all necessary purposes. Stein v. Frieberg, 64 Tex. 271.

And a county court of Texas may enjoin a sale of exempt property under an execution issued from the district court under Tex. Const. 1876, art. 5, § 16, giving the county court jurisdiction to issue injunctions, and giving concurrent jurisdiction with the district court where the amount in controversy does not exceed $1,000. Anderson v. Larremore, 1 Tex. App. Civ. Cas. (White & W.) § 947.

Where an injunction stays the process of a sale of homestead property and also questions the validity and regularity of the writ, which was specific, the writ of injunction must be returned to the court from which the order of sale issued, and not to the court of any other county granting the injunction. Seligson v. Collins, 64 Tex. 314.

But the statute in such a case was held not to apply to an injunction granted in favor of a purchaser of a homestead from the debtor where the judgment was not attacked. Van Ratcliff v. Call, 72 Tex. 491.

But where a husband and wife brought a suit to enjoin a decree of foreclosure of a homestead on the ground that the wife was not a party to such decree where she died pending the injunction suit, it was held that the suit to enjoin should have been in the court rendering the decree, and that although the mortgage was void, the homestead right did not vest in the husband, and the injunction was refused. Bevalk v. Kraemer, 8 Cal. 66, 68 Am. Dec. 304.

And in Missouri an injunction cannot be issued by one court to prevent a levy on exempt homestead property on an execution issued from another court, as Mo. Rev. Stat. § 2405, provides that the writ may be set aside or quashed by the court which issued it. Mellier v. Bartlett, 89 Mo. 134.

c. *Other cases.*

An injunction, at the instance of the defendant, against an execution sale or final process, is seldom granted except in the court in which the judgment was rendered.

The court of one county should not grant an injunction against an execution issued from another county, unless the complainant is a third party, and in this case the objections to the execution as to discharge in bankruptcy and delay in issuing execution could only be tried by the record. Winnie v. Grayson, 3 Tex. 429.

A county court cannot enjoin a sale on an execution against complainant from a justice amounting to $125, although the property levied on is worth $400, as the original amount in controversy determines the jurisdiction of the county court. Wheeler & Wilson Mfg. Co. v. Whitener, 2 Tex. App. Civ. Cas. (Willson) § 5.

In Wheeler & Wilson Mfg. Co. v. Collins, 1 Tex. App. Civ. Cas. (White & W.) § 132, where "a justice of the peace of H. county rendered a judgment and issued execution thereon to W. county, and the county judge of the latter county granted an injunction restraining the collection of the execution, . . . he had no jurisdiction of the subject-matter, and no authority to grant the injunction." The case does not state the cause for injunction.

And an inferior court has no jurisdiction to enjoin an execution against complainant issued from a superior court, or to enjoin a judgment of another circuit court of concurrent jurisdiction. (The cause of action in the injunction suit is not stated.) Rosbell v. Maxwell, Hempst. 25.

2 Ind. Rev. Stat. (Gavin & Hord, pp. 23, 131), providing that injunctions may be granted by the circuit court and courts of the common pleas in their respective counties, simply confers jurisdiction, and does not allow one of these courts to enjoin proceedings or process of the other at the suit of the defendant, and a sale on a vendi. exp. should not be enjoined on the ground that real estate was being sold instead of personalty. Indiana & I. R. Co. v. Williams, 22 Ind. 158.

And under Ky. Civ. Code, § 285, providing that an injunction to stay proceedings on a judgment shall not be granted in any other court than that in which the judgment was rendered, a circuit court has no jurisdiction to enjoin the sale under an execution issued from a justice of the peace; and this section controls, although the injunction was only asked to prevent the levy on that particular property, but, was a suit by the defendant in the judgment. Chesapeake, O. & S. W. R. Co. v. Reasor, 84 Ky. 369; McConnell v. Rawe (Ky.) 1 S. W. Rep. 582.

And this section applies to all parties, whether they were parties to the judgment or not. Mallory v. Dauber, 83 Ky. 239.

In Arthurs v. Villeré, 43 La. Ann. 414, it was held that no doubt there exist exceptional cases in which an injunction may be granted by a court, not that which rendered the judgment about to be executed; but in none of these cases has the defendant in the suit ever been recognized the right to claim such relief from a forum, which was not that which exercised jurisdiction over him, and condemned him. He cannot be sentenced by one jurisdiction and be absolved by another. It is useless to enumerate those exceptional cases. It is enough to observe that injunctions in such instances have been allowed, as a rule, only to third parties, not connected with the suit and residing within the jurisdiction of the sister court issuing the process. And La. Code Pr. art. 617, provides that the execution of a judgment belongs to the courts by which the cause has been tried, and La. Code Pr. art. 629, provides that it is for the court which has rendered judgment to take cognizance of the manner of its execution. But see next case.

But in Copley v. Edwards, 5 La. Ann. 647, it was held that where the execution contains erroneous taxation of costs, and complainant pleads partial payment, the court of the parish where an execution is sought to be enforced may enjoin the same.

And in Brown v. Brown, 30 La. Ann. 506, it was held that a parish court in which a succession has been opened, having control of the property, has jurisdiction to enjoin a nominal administrator from collecting a judgment belonging to the estate under a judgment of the district court, as the attack is not on the validity of the judgment, but the right and power to act as an administrator, on the ground that there was no order, advertisement, commission, oath, or inventory. This injunction proceeding seems to have been sued out in aid of a suit for amotion or destitution, as it is called by the plaintiff, if such it can be styled, and to prevent the defendant from attempting to possess himself of a large amount of property until he shall have given bond as administrator.

In Wood v. Hughes (Ind.) 32 N. E. Rep. 594, it was held that the jurisdiction of an appeal from an order enjoining the levy of an execution upon real estate is not to the appellate court, but to the supreme court of Indiana. The case does not show what was the cause assigned for injunction.

d. *Federal and state courts.*

It is a well-recognized rule that state courts will not enjoin sales under process from the Federal courts and *vice versa*; but where a suit is brought in the state court and removed to the Federal court, this rule does not apply. But in one case a territorial court enjoined an execution from a Federal court attempted to be enforced beyond the jurisdiction of the Federal court.

The Federal courts cannot enjoin a sale of the property of one person on an execution issued out of a state court against the property of another. Daly v. The Sheriff, 1 Woods, C. C. 173. To the same effect, Hamilton v. Walsh, 23 Fed.

Rep. 420; Domestic & Foreign Missionary Soc. v. Hineman, 13 Fed. Rep. 161.

And the same rule was applied where bondholders of a railroad attempted to enjoin a sale of rolling stock on an execution from a state court. Ruggles v. Simonton, 3 Biss. 325.

And in American Asso. v. Hurst, 7 C. C. A. 598, 59 Fed. Rep. 1, it was held that a sale of land under an execution issued from a court of equity in Kentucky on a sale bond is a "proceeding," under U. S. Rev. Stat. § 720, prohibiting an injunction in the Federal court against a proceeding in the state court; denying the authority of Cropper v. Coburn, *infra*, as such case was in effect overruled by Freeman v. Howe, 65 U. S. 24 How. 453, 16 L. ed. 750.

So, a Federal court has no power to enjoin a levy made on lands which are situated in the foreign state and beyond its territorial jurisdiction, on the ground that it has appointed a receiver of such property under insolvency proceedings, and the statute does not prohibit a citizen from obtaining a preference in another state, and the person so enjoined is not a party or privy to the litigation in which the receiver was appointed. Schindelholz v. Cullum, 55 Fed. Rep. 885.

And a third party cannot obtain an injunction in a state court against the sale of his property on an execution issued from a Federal court. Brooks v. Montgomery, 23 La. Ann. 450.

Where an injunction is granted in a state court against an execution or attachment sale, and is transferred to the Federal court, the injunction remains in force, as U. S. Rev. Stat. § 646, provides that an injunction granted before a removal of a cause shall continue in force. Perry v. Sharpe, 8 Fed. Rep. 15.

Prior to this statute, in Diggs v. Wolcott, 8 U. S. 4 Cranch, 179, 2 L. ed. 587, it was held that where a suit to enjoin proceedings in a state court was removed to a Federal court, the latter could not grant an injunction.

After an injunction preventing the disposition of property in a foreign state, a subsequent injunction against another person, not a party to the original action, from enforcing a sale under execution in a foreign country (Mexico), cannot be obtained after an execution sale and purchase by a third party. Mexican Ore Co. v. Mexican Guadalupe Min. Co. 47 Fed. Rep. 351.

In Cropper v. Coburn, 2 Curt. C. C. 465, it was held that the act of Congress March 2, 1793, providing that an injunction will not be granted to stay proceedings in a state court, does not apply to an injunction against the sale of the property of a third person on an attachment against another, as the attachment on mesne process is not a proceeding.

But the authority of this case has been denied in Daly v. The Sheriff, 1 Woods, C. C. 175, and American Asso. v. Hurst, *supra*, and in effect was overruled in Freeman v. Howe, 65 U. S. 24 How. 453, 16 L. ed. 750, which was a suit in replevin followed by Covell v. Heyman, 111 U. S. 176, 28 L. ed. 390.

And in Needles v. Frost (Okla.) 35 Pac. Rep. 574, it was held that the levy and sale under execution from the Federal court for the Indian territory will be enjoined by a territorial court, where the levy is made in Oklahoma and the Federal court issuing such execution had no jurisdiction in Oklahoma; and this is not an interference with the process of the Federal court, as such execution is void, as judgments have no extraterritorial force.

And the Federal court may enjoin the inequitable use of judgments and executions in a state court, at the instance of a *cestui que trust*, who files a bill claiming that such judgments are trust property and asking that the same be assigned to her; and this does not conflict with U. S. Rev. Stat. § 720, prohibiting the Federal court from enjoining proceedings in a state court. Linton v. Mosgrove, 14 Fed. Rep. 543.

And in Watson v. Jones, 80 U. S. 13 Wall. 679, 20 L. ed. 666, which was a suit to prevent interference with possession of a church, the defendants pleaded that they claimed possession under a decree of a state court, and that the marshal of the state court was in charge of the property. It was held that the Federal decisions are conclusive against any injunction from the Federal court forbidding the defendants to take possession of property which the unexecuted decree of the chancery court requires the marshal to deliver to them. Yet as the bill prays for other and further relief, which the circuit court could render for the protection of the right of the plaintiffs, and which did not enjoin the defendants from taking possession of the church property, and which did not disturb the possession of the marshal of the Louisville chancery court, the Federal court had a right to hear the case and grant that relief. The possession of the marshal is a substitute for the possession of the defendants, and the decree recognizes the right of the defendants under the marshal; and while they are not enjoined from receiving that possession from the marshal, and he is not restrained from obeying the decree of the chancery court by delivering it, and while there is no order made on the marshal at all to interfere with his possession, the defendants are required by the decree to respect the rights of the plaintiffs, and to so use the possession and control to which they may be restored as not to hinder or obstruct the true uses of the trust, which that possession is intended to protect.

A levy and sale under process from the state court will be enjoined by the state court where there was a levy previously made on the same property under a judgment in the Federal court. Hall v. Boyd, 52 Ga. 456.

XVIII. *Remedy at law.*

a. *Personal property.*

It is well recognized that where there is a plain and adequate remedy at law, courts of equity will not interfere, by injunction, to prevent a sale on execution of personal property or proceedings on final process. There are exceptions to this rule, however, for which see *supra*, I. *Exempt personal property*; VI. *Railroad and quasi public corporation property*; VII. *Partnership property*; VIII. *Property owned by third parties*; b. *Personal property*; i. *Slaves*; j. *Wife's personal property*.

So, the remedy at law against an unlawful seizure of the personal property of a third person under an execution prevents an injunction against the same. Hall v. Davis, 5 J. J. Marsh. 290; Hammond v. St. John, 4 Yerg. 107.

Unless it be of a peculiar character, as slaves. Beatty v. Smith, 2 Smedes & M. 567.

The remedy by third opposition in Louisiana (which is similar to interposition of claim by third party) prevents an injunction against a foreclosure sale of land. Van Loan v. Heffner, 30 La. Ann. 1213.

And the remedy at law of action of claim and delivery will prevent an injunction against an execution sale. Richards v. Kirkpatrick, 53 Cal. 433; Chittenden v. Davidson, 20 Jones & S. 421.

And the right of trial of claim of title under Ala. Code, §§ 2587-2589, prevents an injunction against an execution sale of personal property. Gerald v. McKenzie, 27 Ala. 166.

And the remedy at law under N. C. C. C. P. § 177, subsec. 4, to try claim of title, prevents an injunction. Baxter v. Baxter, 77 N. C. 119.

And the remedy of affidavit and claim bond prevents an injunction. Ferguson v. Herring, 49 Tex. 128.

But this rule does not apply to a mortgagee. George v. Dyer, 1 Tex. App. Civ. Cas. (White & W.) § 780.

In Baker v. Rinehard, 11 W. Va. 238, it was held that the statutory remedy by giving a suspending bond or a forthcoming bond by the claimant and a trial by jury thereon prevents an injunction against an execution sale of personal property belonging to a third party. But see Cropper v. Coburn, 2 Curt. C. C. 465.

The remedy by an action of damages for unlawful seizure of goods will prevent an injunction. Chittenden v. Davidson, *supra*; Lewis v. Levy, 16 Md. 85; Freeland v. Reynolds, 16 Md. 416; Drewson v. American Surety Co. 22 N. Y. Week. Dig. 562; Frazier v. White, 49 Md. 1.

In Bowyer v. Creigh, 3 Rand. (Va.) 25, it was held that the remedy at law by requiring the sheriff to take an indemnifying bond before a sale of personal property on which there is a lien or suit for the specific property will prevent an injunction in favor of a lienholder. But see Daly v. The Sheriff, *infra*.

And a remedy at law giving a lien on the proceeds of an execution sale, in favor of a senior execution, will prevent an injunction against a sale of land under a junior execution. Sanders v. Foster, 66 Ga. 292; Wiley v. Bridgman, 1 Head, 68.

So, the remedy of motion to quash prevents an injunction against an execution sale. Nelson v. Griffey, 131 Pa. 273, Reversing 37 Pittsb. L. J. 65; Beaird v. Foreman, 1 Ill. 385, 12 Am. Dec. 197; Palmer v. Gardiner, 77 Ill. 143; Williams v. Wright, 9 Humph. 493; Jacks v. Bigham, 36 Ark. 481; Robinson v. Chesseldine, 5 Ill. 332.

And Mo. Rev. Stat. § 2405, providing that the judge of the court out of which the execution issued may quash the same prevents an injunction. Mellier v. Bartlett, 89 Mo. 134.

And Gantt's (Ark.) Dig. § 2619, providing for quashing an execution, gives a remedy at law against an execution issued against a person individually when it should be as administrator, and will bar an injunction against an execution levy. King v. Clay, 34 Ark. 291.

And the remedy at law to set aside a sale and stay the proceedings prevents an injunction against the sale. Fahs v. Roberts, 54 Ill. 192; Robinson v. Chesseldine, *supra*; Walker v. Gurley, 83 N. C. 429; La Crosse & M. Packet Co. v. Reynolds, 12 Minn. 213; Logan v. Lucas, 59 Ill. 237; Luco v. Brown, 73 Cal. 3; Jacks v. Bigham, *supra*. But *contra* was held in Buffum v. Foster, 77 Hun. 27.

The remedy in the court rendering the judgment, to stay the sale,—prevents a court of chancery from granting the same relief. Piggott v. Addicks, 3 G. Greene, 427, 56 Am. Dec. 547; Beaird v. Foreman, 1 Ill. 385, 12 Am. Dec. 197.

An administrator's sale will not be restrained for insufficiency of advertisement as there is a remedy in the orphans' court to have the proceedings corrected. Parker v. Allen (N. J.) 3 Cent. Rep. 478.

And the remedy by a motion, before the justice of the peace, to correct an execution to make it conform to the judgment, will prevent an injunction against an execution sale. Martin v. Pifer, 98 Ind. 245.

And the better practice is to file a motion in the case in which judgment is rendered for a return of the execution, where a judgment is superseded on error, before the sale, rather than to enjoin the sale. Jaedicke v. Patrie, 15 Kan. 287.

And the remedy of supersedeas prevents an injunction. Williams v. Wright, 9 Humph. 493.

And in Robinson v. Yon, 8 Fla. 350, it was held that the remedy in the court rendering judgment, to recall an execution, precludes enjoining an execution sale made at a time unauthorized. But see Krinke v. Parish, *infra*.

And the remedy by suit for possession of personal property analogous to replevin, trover, debt, trespass, or case, bars an injunction against an execution sale. Stillwell v. Oliver, 35 Ark. 184; Endres v. Lloyd, 56 Ga. 547; Lovette v. Longmire, 14 Ark. 339.

The remedy of trespass, trover, detinue, or replevin after sale, prevents an injunction against an execution sale of personal property. Du Pre v. Williams, 5 Jones, Eq. 96.

And the remedy at law of trespass or trover will prevent an injunction against an execution sale of personal property. Davidson v. Floyd, 15 Fla. 667; Miller v. Crews, 2 Leigh, 578; Kendrick v. Arnold, 4 Bibb, 235; Howell v. Howell, 5 Ired. Eq. 258; Johnson v. Connecticut Bank, 21 Conn. 148. But see Cropper v. Coburn, *infra*.

And in Kentucky the remedy of trover, or trespass, or detinue, will prevent an injunction against an execution sale of slaves owned by a third person. Nesmieth v. Bowler, 3 Bibb, 487.

And in Allen v. Freeland, 3 Rand. (Va.) 170, it was held that the remedy of detinue prevents an injunction against a sale of slaves on the execution against a third party,—especially where the title of the claimant is fraudulent. But see *supra*, VIII. f.

So, the remedy at law, of replevin, prevents an injunction against an execution sale of personal property. Frazier v. White, 49 Md. 1; Bouldin v. Alexander, 7 T. B. Mon. 425; Young v. Young, 9 B. Mon. 66; Allen v. Winstandly, 135 Ind. 105; Bryan v. Long, 14 Fla. 366. But see Central Trust Co. v. Moran, *infra*.

But in Amis v. Myers, 57 U. S. 16 How. 492, 14 L. ed. 1029, it was held that a clear and adequate remedy at law was held not to defeat the remedy of an injunction against a levy of execution on slaves, and the court says this is an exceptional case, and is not to be a precedent.

And a remedy at law under Mass. Rev. Stat. chap. 90, §§ 73–76, by giving bond to an officer to prevent a levy of an attachment, does not apply to a levy against firm property on a writ against an individual member of the firm. Cropper v. Coburn, 2 Curt. C. C. 465.

And in Daly v. The Sheriff, 1 Woods, C. C. 175, it was said that an action on an indemnifying bond given to the sheriff under a state statute, or an action of trespass against the sheriff, is not such an adequate and complete remedy at law as would oust the Federal court of equity of jurisdiction to restrain the sale of the property of a third person under an execution. But the Federal court cannot restrain the execution of process from a state court; denying authority of Cropper v. Coburn, *supra*, on the last proposition.

And a remedy at law to have an execution recalled will not bar an injunction against levy and sale on an execution issued on a dormant judgment. Krinke v. Parish, 9 Ohio, C. C. 141, 2 Ohio Dec. 85.

And the remedy of trespass or trover is not adequate where partnership property is levied on for a debt of one of the firm. Cropper v. Coburn, *supra*.

And the remedy of replevin or damages is inadequate to protect mortgagees of the rolling stock of a railroad from an execution sale, where the statute prevents a severance of the property, and the mortgagees are not entitled to the possession. Central Trust Co. v. Moran, 56 Minn. 158, 29 L. R. A. 212.

b. Real property.

In regard to the remedies at law preventing an injunction against the sale of real property on execution, the cases below suggesting such remedies must be examined in connection with the long line of authorities for and against injunctions *supra*, VIII. b, c, and X. and XV., as the cases given below are simply suggestive rather than de-

claratory as to the uniformity in denying injunctions where another remedy exists. In fact it may be said that nearly all the cases that deny injunctive relief against execution sales of real property do so on the ground that where complainant has a good title the sale will not prejudice him, and the remedy of defending an action of ejectment in such cases bars the right of injunction.

The remedy of an action to quiet title prevents an injunction against an execution sale that is void. Drake v. Jones, 27 Mo. 428.

And the failure to exercise the remedy at law by caveat against a grant of title, and by redemption, prevents an injunction against proceedings to complete a void sheriff's sale. Lafferty v. Conn, 3 Sneed, 221.

And the remedy at law by setting up ownership and right to redeem prevents an injunction against a judgment to recover possession. York Mfg. Co. v. Cutts, 18 Me. 204.

And a remedy at law to contest title prevents an injunction against a sale under mechanic's lien. Coughron v. Swift, 18 Ill. 414.

And the remedy by ejectment bars an injunction in favor of an executor against an execution sale of real estate for the debts of an heir. Johnson v. Connecticut Bank, 21 Conn. 148.

In Roman Catholic Archbishop v. Shipman, 69 Cal. 586, where an injunction was refused against the sale of real property belonging to a third party, as extrinsic evidence was not necessary to protect the title, it was suggested that there was a remedy against the enforcement of the judgment by asking the court rendering judgment to refuse a writ of fi. fa., or by superseding it, or by an original action to enjoin for matters subsequent to the judgment, or to have adverse claim determined under Cal. Code Civ. Proc. § 738.

But in Williamson v. Russell, 18 Va. 612, it was held that the remedy at law of damages against a sheriff for ejecting a person not a party to a suit under a writ of fi. fa. will not prevent an injunction against execution of a writ.

XIX. *Irregularities.*

a. *Execution.*

1. *Condition precedent.*

Irregularities in the proceedings prior to the issuing of the execution will not be ground for injunction, unless a mandatory statute is violated.

