Co.* 81 Mo. 466; *Brown* v. *Hannibal & St. J. R. Co.* 50 Mo. 461, 11 Am. Rep. 420; *Boland* v. *Missouri R. Co.* 36 Mo. 490; *O'Flaherty* v. *Union R. Co.* 45 Mo. 71, 100 Am. Dec. 343; *Cadmus* v. *St. Louis Bridge & Tunnel Co.* 15 Mo. App. 95; *White* v. *Wabash Western R. Co.* 34 Mo. App. 74; *Mauerman* v. *St. Louis, I. M. & S. R. Co.* 41 Mo. App. 348; *Schmitz* v. *St. Louis, I. M. & S. R. Co.* 46 Mo. App. 380; *Fugler* v. *Bothe*, 43 Mo. App. 44; *Dougherty* v. *Missouri R. Co.* 97 Mo. 647; *M. Forster Vinegar Mfg. Co.* v. *Guggemos*, 98 Mo. 391; *Boller* v. *Cohen*, 42 Mo. App. 97; *Wetzell* v. *Wagoner*, 41 Mo. App. 509; *Missouri Pac. R. Co.* v. *Schoennen*, 37 Mo. App. 613.

The court did not give improper or illegal instructions at the instance of the plaintiff. The instructions given for plaintiff are in substance the same as those given in *Wilkins* v. *St. Louis, I. M. & S. R. Co.* 101 Mo. 101; and in *Schmitz* v. *St. Louis, I. M. & S. R. Co.* 46 Mo. App. 380.

Hicks v. *Pacific R. Co.* 64 Mo. 439; *Koons* v. *St. Louis & I. M. R. Co.* 65 Mo. 592.

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

This is a suit by William Schmitz, a minor, nine years old, by his next friend, Anton Schmitz, to recover damages for personal injuries caused by the negligence of the defendant in operating its cars upon Lesperance street crossing in the city of St. Louis. It was brought in the circuit court of the city of St. Louis, and thereafter taken by change of venue to Warren county circuit court. It was tried before a jury, and resulted in a verdict and judgment of $5,708 for plaintiff. The petition, or that part of it which is before this court for consideration, is as follows: "Now comes the plaintiff, and avers that he is a minor, under the age of ten years, and that Anton Schmitz was duly appointed as his next friend to bring this suit, before said suit was brought. That defendant is, and at the time hereinafter mentioned was, a corporation duly organized under the laws of the state of Missouri, and engaged in the operation of a railroad, a part of which is in the city of St. Louis. Plaintiff further states that on the 24th day of August, 1890, and in the daytime, he was going east on a public street in said city known as 'Lesperance Street,' where said street is crossed by defendant's railroad in said city. That at said time and place a train of flat cars was standing across said street, which impeded his progress on said street, which train stood there for several minutes, and not in motion. The plaintiff, seeing said train standing perfectly still for several minutes, and there being no sign or indication that it was going to move, and seeing many adults and others crossing over the same in said street—between the flat cars—without let or hindrance, or notice not to do so, undertook to cross over between two such flat cars, in said street, where the other persons upon said street had crossed immediately before him. That he stopped, listened, and looked before so crossing, and the bell of the locomotive was not rung, the whistle was not sounded, nor was any audible or visible signal given by defendant or its employés to notify plaintiff that said train was about to be thrust backwards, nor was any brakeman in sight of plaintiff, nor was any brakeman on the rear of said train, nor was there any gate or bar across said street where it was crossed by said railroad; and without any notice or warning whatever given on the part of the defendant, the said defendant violently, suddenly, carelessly, and negligently caused the engine, propelled by steam power, to jam the cars of said train together, thereby breaking and crushing the bones of plaintiff's foot and ankle between the bumpers of two of said cars while he was in the act of crossing as aforesaid, and in consequence he was injured, and maimed for life, and caused to

suffer great physical and mental pain and agony. Plaintiff further states that, considering his age and intelligence, he was at the time exercising that degree of care and diligence which could be expected of him, or that was due from one of his age, and that the immediate cause of said injury to him was the carelessness and negligence of the defendant in failing to do its duty in protecting persons, and especially children of immature judgment, in the lawful use of said public street from injury by its said cars; that the car so thrust backward which crushed plaintiff's foot was attached to several other cars and a locomotive, constituting a freight train, which at the time of said injuries was propelled backward suddenly and violently by steam power. Wherefore plaintiff avers that he has been injured and sustained damages in the sum of twenty thousand dollars ($20,000), for which, with cost of suit, he prays judgment." The answer was a general denial and plea of contributory negligence on plaintiff's part in attempting to cross the track at the time, place, and manner he did. Plaintiff replied, denying the new matter in the answer.

The facts are that on August 24, 1890, William Schmitz, aged nine years and two months, with three other boys, went east on Lesperance street, a public street in the city of St. Louis, and, on arriving at the place where defendant's railroad tracks cross the street, they found their way impeded by two cars, the bumpers of which were disconnected, leaving an opening of about nine inches between them. They saw about fifty to seventy-five persons cross the track upon which said cars were standing, in a line near the center of the most traveled part of the street,—some of whom passed over and some under the disconnected bumpers, and some passed through the 9-inch space between them sideways; while some others climbed over the car, it being a flat car. After all of these had passed over, plaintiff and his then comrades still stood, looked, listened, and waited for the cars to separate further, thus widening the gap. After thus waiting for the cars to be moved from the street crossing five to fifteen minutes, during which time there was no flagman or other employé of defendant in sight and neither seeing nor hearing any indications that the cars would be moved, and being anxious to reach the other side of the railroad track, one of these boys crossed the track by passing through the disconnected bumpers, and then another climbed over said bumpers, and plaintiff endeavored to follow him, and in doing so put one foot on one of the bumpers and raised his body, and, as his other foot was swinging between the disconnected bumpers, the defendant's employés in charge of the engine caused it suddenly to jam the bumpers of the cars together, thereby catching plaintiff's foot and ankle between said disconnected bumpers, crushing the bones and muscles. The flagman was not in sight: The evidence shows that the plaintiff did not think that the cars would be moved without his being notified, and did not apprehend any danger in endeavoring to pass over the bumpers as he did on this occasion. It also shows that he suffered intense physical pain for many months after his injury, and that he is crippled for life. The extent of his injuries was testified to by Dr. Faber; and his foot and ankle, as it appeared at the trial, was exhibited to the jury without objection.