So, where a defendant fails to appeal, or join in the appeal taken by the plaintiff, and thereby acquiesces in the judgment, he cannot after affirmance obtain an injunction, although a fi. fa. was issued before the judgment of the supreme court was recorded in the court below. Savoié v. Thibodaux, 29 La. Ann. 51.

And irregularity in quashing a forthcoming bond will not be ground for enjoining an execution on the original judgment against the surety who did not sign the forthcoming bond, as there is a remedy in the court issuing the execution to supersede the same. Thomas v. Tappan, Freem. Ch. (Miss.) 472.

And an injunction will not be granted against an execution sale on an execution sale bond, for irregularities in the affidavit on which execution issued, where the judgment was destroyed by burning the court-house, as La. act March 18, 1860, authorizing an injunction in certain cases, does not apply to an injunction against an execution on a twelve-months' bond. Wafer v. Wafer, 7 La. Ann. 542.

And the remedy at law to restrain an execution for irregularities in the proceedings will prevent an injunction against the same at the instance of a purchaser. Wagner v. Pegues, 10 S. C. N. S. 259.

An order of seizure and sale issued without the production of the complete evidence required by law will not authorize an injunction, as this is not one of the grounds, under La. Code Pr. art. 739, providing eight grounds for arresting the sale under a seizure; and there is also a remedy by appeal. Dupre v. Anderson, 45 La. Ann. 1134.

And that an execution on a forfeited fi. fa. bond was issued without the sanction of the court is not ground for enjoining the same. Bryan v. Knight, 1 Tex. 180.

And a fi. fa. on a replevin bond will not be enjoined on the ground that the same was issued without præcipe where the creditor has ratified the act of the clerk. Clarkson v. White, 4 J. J. Marsh. 529, 20 Am. Dec. 229. But see Berry v. Nichols, *infra*.

In Berry v. Nichols, 96 Ind. 287, the bill of complaint alleging that the writ of vendi. exp. issued without a præcipe was sufficient to set aside the sale, as Ind. Rev. Stat. 1881, § 741, provides that a vendi. exp. can only issue on a præcipe; but a sale should not be perpetually enjoined; and the real estate should not be released from the lien of the judgment.

And in Bryan v. Knight, *supra*, it was said that if a bond in fi. fa. was not taken in conformity to the law, and was not such an one as an execution could issue upon, it might be ground for injunction.

2. *Form.*

An injunction will not be granted against an execution sale on account of the form of the execution, or variance in the same, as the remedy in the court issuing the same is generally adequate and sufficient. (See further, *Party*, *infra*.)

So, an irregularity in the form of an execution will not be ground for an injunction, as there is a remedy in the court issuing the execution. Trieste v. Enslen (Ala.) 17 So. Rep. 356.

And the variance between the names in the execution and judgment, where the names are stated in the judgment roll, will not authorize an injunction against the judgment or execution levy on land at the instance of a third party. Hill v. Gordon, 45 Fed. Rep. 278.

And that the execution did not conform to the judgment will not be ground for enjoining the sale, as there is a remedy in the court issuing execution by motion for correction. Martin v. Pifer, 96 Ind. 245.

In an action by defendant to quiet title after an execution sale, and to enjoin the purchasers, on the ground that the order of sale was not a true copy of the original and that the real estate was not sold on a fi. fa. issued on the judgment, it was held, under 2 Ind. Rev. Stat. 1876, p. 228, providing that a sheriff's return entered on the execution docket shall be a record, that the truth of such record cannot be impeached without a direct proceeding against the officer. Fry v. Gallaspie, 61 Ind. 478.

And executions will not be adjudged void which are valid upon their face, where no attempt has been made to set aside or quash the same. Beaird v. Foreman, 1 Ill. 303, 12 Am. Dec. 197.

A sale on execution of personal property of the surety on a cost bond will not be enjoined, although the execution is void on its face, and although the justice had no authority to issue the same, as there is a remedy at law to compel the justice to try the question made by affidavit of illegality, and the justice can be compelled to hear and try such claim. Wordehoff v. Evers, 13 Fla. 339.

And an execution not under seal will not be ground for enjoining the same. Jilson v. Stebbins, 41 Wis. 235.

3. *Time.*

Injunctions will not be granted on account of premature issuance of a writ of seizure, execution, or delay in issuing the same.

So, premature issuance of a writ of seizure and

sale will not authorize an injunction, as a new writ will immediately lie under the same order. Williams v. Douglass, 47 La. Ann. 1277; Dayton v. Commercial Bank, 6 Rob. (La.) 17.

So, an injunction will not be granted against an execution as having prematurely issued under the stay law, where complainant does not bring himself within the terms of the stay law. Windisch v. Gussett, 30 Tex. 744.

And delay in issuing an execution will not be ground for enjoining an execution sale, as against a purchaser for value, as no one but the defendant can object to irregularity in an execution. Wagner v. Pegues, 10 S. C. N. S. 259.

4. *Party.*

Injunctions have been granted where executions improperly issued against stockholders, and sometimes the death of the plaintiff has been cause for injunctions where the executions ignored that fact; but on this point there is some conflict of authority. To obtain an injunction for irregularity as to the party named in the execution, the complainant must be in danger of injury, or else it will not be granted.

An injunction was granted to prevent a creditor having a judgment against a banking company from enforcing it as against an alleged shareholder whose relation as such to the company had long ceased to exist, though technically he was still a shareholder. Bargate v. Shortridge, 5 H. L. Cas. 297, 24 L. J. Ch. 457.

Where an execution was issued against stockholders individually on a judgment against the corporation, and there is no adjudication that certain persons were members, the same will be enjoined, as the execution should follow the judgment and run against the corporation, with a clause that it be levied on the property of the members and leave it to the officer to determine if they are members. Hampson v. Weare, 4 Iowa, 13, 66 Am. Dec. 116. See also Stout v. La Follette, 64 Ind. 365, *supra*, XI. b. 1, as to levy on stock; Weber v. Bullock, 19 Colo. 214; and Anderson v. Riddle, 10 Mo. 23, *supra*, VIII. b.

Where the plaintiff named in execution is dead the sale should be enjoined. Dailey v. Wynn, 33 Tex. 614.

So, where there is no indorsement on the execution as required by Iowa Rev. § 3284, providing that after death of the plaintiff an execution may be issued, but the clerk must indorse the death and the names of the personal representatives on the execution, an injunction will be granted. Meek v. Bunker, 33 Iowa, 169.

But in Rooks v. Williams, 13 La. Ann. 374, an injunction was refused where a fi. fa. was issued in the name of the decedent instead of in the name of the administrator, as relief could be obtained by paying the debt to the administrator.

And where an execution was issued in the name of an executor of the deceased partner instead of in the name of the surviving partner, proceedings thereon will not be enjoined at the instance of the debtor who does not tender into court the money, where he claims that a third party is asserting an attachment against the same. Hastings v. Cropper, 3 Del. Ch. 165.

An assignment of the right in a seizure to a third party, without notice to the defendant, will not be ground for enjoining the sale, where no tender is made of the amount due. Walker v. Gillavaso, 28 La. Ann. 42.

But the assignor of a mortgage and judgment will be restrained at the instance of his assignee, from issuing process thereon for the use of his assignee, where such assignor has not the authority to take such proceedings, although he may have the power of attorney to collect the same to be paid by him to his assignee, but not the power to sue out process, where the sale would destroy the lien of complainant. Lesley v. Shock, 3 Houst. (Del.) 130.

A defendant who does not appeal cannot obtain an injunction against the execution on the ground that it also included in it the names of the parties and their sureties appealing. Kendrick v. Rice, 16 Tex. 254.

Fees paid to counsel in prosecuting an injunction against an illegal seizure because the defendant was dead when suit was filed and was named in the writ cannot be recovered by the plaintiff of the defendant where the injunction is allowed. Hill v. Noe, 4 La. Ann. 304.

5. *Excessive.*

There is some difference in the cases in regard to injunctions for excessive executions owing to the facts in each case. It seems that an injunction will not be generally granted against the excess unless the balance is tendered, or where the excess is small, or where there is a remedy in the court issuing execution, and will not be granted on account of there being several executions issued.

Where a credit was allowed in the judgment, but not in the body of the fi. fa., but was indorsed on the back of it, with a certificate by the clerk under a seal of court, an injunction should not be granted against the sale or the execution. Rowly v. Kemp, 2 La. Ann. 360.

And that an execution is excessive in the amount of $10 will not be ground for enjoining the same. Jilson v. Stebbins, 41 Wis. 235.

And an execution against a surety on a claim bond in excess of the penalty will not be enjoined as there is a remedy in the court from which the execution is issued. Trieste v. Enslen (Ala.) 17 So. Rep. 356.

An execution issued for more than the amount due will not authorize an injunction against the whole of the execution. Rowly v. Kemp, *supra*.

And under La. act 1855, § 4, p. 324, limiting an injunction against a fi. fa. for subsequent payment to the amount pleaded, the same rule applies to mistake in issuing writs of fi. fa., and the right to enjoin is limited to the amount occasioned by the error of the officer, and does not extend to the whole judgment. Barrow v. Robichaux, 14 La. Ann. 203.

And an execution for a greater amount than due will not be enjoined, where the amount admitted to be due is not tendered. Eaton v. Markley, 126 Ind. 123.

But in Harper v. Terry, 16 La. Ann. 216, it was said that if a fi. fa. issues for more than is due upon the judgment, the remedy is by injunction against the sale, under La. Rev. Stat. p. 246, §§ 3, 4.

A sale will not be enjoined because made under several writs, or because several writs on the same judgment are issued at the same time.

The improper issue of a second execution will not authorize an injunction against the sale, as the remedy is in the court issuing it. Gregory v. Ford, 14 Cal. 138, 73 Am. Dec. 639.

And the same was held where two executions were issued for the same debt to different counties at the same time. Elliott v. Elmore, 16 Ohio, 27.

And was refused against an execution sale made under three different writs, two in the name of different parties, one being a writ of fi. fa., as the objection is without force. Walker v. Villavaso, 28 La. Ann. 42.

b. *Levy.*

1. *Excessive.*

That a levy is excessive will not be ground for enjoining the sale, and that hard times will prevent a fair sale will not be ground for injunction, although an injunction was allowed in one case.

An injunction will not be granted against ex-

cessive levy, where the bill is filed by unsecured creditors, and the judgments are not attacked. Dodd v. Solomons, 93 Ga. 314.

Or where the property did not bring the amount of the judgment and the sale was fair. Allagood v. Cook, 92 Ga. 570.

And an injunction will not be granted for excessive levy, as La. Code Pr. arts. 652, 653, provide a remedy by reduction. Dabbs v. Hemken, 3 Rob. (La.) 123; Lambeth v. Sentell, 33 La. Ann. 691; Hefner v. Hesse, 29 La. Ann. 149.

And an excessive levy of an execution upon realty will not be enjoined, as there is a remedy by motion to quash the same, if any injury could result. Palmer v. Gardiner, 77 Ill. 143.

So, an excessive levy on real property is not of itself a cause for injunction against the sale,—especially where the debtor does not offer personal property to the officer sufficient to satisfy the execution. Cook v. De la Garza, 13 Tex. 431.

And a levy will not be enjoined as excessive, and as made without noticing growing crops of great value, where such levy was made in small divisions so as to sell in parcels, and complainant had gathered and pocketed proceeds of the growing crop. Saffold v. Foster, 75 Ga. 273.

And that the levy was excessive, and the property capable of being subdivided, where the evidence is conflicting, will not be cause for injunction. Brunner v. Royal, 89 Ga. 776.

Hard times is not a ground for enjoining execution and sale, as this is no reason why it should not be sold for what it would bring to pay a debt justly due, and reduced to judgment and proceeding under final process. Winn v. Henderson, 63 Ga. 365; Poullain v. English, 57 Ga. 422. But see *Ex parte* Grimball, *infra*.

In *Ex parte* Grimball, T. U. P. Charlt. (Ga.) 153, an injunction was granted to stay an execution sale for five months, on depositing with the sheriff sufficient property, the valuation to be ascertained by the price three months preceding the embargo act, as such act produced a national calamity of depression and it would have been ruinous and against conscience to allow a sale to be forced at that time, and a hardship and oppressive. The later cases immediately *supra* overrule this decision in effect, but do not refer to it.

2. *Mode, manner, and description.*

Irregularities in the mode of levy, or description of the property seized, have generally been held insufficient grounds for injunction, where the description is sufficiently accurate to easily identify the land. Boggs v. Lowrey, 78 Ga. 539.

And so with personal property levied upon, where the defendant knew what property was seized. Deville v. Hayes, 23 La. Ann. 550.

And the failure of the sheriff to take personal property into his possession will not authorize the debtor to enjoin the sale, as, if not seized, the debtor would have no ground of complaint. *Ibid.*; Gusman v. De Poret, 33 La. Ann. 333.

And an injunction against the sale of slaves was not granted on the ground that one of the slaves was not in the county or in the possession of the sheriff, and that such a sale would be at a ruinous price, where it was the fault of the plaintiff that the sheriff had not taken possession. Calderwood v. Trent, 9 Rob. (La.) 227.

And a surety on a forthcoming bond cannot obtain an injunction against an execution thereon on the ground of irregularity in the levy of the execution for which the bond was given, where the levy was made by the sheriff coming into a store with the execution, and the debtor supposed that both parties considered that the levy was made on the goods, and the debtor recognized the levy. Baine v. Williams, 10 Smedes & M. 113.

3. *Notice.*

If no notice of the levy is given as required by statute, an injunction will be granted, but if the objection is that the notice was defective on account of time, an injunction will not be granted.

A temporary injunction was granted where the plaintiff in the injunction had no notice of any levy until after the sale. Brunner v. Royal, 89 Ga. 776.

And under La. Code Pr. arts. 654, 655, requiring notice of seizure to be given to the defendant in execution three days prior to the advertisement, the failure to give such notice will render the sale void, and an injunction will be granted against making the sale. Lapene v. McCan, 28 La. Ann. 749.

And under La. Code Pr. arts. 575, 624, providing for notice of judgment to be served on the defendant, an execution of a writ of fi. fa. will be enjoined, where such notice is not given. Greene v. Johnson, 21 La. Ann. 464.

And an injunction will be granted against a mortgage sale, where the notice of order of seizure and sale was not served upon the tutrix before she was confirmed, she being a necessary party in executory proceedings on the mortgage. O'Hara v. Folwell, 26 La. Ann. 370.

But irregularity in giving plaintiff three days' notice of seizure of his land, instead of five as required by law, will not authorize an injunction, where another seizure can be made immediately by taking out an alias order. Morgan v. Whitesides Curator, 14 La. 277.

c. *Sale.*

1. *Notice and advertisement.*

Irregularities in notices and advertisements seldom entitle the complainant to an injunction, as such irregularities usually are not prejudicial, and there is a remedy in the court from which the process or order of sale issued. But an injunction was granted where the advertisement was published in a Sunday paper.

Irregularities in the proceeding of the sheriff in not giving proper notice of the sale will not authorize an injunction preventing a writ of possession. Wilson v. Miller, 30 Md. 82, 96 Am. Dec. 568.

And where a waiver of an advertisement is made by the debtor, an attempt to withdraw such waiver will not authorize an injunction, where the advertisement is dispensed with. Borron v. Solibellos, 23 La. Ann. 355.

And that a sale of property seized on an execution was advertised before the expiration of the three days allowed for a notice of seizure, will not authorize an injunction against the sale, where more than the necessary delay between the seizure and sale was allowed. Dabbs v. Hemken, 3 Rob. (La.) 123.

So, an execution sale will not be enjoined, because the advertisements were all posted in the same village, and not in three different points in the parish, where the ground for injunction is that they were not made by a duly authorized officer, and that the description was indefinite. Dorsey v. Hills, 4 La. Ann. 108.

And a sale made under an order of the orphans' court to pay debts of deceased will not be enjoined on the ground that the advertisements are uncertain or insufficient, and the orphans' court has full power to correct the same. Parker v. Allen (N. J.) 3 Cent. Rep. 476.

And a slight variance between the description of the property advertised, and that in the notice of seizure, which is not misleading, will not authorize an injunction against the sale. Dabbs v. Hemken, 3 Rob. (La.) 129.

So, the error in advertising a sale for cash, having been corrected in a subsequent advertisement, will

not authorize an injunction against the sale. McMicken v. Morgan, 9 La. Ann. 208.

Insufficiency in description in an execution sale of the interest of the debtor in the land will not authorize an injunction, as, if the description is insufficient, there will be no sale, and the party complaining will not be prejudiced, and if there is a good sale, it should not be enjoined. Henderson v. Hoy, 26 La. Ann. 156.

And insufficiency of advertisement will not authorize an injunction against an administrator's sale, as there is a remedy in the court where the proceedings are pending. Parker v. Allen (N. J.) 3 Cent. Rep. 476.

And an injunction will not be granted to restrain an execution sale on account of insufficiency in advertising the quality of animals, where the proof does not establish this fact. Dorsey v. Hills, 4 La. Ann. 106.

And an assignor of a mortgage cannot enjoin a judgment against him or set aside the sale in favor of the assignee for the deficiency, where the master failed to give the assignee personal notice of the sale as he had promised, and he was thereby prevented from bidding on the property, as the negligence of the master acting as his agent is not sufficient reason to deprive the purchaser of the benefit of his purchase. Crumpton v. Baldwin, 42 Ill. 165.

A sale under foreclosure will not be enjoined at the instance of defendant on the assumption that the sheriff and district court will subsequently misinterpret a new statute in regard to redemption. Gordon v. Bodwell (Kan.) 39 Pac. Rep. 1044.

But under Ind. Rev. Stat. 1881, § 2000, prohibiting labor on Sunday, an advertisement of sheriff's sale in a Sunday newspaper is void, and such sale may be enjoined. Shaw v. Williams, 87 Ind. 158, 44 Am. Rep. 756.

In Clement v. Oakey, 2 Rob. (La.) 90, it was said that an injunction is the proper remedy to arrest an order of seizure, for alteration in the property by subdivision and changes in names of streets and squares, on the ground that the seizure notices and advertisements were defective.

On dissolution of an injunction against the execution of a deed under a fi. fa. on account of the advertisement of the sale, a judgment should not be rendered against the complainant for the amount of the judgment at law. McDonald v. Cook, 11 Mo. 632.

2. *Appraisement.*

The failure to make an appraisement required by law will generally be sufficient ground for an injunction; but this was refused where the defendant was not prejudiced and had a remedy in the court rendering judgment.

A sale "without appraisement" will be enjoined where the clerk improperly indorsed on the execution "without appraisement," when the indorsement should have been the reverse. Robinson v. Perry, 4 Tex. 273.

And a junior mortgagee may have an injunction against the execution of a fi. fa. on the ground that the sheriff was about to sell the mortgaged property without an appraisement as required by law, which would cause loss to the mortgagee. Robertson v. Travis, 4 La. Ann. 151.

So, where no notice to appoint appraisers or appraisement was ever made, as contemplated by law, and the said property was adjudicated for a sum below two thirds of its value. Drouet v. Lacroix, 28 La. Ann. 126.

But in Walker v. Villavaso, 26 La. Ann. 42, it was held that where no legal notice of appraisement was made or served, but the plaintiff had the benefit of this objection, if it existed, and it could be remedied in future proceedings, an injunction against the sale was denied. (This was the fourth injunction against the sale.)

And the same was held in Robinson v. Chesseldine, 5 Ill. 332, as there was a remedy by motion to set aside or quash the execution, and if complainant was entitled to have an appraisement, the court on proper application could have an order to that effect indorsed on the execution.

3. *Costs.*

An injunction was allowed against a resale by an administrator for failure to pay the bid and costs, where the purchaser contested the commissions and expenses only, but offered to submit the same to the county court which ordered the sale and offered to pay all that would be required. Huddleston v. Kempner, 87 Tex. 372, affirming 28 S. W. Rep. 236.

In an injunction against an execution because containing erroneous costs, it is error to enjoin any that are not attacked, and it is error to refer the taxing to an auditor, as this is the province of the court; and judgment damages, and interest should not be rendered in the injunction suit as the statute relating to damages excludes costs. Lockart v. Stuckler, 49 Tex. 765.

4. *Time, place, and manner.*

Irregularities as to time, place, and manner of making a sale have usually been held insufficient to entitle an injunction.

An injunction will not be granted to restrain a sale not made upon one of the particular days designated by statute, as Fla. act 1844 provides for relief in the court rendering judgment to stay the same and control process. Robinson v. Yon, 8 Fla. 350.

An order for injunction against a sale under execution is not effectual until the execution of the bond required by the order, where it was claimed that the sheriff had agreed to an adjournment of the sale while an injunction was being obtained against the sale of an equity of redemption, but such sale could not have been prevented on account of other executions. Pell v. Lander, 8 B. Mon. 554.

And an injunction will not be granted against a sale of fixtures at the court-house, under a mortgage foreclosure, as La. Code Pr. art. 656, providing for the sale of movables at the place where seized, does not apply. Walker v. Villavaso, 26 La. Ann. 42.

And an injunction against completion of a sheriff's sale on the ground that the sale was made in entirety will not be granted on conflicting evidence; besides, the sheriff has discrimination as regards the mode of making sales. Holmes v. Steele, 28 N. J. Eq. 173.

Or where different lots of land have been sold *en masse* greatly below their value. Ballance v. Loomise, 22 Ill. 82.

And the same was held under Colo. Gen. Laws, chap. 53, § 1416, providing that property if susceptible of division shall be sold in such quantities as shall be necessary to satisfy the execution and costs, where the property was sold four different times during the year and in no instance did it bring more than the debt and costs, and there was an offer to sell the property separately and no bids were received. White v. Crow, 110 U. S. 183, 28 L. ed. 113.