During the course of the trial plaintiff was permitted, against defendant's objections, to prove that a large number of persons had crossed the train before he did, and that there was no watchman at the crossing to warn them of danger. The defendant saved his exceptions to these rulings of the court. The testimony adduced by the defendant tended to prove that a few minutes before the accident there was a train of cars standing north of the crossing; that defendant's watchman, John Misch, was standing on the west side of the track on which plaintiff was injured; that he saw several cars moving northward on the track towards the crossing at a slow rate of speed; that he crossed over this track to the east side, just a moment previous to the closing of the crossing; that he did not see plaintiff or his companions anywhere near the crossing at that time, nor did he see them there at all until after he heard the cry of pain caused by the crushing of plaintiff's foot; that the accident happened only a few moments after he had crossed over the track; that he was standing on the next track east of the one on which plaintiff was injured, and was within a few feet of him at the time; that there was a train backing northward towards the crossing a few moments before the accident; that the men in charge of this train were coupling up detached sections of cars for the purpose of making up a train; that the car which injured plaintiff formed a part of one of these detached sections, but the train backing north was not attached to this section, and never came in contact therewith, so far as the employés in charge of the train knew; that none of the hands in charge of this train witnessed or knew anything about the accident until after it had happened; that the watchman had been at the crossing all day, in the discharge of his duty, and was on the opposite side of the train on the track next to the one on which the boy was injured at the time thereof. The defendant offered in evidence the deposition of Frank Furley, which had been taken by plaintiff, and filed in this suit, to which evidence plaintiff objected, on the ground that the witness was in court, it appearing from the cross-examination of plaintiff's witnesses that deponent had been taken to the court by plaintiff. The court sustained the objection, and excluded the deposition, to which ruling and action of the court defendant at the time duly excepted. Defendant thereupon prayed the court to instruct the jury as follows:

"(a) The court instructs the jury that under the pleadings and the evidence the plaintiff cannot recover. First. The court instructs the jury that the following are the only grounds of negligence charged in plaintiff's petition which you can consider under the instructions hereafter given you: (1) That the bell of the locomotive was not rung, or the whistle sounded; (2) that plaintiff

was not notified of the intention of those in charge of the train to move it backward; (3) that no brakeman was on the rear car of said train; (4) that there was no gate or bar across the street; (5) that the servants of defendant, without any notice or warning, suddenly, carelessly, and negligently caused the engine to jam the cars of the train together, whereby plaintiff's foot was crushed and mashed. You are further instructed that it is admitted by the plaintiff's petition that the cars between which plaintiff was injured were coupled together and plaintiff was injured while attempting to climb between them." "Third. Concerning the charge in plaintiff's petition that the plaintiff was not notified of the intention of those in charge of the train to move it backwards, you are instructed that the defendant's servants had the right to assume that no person would attempt to climb between the cars of said train, and said servants were not bound to give notice to any one so climbing between said cars unless said servants knew that said person was in between said cars, so in the act of climbing over them; and unless you believe from the evidence that some servant engaged with said train actually knew that plaintiff was in the act of climbing between said cars at the time they were moved, then you must find that issue for the defendant. Fourth. Concerning the charge of the petition that defendant's servants, without any notice or warning, suddenly, carelessly, and negligently caused the engine to jam the cars together, you are instructed that the law does not require any such notice or warning of the defendant's servants, under the circumstances in this case, unless they actually knew that the plaintiff was between said cars, and was in danger of being hurt by such movement of the engine; and unless you find from the evidence that they did actually know that plaintiff was between said cars, and in danger of being hurt by such movement of them, then you must find for the defendant upon this, the last, ground charged in said petition." Which instructions the court refused to give to the jury, to which action and ruling of the court defendant at the time duly excepted.

The court then modified defendant's first, third, and sixth "refused" instructions, and of its own motion gave the same to the jury as modified, as follows: "The court instructs the jury that the following are the only grounds of negligence charged in plaintiff's petition which you can consider under the instructions hereafter given you: (1) That the bell of the locomotive was not rung, or the whistle sounded; (2) that the plaintiff was not notified of the intention of those in charge of the train to move it backward; (3) that no brakeman was on the rear car of said train; (4) that there was no gate or bar across the street; (5) that the servants of defendant, without any notice or warning, suddenly, carelessly, and negligently caused the engine to jam the cars of the train together, whereby plaintiff's foot was caught and mashed." "Third. Concerning the charge in plaintiff's petition that the plaintiff was not notified of the intention of those in charge of the train to move it backward, you are instructed that the defendant's servants had the right to assume that no person would attempt to climb between the cars of said train, and said servants were not bound to give notice to any one so climbing between said cars, unless said servants knew, or by the exercise of ordinary care might have known, that said person was in between said cars, so in the act of climbing over them; and unless you believe from the evidence that some servant engaged with said train actually knew that plaintiff was in the act of climbing between said cars at the time they were moved, then you must find that issue for the defendant." "Sixth. Concerning the charge of the petition that defendant's servants, without any notice or warning, suddenly, carelessly, and negligently caused the engine to jam the cars together, you are instructed that the law does not require any such notice or warning of the defendant's servants under the circumstances of this case, unless they actually knew, or by exercise of ordinary care might have known, that the plaintiff was between said cars, and was in danger of being hurt by such movement of the engine; and unless you find from the evidence that they did actually know, or by the exercise of ordinary care might have known, that the plaintiff was between said cars, and in danger of being hurt by such movement of them, then you will find for the defendant upon this, the last, ground charged in said petition." To which action of the court in modifying said instructions and giving them to the jury as modified defendant at the time duly excepted.

The court, at the instance of the plaintiff, gave the jury the following instructions: "First. The court instructs the jury that it was the duty of the defendant's flagman, and its agents and servants in management of its locomotive and train under their charge, to exercise reasonable care and precaution to prevent any injury to persons upon the tracks of defendant, and any failure on their part to exercise care and precaution would be such negligence as to make the defendant liable for the injuries to plaintiff resulting from such negligence, unless the jury further believes from the evidence that plaintiff was not acting with reasonable care and diligence for one of his age in passing over the cars as he did on the occasion of his injuries; and in passing upon the question as to whether the flagman and agents and servants of the defendant were or were not negligent in conducting and managing the locomotive and train at said crossing you should take into consideration all the facts and circumstances as proved by the evidence to have existed at the time when and the place where the injuries occurred, and you should give to each fact and circumstance and to the testimony of each witness such weight only as you may deem such fact, circumstance, or testimony entitled to in connection with all the evidence in the case. Second. By the term 'negligence,' as used in these instructions, is meant the want of that degree of care that any ordinary prudent person would have exercised under the same or similar circumstances. Third. The court further instructs the jury that, though they may believe from the evidence that it would have

been negligence in an adult to have climbed over the drawbars of the cars, as the plaintiff did on the occasion of his injuries, still if the jury find that by reason of his youth and inexperience he was not aware of the danger to which he was exposed in doing so, then the jury will take this into consideration in passing upon the question of plaintiff's alleged contributory neg igence. Fourth. The jury are instructed that if you find for the plaintiff you will, in assessing the damages, take into consideration the physical condition he was in before the injuries in question; the physical pain and mental anguish he has suffered, occasioned by said injuries; and the physical pain and mental anguish, if any, you believe from the evidence he is likely to suffer in the future because of said injuries; and in addition to this, you may also consider to what extent, if any, plaintiff's capacity for earning a livelihood, after his majority, will be impaired by said injuries, and you will return a verdict for him in such sum as your believe to be just and reasonable, not exceeding twenty thousand dollars." To which action of the court in giving said instructions to the jury, and each of them, the defendant at the time duly excepted.

The court, at the instance of the defendant, gave the jury the following instructions: "Second. Concerning the failure of the defendant to ring the bell or sound the whistle as charged in the petition, you are instructed that under the circumstances in this case the defendant's servants were not bound to do either, and your verdict must be for the defendant as to that ground of negligence." "Fourth. Concerning the charge in plaintiff's petition that there was no gate or bar across the street, you are instructed that there is no evidence to support that ground, and you must find for the defendant on that charge. Concerning the charge in the petition that no brakeman was stationed on the rear end of the train, you are instructed that, under the evidence in this case, the defendant was not required to have a brakeman so stationed, and you must find for the defendant upon this charge of the petition." "Seventh. The jury are instructed that it was an act of gross carelessness to have climbed between the cars as the plaintiff did, if he was of sufficient years and understanding to have appreciated the danger of so doing; and whether he did understand and appreciate the danger of so doing is a matter for you to determine; and in determining this you may take into consideration his admissions and statements while testifying in this case, and, if you find him of sufficient understanding to appreciate the danger he might encounter in passing between said cars, then you must, upon this finding alone, return a verdict for the defendant."

It is claimed by defendant that the court committed error in admitting the testimony of plaintiff and his witness Otten regarding the action of other persons in crossing the cars which caused the injury, at the time of or immediately preceding the accident, and of said witness Otten with reference to the absence of a flagman at the crossing at the time. It was held by this court in the case of *Burger v. Missouri Pac. R. Co.*, 112 Mo. 238, which was an action by a child for injuries sustained at the crossing in attempting to cross through a train standing across the street, that evidence that plaintiff saw others cross before him was admissible on the issue of defendant's negligence in starting the train without warning. Evidence of a similar character was admitted without objection in the cases of *Fiedler v. St. Louis, I. M. & S. R. Co.* 107 Mo. 645; *Gurley v. Missouri Pac. R. Co.* 104 Mo. 215; *Brown v. Hannibal & St. J. R. Co.* 50 Mo. 461, 11 Am. Rep. 420; *Stillson v. Hannibal & St. J. R. Co.* 67 Mo. 672; *Philadelphia, W. & B. R. Co. v. Layer*, 112 Pa. 414; and *Thurber v. Harlem Bridge, M. & F. R. Co.* 60 N. Y. 326.

Persons, and especially children, are naturally inclined to do whatever they may see others do. Nor was it error in permitting the witness Otten to testify that no flagman was present at the time of the accident, as this evidence was admissible as tending to show negligence on the part of the defendant, and the want of care and caution in order to prevent accidents at this crossing.

It was also contended by defendant that the court erred in excluding the deposition of Frank Furley, offered by defendant, which had been taken by the plaintiff, and filed in this case; and reliance is placed upon the case of *Schmick v. Noel*, 64 Tex. 406, as sustaining this position. An examination of that case will show that the deposition which was read was that of the plaintiff in the suit, and even in that case the court held that it was a matter of practice resting largely in the discretion of the trial court. The rule in this state, however, is that declarations of a party to a suit, contained in his deposition, taken by the other party, may be read in evidence against him in the same case, although he is present at the trial; *Bogie v. Nolan*, 96 Mo. 85. But section 4461, Rev. Stat. 1889, makes no provision for the reading of the deposition of a witness not a party to the suit, who is present at the time of the trial, and excludes, by implication at least, the right to do so. *Schmitz v. St. Louis, I. M. & S. R. Co.* 46 Mo. App. 391.

The next contention is that the demurrer to plaintiff's evidence should have been sustained, because, as soon as plaintiff touched or stepped upon defendant's train, he became a trespasser, and as such defendant owed him no duty, and he was entitled to no protection save against willful injury. The plaintiff had the same right that the defendant had to the use of the highway, and he might well assume that if any immediate movement of the cars was made at all some signal would be given before the movement was made, or that the cars would be pulled further apart, so as to relieve the street of the obstruction. While it is true that the duty of giving the statutory signals of ringing the bell and sounding the whistle has no application to one situated as plaintiff was in between two cars, but was intended to give warning to persons about to cross the track of the approach of a train, yet, as there was a space of at least nine inches open between the cars, through which a large number of persons had

been passing, and others were climbing over couplings between the cars. It was a question whether it was not the duty, under the circumstances, of those in charge of the train, to give some kind of warning of their intention to move, in order thereby to prevent injury to persons who might be passing between or over the cars. *Burger* v. *Missouri Pac. R. Co.* 112 Mo. 238; *Barkley* v. *Missouri Pac. R. Co.* 96 Mo. 378; *Philadelphia, W. & B. R. Co.* v. *Layer*, 112 Pa. 414. That it was negligence in defendant to leave its cars standing across the street in a populous city, where many pedestrians were known to be in the habit of crossing, with a space at least nine inches between the drawheads of the cars, as if to invite persons who could do so to pass between them, there can be no question. And if, without any warning, it closed up the space between the cars, by reason of which plaintiff was injured without any fault or negligence on his part contributing directly thereto, the defendant should be held liable. It was the duty of the defendant's servants and employés to know the condition of the cars at the crossing, and to provide against any accident that might be occasioned by their movement. In the case of *Wilkins* v. *St. Louis, I. M. & S. R. Co.*, 101 Mo. 93, it appears that the plaintiff's husband was killed at the same crossing. The deceased undertook to pass between the cars standing about two feet apart, and by the sudden backward movement of the train, made without any warning, he was crushed between the cars and injured, from the effect of which injury he subsequently died. This court in that case said: "This movement is said to have been made with the object of pushing the loose train of several cars close together towards the north; but, as it was evident that an opening for the purpose of clearing the street was to have been made, a forward movement of the engine and train of eleven cars was much more likely to be anticipated by a looker-on than the movement that was actually made. There was evidence that no bell was rung or whistle sounded before the movement of the train in question. Deceased might rightly assume that some such signal would be given before the movement was made." So, in the case of *Gurley* v. *Missouri Pac. R. Co.*, 104 Mo. 211, in which it appears that the plaintiff was passing over a footway leading through the defendant's yards and over its tracks, and which was not a public street or highway, but the railroad company had permitted persons to use it in passing to and from the depot. Across this path there was a small space, about one foot in width, between two cars. The plaintiff, in attempting to pass through this opening, by a sudden movement of the cars was crushed between them and injured. This court held that no negligence could be attributed to the railroad company, because it was under no legal obligation to notify persons of the movements of its cars at that point. The decision was bottomed on the fact that the footpath was not a public highway, and that plaintiff's use of it was merely that of a licensee. The court said, Gantt, *J.*, delivering the opinion: "The relation of the plaintiff and defendant must be kept in view. This was not a public crossing. If it had been so, defendant would have owed plaintiff a positive legal duty; but, being a mere private crossing, and plaintiff being a licensee only, defendant was bound not to recklessly injure plaintiff." While there was no statutory duty imposed on defendant to either ring the bell on the engine or sound the whistle before moving its train under the circumstances which existed in the case at bar at the time of the accident, it was, owing to the dangerous character of its machinery, the time and place where the injury occurred, the duty of its flagman and its agents and servants in the management of its cars under their charge to exercise at least reasonable and ordinary care and caution to prevent injury to persons crossing its tracks. If, then, the defendant was guilty of negligence which caused the injury, and plaintiff was at the time in the exercise of due care for one of his age and intelligence, and without fault contributing directly thereto, the defendant is liable. These questions were for the consideration of the jury under the instructions of the court as the evidence was ample upon which to predicate them. It necessarily follows that there was no error in refusing defendant's instructions in the nature of demurrers to the evidence.