A sale of land specifically pledged for the debt in judgment will not be enjoined in order to have it surveyed and subdivided, where the debtor had ample time to have the same done before judgment so as to sell each tract separately. Reeves v. Bolles, 95 Ga. 402.

And the failure of the debtor to resist the manner of sale will prevent an injunction against permitting the purchaser to use the property pending an action to annul the sale, where pews in a church are sold as ground rents in a lump. City Bank v. McIntyre, 8 Rob. (La.) 467.

An execution sale of the undivided one half of a

plantation will not be enjoined for failure to divide the same into lots, as provided for in the Constitution, where it could not be divided into lots. Borron v. Sollibellos, 28 La. Ann. 353.

And an injunction will not be granted against the completion of a sheriff's sale on the ground of misunderstanding in reference to a matter of law on the part of the bystanders as to whether or not a building on the ground must come down, or that the sheriff refused to adjourn the sale, or that the bidder was an agent of the buyer and thus bought the property at a lower price. Skillman v. Holcomb, 12 N. J. Eq. 131.

5. *Officer.*

Irregularities in regard to the authority of the officer making the sale are generally regarded as insufficient to obtain an injunction.

That a new court commissioner was not reappointed on division of the state of Virginia to complete a sale made in West Virginia, under a decree in force when the state was formed, will not be ground for enjoining the sale, as such commissioners are not public officers. Shields v. McClung, 6 W. Va. 79.

And an injunction will not be granted against a sale of land under execution, on the ground that the party making the sale is a deputy of a sheriff who has absconded, but the fact has not been judicially determined. Ballance v. Loomis, 22 Ill. 82.

And an heir is not a proper party to object that a second master in foreclosure to make a sale was appointed without notice to the administrator, when such an heir is not a party, or necessary party, in the foreclosure proceedings. Merritt v. Daffin, 24 Fla. 330.

And an execution sale will not be enjoined on the ground that the officer levying styles himself a special-deputy sheriff. Miller v. Clements, 54 Tex. 351.

As to making officer a party, see *infra*, XX. c.

XX. *Effect of injunction on executions, sales, and final process.*

a. *Release of errors.*

An injunction against a sale under execution which does not attack a judgment is not a release of errors. Fahs v. Roberts, 54 Ill. 192.

In matters prior to and including the judgment. St. Louis, A. & T. H. R. Co. v. Todd, 40 Ill. 89.

b. *Release of lien.*

As to the effect of injunctions on execution sales and final process some of the cases base the decision on the question of the return of the officer, and hold that a return "stayed by injunction" releases the levy and lien. Bisbee v. Hall, 3 Ohio, 449; Taggert v. Hill, *infra*; Keith v. Wilson, 3 Met. (Ky.) 201.

And the same was said to be the rule in Eldridge v. Chambers, 8 B. Mon. 411; Daviess v. Myers, 13 B. Mon. 511; Newlin v. Murray, *infra*.

Where there are several executions in the hands of the officer, and the senior execution is stayed by injunction, and he sells on the junior execution, he must apply the money to that execution. Newlin v. Murray, 63 N. C. 566; Conway v. Jett, 3 Yerg. 481, 24 Am. Dec. 590.

But not where the injunction is dissolved before the day of the sale. Duckett v. Dalrymple, 1 Rich. L. 143.

But where the kind of property levied upon is discussed in the opinion, the weight of authority is that an injunction releases the lien of a levy upon personal property. Overton v. Perkins, Mart. & Y. 367.

And in McCamy v. Lawson, 3 Head, 256; Rocco v. Parczyk, 9 Lea, 328; Miller v. Estill, 8 Yerg. 452; and Porter v. Cocke, Peck (Tenn.) 30,—it was said that an injunction releases the lien of a levy of a fi. fa. on personal property.

And the plaintiff has no claim on the sheriff for releasing goods, where there is an injunction against the sale. Taggert v. Hill, 2 Hayw. (N. C.) 81, N. C. Conf. Rep. 164.

In Ross v. Poythress, 1 Wash. (Va.) 130, the court declined to express an opinion as to the effect of an injunction obtained upon an execution against goods and chattels after seizure, saying that it was probably settled by Va. act 1791, which, directing a restitution of the money levied, would seem to include inferior cases, and to extend, by an equitable construction, to the restitution of goods seized on execution, and not sold.

But in Pettingill v. Moss, 3 Minn. 222, it was held that where a levy on personal property has been enjoined, the sheriff may complete the sale after dissolution of the injunction.

And in Flowers v. Fletcher, Sneed (Ky.) 225, it was said that where an execution has been levied, or even the money made, but not paid to the plaintiff, if the defendant obtains an injunction, the property is to be restored or the money returned to the defendant by the sheriff. The distinction as to the kind of property levied on is not discussed.

If an injunction is obtained after execution executed, and the goods are in the hands of the sheriff, and he sells them without process, he will be ordered to pay the proceeds into court. Franklyn v. Thomas, 3 Meriv. 225.

And in Hawkshaw v. Parkins, 2 Swanst. 539, it was said that after an execution issued against the goods and an injunction then issued, the sheriff might proceed to sell; but the court will in special cases stay the money in his hands.

And in Conway v. Jett, 3 Yerg. 481, 24 Am. Dec. 590, where the sheriff was sought to be held liable for not selling under other executions that came to his hands after an injunction was granted against an execution levied on negroes, it was held that the injunction does not release the levy so as to subject the property to other executions, unless the order of the judge requires security to be given in the injunction suit.

And where personal property had been levied on, it was held that under Miss. act 1824, giving to judgment creditors a lien from the time of entry of judgment, an injunction against an execution levy does not displace the lien, but its execution is simply restrained until dissolution of the injunction. Smith v. Everly, 4 How. (Miss.) 178.

Where the question as to the effect of the injunction on the lien was discussed with reference to the kind of property, the weight of authority is that, where the property levied on is real estate, the lien is not devested by the injunction. Overton v. Perkins, Mart. & Y. 367; Porter v. Cocke, Peck (Tenn.) 30; Miller v. Estill, 8 Yerg. 452 (Haywood, J.); Pettingill v. Moss, 3 Minn. 222; Knox v. Randall, 24 Minn. 479; Lynn v. Gridley, Walk. (Miss.) 543, 12 Am. Dec. 591; Anderson v. Tydings, 3 Md. 427; Gibbes v. Mitchell, 2 Bay, 120; Boyd v. Harris, 1 Md. Ch. 468.

In Rocco v. Parczyk, 9 Lea, 328, and McCamy v. Lawson, 3 Head, 256, it was said that the lien of a levy on real estate was not discharged by an injunction.

There are some cases in regard to the effect of an injunction on final process, which do not discuss the distinction as to a levy on real or personal property, and some of the cases do not disclose the kind of property levied upon, and there is such a conflict that it is difficult to state clearly a rule that should control in such cases.

A sci. fa. is not necessary to obtain a writ of fa. fa. where the execution of the same has been stayed by injunction, and not more than a year has elapsed since the affirmance by the court of appeals of the decree of dissolution. Nolan v. Seekright, 6 Munf. 165.

And in Gibbes v. Mitchell, 2 Bay, 120, it was held that an injunction does not release the lien of a levy, and after dissolution the sheriff may proceed

to sell after a year and a day without a sci. fa., or even after he is out of office. (The levy in this case was on negroes.)

And in Hefner v. Hesse, 29 La. Ann. 149, it was said that the injunction merely suspended the executions, and it may be that they have as much force on dissolution as they had on the day they were issued. This case does not refer to Dugat v. Babin, *infra*.

And where the defendant had caused the delay by an injunction, an execution will not be set aside because sued out above a year after the judgment without a sci. fa. to revive it. Michel v. Cue, 2 Burr. 660. But the converse was held in Booth v. Booth, 1 Salk. 323.

And in Miller v. Estill, 8 Yerg. 452, it was said that the general lien of a judgment is defeated when enjoined and a levy is not made in twelve months, as against a purchaser.

And in Lockridge v. Biggerstaff, 2 Duv. 281, 87 Am. Dec. 498, it was held that an injunction arrests the execution of a fi. fa. though levied, and discharges the lien notwithstanding the injunction is wrongfully sued out. The creditor should sue out a new fi. fa. on dissolution of the injunction and not a vendi. exp. (The kind of property is not stated.)

Under La. Code Pr. art. 700, providing that so long as the injunction continues the limit for making returns does not affect the right enjoined, as it is doubtful whether a sheriff can make a sale on the writ after the injunction against the same has been dissolved. Dugat v. Babin, 8 Mart. N. S. 391. But see Hefner v. Hesse, 29 La. Ann. 149.

A sale under an execution cannot be made after the return day of the same, although the sale has been prevented by an injunction which has been dissolved, as Ill. Rev. Stat. chap. 77, providing that the time that an officer is restrained from making a sale shall not be considered, does not apply to § 8 of the same chapter which provides that executions shall be returnable ninety days after date. Welker v. Hinze, 16 Ill. App. 328.

And under Miss. act Feb. 24, 1844, Hutch. Code, 232, providing that the lien of a judgment shall cease within two years from the passage of the act, where an execution levied on land was restrained for more than two years after the passage of that act on a judgment rendered prior thereto, there being no saving clause in the act, the lien of the judgment was gone. Kilpatrick v. Byrne, 25 Miss. 571.

An order of sale differs from an ordinary execution, and an injunction against the sale under the latter where the validity of process is not questioned does not suspend the process, but the sheriff may sell other property; but he cannot do this under an order of sale which is enjoined. Seligson v. Collins, 54 Tex. 314.

The execution of an order of sale cannot be arrested except by injunction. State v. Judge of 2d Dist. Ct. 30 La. Ann. 233.

In Anonymous, 6 Mod. 130, where the holder for a term of years was kept out of possession by reason of his judgment and execution in ejectment having been enjoined, a motion to renew the term on account of the injunction was denied. (Holt, Ch. J., said he considered there wanted a clock over against the hall-gate.)

Md. act 1799, chap. 79, § 10, requiring the sheriff to restore possession of property levied upon where the sale is enjoined, does not require him to return the money instead of the property, where the sale was completed before the injunction issued; and the county court cannot require such return before the injunction is made perpetual. Dail v. Traverse, 3 Gill, 41.

c. *Officer.*

An officer who disregards the injunction and proceeds with the sale is a trespasser, if he has knowledge that an injunction has been granted. There is some conflict of authorities as to whether he should be made a party defendant in the injunction suit.

An officer is a trespasser if he has knowledge of an injunction against a sale, and proceeds to make the sale, even if not served with notice. Turner v. Gatewood, 8 B. Mon. 613; Buffandeau v. Edmondson, 17 Cal. 436, 79 Am. Dec. 139; Stinson v. McMurray, 6 Humph. 339.

And where an injunction had been granted against proceedings at law, and exception was taken to special bail, and the sheriff ruled to produce the body of the defendant, it was a contempt of the injunction. Bullen v. Ovey, 15 Ves. Jr. 141.

But where a sheriff's sale was restrained until the further order of the court in a collateral case, and the report of the referee dismissed the complaint for the injunction, and the sheriff made the sale, it was held that the sheriff was entitled to fees, as the report of the referee under N. Y. Code Civ. Proc. § 1228, stands as a decision of the court. Van Gelder v. Van Gelder, 26 Hun, 356.

Some cases hold that the sheriff need not be made a party in a suit to enjoin an execution sale of property of a third party. Holmes v. Chester, 26 N. J. Eq. 79. See this case *infra*.

And the same was held in a suit to enjoin proceedings on a judgment. Ashton v. Parkinson, 8 Phila. 338.

And the same was held where it was claimed that the sale was unfair. Brooks v. Lewis, 13 N. J. Eq. 214.

And the same was held in a suit to enjoin the sale of exempt property. Stout v. McNeill, 98 N. C. 1; Montgomery v. Whitworth, 1 Tenn. Ch. 174.

But in North v. Peters, 138 U. S. 271, 34 L. ed. 936; Olin v. Hungerford, 10 Ohio, 268; and Blanton v. Hall, 2 Heisk. 424,—which were suits to enjoin the sale of property of a third party, it was held that the sheriff was a necessary party.

And in Burpee v. Smith, Walk. Ch. (Mich.) 327; Edney v. King, 4 Ired. Eq. 465; and Lackay v. Curtis, 6 Ired. Eq. 199,—which suits attacked the judgments and executions, it was held that the sheriff was a necessary party.

And in Spotswood v. Higgenbotham, 6 Munf. 314, where the sheriff took a bail bond and to this *non est factum* was pleaded, it was held that the sheriff was a necessary party to a suit to enjoin proceedings on the same.

Holmes v. Chester, *supra*, states that a sheriff is not a necessary party; citing Vernon v. Blackerly, 2 Atk. 147; Farquharson v. Pitcher, 2 Russ. Ch. 87; Joy v. Wirtz, 1 Wash. C. C. 517.

But in Farquharson v. Pitcher the bill for injunction was against the creditor and the sheriff, and the bill was demurred to as multifarious and the demurrer was overruled,—the object of the bill being to prevent the defendants in the equity suit from proceeding against the sheriff, and also to prevent the sheriff from paying the money to the defendants in the equity suit.

In Joy v. Wirtz, *supra*, the suit was not for injunction, and there was no question about the sheriff; the suit was to set aside a release.

And Vernon v. Blackerly, *supra*, was a suit for an annuity, and the question was whether the commissioner for building the church should be made a party.

In North v. Peters, *supra*, the court says: "In a case where the officer has exceeded his authority, he may be proceeded against either by an action for damages, if such remedy be sufficient, or by a writ of injunction to restrain the continued wrong-

doing; and it is not essential that the plaintiffs in the writs be joined as parties defendant, where, as in this case, it does not appear, either from the pleadings or the proofs, that they advised or directed the sheriff to seize the particular property, as the property of their judgment debtor." This seems to be the true rule.

In Buffandeau v. Edmondson, *supra*, where the sheriff was sued for damages in making a sale that was enjoined, and the sheriff was not a party to the injunction suit, it was said: "Being a mere ministerial office with no interest in the subject in controversy, and acting in the execution of the process as the agent of the plaintiff in the writ, we are by no means convinced that he was a necessary party to the proceedings."

And in Nye v. Nightingale, 6 R. I. 439, it was held that where the injunction was against the sheriff and the levying creditor, and a petition for the removal of the cause to the Federal court was filed, the sheriff was such a necessary party that his citizenship prevented a removal of the case.

And in Buffandeau v. Edmondson, 17 Cal. 436, 79 Am. Dec. 139, as to whether it is necessary to make a sheriff a party in a suit to enjoin an execution sale is not determined.

Plaintiffs in an execution need not answer the bill in a suit to enjoin the officer from making a sale, where they do not participate in the acts of the officer, and his answer of justification is sufficient. Beaird v. Foreman, 1 Ill. 303, 12 Am. Dec. 197.

Where a levy is made on property of a third person, which property is not described in the writ or order of sale, the sheriff assumes responsibility; and it would seem that in such a case he should be made a party defendant in the injunction suit. But if the property is described in the order of sale an injunction against the plaintiff therein with notice to the sheriff ought to be effectual without making him a party defendant in an injunction suit. This distinction does not appear to be clearly made in these cases—and the text-books do not solve the question nor fully show the conflict in the decisions.

d. *Limitation.*

While there seems to be some conflict of authorities as to the injunction suspending the statute of limitations, the plaintiff in the action at law is entitled to an injunction to prevent the defendant from pleading the statute as a bar to further proceedings.

A party obtaining an injunction against an execution sale cannot thereafter claim that the lien of the judgment is barred by the statute of limitations when the loss of the lien is occasioned by injunction. Work v. Harper, 31 Miss. 109, 66 Am. Dec. 549; Wilkinson v. Flowers, 37 Miss. 579.

Where a judgment has been enjoined until the bar of the statute of limitations applies, an injunction will be granted to restrain the defendant at law from pleading the statute of limitations. Marshall v. Minter, 43 Miss. 666; Sugg v. Thrasher, 30 Miss. 135; Davis v. Hoopes, 33 Miss. 173.

In Robertson v. Alford, 13 Smedes & M. 509, it was held that an injunction against suits at law, under a statute providing for such injunction in a suit of quo warranto against a bank does not suspend the statute of limitations. It was suggested that no punishment for contempt would be imposed by a chancellor if it was necessary to sue to prevent a statutory bar.

In Barker v. Millard, 16 Wend. 572, it was said that an injunction against proceedings at law does not suspend the statute, but the contrary is implied, as the party to a suit in chancery has often applied to that court to restrain the defendant from setting up the statute in an action at law.

XXI. *Effect of time upon injunctions, executions, and judgments.*

a. *Injunctions and executions.*

Hart. (Tex.) Dig. art. 1509, limiting the time within which an injunction may be had against judgments to six months, does not apply to injunctions against executions. Clegg v. Varnell, 18 Tex. 294.

Or where the cause arises after judgment. Williams v. Bradbury, 9 Tex. 487; Beardsley v. Hall, Id. 119.

And an injunction will be granted against a sale on an execution which issued after more than twelve months from the date of a previous execution. Watson v. Newsham, 17 Tex. 437.

But will not be enjoined in such a case where there is no showing that an intervening execution had not issued. Jordan v. Corley, 42 Tex. 284.

And an execution will not be enjoined after six months' time where delay is not excused in such a case. Pillow v. Thompson, 20 Tex. 206; Doss v. Miller, 6 Tex. 338.

Tex. Rev. Stat. art. 2873, providing for enjoining judgments after a year has elapsed, where delay has been caused by fraud, does not apply to a judgment taken in a foreclosure upon a homestead after a release thereof had been placed on record on account of mistake in the mortgage, where there was no act done or promise made at the time of or after the judgment, but complainant is entitled to a reformation of the judgment omitting the homestead. Williams v. Lumpkin, 66 Tex. 641.

Under Minn. Gen. Stat. chap. 66, § 262, prohibiting an execution from issuing more than ten years from entry of judgment, such an execution is void and will not be enjoined, as it is not a cloud on title. Hanson v. Johnson, 20 Minn. 194. To the same effect, Givens v. Campbell, 20 Iowa, 79.

A defense made on an answer to a summons issued to renew an execution, that notice in the ordinary case had never been served, and an appearance was unauthorized, will prevent an injunction against the execution and judgment. Jackson v. Patrick, 10 S. C. N. S. 197.

But under Ill. Rev. Laws 1833, § 370, providing that if an execution is taken out within one year the judgment shall be a lien on land for seven years, where a purchaser bought after judgment, and an execution was levied four years after the judgment, and a vend. exp. was issued more than eleven years after the judgment, it ceased to be a lien, and a sale thereunder was enjoined at the instance of the purchaser. Riggin v. Mulligan, 9 Ill. 50.

And the defendant in a judgment of foreclosure is entitled to injunction against proceedings upon the execution where no process to enforce the decree was issued until more than five years after its entry. And California Pr. act, § 209, prohibiting an execution after five years, applies to foreclosures. Stout v. Macy, 22 Cal. 647.

b. *Dormant judgments.*

Generally injunctions will be granted against executions on dormant judgments, if complainant shows that he is prejudiced thereby. Krinke v. Parish, 9 Ohio C. C. 141, 2 Ohio Dec. 85; Horner v. Marshall, 5 Munf. 466; Davisson v. Mackay, 22 Or. 247; Trevino v. Stillman, 48 Tex. 561; Buie v. Crouch, 37 Tex. 53; North v. Swing, 24 Tex. 193. But see Seymour v. Hill, *infra*.

In Krinke v. Parish, *supra*, an execution issued on a dormant judgment was enjoined, although such execution might have been recalled on motion.

But injunctions were refused in other cases on questions of pleading and practice, as where the plaintiffs in the judgment are not made parties. Howell v. Foster, 122 Ill. 276.

Or where complainant does not show that he has any property. Titsworth v. Cook, 49 Ill. App. 307.

Or where there is a remedy by motion. Mayo v. Bryte, 47 Cal. 626.

In Seymour v. Hill, 67 Tex. 385, under Tex. Rev. Stat. art. 2274, no injunction shall be granted to stay a judgment, except so much as complainant may show himself equitably entitled to be relieved against and costs; it was held error to enjoin an execution on a dormant judgment which is unpaid. (This case says that this question was not made in the prior Texas cases.)

In Coward v. Chastain, 99 N. C. 443, it was held that an execution sale under a dormant judgment, which is also barred by lapse of time, will not be enjoined, as the sale would pass no title; but it was said that if the evidence of the lapse of time had been before the lower court, an injunction would have been granted by it.

And in Pursel v. Deal, 16 Or. 295, a purchaser of land against which was a dormant judgment, was refused an injunction against an execution which issued under leave of court obtained under Or. Code, § 56, providing for publication service if a cause of action exists, or the defendant is a proper party to an action relating to real property; and the creditor took advantage of the first clause of this section. An injunction will not be granted for irregularity in the exercise of process.

A judgment for slander will be enjoined where, at the time of the alleged slander and at the time of the judgment, the defendant was insane, where such judgment had lain dormant for eight years and the plaintiff had declared his intention never to demand the judgment, although no written release was executed. Horner v. Marshall, 5 Munf. 466.

An execution on a dormant judgment will be enjoined, but the same may be revived in the injunction suit. Trevino v. Stillman, 48 Tex. 561; North v. Swing, 24 Tex. 193. I. T.

GEORGIA SUPREME COURT.

GILLIS *et al., Plffs. in Err.*,
v.
John GILLIS *et al.*

(.....Ga.....)

*1. **Construing together sections 2414 and 2415 of the Code,** which relate to the execution and attestation of wills, the true meaning of the phrase "provided he can swear to the same," as used in section 2415, with reference to the competency of an illiterate or infirm witness, is that such a witness is competent to attest by his mark if, at the time of attesting, he is under no legal disability to testify as a witness; and it is not essential to his competency as an attesting witness to a will that he should be able to swear to or identify his mark at the time the will is offered for probate.

2. **Where, upon the trial of an issue of devisavit vel non, a subscribing witness to the will, from want of memory or other cause, is unable** or unwilling to testify to its attestation by himself or by the other subscribing witnesses, or to the execution of the will by the testator, or to the fact that the testator was mentally capable of making a will, or where a subscribing witness in his evidence denies the existence of any of these facts, the same may be proved by any competent witness having knowledge thereof, although the latter was not a subscribing witness to the will.

3. **The law of mutual wills was not involved** in the present case; the evidence warranted the verdict; and there was no error in denying a new trial.

(March 11, 1895.)

ERROR to the Superior Court for Emanuel County to review a judgment admitting to probate the will of Sarah Gillis, deceased. *Affirmed.*

The facts are stated in the opinion.

*Headnotes by LUMPKIN, J.

NOTE.—For signature by mark in general, see *note* to *Re* Guilfoyle (Cal.) 22 L. R. A. 870.

Messrs. **Williams & Smith, Hines & Felder,** and **A. H. Davis** for plaintiffs in error.

Messrs. **Cain & Polhill, A. Herrington, T. M. Saffold, H. R. Daniel,** and **Evans & Evans** for defendants in error.

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

The nominated executors of the alleged last will of Sarah Gillis propounded the same for probate, and a caveat was filed by some of her heirs at law. On the trial in the superior court, to which court the case had been carried by appeal, there was a verdict for the propounders, and the caveators bring up for review a judgment overruling their motion for a new trial. Besides the general grounds that the verdict was contrary to law and the evidence, and that the court erred in refusing to grant a nonsuit, the motion contained special grounds raising certain questions, the nature of which is disclosed by the headnotes and this opinion.

The paper purporting to be the will was executed by the testatrix on the 12th day of March, 1873. It bears the names of four witnesses, but it was conceded that the last of them signed his name some time after the execution of the paper by the testatrix and its attestation by other witnesses, and it does not appear that he signed in her presence. The appearance, therefore, of the name of this witness upon the paper counts for nothing in determining the question of the legality of its execution. Accordingly, the fact that he signed will be ignored altogether and it will be understood that, in speaking of the subscribing witnesses to the paper, reference to the other three only is intended. One of these signed by making her mark. Another died before the testatrix. The usual and formal attestation clause was used. The paper was offered for probate soon after the death of the testatrix, and about twenty years after its execution and attestation. At the

time of probate the two subscribing witnesses then in life were produced. The one who wrote his own name proved the due execution of the paper as a will. The signature of the deceased witness was shown to be in his handwriting. The illiterate witness testified that she had no recollection of attesting the will, and could not swear to the making of her mark. At the same time, however, she did not expressly swear that she did not attest by her mark the paper propounded.

1. The first and leading question is, Was the paper legally attested as a will? The execution and attestation of written wills in this state, as to both real and personal property, is provided for in sections 2414 and 2415 of the Code. Section 2414 reads as follows: "All wills (except nuncupative wills) disposing of realty or personalty, must be in writing, signed by the party making the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the testator by three or more competent witnesses." Section 2415 declares that "a witness may attest by his mark, provided he can swear to the same; but one witness cannot subscribe the name of another, even in his presence and by his direction." Section 2414 was codified from 29 Car. II. chap. 8, § 5, known as the "Statute of Frauds," in reference to devises of real property (Cobb's Dig. p. 1128; *Huff* v. *Huff*, 41 Ga. 701), and from an act of January 21, 1852 (Acts 1851-52, p. 104), which prescribes that wills bequeathing personal property shall be executed as are wills devising real property. The statute of frauds and our own act of 1852 each uses the word "credible," and section 2414 of the Code uses the word "competent," as to the three or more witnesses required to attest a will. These two words are, as here used, synonymous. *Hall* v. *Hall*, 18 Ga. 40. They mean, in this connection, witnesses who are competent at the time of attestation to testify in a court of justice. Thus, in one of the earlier English decisions, it was said: "The true time for his credibility is the time of attestation; otherwise, a subsequent infamy, which the testator knows nothing of, would avoid his will." *Holdfast* v. *Dowsing*, 2 Strange, 1253. In *Sears* v. *Dillingham*, 12 Mass. 358, the court, after stating that an executor was not a competent witness to prove the execution of a will, said: "But a will to which such an executor is a subscribing witness may be proved by the testimony of the other witnesses; he having been a credible witness, within the statute, at the time of his attestation, and having become incompetent only by accepting the trust." In *Patten* v. *Tallman*, 27 Me. 17, it was said: "The competency of an attesting witness to a will is not to be determined upon the state of facts existing at the time when the will is presented for probate, but upon those existing at the time of the attestation." So very pertinent, in this connection, is the text of Schouler on Wills, that we make an extended extract: "Upon common-law principle, the qualification or disqualification of a witness is usually raised with reference to the time when he is called upon to testify. Nor is competency at that date to be left unconsidered; as where, for instance, a witness who subscribed while in sound mind has become insane by the time the probate of the will is at issue, in which case, of course, his testimony cannot be taken. But his incompetency at this latter date does not defeat the will, whose attestation and subscription was a sort of testifying, such as the peculiar transaction called for. To surround himself with a specified number of witnesses at that time competent, was all that any testator could do, in compliance with the statute requirements; and, what was then a proper execution in all respects taking place, a will was produced whose validity could never be impeached for informality. Hence the rule, which reason should now pronounce the universal one, so far as the question remains a material one at all, that the competency of witnesses, like that of the testator, is tested by one's status at the time when the will was executed. If, therefore, a sufficient number of witnesses attest and subscribe properly who at that date are competent, the will remains valid, although death or supervening disability may render any or all of them incapable in fact of testifying by the time the will is offered for probate. In other words, the inconvenience of this last situation is purely casual and incidental, and without direct prejudice to the will itself, which might, indeed, be established on mere proof of handwriting, where the instrument appeared on its face genuine and formal." Section 351. See also section 350, and Jarman, Wills (Rand. & T.'s ed.) p. 225; *Higgins* v. *Carlton*, 28 Md. 115, 92 Am. Dec. 666, and note on page 680; *Hawes* v. *Humphrey*, 9 Pick. 350, 20 Am. Dec. 481, and note on page 488; *Amory* v. *Fellowes*, 5 Mass. 219; *Carlton* v. *Carlton*, 40 N. H. 14; *Re Holt's Will*, 56 Minn. 33, 23 L. R. A. 481.

A witness who signs by his mark, if so capable of testifying, is just as competent a witness under the statute of frauds, our act of 1852, and section 2414 of the Code, as one likewise capable of testifying who writes his own name. This is settled by an unbroken line of authorities. *Harrison* v. *Harrison*, 8 Ves. Jr. 185; *Addy* v. *Grix*, Id. 504; *Davies* v. *Davies*, 9 Q. B. 648; *Bailey* v. *Bailey*, 35 Ala. 687; *Garrett* v. *Heflin*, 98 Ala. 615; *Horton* v. *Johnson*, 18 Ga. 397; *Montgomery* v. *Perkins*, 2 Met. (Ky.) 448, 74 Am. Dec. 419; *Lord* v. *Lord*, 58 N. H. 7, 42 Am. Rep. 565; *Compton* v. *Mitton*, 12 N. J. L. 81; *Morris* v. *Kniffin*, 37 Barb. 336; *Pridgen* v. *Pridgen*, 13 Ired. L. 260; *Simmons* v. *Leonard*, 91 Tenn. 183; *Jesse* v. *Parker*, 6 Gratt. 57, 52 Am. Dec. 102; 4 Kent, Com. 8th ed. 575; 10 Bacon, Abr. 491; Wms. Exrs. 3d Am. ed. 79; Beach, Wills, § 41; 1 Jarman, Wills (Rand. & T.'s ed.) 212, 214; Schouler, Wills, 331; 1 Am. & Eng. Enc. Law, p. 941. And, indeed, our code expressly declares that 'signature' or 'subscription' includes the mark of an illiterate or infirm person." Section 5. The mark is the signature of the witness. Century, Dict. word *Signature*, 14 Am. & Eng. Enc.

Law, p. 457, word *Mark;* Anderson, Law Dict. words *Mark* and *Signature.*

The subscription of a witness, whether in his own handwriting or by his mark, does not, of course, *ipso facto* make such witness incompetent because at the time of attestation he may be disqualified by law from testifying in a court of justice on account of infancy, imbecility, crime, or for other causes. But for the proviso in section 2415 of our Code, it cannot be reasonably doubted that the true test for determining the competency of any witness to the execution of a will in this state would certainly be whether or not the witness, at the time of attestation, would be disqualified from testifying in a court of justice. The rule as to witnesses generally, unless changed by that proviso, is beyond question applicable to "markmen." Did the words "provided he can swear to the same," referring to a witness unable to write his name, and who attests by his mark, change the rule? Omitting from the section the words just quoted, the mark of the witness, he being legally capable of testifying when he made it, would be good without any further condition. Suppose he should die or become blind or insane; corruptly refuse to testify to what he knew; forget or be inaccessible; and, for any of these reasons, did not, at the time of probate, in fact swear to the mark, but the other two witnesses did swear that he made it, and proved all other essential facts. Must the will fail? The proviso is new. After very diligent search and inquiry, we have been unable to discover even a trace of it in any book other than our Code, where it appears for the first and only time. Can it be possible that it was intended to revolutionize the law on the subject, and make the validity of a will depend upon the life, the eyesight, the continued sanity, the integrity, the memory, or the accessibility of witnesses? No court should so hold unless constrained by the plainest language to do so. We do not feel so constrained in the present instance. To construe section 2415 as contended for would be to open the door for endangering or destroying all wills. It would be contrary to the old law, and not in harmony with the spirit of the Code. Such an unwise and dangerous innovation should come in language able to withstand the severest verbal criticism. If it be expressed in doubtful phrase, construction may turn aside the danger. See *Walker* v. *Hunter*, 17 Ga. 409; *Deupree* v. *Deupree*, 45 Ga. 441-443. If the test of the legal competency of the witnesses is to be applied only at the time of probate, a will might be defeated in many ways. If the witness had died before that time, he could not possibly swear to his mark. If he had become blind he could not see the mark, and therefore could not swear to it. He might remember all the circumstances and know that he did make his mark to a will which was properly executed, but, without the aid of his lost vision, he could not swear to it. If he had lost his mind, he could swear to nothing. If he falsely testified that he could not swear to the mark, he would thus defeat the will, and with small risk, for it is always difficult to convict any person of perjury, and hardly possible to do so when the alleged false evidence relates to a mental state of the witness himself. If he had honestly forgotten or could not really identify the mark as his own, the same result would follow. If he was inaccessible or his whereabouts unknown, the mark would remain unsworn to by him.

Surely, neither the original codifiers nor the general assembly can be supposed ever to have contemplated the defeat of a will in any of these ways. If the time for applying the test of competency as to an illiterate witness is when the will is offered for probate, it necessarily follows that, in order to make the subscription of such a witness valid, he must then swear to his mark, or else he does not count at all as a witness to the will. Accordingly, counsel for the plaintiffs in error contended that as the illiterate witness in this case, on account of her failure of memory, could not and did not swear to her mark, her attestation amounted to nothing, and consequently there were but two legal witnesses to the will, and it was therefore void. We cannot think this contention is sound. It goes beyond even the letter of the section under construction. It assumes that the compilers of our Code made a new law, and did not codify an old law. It "builds, like the martlet, on the outward wall." It leads to patent absurdities. It ignores the fact that sections 2414 and 2415 are *in pari materia,* and must be construed together. It adopts, from two constructions, the one that defeats, rather than the one that upholds, the real purpose of the law. It overlooks the rule that, if the language of any part of section 2415 is devoid of sense, it may be eliminated by the court altogether. It makes the competency of the witness at the time of attestation dependent on his memory or will, or other contingency, at the time of probate. It departs from established authorities, which are laws themselves, the overturning of which would unsettle property rights. It would enable a contestant to defeat a will by successfully tampering with a witness before the trial. And it does not include or suppose the possibility of an illiterate or infirm witness, if in existence, being voluntarily beyond the process of the court, or his whereabouts being unknown, at the time of probate, nor of the death or insanity of such witness before that time. "The presumption against absurdity in the provision of a legislative enactment is probably a more powerful guide to its construction than even the presumption against unreason, inconvenience, or injustice. The legislature may be supposed to intend all of these, but it can scarcely be supposed to intend its own stultification. Accordingly, it has been said that, when to follow the words of an enactment would lead to an absurdity as its consequences, that constitutes sufficient authority to the interpreter to depart from them." Endlich, Interpretation of Statutes, § 264. And see also section 295. Moreover, "in making it requisite to the validity of a will that there should be attesting witnesses who shall subscribe their names to the writing, the law has a threefold purpose: The identification of the paper,

the protection of the testator from deception and fraud, and the ascertainment of his testamentary capacity." Beach, Wills, § 39. The three reasons here specified are fulfilled by having three competent witnesses who are not disqualified at the time of attestation from testifying in a court of justice. Therefore, if an illiterate or infirm person, who is requested by a testator to attest his will, is not so disqualified, he is a competent witness to the will, because he is then competent to testify on the three points mentioned, as well as on any others relating to the factum or validity of the will. Whatever evils may exist in having illiterate or infirm persons, who are otherwise competent, attest wills by their marks, it is shown by a uniform current of decisions, and by the opinion of all text-writers, that the sages of the law, from the earliest times to the present, have upheld the attestation of wills by such witnesses making marks for their signatures, and they have never set forth a reason for any change in the law. In the well-considered case of *Pridgen* v. *Pridgen*, *supra*, Nash, J., delivering the opinion of the court, says: To subscribe is to set one's hand to a writing. If, then, the statute is on the part of the testator, in this particular, complied with by making his mark, why is it not satisfied by the witnesses' making their mark? The inconvenience and danger of defeating wills by allowing witnesses to attest them who cannot write have been strongly urged in the argument. On the other hand, many evils might grow out of a rule confining the attestation to those only who can write." *A fortiori*, how many evils would exist, as already shown, if the contention of the caveators in this case should be upheld.

There is no act of our legislature or decision of our supreme court before the adoption of our Code that ever changed, or attempted to change, the old law as to witnesses attesting wills by their marks; and there is at least one case decided by this court before the Code went into effect which is in harmony with and upholds the law. See *Horton* v. *Johnson*, 18 Ga. 397. How, then, can it be said that the compilers of our Code intended to incorporate into it any other than the prevailing rule of law? It is not to be presumed that they, learned in the law, would, except in rare instances, themselves make a rule of law, when they were only empowered to codify existing laws of force in this state. See act Dec. 9, 1858; *Mechanics' Bank* v. *Heard*, 37 Ga. 412; *Phillips* v. *Solomon*, 42 Ga. 195, 196; *Gardner* v. *Moore*, 51 Ga. 269; *Atlanta* v. *Gate City Gaslight Co.* 71 Ga. 106, 119, 120; *McDaniel* v. *Gate City Gaslight Co.* 79 Ga. 58. At any rate, "the Code is not to be construed as changing the old law, unless the change be very apparent" (*Gardner* v. *Moore*, and *Atlanta* v. *Gate City Gaslight Co. supra*); or, "unless the intent to change be clear," as stated in *Phillips* v. *Solomon*, *supra*. It is therefore reasonable to conclude that the codifiers did not intend to create a new rule in Georgia as to the attestation of wills by illiterate or infirm persons, which would, in the manner above pointed out, so seriously affect the validity of wills so attested. It is hardly probable that they would have inserted the words "provided he can swear to the same" if they had supposed they would receive the construction now contended for by the plaintiffs in error. In our opinion, the true interpretation of section 2415 is found by construing it with section 2414. They are *in pari materia*. Indeed, they cannot be separated, because they relate to the same subject-matter. The rule of law applying to statutes that are *in pari materia* is that, "where there are earlier acts relating to the same subject, the survey must extend to them; for all are, for the purposes of construction, considered as forming one homogeneous and consistent body of law, and each of them may explain and elucidate every other part of the common system to which it belongs." Endlich, Interpretation of Statutes, § 43, and note thereto, where many authorities are collated. This rule applies with peculiar force to sections of our Code relating to the same subject-matter, and which were codified at the same time, because they must be construed, if possible, to harmonize with each other. *Beall* v. *Southern Bank*, 57 Ga. 274; *Thomason* v. *Fannin*, 54 Ga. 363. As was said in the latter case: "If a fair construction can be adopted to prevent such a contradiction by one section of the other, it should be done." Section 2415, read with section 2414, shows that an illiterate or infirm person may attest a will by his mark. Standing by itself, it does not show what the witness is to attest. The whole section is evidently codified from the case of *Horton* v. *Johnson*, 18 Ga. 396, which holds that, if another witness signs the name of an illiterate witness, it is an illegal subscription, unless the illiterate witness affixes his mark; and from the case of *Hall* v. *Hall*, Id. 40, in which it was decided that any witness to a will is competent, provided at the time of attestation he is not disqualified from testifying in a court of justice. This is made plain when section 2415 is construed with section 2414, which, as already stated, is codified from section 5 of the statute of frauds and our act of 1852, which place all witnesses, learned and unlearned, vigorous or infirm, upon the same footing, and render them competent witnesses to a will if by law they are not, at the time of attestation, disqualified from testifying in a court of justice.

It was argued that as section 2414 of the Code distinctly declared, in effect, that all the witnesses to a will must be "competent,"—*i. e.* capable of testifying,—and by its terms necessarily embraced witnesses who could not write their names, the words "provided he can swear to the same," used in the next section with reference to a witness attesting by his mark, would be merely tautological, if regarded simply as repeating the necessity for competency already plainly and unequivocally required. The force of this position cannot fairly be ignored. In it lies the main strength of the argument on the other side of the question, for it gives much plausibility to the contention that the purpose of the words last quoted was to limit, to some extent, the competency of infirm or illiterate

witnesses, by requiring that they should possess at least one other qualification than mere legal capacity to testify, *viz.*, the ability to swear to their marks. It would be unreasonable, if not absurd, to construe the words "can swear" as meaning that the witness must have the requisite memory and the keen physical perception which would enable him, after the lapse of weeks, months, and years, to distinguish and identify a mere cross mark or other ordinary device representing his signature. This would certainly be very difficult, if not altogether impossible, if the mark had no peculiarities. It is much more reasonable to refer the question of ability to swear to the mark, not to recollection or accuracy of vision, but to legal capacity to testify. Synonymous with the word "can," in the connection in which it is used in the proviso under consideration, are the expressions "is able to," "has the power to," "has the ability to," "is competent to," "has the capacity to;" or, negatively speaking, "is not unable to," "has not the lack of power to," "has not the inability to," "is not incompetent to," "lacks not the capacity to." Surely, something must be supplied to this proviso by inference in order to give it sense or meaning. We must thus supply the means from which the witness "can" swear, etc. Is it by reason of his retentive memory or any other inherent power, or by reason of a power which does not spring from his own physical or mental capacities as a person in a natural state, but is conferred upon him by law as a member of society? It would not be straining to substitute the synonymous phrase "is competent to" for the word "can," so that the proviso would read: "Provided he is competent to swear to the same." Had the codifiers used this language, certainly it could not be said that the competency they had in view was his ability by reason of memory, rather than his ability to stand the tests which the law applies to all persons alike in passing upon their fitness to testify as witnesses. It is because of the overwhelming and destructive force of natural laws that the only requirement which human law can exact is that the witness must, at the time of attesting, be able to stand the test of competency prescribed in all cases; and it matters not whether he afterwards loses that competency or not. Illiterate or infirm witnesses simply stand upon the same footing as all others. Illiteracy or infirmity will not count against them, but they must, in other respects, come up to the legal standard of competency by which those who wield the pen are measured. We do not mean to insist that the suggestions just made eliminate the tautology. They cannot, for it is there if the words "provided he can swear to the same" mean what we think they do. But granting they are tautological, or even meaningless and utterly useless, if the foregoing argument is worth anything at all, it establishes the conclusion that it is safer and better to thus treat them than to give them a meaning not only out of harmony with all the law, but leading to consequences which the codifiers—we may almost say with certainty—did not anticipate.

In the argument here, our attention was called to the case of *Thompson* v. *Daritte*, 59 Ga. 472, as somewhat in point, because it there appeared that an attesting witness, when called upon to prove the execution of a will, stated his unwillingness to swear positively to a mark purporting to be made by him, although he said he thought he made it. That case has, however, afforded us no aid in reaching our present decision, for the only point there was whether a mere statement by a witness of his belief could be regarded as affirmative evidence, and no construction of section 2415 of the Code was then attempted. Indeed, so far as we have been able to ascertain, this court has never before been called upon to construe that section. The correctness of the views upon this question we have above expressed are, we think, confirmed by other considerations, which belong more properly to the next division of this opinion.