At the instance of defendant the court instructed the jury that defendant's servants were not bound to ring the bell or sound the whistle; that there was no evidence that there was no gate or bar across the street; and that defendant was not required, under the evidence in this case, to have a brakeman on the rear end of the train at the time of the accident; and that for these reasons, also, the demurrers to the evidence should have been sustained, as there was then nothing left in the petition or evidence upon which the plaintiff could recover. As to whether the defendant's servants were guilty of negligence in the management of the train which caused the injuries, under the circumstances as disclosed by the evidence, aside from the failure to ring the bell or sound the whistle, in the absence of any evidence that there was no bar across the street, and no brakeman on the rear end of the cars, was also a question for the jury under the instructions of the court. Whatever conflict, if any, there was between plaintiff's first instruction and the one numbered 2 given at the request of the defendant, "that defendant was not bound to ring the bell or sound the whistle before moving its cars," was, under the circumstances in this case, an error committed by the court at the instance of defendant, and he will not now be heard to complain of an erroneous instruction given at his request. *Alexander* v. *Clark*, 83 Mo. 482; *Flowers* v. *Helm*, 29 Mo. 324. While the failure to do so could not be made a statutory cause of action, it was a matter for the jury to take into consideration in determining whether defendant's servants and employés were in the exercise of due care and caution in moving its cars. *Wilkins* v. *St. Louis, I. M. & S. R. Co.* 101 Mo. 93. It necessarily follows that there was no error committed by the court

in modifying defendant's refused instructions, and in giving them as modified, as the defendant asked and the court gave substantially the same instructions at the close of the evidence.

Another contention is that the instructions given for plaintiff were erroneous, and should have been refused. Plaintiff's first instruction seems to assume that it was the duty of defendant to keep a flagman at this crossing, and at first impression is objectionable for that reason, as the statute imposes no such duty; but, as the evidence clearly shows that defendant did have a flagman at the crossing to warn persons about to cross the track of impending danger, it is somewhat difficult to conceive how the defendant could have been prejudiced or the jury misled by reason thereof. Taken as a whole, it is, we think, not vulnerable to the objection urged against it. Nor is the instruction in fact in conflict with defendant's instructions, which eliminated from the consideration of the jury all the acts of specific negligence which were alleged in the petition as statutory causes of action, and left only the general allegation of negligence in the management of the train by defendant's servants and agents. Omitting and leaving out all the specific acts of negligence, the petition contains all the necessary allegations to constitute a cause of action at common law, and we think is good after verdict. No objection was taken to it either by motion to strike out any part of it, or by demurrer, or by motion to make it more definite and certain.

We see no objection to the third instruction given on behalf of the plaintiff. It simply tells the jury that if, by reason of the youth and inexperience of the plaintiff, he was not aware of the danger to which he was exposed in crossing between the cars, they will take this into consideration in passing upon the question as to whether or not he was guilty of contributory negligence. This we understand to be the law, as uniformly announced by this court.

Next, the instruction on the measure of damages is challenged as erroneous—First, in assuming that plaintiff suffered physical pain and mental anguish. Counsel for defendant concede that plaintiff suffered physical pain, but deny that one of his age could be capable of suffering mental anguish. That pain would necessarily ensue from any such injury as plaintiff sustained cannot be denied, and may well be assumed. Mental anguish may be properly said to be in this case grief and sorrow by plaintiff over the loss of the use of his limb and becoming a cripple for life. And that a boy nine years of age may ordinarily be capable of appreciating the consequences of such an injury we think too clear for argument. There was no prejudicial error, therefore, in assuming, as the instruction did, that the plaintiff suffered physical pain and mental anguish. The physician who attended him testified that he would be a cripple for life. "The general rule is that pain of mind," when connected with bodily injury, is the subject of damages; but it must be so connected in order to be included in the estimate, unless the injury is accompanied by circumstances of malice, insult, or inhumanity. *Trigg* v. *St. Louis, K. C. & N. R. Co.*, 74 Mo. 147, 41 Am. Rep. 305, and authorities cited. Another objection urged against this instruction is because it tells the jury that in estimating the damages, if they find for plaintiff, in addition to physical pain and mental anguish they will consider to what extent, if any, plaintiff's capacity for earning a livelihood after his majority will be impaired. It will be observed that this is not a claim for damages for loss of services, but because of his inability to earn a livelihood after his majority by reason of injury. The petition contains no specific allegation with reference to plaintiff's inability to earn a livelihood, or to what extent it would likely be impaired after his arrival at the age of twenty-one years; nor was there any evidence with regard thereto further than that the evidence shows the injury to be permanent, and the plaintiff a cripple for life. In the case of *Rosenkranz* v. *Lindell R. Co.*, 108 Mo. 9, Macfarlane, *J.*, in speaking for the court, says: "It is well settled that prospective damage to adults on account of impairment of earning capacity in the future is a proper element of damages in the cases of personal injuries. *Whalen* v. *St. Louis, K. C. & N. R. Co.* 60 Mo. 323; *Pry* v. *Hannibal & St. J. R. Co.* 73 Mo. 124; 2 Sedgw. Damages, 8th ed. § 485.

"Ordinarily, damages will not be awarded to compensate for losses not yet experienced on mere conjectural possibility that such loss will occur. In the case of an adult, proof should be made of 'previous physical condition and ability to labor or follow his usual avocation, as well as his condition since the injury, to enable the jury to properly find the pecuniary damage.' 5 Am. & Eng. Encyclop. Law. 41, and authorities cited.

"What may or may not be done by any one in the future depends upon so many contingencies that prospective loss of earnings cannot be susceptible of direct and conclusive proof, even in case of adults. Nevertheless, as has been seen, such damages are uniformly allowed. The impairment of the earning capacity of one in his infancy is as great a damage to him as though he had not been injured until the day he had reached his majority. That he would have an equal right to compensation logically follows. This plaintiff had never earned anything, and what his ability to labor or his capacity for earning money in business pursuits will be in the future, no one can tell with any certainty. It is properly held in such case, in the absence of the existence of direct evidence, that much must be left to the judgment, common experience, and 'enlightened conscience of the jurors, guided by the facts and circumstances in the case.'" It follows as a necessary consequence, if such damage was not susceptible of proof, that it was not necessary that the petition should contain specific allegation in regard thereto. The jury saw the injured limb, heard the attending physician testify that the injury was permanent, and that the plaintiff would be a cripple for life: and they were as well prepared to judge from observation of the future

ability of plaintiff to earn a livelihood after he arrived at the age of maturity as any one else. The instruction which was condemned in the case of *Wilburn* v. *St. Louis, I. M. & S. R. Co.*, 36 Mo. App. 215, concluded as follows: "And for such other causes as would be just and proper." This instruction, as was said by the court, was palpably erroneous, and gave the jury no criterion whatever by which to estimate the damages, and is unlike the instruction given in the case at bar. And, finally, it is contended that this instruction is erroneous in not confining the jury to the evidence in assessing the damages. The instruction, after specifying what the jury might take into consideration in estimating the damages, concluded as follows: "And you will return a verdict for him in such sum as you believe to be just and reasonable, not exceeding twenty thousand dollars." This part of the instruction, taken alone, would, of course, be objectionable, for the reason that it is too general and gives the jury no rule by which to estimate the damages; but when the instruction is read altogether, as it should be, no such objection could be urged against it. *Haniford* v. *Kansas City*, 103 Mo. 172. After telling the jury the facts that they must take into consideration in estimating the damages, it concludes as above indicated, and certainly confined the inquiry and damages to the facts mentioned. No objection was raised in the court below as to the amount of damages allowed by the jury, and that question cannot now be raised in this court for the first time.