2. Error was assigned upon the admission in evidence of the paper propounded, over the objection that there was not sufficient evidence from the subscribing witnesses as to its execution, and also upon admitting the testimony of Mary Gillis as to the execution of the paper by the testatrix and its attestation by the subscribing witnesses, over the objection that she, not being herself a subscribing witness, was incompetent to testify as to these matters. It is well settled that the subscribing witnesses to a will must, if practicable, be called and examined, but the fate of a will does not depend entirely upon their testimony. Upon the trial of an application to prove a will in solemn form, they are, all of them, unless accounted for, indispensably necessary witnesses; but the testimony, even as to the *factum* of execution, is not confined to them. The fact to be established is the proper execution of the will. If that is proved by competent testimony, it is sufficient, no matter from what quarter the testimony comes, provided the attesting witnesses are among those who bear testimony, or their absence is explained. The inquiry, as in other cases, is whether, taking all the testimony together, the fact is duly established. It is not required that any one or more of the essential facts should be proved by all or any number of the attesting witnesses. The right is simply to have the attesting witnesses examined, no matter what their testimony may be. The law does not allow proof of the valid execution and attestation of a will to be defeated at the time of probate by the failure of the memory on the part of any of the subscribing witnesses (*Deupree* v. *Deupree*, 45 Ga. 442, 443; *Jackson* v. *Le Grange*, 19 Johns. 386, 10 Am. Dec. 237; *Dewey* v. *Dewey*, 1 Met. 349, 35 Am. Dec. 667; *Remsen* v. *Brinckerhoff*, 26 Wend. 325, 37 Am. Dec. 260, note; *Jauncey* v. *Thorne*, 2 Barb. Ch. 40, 45 Am. Dec. 412, and note; *Greenough* v. *Greenough*, 11 Pa. 489, 51 Am. Dec. 567; *Lawyer* v. *Smith*, 8 Mich. 411, 77 Am. Dec. 460; *Brown* v. *Clark*, 77 N. Y. 369; Beach, Wills, § 39, and cases cited in note 19); or by their even denying their signatures to the will altogether, when such denial is overcome by other competent evidence (*Pear-*

son v. *Wightman*, 1 Mill, Const. 336, 12 Am. Dec. 636; *Re Higgins*, 94 N. Y. 554; *Hall* v. *Hall*, 18 Ga. 45; *Gardner* v. *Granniss*, 57 Ga. 555).

In *Deupree* v. *Deupree*, *supra*, decided in the year 1872, McCay, J., delivering the opinion of the court, said: "There is no question as to the general rule that on the death of the witnesses, or on the failure of their memory, the proof of the fact of execution begets a presumption that all the details of the fact were such as the law requires." And, on page 443, he says: "How many wills do not come up for probate until many years after the execution of them. Sometimes the witnesses can only recognize their own handwriting; sometimes they only remember the fact that the testator signed, and perhaps only that they signed. Who was present, and all other details, have passed from memory. To say that under such circumstances the will is not to be probated would be a death blow to wills." And in *Pearson* v. *Wightman*, cited above, Cheves, J., said: "Where subscribing witnesses cannot be produced [or, if found] they deny their signatures, or otherwise fail to prove the due execution of the will, circumstantial evidence may be adduced to supply this deficiency. . . . It would be of terrible consequence if such evidence were not admissible, for how often and how easily might witnesses be tampered with to deny their own attestation?" The facts in the case of *Pate* v. *Joe*, 3 J. J. Marsh. 113, which are sufficiently stated in the case of *Jauncey* v. *Thorne*, *supra*, are very similar to the facts in the case at bar. In that case one of the witnesses (a woman) did not write her own name. As the decision says: "She was examined as a witness several years after the occurrence, but could recollect nothing of the circumstances except that Pate was sick, and rode in their [her and her husband's] wagon, and was left on the road." But her negative evidence was overcome by the affirmative testimony of the other subscribing witnesses, and the court held that the will was duly executed and attested. "The most liberal presumptions in favor of the due execution of wills are sanctioned by courts of justice where, from lapse of time or otherwise, it might be impossible to give any positive evidence on the subject." *Jauncey* v. *Thorne*, *supra*. And see *Peck* v. *Cary*, 27 N. Y. 9, 84 Am. Dec. 220, and note; *Higgins* v. *Carlton*, 28 Md. 115, 92 Am. Dec. 666.

There is nothing in section 2424 of the Code, upon the probate of wills in solemn form, which, rightly construed, conflicts with the law as declared in this opinion. This section does not require that the subscribing witnesses "in existence and within the jurisdiction of the court" shall each swear, at the time of probate, to their own subscriptions, and to the signature and testamentary capacity of the testator, in order to make a will valid; for thus construing the section would lead to obvious and glaring wrongs and absurdities. It simply means that they must be produced for the purpose of testifying to these facts, if competent. This section of the Code must be taken, not literally, but in accordance with common sense and the usual rules of construction, as was done by this court in *Kitchens* v. *Kitchens*, 39 Ga. 171-173, 99 Am. Dec. 453, in construing section 2396 of the Code then in force, which was the same as section 2431 of the present Code. There it is plainly declared that, in the case of a lost will, the copy must be clearly proved by the subscribing witness; yet the court held that, while the subscribing witness must prove the execution of the lost will, other witnesses might prove its contents. The main reason of the rule for calling all witnesses in a proceeding for probate in solemn form is to give the other party an opportunity of cross-examining them: and, while the law requires a will to be attested by three witnesses, it does not necessarily mean that all three must concur in their testimony to prove it on probate. To do this would make the validity of the will depend upon the memory and good faith of the witnesses, and not upon that reasonable proof the law demands in other cases. *Nelson* v. *McGiffert*, 3 Barb. Ch. 158, 49 Am. Dec. 170, 174, note; *Jesse* v. *Parker*, 6 Gratt. 57, 52 Am. Dec. 102; *Montgomery* v. *Perkins*, 2 Met. (Ky.) 448, 74 Am. Dec. 419. Section 2424 does not, when considered in connection with the well-established law on the subject of the attestation and proof of wills, as already shown, prevent the probate of a will on account of defect of memory, or even perjury, of a subscribing witness, when the deficiency is supplied by other evidence, because the general rules of evidence and the force and effect of legal evidence were not intended to be disregarded in probating wills even in solemn form. This is shown by construing together the act of December 13, 1859 (Acts 1859, pp. 33-35), and the cases of *Brown* v. *Anderson*, 13 Ga. 177, and *Hall* v. *Hall*, 18 Ga. 40, from which section 2424 is evidently codified, and by considering the fact that, when a will is propounded for proof in solemn form, "the issue, and the only issue, is *devisavit vel non*,"—did he devise or not? *Wetter* v. *Habersham*, 60 Ga. 194. If each subscribing witness were compelled to testify alike, there might be no issue to pass upon.

3. The only remaining question to be disposed of requires very brief mention or notice. The motion for a new trial complains that the court erred "in not charging the jury the law in regard to mutual wills," and alleges that the verdict is "contrary to the law and evidence in this, to wit: the evidence showed that the will offered for probate was one of several mutual wills, and there was no evidence to show that the other mutual wills were not revoked or destroyed." Although there was some evidence of an agreement between the testatrix and others to make mutual wills, it does not appear that it was ever insisted upon or carried out, or that the caveators had any concern in it. Moreover, it was incumbent on them to show affirmatively the revocation of the dependent wills, if any there were. Code, § 2397. So the law of mutual wills was not involved in this case.

Judgment affirmed.

KANSAS SUPREME COURT.

Granville P. AIKMAN
v.
W. C. EDWARDS, Secretary of State.

(.....Kan.....)

*1. **The legislature of this state has the power, under the Constitution, to transfer** all of the counties comprising a judicial district into another, and thereby to abolish such district before the expiration of the term of office of the judge of the district so abolished.

2. **Chapter 106 of the Laws of 1895,** entitled "An Act Relating to Judicial Districts, Defining the Boundaries of the 5th, 8th, 9th, 13th, 19th, 24th, 31st, and 32d Judicial Districts, and Providing for Holding Terms of Court therein, and Defining Certain Duties of the Trial Court in the 19th Judicial District, and Repealing All Acts and Parts of Acts in Conflict with This Act," does not violate section 16 of article 2 of the Constitution. It does not include more than one subject, the title expresses the subject of the act, and it does not amend sections of prior acts not contained in the new act.

3. **A two-thirds vote of the members of each House of the legislature** is not required on the passage of an act to abolish a judicial district. The vote of a constitutional majority is sufficient.

4. **A failure on the part of the presiding officers to sign a bill** within two days after its passage does not defeat the act, nor in any manner impair its validity, if it be thereafter duly authenticated and approved by the governor.

(November 9, 1895.)

APPLICATION for a writ of mandamus to compel defendant to file petitioner's nomination for the office of judge of the Twenty-sixth Judicial District for which he alleged he had been regularly nominated. *Denied.*

The facts are stated in the opinion.

Messrs. **G. P. Aikman, D. M. Valentine,** and **John H. Milligan,** for plaintiff:

The judge of a district court is a constitutional officer.

Const. art. 3, §§ 1, 5, 11; *State* v. *Thoman*, 10 Kan. 191; Black, Const. L. §§ 94, 95; *State* v. *Friedley*, 135 Ind. 119, 21 L. R. A. 634; Throop, Pub. Off. § 20.

No court has ever upheld a legislative enactment that attempted to destroy, abridge, or impinge upon the vested rights of a constitutional officer.

Black, Const. L. § 94; *State* v. *Noble*, 118 Ind. 368, 4 L. R. A. 101; 1 Bryce, American Commonwealth, 429; *Wright* v. *Defrees*, 8 Ind. 298.

The Constitution says: "A district judge who shall hold his office for a term of four years."

State v. *Thoman*, *supra*; *People* v. *Maynard*, 14 Ill. 419; *State* v. *Noble*, *supra*; *Shoultz* v. *McPheeters*, 79 Ind. 373; *Gregory* v. *State*, 94 Ind. 384, 48 Am. Rep. 162; *Little* v. *State*, 90 Ind. 338, 46 Am. Rep. 224; *Pressley* v. *Lamb*, 105 Ind. 171.

A judge of the district court is neither a state, county, nor township officer.

State v. *Friedley*, 135 Ind. 119, 21 L. R. A. 634; *State* v. *Tucker*, 46 Ind. 359.

That a judge is a constitutional officer and he has a vested right in the office was *stare decisis.*

State v. *Tucker*, and *State* v. *Noble*, *supra*; *Howard* v. *State*, 10 Ind. 99; *Moser* v. *Long*, 64 Ind. 189; *State* v. *Johnston*, 101 Ind. 223; *Hoke* v. *Henderson*, 4 Dev. L. 1, 25 Am. Dec. 677; *People* v. *Bull*, 46 N. Y. 57, 7 Am. Rep. 302; *People* v. *McKinney*, 52 N. Y. 374; 7 Lawson, Rights, Rem. & Pr. ¶ 3797; *Love* v. *Com.* 3 Met. (Ky.) 237; *Com.* v. *Gamble*, 62 Pa. 343, 1 Am. Rep. 422; *People* v. *Dubois*, 23 Ill. 547; *State* v. *Messmore*, 14 Wis. 164.

The intention was that judicial officers should not be disturbed for any cause except malfeasance in office, and according to the well-recognized canons of statutory construction, the court is warranted in taking notice of the intention of the framers of the Constitution.

Cooley, Const. Lim. p. 68; Sutherland, Stat. Constr. §§ 234–237; *Prouty* v. *Stover*, 11 Kan. 235; *Com.* v. *Gamble*, *Love* v. *Com.*, *State* v. *Messmore*, and *People* v. *Dubois*, *supra*.

The legislature cannot remove an officer where the tenure of his office is fixed by the Constitution, and the same result cannot be effected indirectly by transferring the office to another or by abbreviating the term.

Throop, Pub. Off. § 20; *People* v. *Bull*, 46 N. Y. 57, 7 Am. Rep. 302; *People* v. *McKinney*, 52 N. Y. 374; *People* v. *Batchelor*, 22 N. Y. 128; *State* v. *Thoman*, 10 Kan. 191; Black, Const. L. § 93; *King* v. *Hunter*, 65 N. C. 603, 6 Am. Rep. 754; *Ex parte Meredith*, 33 Gratt. 119, 36 Am. Rep. 771; *Keys* v. *Mason*, 3 Sneed, 6; *People* v. *Burbank*, 12 Cal. 378; *State* v. *Wright*, 7 Ohio St. 334; *State* v. *Askew*, 48 Ark. 82; *State* v. *Floyd*, 9 Ark. 313; 12 Am. & Eng. Enc. Law, p. 18, entitled *Tenure of office of judge;* Cooley, Const. Lim. 4th ed. p. 78, and note, p. 336, and note, *Peters* v. *Board of State Canvassers*, 17 Kan. 365.

All the authorities make a clear distinction between a constitutional and legislative office.

Leavenworth County Comrs. v. *State*, 5 Kan. 668; 12 Am. & Eng. Enc. Law, p. 18; *Lease* v. *Freeborn*, 52 Kan. 750; *State* v. *Mitchell*, 50 Kan. 289; Cooley, Const. Lim. p. 336, note 2.

You cannot do by indirection that which cannot be done directly.

A public office is defined to be "a right to exercise a public function or employment and take the fees and emoluments belonging to it."

2 Bouvier, Law Dict. 255; 7 Bacon, Abr. 279, 7 Lawson, Rights, Rem. & Pr. § 3797.

The term of office embraces the idea of tenure, duration, emoluments, and duties.

United States v. *Hartwell*, 73 U. S. 6 Wall. 385, 18 L. ed. 830.

The legislature cannot remove an officer

*Headnotes by ALLEN, J.

NOTE. In connection with the above case, see State v. Friedley (Ind.) 21 L. R. A. 634, as presenting a case closely similar in which the decision was against the statute.

See also 41 L. R. A. 838; 46 L. R. A. 567.

where the tenure of his office is fixed by the Constitution; and it has also been said that the same result cannot be effected indirectly by transferring the office to another or by abbreviating the term.

Throop, Pub. Off. § 20; *People* v. *Van Gaskin*, 5 Mont. 352; *State* v. *Davis*, 44 Mo. 129.

A law limiting the term of office of a constitutional officer is void.

Leavenworth County Comrs. v. *State*, *Com.* v. *Gamble*, *People* v. *Dubois*, *State* v. *Messmore*, and *State* v. *Friedley*, *supra*; *Reid* v. *Smoulter*, 128 Pa. 324, 5 L. R. A. 517; *State* v. *Benedict*, 15 Minn. 198; *People* v. *Albertson*, 55 N. Y. 50.

Taking away the territory of an official takes away his office.

Re Hinkle, 31 Kan. 712; *Re Wood*, 34 Kan. 648; *Crozier* v. *Lyons*, 72 Iowa, 401.

If Judge Shinn has no district or court over which to preside, he is not a judge of any kind.

State Const. art. 3, § 13; *Harvey* v. *Rush County Comrs.* 32 Kan. 162.

If the legislature has such power, the judiciary would not be an independent and co-ordinate branch of the government, but would be wholly dependent upon the legislative department.

State v. *Noble*, 118 Ind. 368, 4 L. R. A. 101; 1 Bryce, American Commonwealth, 31; *Leavenworth County Comrs.* v. *State*, 5 Kan. 689; *State* v. *Thoman*, 10 Kan. 191.

A two thirds vote of the members present of each House is necessary to create or abolish a judicial district.

Const. art. 3, § 14; *Sedgwick County Comrs.* v. *Bailey*, 13 Kan. 610.

If more than one subject is named in the title of the bill it is clearly void.

Missouri P. R. Co. v. *Wyandotte*, 44 Kan. 32; *State* v. *Bankers' & M. Mut. Ben. Asso.* 23 Kan. 499; *St. Louis* v. *Tiefel*, 42 Mo. 592; *Mecherter* v. *Price*, 11 Ind. 199.

The constitutional provision which says that all acts and bills passed by the Senate and House of Representatives shall be signed by the presiding officer means something and is mandatory.

Cooley, Const. Lim. p. 94; *People* v. *Lawrence*, 36 Barb. 177; *Brown* v. *Goben*, 122 Ind. 113; *State* v. *Edgerton School Board*, 76 Wis. 177, 7 L. R. A. 330; *Varney* v. *Justice*, 86 Ky. 596; *Jones* v. *Hutchinson*, 43 Ala. 721.

The authentication of an act must be by signature; and one which, though passed, is not signed nor enrolled, is void.

State v. *Kieswetter*, 45 Ohio St. 254; Burroughs, Pub. Secur. 426; *State* v. *Swift*, 10 Nev. 176, 21 Am. Rep. 721; *State* v. *Mead*, 71 Mo. 266; *Annapolis* v. *Harwood*, 32 Md. 471; *State* v. *Young*, 32 N. J. L. 29; *Sherman* v. *Story*, 30 Cal. 253, 89 Am. Dec. 93.

When the Constitution requires every bill passed to be signed by the presiding officer of the respective Houses, it is mandatory and cannot be dispensed with.

Sutherland, Stat. Constr. p. 51; *Pacific Railroad* v. *The Governor*, 23 Mo. 364, 66 Am. Dec. 673; *Speer* v. *Allegheny & M. Pt. Road Co.* 22 Pa. 376; Cooley, Const. Lim. 183.

Mr. **F. B. Dawes,** Attorney General, for defendant:

The fact that the act of the legislature, the validity of which is questioned in this suit, was not signed by the lieutenant governor and speaker of the House of Representatives until more than two days after it had finally passed both the Senate and House of Representatives, does not make the act invalid.

Leavenworth County Comrs. v. *Higginbotham*, 17 Kan. 62.

The title of this act is sufficiently broad to include everything contained in such act.

Woodruff v. *Baldwin*, 23 Kan. 491; *State* v. *Barrett*, 27 Kan. 217; *Cherokee County Comrs.* v. *State*, 36 Kan. 337; *State* v. *Bush*, 45 Kan. 140; *Re Sanders*, 53 Kan. 191, 23 L. R. A. 603.

While this law practically amends or modifies prior laws in reference to certain judicial districts, yet it is an independent statute, complete in itself, and as such does not violate the provisions of the last subdivision of section 16, article 2, of the Constitution.

Sutherland, Stat. Constr. 173, and authorities cited; *State* v. *Cross*, 38 Kan. 696.

Where the constitutional question is raised, though it may be legitimately presented by the record, yet if the record presents some other and clear ground upon which the court may rest its judgment and thereby render the constitutional question immaterial to the case, that course will be adopted, and the question of constitutional power will be left for consideration until a case arises which cannot be disposed of without considering it.

Cooley, Const. Lim. 196; *Ex parte Randolph*, 2 Brock. 447; *Frees* v. *Ford*, 6 N. Y. 178; *Cumberland & O. R. Co.* v. *Washington County Ct.* 10 Bush, 564; *White* v. *Scott*, 4 Barb. 56; *Mobile & O. R. Co.* v. *State*, 29 Ala. 573; *Davis* v. *Wilson*, 11 Kan. 74.

No one, except the judges of the districts whose terms would be affected, would have a right to question the validity of this act.

Cooley, Const. Lim. 197; *People* v. *Rensselaer & S. R. Co.* 15 Wend. 113, 30 Am. Dec. 33; *Sinclair* v. *Jackson*, 8 Cow. 543; *Smith* v. *McCarthy*, 56 Pa. 359; *Antoni* v. *Wright*, 22 Gratt. 857; *Marshall* v. *Donovan*, 10 Bush, 681; *Re Wellington*, 16 Pick. 87, 26 Am. Dec. 631; *Hingham & I. Bridge & Turnp. Co.* v. *Norfolk County*, 6 Allen, 353; *Dejarnett* v. *Haynes*, 23 Miss. 600; *Heyward* v. *New York*, 8 Barb. 486; *Re Albany Street*, 11 Wend. 149, 25 Am. Dec. 618; *Williamson* v. *Carlton*, 51 Me. 419; *State* v. *Rich*, 20 Mo. 393; *Jones* v. *Black*, 48 Ala. 540.

The power given by the Constitution to the legislature to increase the number of judicial districts would also include the power to abolish.

There can be no question that the Constitution does not, either directly or impliedly, prohibit the legislature from so doing, and such being the case, they have the power.

People v. *Draper*, 15 N. Y. 532; *Thorp* v. *Rutland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625; Cooley, Const. Lim. 107; *Adams* v. *Howe*, 14 Mass. 340, 7 Am. Dec. 216; *People* v. *Rucker*, 5 Colo. 455; *Leggett* v. *Hunter*, 19 N. Y. 445; *Cochran* v. *Van Surlay*, 20 Wend. 365,

32 Am. Dec. 570; *People* v. *Morrell*, 21 Wend. 563; *Sears* v. *Cottrell*, 5 Mich. 251; *Beauchamp* v. *State*, 6 Blackf. 299; *People* v. *Wright*, 70 Ill. 388; *State* v. *Reid*, 1 Ala. 612, 35 Am. Dec. 44; *Andrews* v. *State*, 3 Heisk. 165, 8 Am. Rep. 8; *Lewis & Nelson's Appeal*, 67 Pa. 153; *Walker* v. *Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24.

The power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility.

Cooley, Const. Lim. 192; 3 Am. & Eng. Enc. Law, p. 674; *Pennsylvania R. Co.* v. *Riblet*, 66 Pa. 164; *People* v. *New York C. R. Co.* 34 Barb. 123; *Tyler* v. *People*, 8 Mich. 320; *Inkster* v. *Carver*, 16 Mich. 484; *Flint River S. B. Co.* v. *Foster*, 5 Ga. 194, 48 Am. Dec. 248; *Atchison* v. *Bartholow*, 4 Kan. 124; *Ogden* v. *Saunders*, 25 U. S. 12 Wheat. 213, 6 L. ed. 606; *Cherokee County Comrs.* v. *State*, 36 Kan. 337.

The fact that the legislature passed this act is a conclusive presumption, so far as this court is concerned, of the wisdom and need of such a law.

People v. *Draper*, 15 N. Y. 532; *Re Hinkle*, 31 Kan. 712; *Division of Howard County*, 15 Kan. 194; *Hagerty* v. *Arnold*, 13 Kan. 367; *Re Wood*, 34 Kan. 648; *State* v. *Askew*, 48 Ark. 82; *Van Buren County Supers.* v. *Mattox*, 30 Ark. 566; *State* v. *Gaines*, 2 Lea, 316.

The fact that this law passed by the legislature in response to the demands of the people, that the number of judicial districts be diminished, results incidentally in lessening the term of some judges for a short time and their salary by such law being reserved to them for the full term, will not be sufficient reason for declaring such law unconstitutional.

State v. *Ranson*, 73 Mo. 78; *State* v. *McGovney*, 92 Mo. 428; *Hagerty* v. *Arnold*, *supra*.

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

It is alleged in the alternative writ of mandamus issued in this case that the plaintiff was, on the 17th day of September, 1895, duly and legally nominated to the office of district judge by the Republican judicial convention held at the city of Eldorado, in Butler county, for the 26th judicial district, including the counties of Butler and Greenwood; that a certificate of such nomination in due form was signed by the chairman and secretary of said convention, and presented to the defendant, secretary of state, with the request that he file the same; that the defendant refused to comply with this request on the ground that Butler and Greenwood counties were, by act of the last legislature, transferred to the 13th judicial district. The writ commands the secretary of state to file the certificate of nomination or show cause. The attorney general appears on behalf of the defendant, and moves to quash the writ, because it does not state a cause of action against the defendant.

Chapter 106 of the Laws of 1895, entitled "An Act Relating to Judicial Districts, Defining the Boundaries of the 5th, 8th, 9th, 13th, 19th, 24th, 31st, and 32d Judicial Districts, and Providing for Holding Terms of Court therein, and Defining Certain Duties of the Trial Court in the 19th Judicial District, and Repealing All Acts and Parts of Acts in Conflict with This Act," provides in section 7 that "the counties of Chautauqua, Elk, Greenwood, and Butler shall constitute the 13th judicial district." Prior to the passage of this act the 26th judicial district included only the counties of Butler and Greenwood, and by transferring these to the 13th district the 26th is abolished because it is left without territory. By changes in the boundaries of other districts the 25th, 27th, and 28th districts are also abolished. Chapter 99 of the Laws of 1895 abolishes the 14th district in the same manner, and at the same session of the legislature the Shawnee county circuit court was also abolished.

1. The validity of chapter 106 is challenged by the plaintiff on various grounds. First. It is contended with great earnestness that the office of judge of the district court is a constitutional office, which it is beyond the power of the legislature to abolish; that this act, by its terms, takes effect on the 15th day of October, 1895, while the term of office of the Honorable C. W. Shinn, the present judge of the 26th judicial district, will not expire until the second Monday in January, 1896; that the Constitution protects the district judge in his office for the full term of four years, and that the legislature cannot directly abridge his term, nor indirectly accomplish the same result by destroying his district. It is contended that the judicial department is co-ordinate with and independent of the legislative, and that, if the right of the legislature to destroy a judicial district, and thereby legislate a judge out of office, is recognized, the independence of the judiciary is destroyed, and the legislative will becomes dominant over the judicial department of the government. In support of this contention it must be conceded that cases closely in point, decided by eminent courts, are cited. Among the strongest may be mentioned *Com.* v. *Gamble*, 62 Pa. 343, 1 Am. Rep. 422; *State* v. *Friedley*, 135 Ind. 119, 21 L. R. A. 634; *People* v. *Dubois*, 23 Ill. 547; and *State* v. *Messmore*, 14 Wis. 177. We have carefully weighed and considered these authorities, and recognize their full force. While the reasoning of the courts in these cases is applicable to the one now under consideration, we may remark that in each of the cases mentioned the court had under consideration an act of the legislature which would deprive a single judge only of his office, if valid. In this case the legislature had under consideration the rearrangement of the judicial districts covering a large part of the state. Notwithstanding our great respect for the tribunals by which these cases were decided, and the force of the reasoning by which their decisions are supported, we are constrained to give a different construction to the provisions of our own Constitution. The provisions in article 3 of that instrument, so far as they affect the matter under consideration, are as follows:

"Sec. 1. The judicial power of this state shall be vested in a supreme court, dis-

trict courts, probate courts, justices of the peace, and such other courts inferior to the supreme court as may be provided by law. And all courts of record shall have a seal to be used in the authentication of all process."

"Sec. 5. The state shall be divided into five judicial districts, in each of which there shall be elected by the electors thereof a district judge who shall hold his office for the term of four years. District courts shall be held at such times and places as may be provided by law.

"Sec. 6. The district courts shall have such jurisdiction in their respective districts as may be provided by law.

"Sec. 7. There shall be elected in each organized county a clerk of the district court, who shall hold his office two years, and whose duties shall be prescribed by law.

"Sec. 8. There shall be a probate court in each county, which shall be a court of record, and have such probate jurisdiction and care of estates of deceased persons, minors, and persons of unsound mind, as may be prescribed by law, and shall have jurisdiction in cases of habeas corpus. This court shall consist of one judge who shall be elected by the qualified voters of the county, and hold his office two years. He shall be his own clerk, and shall hold court at such times, and receive for compensation such fees, as may be prescribed by law.

"Sec. 9. Two justices of the peace shall be elected in each township, whose term of office shall be two years, and whose powers and duties shall be prescribed by law. The number of justices of the peace may be increased in any township by law."

"Sec. 14. Provision may be made by law for the increase of the number of judicial districts whenever two thirds of the members of each House shall concur. Such districts shall be formed of compact territory and bounded by county lines, and such increase shall not vacate the office of any judge.

"Sec. 15. Justices of the supreme court and judges of the district courts may be removed from office by resolution of both Houses if two thirds of the members of each house concur, but no such removal shall be made except upon complaint, the substance of which shall be entered upon the journal, nor until the party charged shall have had notice and opportunity to be heard."

The legislature of 1887 created the 25th, 26th, 27th, 28th, and 29th judicial districts, and the legislature of 1889 created the 30th, 31st, 32d, 33rd, 34th, and 35th districts. The acts creating these districts were passed at a time when the development of the resources of the state and the increase in its population were expected to continue with the same rapidity as in the preceding years. Subsequent events have shown that this increase was extravagant and unnecessary, and there came an exceptionally strong demand from the people that some of these needless offices be abolished. The act of the legislature of 1895 now under consideration was passed in compliance with this demand. The question we now have to consider is whether this purpose has been accomplished without any violation of constitutional restrictions. The argument on behalf of the plaintiff, and the reasoning of the courts in the authorities sustaining his contention, may, perhaps, be divided into two main propositions: One, that it was the general purpose of the framers of the Constitution to protect the judicial department from legislative interference; the other, that they intended to insure to the judge a tenure of office for the full term for which he was elected; the one being necessary for the preservation of the independence and integrity of the judicial branch of the government in the administration of justice between litigants, and the other to preserve the individual right of the judge to his office. That the Constitution intends to secure the judiciary as an independent co-ordinate branch of the government is conceded on all hands, and that the district courts are an important part of the judicial system is beyond question. It is contended that, because the Constitution provides for district courts, and fixes the term of the judges, and prescribes the mode of their removal from office, their position is fixed, and is as safe from legislative interference as that of the justices of this court; that both are constitutional officers, in exactly the same sense, and to exactly the same extent. But it will be noticed that under the provisions of the Constitution above quoted the judicial power is vested, not merely in supreme and district courts, but in probate courts, justices of the peace, and such other courts, inferior to the supreme court, as the legislature may see fit to create. Probate judges and justices of the peace are constitutional officers, whose terms are fixed at two years by that instrument. The only provision of the Constitution which can be construed as giving superior protection to district judges over probate judges and justices of the peace is that providing for the removal from office of justices of the supreme court and judges of the district courts. The number of the justices of the supreme court, as well as the duration of their terms of office, is definitely fixed by the terms of the Constitution. Their original jurisdiction is fixed by the Constitution itself, and is coextensive with the state. Their appellate jurisdiction alone is subject to legislative discretion. The case of district judges and justices of the peace is different in this important particular: that the number of judicial districts, and therefore the number of district judges, as well as the number of counties and townships, and of probate judges and justices of the peace, depend on legislative discretion. The Constitution requires a probate judge in each county, but leaves the number of counties into which the state shall be divided to be determined by the legislature, with the single restriction that no county shall include an area of less than 432 square miles. It provides that two justices of the peace shall be elected in each township, but leaves the establishment of townships entirely to the legislature. If the contention of the plaintiff is sound, it follows as a logical sequence that the legislature cannot abolish a township or county at a time when it will have the effect to shorten the

term of office of a justice of the peace, a probate judge, or, indeed, a clerk of the district court.

We think prior decisions of this court have construed our Constitution and announced the principles decisive of this case. In the case of *Division of Howard County*, 15 Kan. 94, it was held that "the legislature has the power to abolish counties and county organizations whenever it becomes necessary for them to do so in changing county lines or in creating new counties." *Re Hinkle*, 31 Kan. 712, decides: "The legislature has the power to abolish or destroy a municipal township, and when the township is abolished or destroyed, the township officers must go with it." The doctrine of this case is reaffirmed in *Re Wood*, 34 Kan. 645. In the case of *State* v. *Hamilton*, 40 Kan. 323, it was said: "There is no constitutional restriction upon the power of the legislature to abolish municipal and county organizations, and the existence of the power is not disputed and cannot be doubted." The Constitution provides for five judicial districts. It is clear that the legislature cannot reduce the number of districts below five. Section 14, above quoted, provides for an increase of the number, and the concluding sentence of the section is, "and such increase shall not vacate the office of any judge." It is argued that the word "increase" should be interpreted to include alteration or diminution, and that the real intent of the framers of the Constitution was to absolutely protect every district judge against the abolition of his office by the legislature. If so, the framers of the Constitution were singularly careless in their selection of words. This we cannot assume without most cogent reasons. If it had been intended to prohibit the vacation of the office of a judge by the abolition of his district, it would have required but very few words to say so. To vacate the office of a district judge already elected by the people and serving, by an act increasing the number of judges, would clearly be, in effect, the removal of a judge from office when his office was not destroyed. To allow the legislature, while making one new district, to legislate the judge of an old district out of office, and provide for the appointment or election of two new judges, would clearly be vicious in principle, and this is the class of legislation which falls within the constitutional inhibition. But to prohibit the legislature from abolishing a district which had been improvidently established, and thereby vacate the office of a judge, is another and altogether different thing, which the Constitution does not, in express terms, prohibit. While the independence and integrity of courts in the exercise of all the powers confided in them by the Constitution should be firmly maintained, jealousy of encroachments on judicial power must not blind us to the just power of the legislature in determining within constitutional limits the number of courts required by the public exigencies, and the kind and extent of the jurisdiction and functions to be discharged by each. We think the legislature has the power to abolish as well as to create, to diminish as well as to increase, the number of judicial districts. We might say, in this connection, that the plaintiff in this case does not claim any vested right in an office, and that no question is presented by the record before us as to the right of the legislature to deprive a district judge of the compensation allowed him by law. In the act under consideration the legislature has seen fit to provide that the act shall not be construed to deprive any judge of his salary for the full term for which he was elected. The claim of the plaintiff in this case rests on the broad proposition that the act in its entirety is void. The conclusion we have reached is not wholly without support from authorities in other states. *Van Buren County Supers.* v. *Mattox*, 30 Ark. 566; *State* v. *Gaines*, 2 Lea, 316; *Crozier* v. *Lyons*, 72 Iowa, 401.

If the contention that a judge, when once elected, is entitled not only to the emoluments of his office, but to exercise the functions of his office in the territory for which he was elected, be sound, does his right extend over the whole district, or only over a part of it, and can there be a sound distinction between the right to take away a part of his district and the right to take away the whole? It has never been contended, so far as we are aware, that the legislature is without power to change the boundaries of judicial districts by detaching counties from one and adding them to another; nor has it been doubted that the legislature might do this during the continuance in office of any judge. That this has the effect of placing the people of the county so transferred from one district to another away from the jurisdiction of a judge in whose selection they have taken part, and under the jurisdiction of another judge in whose election they have had no voice, is clear. The great fallacy, as we view the case, in the argument in favor of the plaintiff, and in the cases cited by him, is that the rights of the particular individual who chances to be elected judge are looked upon as paramount and superior to the rights of the public. The correct view is that a public officer, no matter what the department of the government in which he serves, is a public servant. A district judge is provided to aid in the administration of the laws. While it is right that the public should deal justly with him, his individual rights are by no means of primary importance. The most substantial objection that can be urged against such a transfer as is made by this act is that the people are placed in a district under a judge in whose selection they have had no voice, and who might not have been chosen if all the people in the enlarged district had been permitted to vote at the time of his election. The reasons apply against the transfer of one county with just the same force as against the transfer of all the counties included within a district. Acts of the legislature transferring a county from one district to another have very frequently been passed during the history of the state, and their validity has never been questioned. The only ground on which it can be urged that the legislature might transfer Greenwood county into the 13th district, but not Butler, is that the judge of

the 26th district resides in Butler county. This ground is purely personal to the judge. It has no weight whatever affecting the interests of the public.

We need not discuss the question, argued at some length in the brief, whether there can be a judge without a district, or without a court over which to preside, as the plaintiff in this case has no interest in that question. Nor shall we attempt to answer the list of questions asked under this head in the brief. It is sufficient for us to say that the legislature had power to transfer Greenwood and Butler counties into the 13th judicial district in the manner provided in the act under consideration.

2. It appears that on the final passage of the act two thirds of the senators voted for it; that in the House it received eighty-three votes, being one short of two thirds of the members. It is contended that the Constitution requires the concurrence of two thirds of the members of each House to increase the number of judicial districts, and that there is an implied inhibition on the reduction of the number of districts without the concurrence of an equal number. The general rule is that laws may be enacted by the vote of a majority of all the members elected to each House. The concurrence of a larger number is only required in cases mentioned in the Constitution itself. It is not apparent that the same reasons exist for a two-thirds majority in order to abolish a judicial district, or to change its boundaries, that do for creating one. One of the worst tendencies to be provided against in our system of government is that of constantly creating new offices to be filled, and increasing the salaries of old ones. Those desiring lucrative positions, or public favors of any kind, are constantly pressing their claims on the members of the law-making body, and it was thought wise to require the concurrence of two thirds of the members of each House as a safeguard against this tendency. Any one who has observed the obstacles which are invariably thrown in the way of every attempt at the abolition of an office, or reduction of a salary, or the taking away of a special privilege, must be fully aware that no necessity exists for unusual constitutional restrictions on the power to reduce the number of officers, or deprive any person of a salary or a privilege held to the detriment of the public. When the people are not vigilant, their rights are often easily lost, and regained only with utmost labor. *Facilis descensus Averno. Noctes atque dies patet atri janua Ditis; sed revocare gradum, superasque evadere ad auras, hoc opus, hic labor est.*

3. It it urged that the act is void because it violates section 16 of article 2 of the Constitution; that the title is defective because it does not clearly express the purpose of the act, does not mention the judicial districts abolished, and includes more than one subject. The first part of the title, "An Act Relating to Judicial Districts," is very broad and comprehensive. Whatever changes are made by the act are effected by so extending the boundaries of the districts named as to include within them the territory of the old 25th, 26th, and 28th districts. There is no abolition of these districts by express words, but any person reading the title of the act would be informed that changes of boundaries were made, and of course a change in the boundary of one district could not be effected without also changing the boundary of another. The contention that, because a clause is inserted in the act, making it "the duty of the trial court of the 19th judicial district in assigning the docket to so group cases arising in Arkansas City and cases controlled by Arkansas City attorneys, so they can, on motion, be tried in succession," it contains more than one subject, is not good. While this matter is perhaps a little remote from the general purpose of the act, it still is connected with judicial districts. This is not a matter of very great importance, and to hold this whole act void on this ground would seem extremely technical and hypercritical. Nor do we think that greater force should be given to the objection to the last clause of section 4, relating to summoning juries in Dickinson and Morris counties. All these matters relate to judicial districts. It is contended that the construction we have given to the act under consideration makes it amendatory legislation, and therefore void, within the rule followed in *State* v. *Guinney*, (Kan.) 40 Pac. Rep. 926. Every act changing the law is not necessarily amendatory because previous legislation existed on the same subject. An amendment properly is a correction of one or more existing defects. It looks to particulars, without disturbing the general framework of the law. But where the legislature has under consideration not merely minor particulars, but the whole subject-matter of the law, it may wholly annul all former legislation on the subject, and pass an act covering the entire field, without specifically naming or attempting to amend particular provisions in prior statutes. The new act then becomes a substitute for all former legislation on the subject, and may repeal, either in express terms or by necessary implication, all former sections of the law inconsistent with the new enactment. Were we to hold the act under consideration amendatory of former statutes, and void because the sections amended are not contained in the new act, and apply the same rule to former statutes, it is very difficult to tell in what judicial districts the various counties named in the act would be found. By referring to chapter 147 of the Laws of 1887, by which the 26th judicial district was created, we find that it does not in terms amend any former law, nor contain even a general repealing clause. It merely creates judicial districts, and fixes the terms of court therein; the 26th district being composed of the counties of Butler and Greenwood. Prior to the passage of that act, Butler county was in the 18th district, created by chapter 102 of the Laws of 1883, and Greenwood county was in the 5th. Prior to that time, Butler county had been in the 13th district, created by chapter 112 of the Laws of 1872, and prior to that time in the 9th. Greenwood county was attached for judicial purposes to Woodson county, which was included in the 5th dis-

trict in 1861. None of the acts creating the various judicial districts in which Butler county has been included have ever complied with the constitutional requirements of an amendatory statute, and, if the act under consideration is void for that reason, the act creating the 26th judicial district is void also, and no 26th district has ever existed. It is clear that the statute is not void for this reason.

4. A final objection is that the act was not signed by the presiding officers of the respective Houses within two days after its passage, as required by section 14 of article 2 of the Constitution. If the contention of the plaintiff is sound, then a veto power rests in the presiding officers of the two Houses, which has remained undiscovered from the organization of the state government to this time. It would undoubtedly be a very great surprise to the general public if it were to be declared by this court that the lieutenant governor and the speaker of the House, by merely delaying for more than two days to attach their signatures to it, could effectually kill a law duly passed by the Senate and House. In the case of *Leavenworth County Comrs.* v. *Higginbotham*, 17 Kan. 62, it was held that the failure of the presiding officer of the Senate to sign a bill did not invalidate the law, and that the act then under consideration was a law, although never authenticated as such by him.

The motion to quash the writ is sustained.

All the Justices concur.

ILLINOIS SUPREME COURT.

Fred L. VOLTZ *et al.*, *Appts.*,
v.
NATIONAL BANK OF ILLINOIS.

(158 Ill. 532.)

1. A bank which guaranteed the payment of the checks of another bank that was not a member of a clearing-house association, in order to clear its checks, and, after the latter bank had made an assignment for creditors and a check thereon which had been certified for the drawers had been refused at the clearing-house, paid the check in pursuance of the guaranty,—did not do this as agent of the other bank, but became an assignee of the check, with the right to recover thereon against the drawers.

2. Even if a guaranty by one bank to another for clearing-house purposes is ultra vires this fact will not avail the drawers of a certified check who are not parties to the guaranty, when charged with liability to the bank, which in compliance with its guaranty has paid the check and become an assignee thereof after the drawee has become insolvent.

3. A bank which pays a check in pursuance of a guaranty, even if that was *ultra vires*, is not a mere volunteer so as to be precluded from claiming the rights of the person to whom payment was made, by subrogation.

(October, 11, 1895.)

APPEAL by defendants from a judgment of the Appellate Court, First District, affirming a judgment of the Circuit Court for Cook County in favor of plaintiff in an action brought to enforce payment of a check of which defendants were drawers after it had been dishonored by the drawee and taken up by plaintiff under its guaranty. *Affirmed.*

Statement by **Baker, J.**:

This cause is brought to this court by appeal, on a certificate of importance from the Appellate Court for the First District.

On and for some time prior to June 3, 1893, there was in the city of Chicago an association known as the "Chicago Clearing-House." The membership of that association comprised certain of the Chicago banks, and its purpose was to facilitate the daily settlement between those banks. The National Bank of Illinois, appellee, and the First National Bank of Chicago, were both members of that association. On and for some time prior to June 2, 1893, Herman Schaffner & Co. were engaged in business as private bankers in the city of Chicago. They were not in the clearing-house association, but, through an arrangement between them and appellee, checks drawn upon the former were cleared by the latter. In order to make this arrangement effective, so that checks drawn upon Herman Schaffner & Co., and certified, would be received by the clearing-house banks, it became necessary for appellee to guarantee the payment of such checks.

On June 2, 1893, the First National Bank held for collection a draft for $581.03, drawn upon appellants, F. L. Voltz & Co., and by them accepted. On that day, appellants, who then had funds on general deposit with Herman Schaffner & Co., drew a check upon the latter for the sum of $581.03, had it certified, and delivered it to the First National Bank in payment of the draft. That check was received by the First National Bank between eleven and twelve o'clock on June 2, and too late to be put through the clearing-house on that day. At about 8:30 A. M. of June 3, 1893, Herman Schaffner & Co. made a voluntary assignment for the benefit of their creditors. They then ceased doing business and are still insolvent. On June 3, 1893, the First National Bank presented said check, through the clearing-house, to the National Bank of Illinois. The payment of it was refused on account of the insolvency of Herman Schaffner & Co. The cashier of the First National thereupon called the attention of

NOTE.—As to clearing-house business, including agency of clearing-house members for outside banks, see *note* to Yardley v. Philler (C. C. App. 3d C.) 25 L. R. A. 824, also O'Brien v. Grant (N. Y.) 28 L. R. A. 361.

appellee to the guaranty in evidence, and appellee issued its cashier's check for the amount, and the check in suit was indorsed "without recourse," by the First National Bank, and delivered to appellee.

The amount of the check was charged by appellee as an overdraft of Herman Schaffner & Co.'s account, and it subsequently filed a claim for the amount so paid against the estate of Herman Schaffner & Co. The following is a copy of the check as it was offered in evidence:

"No. 1076. Chicago, June 2, 1893.

"*To Herman Schaffner & Co., Bankers:*

"Pay to the order of First National $581\frac{03}{100}$ five hundred eighty-one and $\frac{03}{100}$ dollars.

"F. L. Voltz & Co."

"Certified June 2, 1893.

"Herman Schaffner & Co.

"A Swartz, Teller."