As there does not appear to have been any error committed in the trial of the cause which would justify a reversal of it, *the judgment will be affirmed*, and it is so ordered.

All concur, except **Sherwood, J.**, who dissents, and **Barclay, J.**, absent.

KANSAS SUPREME COURT.

J. A. POLLEY, *Pltf. in Err.*,
v.
Edward E. JOHNSON *et al.*

(........Kan.........)

***1. Where land is conveyed by the owner to another in trust to reconvey to the grantor's wife,** or such person as the grantor may thereafter designate, and the grantee has no interest in the lands, but afterwards executes such trust by a conveyance to the grantor's wife, as between grantor and his creditors such lands will be treated as his property until reconveyed by the trustee; and the fact that such trust rests in parol, and is therefore not enforceable under the statute concerning trusts and powers, does not change the rule.

*Headnotes by ALLEN, J.

NOTE.—*Crops as personal property for the purpose of levy and sale.*

General doctrine.

For a classification of growing fruit as real or personal property, see *note* to Sparrow v. Pond (Minn.) 16 L. R. A. 103.

The question whether or not growing crops are the subject of execution as other personal property, would depend upon the question whether they are in their nature the natural or spontaneous growth of the land, as *fructus naturales*, or whether they are the production of labor and industry, *fructus industriales*. If they are the former they are considered as part of the land itself, if the latter, they are treated as other personal property. It has been generally held that only such crops as are sown and planted and reached perfection within the year are personal property and as such liable to be taken in execution. The test would, however, seem to be whether such crop was the production of the industry of man.

The manner, as well as the purpose of planting, is an essential element to be taken into consideration in determining whether such crops are real or personal estate and subject to execution. Sparrow v. Pond, 16 L. R. A. 103, 49 Minn. 412.

Growing crops of grain and other annual produce raised by industry, are personal property and chattels and may be levied on and sold under execution. Kingsley v. Holbrook, 45 N. H. 313, 86 Am. Dec. 173; Howe v. Batchelder, 49 N. H. 204.

To the same effect are the cases following: Crine v. Tifts, 65 Ga. 644; Favorite v. Deardorff, 84 Ind. 555; Lindley v. Kelley, 42 Ind. 294; Coughlin v. Coughlin, 26 Kan. 116; Thompson v. Craigmyle, 4 B. Mon. 391, 41 Am. Dec. 240; Parham v. Tompson, 2 J. J. Marsh. 159; Craddock v. Riddlesbarger, 2 Dana, 205; Porche v. Bodin, 28 La. Ann. 761; Pickens v. Webster, 31 La. Ann. 870; Penhallow v. Dwight, 7 Mass. 34, 5 Am. Dec. 21; Preston v. Ryan, 45 Mich. 174; Cayce v. Stovall, 50 Miss. 396; Westbrook v. Eager, 16 N. J. L. 81; Green v. Armstrong, 1 Denio, 550; Shepard v. Philbrick, 2 Denio, 175; Whipple v. Foot, 2 Johns. 418, 3 Am. Dec. 442; Harder v. Plass, 57 Hun, 540; Bank of Lansingburgh v. Crary, 1 Barb. 542; Harris v. Frink, 49 N. Y. 24, 10 Am. Rep. 318; Newcomb v. Raynor, 15 Wend. 108, 34 Am. Dec. 219; Mumford v. Whitney, 15 Wend. 387, 30 Am. Dec. 60; Austin v. Sawyer, 9 Cow. 39; Flynt v. Conrad, 61 N. C. 190, 93 Am. Dec. 588; Smith v. Tritt, 18 N. C. 241, 28 Am. Dec. 565; Brittain v. McKay, 23 N. C. 265, 35 Am. Dec. 738; Bond v. Coke, 71 N. C. 100; Stambaugh v. Yeates, 2 Rawle, 161; Pattison's App. 61 Pa. 294, 100 Am. Dec. 637; Hershey v. Metzgar, 90 Pa. 217; Long v. Seavers, 103 Pa. 519; Devore v. Kemp, 3 Hill, L. 259; Cook v. Steel, 42 Tex. 53; Edwards v. Thompson, 85 Tenn. 720; Silberberg v. Trilling, 82 Tex. 523; Willis v. Moore, 59 Tex. 628, 46 Am. Rep. 284; Hamblet v. Bliss, 55 Vt. 535.

The following English cases show that growing crops of grain and vegetables *fructus industriales*, being goods and chattels and not real estate, may be sold on execution as personal chattels. Carrington v. Roots, 2 Mees. & W. 248; Sainsbury v. Matthews, 4 Mees. & W. 343; Jones v. Flint, 10 Ad. & El. 753, 2 Perry & D. 594; Warwick v. Bruce, 2 Maule & S. 205; Graves v. Weld, 5 Barn. & Ad. 105, 2 Nev. & M. 725.

Even while annexed to the freehold. McKenzie v. Lampley, 31 Ala. 526.

A growing crop of fruit trees is part of the freehold and not goods and chattels, so as to be subject to execution under a *fi. fa.* Adams v. Smith, 1 Ill. 221. Bank of Lansingburgh v. Crary, 1 Barb. 542.

Hops growing upon vines are personal estate, be-

See also 32 L. R. A. 811; 34 L. R. A. 286.

2. Annual crops which are the product of industry and care, sown by the owner of the soil, are, while growing and immature, personal property subject to attachment and sale for the debts of the owner.

(December 9, 1893.)

ERROR to the District Court for Lincoln County to review a judgment in favor of plaintiffs in an action brought to enjoin defendant from harvesting and carrying away wheat on a certain quarter-section of land. *Affirmed.*

The facts are stated in the opinion.

Mr. **David Ritchie,** for plaintiff in error:

From this testimony it clearly appears that the land in question was the homestead of H. H. Meer at the time of the conveyance and could not be sold or conveyed with intent to defraud creditors for the reason that it was in any event beyond the reach of creditors.

Mull v. *Jones*, 33 Kan. 112, and cases there cited; *Hixon* v. *George*, 18 Kan. 253; *Monroe* v. *May*, 9 Kan. 466; *Arthur* v. *Wallace*, 8 Kan. 267.

The legal effect of this transaction was that the attempted trust was void, but the deed in question was valid as against the Meers and all the world besides and conveyed not only the land but also the growing wheat then upon the land which had been sown by the owner of the soil, and was yet immature and unripe.

Gee v. *Thrailkill*, 45 Kan. 173; 2 Nash, Code Pl. 4th ed. p. 862; *Smith* v. *Hague*, 25 Kan. 246; *Garanflo* v. *Cooley*, 33 Kan. 137; *Chapman* v. *Veach*, 32 Kan. 167; *Babcock* v. *Dieter*, 30 Kan. 172; *Beckman* v. *Sikes*, 35 Kan. 120; *Smith* v. *Leighton*, 38 Kan. 544.

Annual crops which are produced by industry, when planted by the owner of the soil, remain a part of the real estate to which they are attached until such time as they are ready to be harvested and are not subject to execution until that time.

See Washb. Real Prop. 2d ed. §§ 5-8, p. 4; *Burleigh* v. *Piper*, 51 Iowa, 649; *Ellithorpe* v. *Reidesil*, 71 Iowa, 315.

Mr. **C. B. Daughters,** for defendant in error:

A conveyance to a third party for the sole purpose of having it transferred to first party's wife conveys nothing but the bare legal title to the third party.

Harrison v. *Andrews*, 18 Kan. 535.

In many of the states the levy upon growing crops is controlled by statute.

Our own statutes certainly authorize the levy and sale of growing crops in certain cases, and by implication in all cases.

See Justice Act, § 153; *Lindley* v. *Kelley*, 42 Ind. 294; *Penhallow* v. *Dwight*, 7 Mass. 34, 5 Am. Dec. 21; *Davidson* v. *Waldron*, 31 Ill. 120, 83 Am. Dec. 206; *Pierce* v. *Roche*, 40 Ill. 292; *Preston* v. *Ryan*, 45 Mich. 174; *Johnson* v. *Walker*, 23 Neb. 736; *Ayers* v. *Hawk* (N. J. Eq.) Dec. 30, 1887.

Growing annual crops are always considered as personalty.

Benjamin, Sales, p. 125; Washb. Real Prop. § 5, also § 4, p. 133; Hilliard, Real Prop. § 64, p. 16; Tiedeman, Real Prop. §§ 70, 71; *Cald-*

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ing raised by means of manual cultivation. Frank v. Harrington, 36 Barb. 415; Latham v. Atwood, Cro. Car. 515.

Fruits growing upon cultivated trees are not the subject of levy as personal property. Sparrow v. Pond, 16 L. R. A. 103, 49 Minn. 412.

So peaches on trees cannot be taken in execution. State v. Gemmill, 1 Houst. (Del.) 9.

Aliter when the fruit is gathered. *Ibid.*

Growing unpicked cotton upon the homestead is also exempt; *aliter* when picked. Alexander v. Holte, 59 Tex. 205; Coates v. Caldwell, 71 Tex. 20.

In Sparrow v. Pond, *supra*, it was held that blackberries growing on bushes could not be taken in execution as personal property.

The title to a growing crop sold under a *fi. fa.* vests in the purchaser from the time of sale as against all others, and may be gathered when ripe. Peacock v. Purvis, 2 Brod. & B. 362, 5 Moore, 79; Coombs v. Jordan, 3 Bland, Ch. 312, 22 Am. Dec. 236.

The law affords the purchaser a remedy against all who unlawfully disturb him in the enjoyment thereof. Brittain v. McKay, 23 N. C. 265, 35 Am. Dec. 738.

Sufficiency of sheriff's possessions.

Such possession must be taken of personalty under an attachment as the nature of the property admits of. Throop v. Maiden (Kan.) Nov. 11, 1893.

The officer must take and retain actual and exclusive control. *Ibid.*

Manual possession is not necessary, a declaration that it is levied upon under an execution is sufficient. Whipple v. Foot, 2 Johns. 418, 3 Am. Dec. 442.

Where corn levied upon by the sheriff was standing in the field ungathered at the time of execution levied, and the sheriff had previously notified the defendants of the purpose of his levy, and at the time of the levy that he was about to make it, going into the field for that purpose, the court held his possession sufficient as against such parties, and that it was not necessary for him to place a watch and guard over the property. Barr v. Cannon, 69 Iowa, 20.

Where the officer notified the debtor of the levy but did not authorize him to hold possession for him nor place him in charge, and placed no notice of his claim upon the property, and exercised no control for a period of two months, during which time the property was used by the debtor, the court held that a subsequent mortgagee prevailed over such levy. Throop v. Maiden, *supra.*

Where a sheriff levied upon growing crops and before sale the same were seized by the collector of taxes and sold, the court held that such crops were already in the custody of the law and the collector sold without right, so that the purchaser from him had no right of action in trover against the purchaser from the sheriff. Hartwell v. Bissell, 17 Johns. 128.

The sheriff may suffer wheat to grow till harvest and then cut and sell it, or may perhaps sell it growing, and the purchaser would then be entitled to enter for the purpose of cutting and carrying it away. Adams v. Tanner, 5 Ala. 740.

In McKenzie v. Lampley, 31 Ala. 526, it was held that an execution was a lien upon a growing crop from the time of delivery to the sheriff.

Position of the purchaser.

The legal right to sell such a crop before it is gathered results from its personal character and the right to levy on it. Parham v. Tompson, 2 J. J. Marsh. 159.

And a creditor at such a sale who enters upon the land and purchases the crop is not a trespasser, the process and judgment being regular and the sale bona fide. *Ibid.*

well v. *Custard*, 7 Kan. 307, and cases therein cited.

Execution can levy on all that goes to the executor.

Benjamin, Sales, p. 123.

Distinction as to the mature or immature crops rejected.

Benjamin, Sales, p. 124.

Growing crops may be levied upon and sold as such.

2 Freeman, Executions, § 349*b*.

And a mere sale operates to sever it from the realty.

Johnson v. *Walker, supra*.

How growing crops are levied upon.

2 Freeman, Executions, § 263.

Growing crops may be reserved by parol.

Youmans v. *Caldwell*, 4 Ohio St. 71; *Baker* v. *Jordan*, 3 Ohio St. 438.

Growing crops are declared to be subject to execution from justice court.

Long v. *Hines*, 40 Kan. 216; *Pracht* v. *Pister*, 30 Kan. 568.

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

Defendants in error, as plaintiffs below, brought their action against plaintiff in error to enjoin him from harvesting and carrying away about 90 acres of wheat, grown on a quarter-section of land in Lincoln county. The wheat was sown in the fall of 1888 by H. H. Meer, who then owned and occupied the land as his homestead. On the 4th day of October he executed a deed for the land to Edward H. Thuse. His wife was in the insane asylum at the time, and he signed the deed also as her guardian. The copy of this deed contained in the record does not show any approval by the probate court, but no point on the want of approval is made by either party. On the 22d day of October an attachment issued in a suit against Meer by a justice of the peace, was levied on the crop of wheat, and on the 11th of December, 1888, the constable sold the same to the plaintiffs. These conveyed the land on January 5, 1889, to Emma Meer, wife of H. H. Meer. He testified on the trial that he paid nothing for the farm, and was to deed it back to Meer's wife, if she got well, or any other party he traded with or sold to. On January 31, 1889, Meer and wife conveyed the land to defendant Polley.

Two questions are raised by the plaintiff in error: (1) Was there anything that could

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A purchaser under such an execution may enter and remove the corn purchased, provided it belonged to the defendant in the execution and the sale was valid. Thompson v. Craigmyle, 4 B. Mon. 391, 41 Am. Dec. 240.

A sale of a crop by a sheriff under an execution is valid and entitles the purchasers to ingress and egress to gather the same. Stewart v. Doughty, 9 Johns. 108.

Where growing crops were levied upon and sold by the sheriff under a *fi. fa.* it was held that the purchaser acquired a superior title to that of the purchaser under a subsequent tax levy. Hartwell v. Bissell, 17 Johns. 128.

A purchaser under an execution sale is entitled to the crops upon the land at the time of sale, as against a purchaser under an execution by foreclosure on a mortgage subsequently made. Shepard v. Philbrick, 2 Denio, 175.

He has power of egress and regress for the purposes of cutting and carrying away such a crop. Brittain v. McKay, 23 N. C. 265, 35 Am. Dec. 738.