Indorsed on back: "First National Bank.—Without recourse.—R. J. Street, *Cash.*" "Pay through Chicago clearing-house only." "Paid June 3, 1893." The indorsement, "Paid June 3, 1893," is the clearing-house stamp, put there on June 2, and dated a day ahead, by the First National Bank, in anticipation of payment through the clearing of the next day, as was the usage among the members of the clearing-house.

The following is a copy of the guaranty given by appellee to the First National Bank:

"Chicago, Feb. 3, 1886.

"*L. J. Gage, Esq., Vice-president, City:*

"Dear Sir:—This bank hereby holds itself accountable for payment, on presentation, in the regular course to it, of any and all checks or drafts drawn upon the banks and bankers below named, or either of them, and properly certified by them. This obligation, however, to apply only to such drafts and checks as may be received by you in the course of your business in payment of collections or discounted items. . . . Herman Schaffner & Co. "Truly yours,

Wm. A. Hammond, Cashier."

The suit is assumpsit, by appellee, as assignee of the check, against appellants, as makers. The declaration also contains the common counts. The issues joined were submitted to the circuit court without a jury, and the finding and the judgment were for appellee for $607.66 damages, and thereafter the judgment was affirmed in the appellate court.

At the trial appellants submitted certain written propositions to be held as law. The court held proposition 1, as follows:

"The court finds, as matter of law, that the relationship between Herman Schaffner & Co. and the plaintiff herein, whereby the latter represented the former in the clearing-house in the city of Chicago, was that of principal and agent."

But the court refused to hold propositions from 2 to 9 inclusive, which were as follows:

"2. The court finds, as a matter of law, that the plaintiff herein came into possession of the check sued on herein, for and as the agent of Herman Schaffner & Co., and that the payment made therefor by it to the First National Bank was, in law, a payment by Herman Schaffner & Co., and an extinguishment of the drawer's liability.

"3. The court finds, as a matter of law, that as the National Bank of Illinois was not liable upon its guaranty to the First National Bank, the payment by it was made by it as volunteer, and it is not entitled to be subrogated, as against the defendants, to the rights of the First National Bank.

"4. The court finds, as a matter of law, that the contract executed by the National Bank of Illinois in 1886 was *ultra vires* and void, and that the First National Bank could not have maintained any recovery thereon for the check in question.

"5. The court finds, as a matter of law, that the contract of guaranty executed by the National Bank of Illinois to the First National Bank in 1886 is void, as rendering the National Bank of Illinois liable for an amount in excess of the capital stock of the company actually paid in, and that the First National Bank could not have maintained any action thereon for the recovery of the amount of the check in suit.

"6. The court finds, as a matter of law, that the contract of guaranty executed by the National Bank of Illinois to the First National Bank in 1886 is void, as being against public policy, and that the First National Bank could not have maintained any action thereon for the recovery of the amount of the check in suit.

"7. The court finds, as a matter of law, that the defendants are not liable to the plaintiff upon the check sued on herein.

"8. The court finds, as a matter of law, that the First National Bank was bound to know the *ultra vires* character of the contract of guaranty executed to it by the National Bank of Illinois in 1886, by reason of itself being a national bank.

"9. The court finds, as a matter of law, that Herman Schaffner & Co. would have no right of action upon the check in question if it had paid it, and that the National Bank of Illinois cannot, by virtue of the payments made by it in the course of its agency for Herman Schaffner & Co., acquire any greater rights, as against the defendants herein, than Herman Schaffner & Co. would have had, had such payment been made by them."

Messrs. **Moses, Pam, & Kennedy** for appellants.

Messrs. **Moran, Kraus, & Mayer,** for appellee:

The certification having been thus procured by the drawers of the check, their primary liability, the check not having been paid by Schaffner & Co., upon whom it was drawn, continued.

Metropolitan Nat. Bank v. *Jones*, 137 Ill. 634, 12 L. R. A. 492.

Under the circumstances there can be no difference between an uncertified and a certified check. Nonpayment of either by the bank leaves the drawer primarily liable.

Bickford v. *First Nat. Bank*, 42 Ill. 238, 89 Am. Dec. 436.

The fact that appellee had given a guaranty to the First National Bank in no way impairs

or affects its right to have recourse against the drawers of the check. Appellee did not guarantee the payment of the check to appellants and appellants could, therefore, under no circumstances, have sued appellee upon the guaranty.

Bishop v. *Rowe*, 71 Me. 263; *Pacific Bank* v. *Mitchell*, 9 Met. 297; *McGregory* v. *McGregory*, 107 Mass. 543; *Pinney* v. *McGregory*, 102 Mass. 186; *Swope* v. *Leffingwell*, 72 Mo. 348.

Even if there had been no transfer of the check by indorsement from the First National Bank to appellee, the latter, by taking up this check under the guaranty in evidence, stood in the position of an indorsee thereon.

2 Dan. Neg. Inst. § 1774.

A guarantor of a note or check who, upon nonpayment of the same becomes immediately liable to an action upon that note or check, cannot be a "mere volunteer."

Bishop v. *Rowe, supra; Babcock* v. *Blanchard*, 86 Ill. 165; Sheldon, Subrogation, 2d ed. § 186; *Hamilton* v. *Johnston*, 82 Ill. 39.

There is an implied assumpsit on the part of the appellants to pay appellee the amount of the check, and the count for money paid to their use sustains the judgment below.

Brandt, Suretyship & Guaranty (1878) §§ 178, 179.

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

There was no real inconsistency in the rulings of the trial court upon the written propositions submitted to it, in holding proposition 1 and refusing to hold propositions 2, 7, and 9 as law in the decision of the case. Assuming it to be true that, while appellee represented Herman Schaffner & Co. in the clearing-house, the relation that existed between them was that of principal and agent yet that relation ceased to exist early on the morning of June 3, 1893, when Herman Schaffner & Co. made a general assignment for the benefit of their creditors and ceased doing business, and appellee refused longer to represent them in the clearing-house, and threw out and returned their clearings, amounting to $6,976.01. The evidence is, that in the forenoon of June 3 appellee refused longer to pay checks certified by them, and that the check in question was not paid through the clearing-house. The testimony of Moll, who was assistant cashier of appellee, is explicit, that the check was paid by appellee on account of the guaranty in writing held by the First National Bank. And Street, cashier of the First National Bank, testifies in chief: "This check was shown to me by our note teller, and I remembered the fact that we had a guaranty from the National Bank of Illinois, and I held them to their guaranty, simply, and they took the check up." And he testifies on cross-examination: "When that check was not paid through the clearing-house, our bank, either on June 3 or June 5, demanded that the National Bank of Illinois should give us the face of it." And also says that he indorsed the check by way of transfer to the National Bank of Illinois, but to protect his own bank made the indorsement "without recourse."

In holding proposition 1, the trial court did not, either in terms or by necessary implication, find, as matter of fact, that appellee, in paying the check, did so as agent of Herman Schaffner & Co., and when that proposition is read in the light of the refusal to hold propositions 2, 7, and 9 it is manifest that court must have found that appellee did not pay or come into possession of the check "for and as the agent" of Herman Schaffner & Co. Therefore the doctrine that payment by the agent of the maker of a note or drawee and acceptor of a check is a payment of the note or check, and an extinguishment of the liability of the indorser of such note or drawer of such check, has no application to the case, and the authorities cited by appellants upon this branch of the controversy,—*i. e.*, Mechem, Agency, § 487; *Burton* v. *Slaughter*, 26 Gratt. 914, and *Johnson* v. *Glover*, 121 Ill. 293,—are not in point.

In our opinion, the conclusion here must be, that when appellee gave to the First National Bank its cashier's check for the face of the F. L. Voltz & Co. check, and took an assignment of the latter check, it did so, not as the agent of Herman Schaffner & Co., but as guarantor of said check; and it follows, since appellee did not pay the check as agent, that by the indorsement it took the legal title to the check, and has a legal right, as assignee, to recover the money therein specified from appellants, the drawers of the check, the said Herman Schaffner & Co. having failed and refused to make payment,—and this, wholly regardless of the considerations that may have induced it to make the payment and take the assignment. Appellants, the drawers, procured the certification of the check prior to its delivery to the payee, and they are primarily liable to such payee or its assignee. *Metropolitan Nat. Bank* v. *Jones*, 137 Ill. 634, 12 L. R. A. 492; *Brown* v. *Leckie*, 43 Ill. 497; *Bickford* v. *First Nat. Bank*, 42 Ill. 238, 89 Am. Dec. 436; *Rounds* v. *Smith*, 42 Ill. 245.

It is claimed in some of the refused propositions that were submitted to the court, and also in the argument of appellants, that the contract of guaranty given by appellee to the First National Bank was *ultra vires* and void; that it was also void as rendering appellee liable for an amount in excess of its capital stock actually paid in, and void as being against public policy; and that therefore the First National Bank could not have maintained any action thereon against appellee for the recovery of the amount of the check in suit, and consequently the payment made by appellee was made as a volunteer, and it is not entitled to be subrogated, as against appellants, to the rights of the First National Bank. Even if all these claims should be conceded, yet if we are right in the conclusions we have announced above, appellee, as assignee of the check, has a complete legal right of recovery, and it is wholly immaterial even if it has not the equitable right to be subrogated to the position of the First National Bank.

But the determination of the question whether the guaranty contract is *ultra vires* and void, or void as being otherwise contrary

to the statute under which appellee was organized, or against public policy, depends upon the interpretation that is to be placed upon the national bank act and the effect to be given its provisions. It may be that if a statute of this state was involved, then the rule that no right of action can spring out of an illegal contract (held in *Penn* v. *Bornman*, 102 Ill. 523, and in other cases), would apply. But in the very case just cited the paramount authority of the Supreme Court of the United States to construe all Federal statutes, including the national bank act, is fully conceded. The doctrine of the Federal courts, as applied to this case, is that, even if the guaranty which appellee gave to the First National Bank was *ultra vires*, or given in violation of the national bank act, yet appellee could not urge that defense after the First National Bank, in reliance upon that guaranty, had taken the certified check in payment of the acceptance of F. L. Voltz & Co., and that the power to redress the wrong committed by the appellee bank was in the government only, by a proceeding to forfeit the charter of the bank. *Union Nat. Bank* v. *Matthews*, 98 U. S. 621, 25 L. ed. 188; *National Bank* v. *Whitney*, 103 U. S. 99, 26 L. ed. 443; *Weber* v. *Spokane Nat. Bank*, 64 Fed. Rep. 208.

It would seem that, under the decisions of the Federal courts, appellee could not have availed itself of the defense of *ultra vires* in an actiton brought on the guaranty. But even if it could have done so, it did not, but paid the check in accordance with its guaranty, and the question of the validity of such guaranty was one in which appellants had no interest, and it is a matter of indifference to them whether they pay the First National Bank or appellee, and therefore they cannot be heard to say that appellee shall not have the benefit of the doctrine of subrogation. (*Slack* v. *Kirk*, 67 Pa. 380, 5 Am. Rep. 438; 2 Morse, Banks & Banking, § 723). Here the guaranty was not indorsed on the check, but was written on a separate paper, and that paper was addressed only to the First National Bank, and upon the face of the guaranty there was an express restriction that the obligation assumed should "apply only to such drafts and checks as may be received by you, in the course of your business, in payment of collections or discounted items." And the rule is that a guaranty so given and addressed to a particular person or corporation only is not negotiable, and is a mere personal contract. (2 Dan. Neg. Inst. § 1774). And it results from this rule, that appellants, the drawers of the check, are total strangers to this contract of guaranty, and it does not inure to their benefit or invest them with any right.

Appellee being legally liable, or, at the very least, under moral obligations for the payment of the certified check to the First National Bank, it cannot be said that it was a mere volunteer when it paid the money and took up the check. A person who, though not obliged to do an act, yet has an interest in doing it, is not to be regarded as necessarily and simply a volunteer. *Wright* v. *London & N. W. R. Co.* L. R. 1 Q. B. Div. 252; *Holmes* v. *North Eastern R. Co.* L. R. 4 Exch. 254, L. R. 6 Exch. 123. And where one guarantees payment of a note or check, and on default of payment by the principal debtor pays the same to the holder, the law will imply a promise to repay on the part of the persons primarily liable, and the guarantor will be subrogated to the rights of the holder to whom he makes payment, and may maintain assumpsit against such persons. *Babcock* v. *Blanchard*, 86 Ill. 165; *Hamilton* v. *Johnston*, 82 Ill. 39; Sheldon, Subrogation, 2d ed. § 186, p. 285.

We think there was no substantial error in the rulings of the circuit court upon the written propositions that were submitted to it.

The judgment of affirmance rendered by the Appellate Court is affirmed.

GEORGIA SUPREME COURT.

WESTERN UNION TELEGRAPH CO.,
Plf. in Err.,
v.
J. S. HOWELL.

(95 Ga. 194.)

***1. According to the principle ruled by this court in the cases of Western U. Teleg. Co. v. James, 90 Ga. 254, and Western U. Teleg. Co. v. Michelson, 94 Ga. 436, there is nothing in that provision of the Constitution of the United States which confers upon Congress the power to regulate commerce among the several states, prohibiting the general assembly of this state from enacting a law subjecting telegraph companies to penalties for acts of negligence occurring entirely within the limits of Georgia, although such acts may be committed in dealing with messages which are to be transmitted to points in other states.**

2. Where a message, the charges upon which were duly paid in advance, was

Headnotes by LUMPKIN, J.

NOTE.—For power of state to control or impose burdens on interstate telegraph business, see Postal Teleg. Cable Co. v. Baltimore (Md.) 24 L. R. A. 161, and *note*.

For application to interstate business of state law as to liability for negligence, see also Solan v. Chicago, M. & St. P. R. Co. (Iowa) 28 L. R. A. 718, and St. Joseph & G. I. R. Co. v. Palmer (Neb.) 22 L. R. A. 335.

received by a telegraph company, at one of its offices in this state, for transmission to a point in another state, and was never delivered to the person to whom it was addressed, it is incumbent on the company, in order to escape liability for the statutory penalty for negligence in transmission from the Georgia office, to show that the message was in fact transmitted from that office with due diligence, and that the nondelivery to the sendee was due to some default or other cause arising beyond the limits of this state.

(December 21, 1894.)

ERROR to the Superior Court for De Kalb County to review a judgment in favor of plaintiff in an action brought to recover the statutory penalty and special damages for defendant's failure to promptly deliver a telegraph message. *Affirmed.*

Plaintiff was arrested in Georgia: he delivered a message containing this information and requesting aid, directed to his brother in Alabama, paying the charge therefor. Defendant neglected to deliver the message. Plaintiff recovered a verdict for the statutory penalty and special damages.

Messrs. **Bigby, Reed & Berry** and **Dorsey, Brewster, & Howell** for plaintiff in error.

Mr. **J. S. Candler** for defendant in error.

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

The facts appear in the reporter's statement.

1. The case at bar, so far as relates to the proposition announced in the first headnote, is not distinguishable in principle from those of *Western U. Teleg. Co.* v. *James*, 90 Ga. 254, and *Western U. Teleg. Co.* v. *Michelson*, 94 Ga. 436. We have therefore felt constrained to follow those cases. As no opinion was written in either of them, the writer, but for a reason which will be presently stated, would feel it incumbent upon himself to endeavor to set forth with some care the views upon which these decisions rest. It is obvious that to do so would require the consumption of much time, and the expenditure of a considerable amount of labor, as the subject is one which has but lately arisen, and is not free from doubt and difficulty. Inasmuch, however, as the general assembly of this state, four days before the present case was decided by this court, repealed the act imposing penalties upon telegraph companies (Acts 1894, p. 79, repealing both the Statute of October 22, 1887, and the amendment thereto of December 20, 1892), and in consequence the question is no longer of practical importance in this state, it is not now deemed necessary to enter into an elaborate discussion of it. The time at our command can certainly be more profitably expended in preparing opinions, so far as we are able, devoted to the discussion of questions which are live issues, and are likely to arise in future litigation. We shall therefore content ourselves with citing the case of *Connell* v. *Western U. Teleg. Co.*, 108 Mo. 459, which supports the view entertained by this court, although the subject was not dealt with at any great length, nor accorded the thorough and satisfactory discussion which its importance would seem to demand. It may nevertheless be very profitably examined, for, so far as we have been able to discover, it is the only decision outside of this state which has, as yet, directly dealt with the question. Reference may also be made to the American & English Encyclopædia of Law (vol. 25, p. 768), where, in a note, the *Connell Case* is cited, and also to page 770 of the same volume, where, at the conclusion of note 3 (which begins on the preceding page, with the title, *Regulation of Interstate Messages*), comments and expressions in full harmony with the view of the question taken by this court will be found, together with references to cases more or less in point.

2. Counsel for the telegraph company, while not conceding its liability in any event, contended that as the plaintiff had failed to show that the omission of duty on the part of the company occurred within the limits of this state, he could not recover, even under the rulings announced in the *James* and *Michelson Cases*. We quite agree with counsel that our penalty statute could have no extraterritorial operation, but are compelled to express our dissent to the assertion that the plaintiff totally failed to make out a prima facie case of negligence on the part of the company occurring within the borders of the state. The matter simply resolves itself into a question of burden of proof, and appears to us to be free from serious difficulty. The rule as to telegraph companies seems to be the same as that applicable to railroad carriers. Proof of the delivery to a telegraph company of a message, non (or incorrect) transmission of it, and consequent damage, is all that is required to make out a prima facie case of negligence. Thompson, Electricity, §§ 266, 275; 25 Am. & Eng. Enc. Law, p. 831; Whart. Neg. § 766; 3 Sutherland, Damages, 2d ed. § 295, p. 2140; Gray, Communications by Telegraph, §§ 26, 53, 54, 77. Breach of the contract is presumed to comprehend negligence. This, as stated by Boynton, Ch. J., in *Western U. Teleg. Co.* v. *Grimold*, 37 Ohio St. 313, for the reason that: "If the error or mistake is attributable to atmospheric causes or disturbances, or to any cause for which the company is not at fault, it is entirely within its power to show it. To require the sender of the message to establish the particular act of negligence, or ferret out the particular locality where the negligent act occurred, after showing the mistake itself, would be to require, in many cases, an impossibility, not infrequently enabling the company to evade a just liability. In *Turner* v. *Hawkeye Teleg. Co.* 41 Iowa, 458, 20 Am. Rep. 605, the court dealt with the question of presumption in a case where a message delivered by one telegraph company to another, which was sued for error in transmission, was not shown by the plaintiff to have been different from the one delivered to him. Beck, J., says: "Defendant's line of telegraph did not extend to Chicago, but at Grinnell it connected with

another line reaching to that city, from which the market reports were obtained, and sent by defendant to different points on its line. It is insisted by defendant that plaintiff failed to show that a correct report was furnished, to be sent from Grinnell upon defendant's line. The evidence shows that the market reports were received at Grinnell on the day the incorrect one was delivered to plaintiff. Upon this evidence, we must presume that the reports received there, and delivered to defendant, were correct. The rules of evidence, in the absence of proof showing the report delivered to defendant at Grinnell to be either correct or incorrect, require us to presume it to have been correct. They are based upon the fact that men ordinarily, in the course of business, act correctly and speak truly. Errors and intentional misstatements are exceptions, and not the rule, in the affairs of business. Their application in this case is demanded by the fact that the evidence to establish error in the report furnished defendant was within its control and exclusive knowledge. Plaintiff was utterly unable to prove the correctness of the report furnished at Grinnell, while, if it had been incorrect, defendant could have readily established the fact." Again, in *Olympe de La Grange* v. *Southwestern Teleg. Co.* 25 La. Ann. 383, it was contended that the defendant was not the first carrier or contractor, and that it was not proved that the error in the transmission occurred on defendant's line, on whose printed blank there was an express provision for nonliability for the default of other companies. But it was held "that, whether first carrier or not, it was peculiarly within their power, and was their duty, to make the proof here suggested, if necessary." Surely, the two cases last cited go further than is requisite to support our ruling in the present case; for, where a third party is also concerned, the further question is presented whether it was not in the power of the plaintiff to show that such third party, in dealing with the message, was free from negligence. In the case at bar the plaintiff showed a breach of contract,—and prima facie negligence,—which must have occurred on the defendant's line, either in this state or in Alabama. Undoubtedly, it was in the exclusive power of the telegraph company to show the exact point where the failure of diligence occurred, and through the negligence of what particular servant it was occasioned. It will not do to say that the servants of the company are equally at the disposal of the plaintiff to prove the facts connected with the transaction. The truth of this assertion may be demonstrated by the peculiar facts here presented. The plaintiff, it is true, did know the company's agent at Lithonia, and perhaps could have secured him as a witness at the trial. But suppose this had been done, and he had testified that he had promptly forwarded the message to the relay office at Atlanta, but had no further knowledge as to the transaction. How could the plaintiff pursue his investigation and proof? Would he have to sue out interrogatories,—for he could not compel personal presence in another county,—directed to each and every one of the numerous employees of the company stationed in the Atlanta office? Certainly, the company could not reasonably be expected to aid him by furnishing a list of all its servants, nor to keep him posted when any of them resigned, or were transferred elsewhere. It might be, and doubtless is, often convenient to the company to change the location of its employees, and it could do so in the utmost good faith; but, whatever the motive, the inconvenience to the plaintiff in reaching them as witnesses would be the same. Again, it cannot be known that the telegraph company keeps such records in writing of its business as would enable the plaintiff to show the required facts by compelling the defendant to produce its records in court. Besides, how would it be known that such records, if kept at all, were correct? If the company itself did not see to it that evidence of negligence was not recorded against it, would it not be a temptation to its employees to omit making any record of their own shortcomings which might result in their discharge? And, at last, this would merely be a different way of compelling the company to supply evidence entirely within its own keeping. It follows from the foregoing that the default should be treated as having occurred in Georgia, the burden being on the defendant to show the contrary, and it having failed to do so. Finally, the plaintiff showed more than a mere failure to deliver. His brother, the addressee, who lived in Montgomery, testified: "I went directly to the telegraph office, as soon as I received my brother's letter, and there had been no message for me at all. The telegram was sent on Thursday. I received my brother's letter on Sunday morning, at 9:30." Therefore, it was shown, that three days after the message was handed to the agent at Lithonia, the office in Montgomery had still failed to receive it over the wire from Atlanta. This being so, it makes no difference whether the message was afterwards sent, or not. Three days' delay in Georgia, unexplained, would render the company liable to the penalty, for this would be undoubtedly, and *per se*, an unreasonable and inexcusable delay; and even if the office in Montgomery had afterwards received the message, and had made no attempt to deliver it to the addressee, these facts would be of no consequence whatever, with reference to the question of the company's liability for the penalty.