When the corn is not ripe at the time of sale under *fi. fa.* the vendee has a reasonable time after it ripens to cut and carry it away, and while so remaining on the land it is not liable to distress for rent, being considered as *in custodia legis*. Smith v. Tritt, 18 N. C. 241, 28 Am. Dec. 565.

The vendee of the sheriff purchases the crops as personal chattels and not as parcel of the land, and acquires no particular right in the land itself, nor any particular possession or occupation of such land, but the law annexes to this transfer whatever is necessary for the taking and enjoying of the same for free entry, egress, and regress to cut and carry away the same. Brittain v. McKay, *supra*.

The Pennsylvania Act of March 21, 1772, made grain growing the subject of distress for rent, and gave the purchaser right of egress and ingress. Bear v. Bitzer, 16 Pa. 175, 55 Am. Dec. 490.

Crops held upon shares.

a. Tenants in common.

An interest in a crop worked on shares may be attached by the sheriff who retains possession of the whole crop, selling the undivided interest of the defendant, the purchaser being the co-tenant with the owner of the other portion of the crop. Bernal v. Hovious, 17 Cal. 541, 79 Am. Dec. 147.

In Thompson v. Mawhinney, 17 Ala. 362, 52 Am. Dec. 176, where authority was given by one joint tenant of a share of a crop to sell, it was held that such share was still liable under execution.

Where, in an execution against one co-tenant, the sheriff seizes and sells the whole property, an action of trespass will lie against him. Moulton v. Robinson, Ladd v. Robinson, 27 N. H. 550.

b. Husband and wife.

In Davis v. Clark, 26 Ind. 424, 89 Am. Dec. 471, it was held that land conveyed to husband and wife did not vest the husband with such an estate as was liable to sale on execution.

In Patton v. Rankin, 68 Ind. 345, 34 Am. Rep. 254, an action to enjoin the sale of corn levied upon by sheriff upon land belonging to the wife raised by the husband, the court followed Davis v. Clark, *supra*.

A crop raised on land held by husband and wife by entireties is subject to the same law as the land itself, and not liable to levy and sale on an execution against the husband. Patton v. Rankin, *supra*.

c. Cropper's share.

Execution does not lie against a cropper's share of a crop before division. Gray v. Robinson (Ariz.) Jan. 25, 1893.

A cropper's portion of the crop was held not to be subject to levy under a *fi. fa.* until the advances made for the purpose of making the crop, were paid. Hunter v. Edmundson, Ga. Dec. pt. 1, p. 74.

In Braizer v. Ansley, 33 N. C. 12, 51 Am. Dec. 408, it was stated to be well settled in law in that state, that a cropper had no such interest in the crop as could be subjected to the payment of his debts while it remained *en masse* until a division, the whole being the property of the landlord.

d. Landlord and tenant.

A landlord's attachment for rent should direct the levy on the crops only, and should not authorize the officer executing it to levy on the estate generally. Ellis v. Martin, 60 Ala. 394; Hawkins v. Gill, 6 Ala. 620.

be taken under the order of attachment issued against Meer, by which the court could obtain jurisdiction? It is contended that the farm was the homestead of Meer, entirely exempt from the payment of his debts; that his creditors could not look, in any event, to this land for the satisfaction of their claims; that, as against them, the conveyance to Thuse passed a full title, notwithstanding the want of consideration, and the secret understanding that Thuse was to hold it for the plaintiff and subject to the control of Meer; that, as the trust under which Thuse held was created wholly by parol, it could not be enforced; that under the authority of *Gee* v. *Thrailkill*, 45 Kan. 173, Thuse acquired the absolute title to the land, which carried with it the crop of growing wheat; that, when the constable levied the attachment, Meer had no property either in the land or the growing wheat; and that he therefore at that time had no property in the wheat to be attached. Various cases are cited in support of the proposition that a conveyance of lands carries title to all growing crops thereon. There can be no question as to the correctness of this as a general proposition, but we think that this case clearly shows that Thuse never had any real interest in the land. A deed to the homestead, executed under the circumstances and in the manner shown in this case, without the approval of the probate court, would not pass any title. But assuming that it did pass the legal title to Thuse, and, further, that the trust thereby created could not have been enforced in an action against him, yet as he has seen fit to recognize and execute the trust so created, and has in fact conveyed the land in accordance with the parol understanding between himself and Meer, we think the equitable title must be held to have never been transferred, and that the land and the wheat thereon was just as much the property of Meer after the execution of the conveyance to Thuse as before. *Harrison* v. *Andrews*, 18 Kan. 535. We think this case must be considered as though no change of title occurred until the execution of the deed by Meer and wife to Polley, which was after the sale of the growing wheat.

The second contention is that growing wheat sown by the owner of the soil is a part of the realty until ripe and ready to sever from the soil, and therefore is not subject to attachment as personalty. In support of this

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Process of attachment is the remedy for the enforcing of the lien if the crop is removed without consent, and if removed attachment may be levied on it in possession of the tenant or one holding it in his right, or in the possession of the purchaser with notice. Lomax v. LeGrand, 60 Ala. 537; Rev. Code, §§ 2961, 2963.

An attachment lien which ordinarily gives from the time of seizure or levy upon the property, does not so commence in the case of a crop lien the process of attachment only being used to enforce the latter. Carter v. Wilson, 61 Ala. 434.

In Schell v. Simon, 66 Cal. 264, it was held the purchaser at an execution sale of the interest of a landlord in a growing crop was tenant in common with the lessee where the land was rented upon shares.

In Deaver v. Rice, 20 N. C. 431, 34 Am. Dec. 388, it was held that the landlord's rent lien was not superior to that of the tenant's other creditors upon the crop.

In Walston v. Bryan, 64 N. C. 764, the lessor's interest in a crop reserved as rent was held not to be the subject of levy under execution prior to its separation.

A landlord's share in a crop is not severed by a sale under a *fi. fa.* of the share, so as to affect the title of a subsequent purchaser at a sheriff's sale, who acquires his deed before the rent is due. Long v. Seavers, 103 Pa. 517.

Where the portion of a crop was reserved to the landlord in payment of rent, it was held he was not a tenant in common with the lessee and had no property in the crop until it was severed and delivered, which could be made the subject of a levy and sale. Devore v. Kemp, 3 Hill, L. 259.

Where land was leased upon shares, the produce to be controlled by the lessor until sale, the possession of the premises to be that of the lessor as against the lessee's creditors, it was held that the lessee had no title or interest in the crops attachable for his debts. Esdon v. Colburn, 28 Vt. 631, 67 Am. Dec. 730.

State decisions.

Under the Alabama Act of 1821, § 1, a *fi. fa.* or other execution could not be levied upon a planted crop until gathered, and it has been held that the statute prevents the lien attaching until that period, and the title of bona fide purchasers or creditors will not be affected thereby. Adams v. Tanner, 5 Ala. 740.

In Evans v. Lamar, 21 Ala. 333, it was stated that while it might be conceded that an ungathered crop was regarded as the chattel of the person who owned it, and by the common law was subject to be levied upon and sold under execution for the payment of his debts, yet the legislature of that state had by special enactment exempted such property from levy and sale under execution. Clay's Dig. 210, § 46.

The above act was repealed by section 10 of the Code, which enacted by section 2461, that a levy might be made on a growing crop, when there was no other property of the defendant known to the sheriff, but that no sale should be made until the crop was gathered, and this section was repealed by an Act of February 7, 1854.

In McKenzie v. Lampley, 31 Ala. 528, the delivery of the *fieri facias* to the sheriff was held to give the plaintiff a lien upon the growing crop, the common law rule not being affected by the statutory provisions which were in force at the time the writ was received by the sheriff.

Such crop is an independent whole not going as the land, but in a different direction, and "such a growing crop may under the common law be seized under a *fieri facias* issued against the owner of the inheritance as his goods and chattels, even while they are annexed to the freehold." McKenzie v. Lampley, 31 Ala. 526, 528.

A growing crop, however immature its state and whatever of labor may be required for its cultivation to maturity, and its severance from the soil, is a personal chattel, subject at common law to execution against a tenant, passing to his personal representatives not descending with the land to the heir, and it is a subject of sale or mortgage. Booker v. Jones, 55 Ala. 266.

In Raventas v. Green, 57 Cal. 254, an unripe growing crop of grain was held to be personal property subject to attachment, service of the writ and statutory notice being a sufficient attachment.

Where a lease provided that the entire crop should be the property of the landlord until the advances were paid, the crop raised was held not to be sub-

proposition, Washb. Real Prop. 2d ed. p. 4; *Burleigh* v. *Piper*, 51 Iowa, 649, and *Ellithorpe* v. *Reidesil*, 71 Iowa, 315, are cited. The last of these authorities, which is a case decided by the supreme court of Iowa, fully sustains this contention; and it is said in the opinion: "The whole proceeding was on the theory that the crops were personal property, and could be levied on and sold as such; but while they remained immature, and were being matured by the soil, they were attached to and constituted part of the realty; they could no more be levied upon and sold on execution as personalty than could the trees growing upon the premises. This doctrine is elementary, and it has frequently been declared by this court. *Downard* v. *Groff*, 40 Iowa, 597; *Burleigh* v. *Piper*, 51 Iowa, 650; *Hecht* v. *Dettman*, 56 Iowa, 679, 41 Am. Rep. 131; *Martin* v. *Knapp*, 57 Iowa, 336." It must be conceded that there is much force in the reasoning to sustain this position. It is a well-established rule that a conveyance of land, either by voluntary deed or judicial sale without reservation, carries all growing crops with the title to the land. *Garanflo* v. *Cooley*, 33 Kan. 137; *Smith* v. *Hague*, 25 Kan. 246; *Chapman* v. *Veach*, 32 Kan. 167. The value of the growing crop depends upon the soil for its support and nourishment, and if disconnected at once, in a case like this, would be nothing. A levy and sale usually affords but little return to the creditor, while it is a serious loss oftentimes to the debtor; but, whatever may be our individual views as to the policy of the law, we must be governed by it as we find it. In the case of *Beckman* v. *Sikes*, 35 Kan. 120, it was held that a sale under a mortgage foreclosure carried to the purchaser growing crops planted after the decree of foreclosure was entered as against a purchaser, who bought from the mortgagor the growing crop one day before the sale by the sheriff. In the opinion the court says: "The lien of the mortgage and the judgment, however, attached to the growing crops until they were severed, as well as to the land. The mortgagor planted the crop, knowing that it was subject to the mortgage, and liable to be devested by the foreclosure and sale of the premises. Any one who purchased said crops from him took them subject to the same contingency, as the recorded mortgage and the decree of foreclosure were notice to him of the existence of the lien. If the land is not sold until the crops ripen and are severed, the vendee of the mortgagor would ordinarily get a good title; but if the land was sold and conveyed while the crop was still growing, and there was no reservation, or waiver of the right to the crop, at such sale the title to the same would pass with the land." *Goodwin* v. *Smith*, 49 Kan. 351, 17 L. R. A. 284, holds: "The pur-

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ject to attachment by creditors until after the repayment of such advances. Howell v. Foster, 65 Cal. 169.

Where a mortgage *fi. fa.* was levied upon stock "and all the crops on" a certain place, it was held the levy was sufficiently specific. Crine v. Tifts, 65 Ga. 644.

Where a large crop of growing corn was purchased, it was held not to be liable to execution for the vendor's debts while being cribbed on the premises where grown, it appearing that the vendor clearly intended the sale to be complete at the time the contract was entered into. Vaughn v. Owens, 21 Ill. App. 249.

Where mortgaged lands in possession of the mortgagor, were levied upon by an execution creditor who sold a crop of wheat growing thereon and levied upon a crop of corn, but before sale thereof a receiver was appointed in foreclosure proceedings, the court held that as against such execution creditor the receiver had no rights to the crops. Favorite v. Deardorff, 84 Ind. 555.

The homestead was exempt from such a force sale except where a lien is given by the joint consent of husband and wife, under article 15, § 9, of the Kansas Constitution. Coughlin v. Coughlin, 26 Kan. 116.

Growing crops raised annually by labor are the subject of sale as personal property before maturity, and their sale does not necessarily involve an interest in realty requiring a written agreement. Northern v. State, 1 Ind. 113, where the action was brought against a constable for failure to return an execution and to collect the money thereon.

By article 465 of the Revised Code of Louisiana, standing crops are considered as immovables and as part of the land to which they are attached, and by article 466 the fruits of an immovable, gathered or produced while it is under seizure, are considered as making part thereof and inure to the benefit of the person making the seizure.

In Porche v. Bodin, 28 La. Ann. 761, it was held that the evident meaning of these articles was, where the crop belongs to the owner of the plantation, it forms part of the immovable, and where it is seized, the fruits gathered or produced inure to the benefit of the seizing creditor.

Where the plantation was seized under a judgment and was not sold until some four years after, and after the lien had expired, it was held that the mere seizure of the mortgaged property did not devest the plaintiff of his title to the crop which he was raising, and that the seizure in no manner disturbed him in its cultivation. Saudel v. Douglass, 27 La. Ann. 628.

Where a sheriff entered and seized growing corn, cut down the same and sold it as personal estate, the court held his action justifiable. Penhallow v. Dwight, 7 Mass. 34, 5 Am. Dec. 21.

The equity prevailing in favor of a mortgagee of after-acquired property will not prevail against a levy made before it had become no more than a general equity. People v. Bristol, 35 Mich. 28.

A levy will prevail over subsequent transactions, but it cannot invalidate prior dispositions in favor of honest creditors and in violation of no statute or legal rule. *Ibid.*

Compiled Laws of Michigan, §§ 4667, 6100, in forbidding the sale of the equity of redemption in mortgaged lands did not in terms prohibit the sale of anything personal in its nature. Preston v. Ryan, 45 Mich. 174.

In Gillitt v. Truax, 27 Minn. 528, it was held that growing crops might be levied upon at any period of their growth, without regard to whether they were above or below the surface, but no sale could be made until the same were ripe or fit for harvesting, and such sale must be completed within thirty days thereafter. Gen. Stat. 1878, chap. 66, § 315.

In Norris v. Watson, 22 N. H. 364, 55 Am. Dec. 161, it was held that the provisions of the Revised Statutes, section 15, chapter 184, authorizing the mortgage of growing crops as personal property, and the attachment of personal property subject to mortgage, were not intended to change the law relating to the attachment of growing crops which were not therefore attachable.