Judgment affirmed.

UNITED STATES CIRCUIT COURT OF APPEALS, SEVENTH CIRCUIT.

CHICAGO, MILWAUKEE, & ST. PAUL RAILWAY COMPANY, *Plff. in Err.*

v.

Benjamin F. WALLACE.

(66 Fed. Rep. 503.)

1. A railroad company is not a common or public carrier in respect to a special train of cars loaded with wild animals and other property as well as persons belonging to or connected with a circus, which is loaded and unloaded by the proprietor of the circus, and is run on special time to suit his convenience, under a special contract that he shall assume all the risk of accidents, the only duty of the railroad being to haul the cars.

2. A railroad company hauling a special train of cars as a private carrier may lawfully contract for entire exemption from the risk of accidents.

(February 23, 1895.)

ERROR to the Circuit Court of the United States for the Northern District of Illinois to review a judgment in favor of plaintiff in an action brought to recover the value of certain property destroyed while it was being transported over defendant's road. *Reversed.*

Before Woods and Jenkins, Circuit Judges, and Bunn, District Judge.

Statement by **Bunn**, District Judge:

The facts in this case are fully and properly stated in the brief of counsel for plaintiff in error, as follows: "This is a writ of error prosecuted by the Chicago, Milwaukee, & St. Paul Railway Company, defendant below, to reverse a judgment of $8,000 recovered against it in the lower court by Benjamin F. Wallace, the plaintiff below, for loss and injury to certain property comprising part of the belongings and equipment of a circus owned by Wallace, and for the loss of performances of the circus caused by two separate accidents happening upon the railroad company's road while it was transporting the circus in a special train composed of cars belonging to Wallace. Plaintiff's declaration is in trespass on the case for negligent violation by defendant of its duty as a common carrier. It contains two counts: The first count avers that on the 7th day of July, 1892, the defendant was possessed of and operating a certain railroad and railroad tracks in the states of Wisconsin and Iowa, and was operating and controlling certain locomotive power and engines upon and along

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NOTE.—*Railroad companies as private carriers in drawing special trains or special cars.*

Very few cases can be found on the subject of a railroad company's liability in transporting special trains or special cars. This note does not include the liability of a connecting carrier in hauling cars of another company during through transportation, nor the question of liability for goods transported for a shipper who hires the use of a whole car for the trip. Nor is the subject of the carriage of livestock included.

As to the liability of a railroad company for injury to postal clerks in mail cars, see *note* to Cleveland, C. C. & St. L. R. Co. v. Ketcham (Ind.) 19 L. R. A. 539. The liability as to passengers on sleeping cars is also considered in a *note* to Mann-Boudoir Car Co. v. Dupre (C. C. App. 5th C.) 21 L. R. A. 289.

Like the principal case, there have been several other cases of accidents to circus trains. In the case of Robertson v. Old Colony R. Co. 156 Mass. 525, an employee connected with a circus was injured by the derailment of a car, on account of a defect in its trucks in the circus train which was hauled by the railroad company under a special contract giving the carrier no control over the condition of the cars or imposing any duty to inspect them. The contract bound the railroad company to haul the cars belonging to the circus proprietors according to a schedule of time fixed by the agreement by which the work was to be done at eighteen different times and nearly all of it at night. The price to be paid was a gross sum less than the regular rates for such service, while the proprietors agreed to load and unload the cars at their own expense and under their own supervision, and to assume all risk of accident from any cause, and to exonerate and save the railroad company harmless from any and all claims for damages to person and property during the transportation. The court held that this contract was one which the railroad had the right to make, as it was under no obligation to draw the cars as a common carrier, citing the Coup Case, *infra*. It was therefore held that the railroad company was not liable for the injury to the circus employee.

In Coup v. Wabash, St. L. & P. R. Co. 56 Mich. 111, 56 Am. Rep. 374, the action was brought by a circus proprietor for injuries to cars and equipments and to persons and animals caused by a collision of two trains made up of his circus cars. The railroad company furnished men and motive power to transport the circus in the special cars which were owned by the proprietor of the circus, consisting of twelve flat, six stock, one elephant, one baggage, and three passenger coaches. The contract provided that the railroad company should not be responsible for damage by want of care in the running of the cars or otherwise. The price was only 10 per cent of the rates charged for carriage. The trains were to be run chiefly at night to accommodate exhibitions, and the running times were fixed with reference to these exhibitions. The railroad employees were to attend to the moving of the train but had nothing to do with the loading and unloading of cars and no right of access or regulation in the cars themselves. The court says: "It is a misnomer to speak of such an arrangement as an agreement for carriage at all," and held that "it was in no sense a common carrier's contract." It was therefore held perfectly legal and proper in such a contract to stipulate for exemption from responsibility for consequences which might follow from carelessness of servants in such special employment.

Another accident to circus cars drawn under a special contract stipulating against any liability of the railroad company for injury to any of the animals or property transported, even if caused by negligence of the railroad company's employees, was involved in the case of Forepaugh v. Delaware, L. & W. R. Co. 128 Pa. 217, 5 L. R. A. 508, but the court, without discussing the question whether the transportation was that of a common carrier or not, held that the exemption from liability must be upheld as the contract of carriage was made in the state of New York where the alleged

its said railroad and tracks; that the plaintiff was the owner of a certain circus known and described as the 'Cook & Whitby Circus,' consisting, besides employees, of a large number of horses, wagons, tents, harnesses, and a large quantity of other property, effects, and paraphernalia, and was also the owner of twenty-four cars; that on the said 7th day of July, 1892, at the city of Prairie du Chien, in Wisconsin, the defendant then and there received as common carrier the aforesaid twenty-four cars of the plaintiff, containing the aforesaid property and effects of the plaintiff, constituting said Cook & Whitby's Circus, and the people connected therewith, to be safely transported to the town of Maquoketa, state of Iowa, and to be safely delivered there to the plaintiff on the 8th day of July, before 9 o'clock of the forenoon of that day. The plaintiff avers that it was the duty of the defendant to provide safe, strong, and efficient locomotive power for the transportation of said cars, with the property and effects of the Cook & Whitby Circus, and it was also the duty of the defendant to construct and maintain its tracks and roadbed, at and near the station known as 'Sny Magill,' in the state of Iowa, in a safe and suitable condition; that the defendant negligently failed to provide strong and efficient locomotive power, and negligently failed to construct and maintain its tracks and roadbed in a safe and suitable condition at said point near Sny Magill, and that in consequence four of said cars were damaged, twenty-four horses were killed, other horses injured, and a large amount of harness was damaged; also that by reason of the accident plaintiff was prevented from giving performances of the circus, which he had advertised, in the vicinity of the town of Maquoketa and the city of Davenport, in the state of Iowa, and thereby lost the profits he would have made had he been able to give said performances. The second count of the declaration avers that on the 6th day of July, 1892, the defendant was possessed of and operating and controlling a certain railroad and railroad tracks in the state of Wisconsin, and operating and controlling certain steam locomotive power and engines upon and along the said railroad and railroad tracks; that upon said day the defendant, at the city of Richland Center, in the state of Wisconsin, received as a common carrier the aforesaid twenty-four cars of the plaintiff, containing all the aforesaid property and effects of plaintiff, constituting said Cook & Whitby's Circus, to be transported, by means of fit and adequate locomotive engine power to be furnished by the defendant, over the railroad and tracks aforesaid, from said city of Richland Center, in the state of Wisconsin, to the said city of Prairie du Chien, in the state of Wisconsin, and to deliver the same at Prairie du Chien on the 7th day of July, 1892, at or before the hour of 9 o'clock in the forenoon of that day; that it was the duty of the defendant to have provided safe and proper appliances at a certain switch located at and near a point south of said Richland Center, and to keep proper and sufficient lights and

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breach of it occurred, and in which such stipulations by common carriers were held valid.

In hauling coal cars belonging to the owner of the coal, a railroad company was held to be a common carrier in Mallory v. Tioga R. Co. 39 Barb. 488, where the transportation was under a contract by which the owner of the cars loaded and unloaded them and furnished brakemen whose service was subject to the railroad company's conductor. For the derailment of such cars the railroad company was held liable. The ground of the decision seems to be that the transportation of cars in this manner was in the line of the general business of the railroad company which by its charter was authorized to charge tolls, among other things, for "empty cars" while the charter directed that no person should place any car on the road without a permit or license from the company. The court also laid stress on the fact that the entire train was controlled and managed by the railroad employees, and that the brakemen furnished by the owner of the cars were in all respects under the control of the conductor. It further appeared that the owner of the coal had large quantities carried over the road, some of it in the railroad company's cars. It seems that the cars owned by him were made a part of the railroad company's train in the same way as if the coal had been in the railroad company's own cars. As showing the real effect of the decision, the court also said: "Yet if, as is claimed by them, they simply entered into a special engagement outside of their general business to provide the plaintiff with sufficient motive power to draw his cars over their road, under the care and control of his servants, they did not thereby assume the obligation of carriers. But the case proved is, in my judgment, materially different from the one thus hypothetically stated."

Reasonable care and diligence are held to be the measure of liability of a railroad company in hauling upon its line wagons belonging to private traders, as in the case of Watson v. North British R. Co. 3 Scotch Sess. Cas. (4th Series) 657, 3 Ry. & C. T. Cas. XVII. (So stated in Rapalje & Mack's Digest of Railway Law, vol. 2, p. 25.)

In transporting over a railroad an engine belonging to another company, the owner of the road was held liable for a collision of the engine with a passenger train where the engine was in charge of a conductor employed by the owner of the road, although an engine driver and fireman on the engine were furnished by its owner. Terre Haute & L. R. Co. v. Chicago, P. & St. L. R. Co. 150 Ill. 502.

Where a railroad company transports a car over its road upon its own trucks it is held to be a common carrier. New Jersey R. & Transp. Co. v. Pennsylvania R. Co. 27 N. J. L. 100.

The distinction between transportation which a railroad company makes as common carrier and that which it makes as a private carrier has been much discussed in other cases which do not specifically touch the question here considered in respect to special trains and special cars. It was much discussed in the earlier cases respecting contracts to limit liability, but mere modifications of the extent of the carrier's liability have long been considered insufficient to destroy the nature of the service as that of a common carrier.

It would seem to be reasonable to hold that in performing a service which it was under no obligation to perform as a common carrier if requested to do so, a railroad company might well contract as a private carrier, and to hold that it could not in this way change the character of its service to that of a private carrier when performing services which the law required it to perform whether it wished to do so or not. If that is to be adopted as the line of distinction, then it would seem that the hauling of special cars or special trains might be done in the capacity of a private carrier. R. A. R.

signals placed at and near said switch to indicate whether said switch was open or closed; that the defendant negligently failed and omitted to perform its duty in this regard, and that by reason thereof the locomotive hauling plaintiff's cars was derailed; that the defendant failed to proceed with due and proper diligence to get its locomotive engine back onto the main track, and that in consequence plaintiff's cars were delayed so long that they did not reach the city of Prairie du Chien in time to give performances, which had been advertised there. The defendant pleaded the general issue to the entire declaration, and afterwards a special plea to the jurisdiction of the court, which was subsequently stricken from the files by order of the court.

"On the trial it appeared that the plaintiff's cars and property were hauled by the defendant under a special contract made and executed June 1, 1892, by the railroad company and by the plaintiff, Wallace, through their duly authorized agents. This special contract reads as follows:

" 'This agreement, made and entered into this 1st day of June, A. D. 1892, by and between the Chicago, Milwaukee, & St. Paul Railway Company, party of the first part, and Cook & Whitby Circus, party of the second part, witnesseth: The party of the first part agrees to run a special train, consisting of ten flat cars, six stock cars, six passenger cars, two advertising cars, in all twenty-four cars, to be furnished by the party of the second part, to run between as below, and as below:

" 'Leaving:

Shakopee to Hastings, June 29th,	$180
Hastings to Redwing, June 30th,	180
Redwing to Faribault, Jul. 1st,	180
Faribault to Decorah, Jul. 2d,	225
Decorah to Boscobel, Jul. 4th,	200
Boscobel to Richland Center, Jul. 5th,	180
Richland Center to Paririe du Chien, Jul. 6th,	200
Prairie du Chien to Maquoketa, Jul. 7th,	200
Maquoketa to Davenport, Jul. 8th,	180

" 'Deliver to Chicago, Rock Island, & Pacific Railway at Davenport, where they leave our line, and carry on said special train, as before described, the circus property of said party of the second part, together with the people properly connected therewith, so far as the same shall be loaded on said train. The said train to be run so as to arrive at its several destinations at or about 6 o'clock in the morning, provided the same shall be loaded and ready to start in time to reach its several destinations at said hour. In consideration thereof the said party of the second part hereby agrees to pay to the said party of the first part the sums as specified above per day in advance (which said sum is a reduction from the usual and regular rates charged by said party of the first part for transportation services of the kind and nature above specified), the sum to be paid to the agent of the said party of the first part at the station from which the next succeeding run is to be made, it being mutually understood that no charge will be made for the use of train or trainmen on Mondays, when the runs for those days are made on the Sunday immediately preceding; and said party of the second part also agrees to load and unload said cars. In consideration of the agreement of said party of the first part to run said special train as above specified, and at and for the reduced rates above named, and also in consideration that, by the running of said special train as above specified, the said party of the first part increases the risks and dangers of operating its railway, and subjects its own property to a greater liability of being damaged, and in further consideration of the premises, said party of the second part does hereby covenant and agree to release and discharge said party of the first part of and from any and all liabilities for claims and damages of every name and nature, by reason or on account of any accident or injury, from whatever cause, that may occur to, or may be suffered or sustained by, any one, or all, of the persons composing or attached to said circus company, or to the cars or other property of said party of the second part, while in or on said train or upon any of the premises belonging to or used by said party of the first part, or by reason or on account of any delays that may occur in the running of said special train, or by failure to reach the several points of destination at the specified time. And, in and for the consideration last above mentioned, said party of the second part does hereby further covenant and agree that he will protect, and forever hold free and harmless, the said party of the first part, from any and all damages or claims for damages that he or they may sustain or incur by reason of any accident or injury that may happen to or be received by any one or more of the several persons composing or attached to said circus company, or permitted by said party of the second part to ride upon said train, or upon any of the premises belonging to or used by said party of the first part. J. H. Hiland, for the Chicago, Milwaukee, & St. Paul Ry. Co. J. M. Hamilton, for Cook & Whitby.'

"The plaintiff offered evidence tending to show that at a point near Sny Magill, on the defendant's road, and while plaintiff's special train was being transported from Prairie du Chien towards Maquoketa, certain of plaintiff's cars were derailed and thrown down an embankment; that as a result twenty-four horses belonging to plaintiff were killed outright, and four others died afterwards from injuries received, and about forty other horses were permanently injured; also that serious injury was done to a large number of sets of harnesses belonging to the plaintiff, as well as to the cars derailed, and that the plaintiff was prevented from giving, and lost probable profits of, performances of his circus at Maquoketa and Davenport, which he had advertised at considerable expense. Plaintiff's evidence tended to show that the derailment was caused by defective roadbed at the point of accident, and by reason of the fact that the locomotive used to haul plaintiff's train of cars was light and of insufficient power. Plaintiff's evidence also showed that, on the evening of the 7th of July, plaintiff's special train, after starting from Richland Center towards Prairie du Chien, was stopped by reason of the engine

running off the track at a misplaced switch a short distance out of Richland Center; that this accident caused a delay of several hours, and thereby prevented the plaintiff from giving, and lost probable profits of, performances at Prairie du Chien, which he had advertised at considerable expense. His evidence tended to show that the accident was caused by negligence of the defendant, and that the delay was greatly aggravated by the failure of the defendant to take proper steps for replacing the locomotive upon the track. At the close of the plaintiff's case defendant moved the court to instruct the jury to return a verdict for the defendant, which motion was overruled by the court, and an exception to the ruling duly taken.

"The testimony of the defendant tended to show that the accident at Soy Magill was not caused by the defective condition of the roadbed, or by reason of insufficient power in the locomotive used in the hauling of plaintiff's cars, but was caused by the breaking of an axle under one of plaintiff's cars; and that the accident to the switch at Richland Center, and the delay there, were not caused by any neglect or misconduct of the defendant or its servants. At the close of the evidence, the defendant requested the court to give certain written charges to the jury, instructing them that the defendant was not a common carrier, or subject to the liabilities of a common carrier, in accepting and transporting plaintiff's train of cars, and the property therein contained; that the defendant was therefore not restrained or controlled by rules applicable to contracts made by common carriers in the transaction of their ordinary business; and that the agreement releasing and discharging the defendant from any and all liability for claims and damages, of whatsoever nature, must control the rights of the parties, and should be enforced in favor of the defendant. The court refused all these requests, to which rulings exceptions were duly taken. The court, in substance, instructed the jury that the clause of the special contract exonerating defendant from all responsibility for loss or damage to plaintiff's property from any cause whatever was contrary to public policy, and void, in so far as it covered loss or damage occasioned by the gross negligence of the defendant or its servants, but was valid in all other respects; that if the jury found from the evidence that the defendant was guilty of gross negligence in not furnishing sufficient motive power and in not keeping its roadbed in proper condition, and that the damage to plaintiff was caused thereby, they should find for the plaintiff, notwithstanding the clause in the special contract exonerating defendant from liability. The jury thereupon brought in a general verdict for the plaintiff for $8,000, and the court, after overruling defendant's motion for a new trial, entered judgment on the verdict, and from that judgment the plaintiff in error, the defendant below, prosecutes this writ of error."

Messrs. **Edwin Walker** and **J. Ralph Dickinson**, for plaintiff in error:

As to services so extraordinary and peculiar in their character, and so wholly and entirely without the scope of the business of a railroad common carrier, the railroad company cannot be deemed to have occupied the relation of a common carrier, but on the contrary it stood in the attitude of a private carrier or special bailee for hire, with reference to the cars and other property to be transported.

Coup v. *Wabash, St. L. & P. R. Co.* 56 Mich. 111, 56 Am. Rep. 374; *Robertson* v. *Old Colony R. Co.* 156 Mass. 525; *Forepaugh* v. *Delaware, L. & W. R. Co.* 128 Pa. 217, 5 L. R. A. 508.

The fact that the defendant railroad company was a common carrier by no means shows that the defendant was a common carrier with reference to transportation service of the kind to be rendered the plaintiff under the special contract.

Hutchinson, Carr. 2d ed. § 44; *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.* 129 U. S. 397, 32 L. ed. 788; *Honeyman* v. *Oregon & C. R. Co.* 13 Or. 352, 57 Am. Rep. 20; *Powell* v. *Mills*, 30 Miss. 231, 64 Am. Dec. 158; *Lake Shore & M. S. R. Co.* v. *Perkins*, 25 Mich. 328, 12 Am. Rep. 275; *Michigan S. & N. I. R. Co.* v. *McDonough*, 21 Mich. 165, 4 Am. Rep. 466.

Tow-boats or vessels engaged in towing other vessels are not engaged in the business of common carriers.

The "Margaret," 94 U. S. 494, 24 L. ed. 146; *Hays* v. *Millar*, 77 Pa. 238, 8 Am. Rep. 445; *Brown* v. *Clegg*, 63 Pa. 51, 3 Am. Rep. 522; *Pennsylvania, D. & M. Steam Nav. Co.* v. *Dandridge*, 8 Gill & J. 248; *Wells* v. *Steam & Nav. Co.* 2 N. Y. 204.

The owners of a canal permitting the use of their canal to canal boats for toll are not common carriers.

Exchange F. Ins. Co. v. *Delaware & H. Canal Co.* 10 Bosw. 180.

Turnpike companies owning turnpikes and permitting their use for a specified toll are not common carriers.

Wilson v. *Susquehannah Turnp. Road*, 21 Barb. 68.

A bridge company is not a common carrier.

Kentucky & I. Bridge Co. v. *Louisville & N. R. Co.* 37 Fed. Rep. 567, 2 L. R. A. 289, 3 Inters. Com. Rep. 351.

If furnishing either the motive power alone or the roadbed alone does not constitute one a common carrier, it seems difficult to see why furnishing both of them should constitute one a common carrier.

"Express Cases," 117 U. S. 1, 29 L. ed. 791.

The fact that the accommodation was furnished under a special contract only, shows conclusively that the company did not undertake to furnish such facilities and accommodations in its capacity as a common carrier.

Lake Shore & M. S. R. Co. v. *Perkins*, and *Michigan S. & N. I. R. Co.* v. *McDonough*, *supra*; *Kimball* v. *Rutland & B. R. Co.* 26 Vt. 247, 62 Am. Dec. 567.

One of the peculiar duties imposed by the common law upon common carriers is the duty of furnishing transportation for all goods of the kind they profess to carry, within the limits of their ability, to all persons demanding such transportation.

This furnishes the true test of the character of a party as to the fact whether he is a com-

mon carrier or not, with reference to any particular transportation.

Fish v. *Chapman*, 2 Ga. 352, 46 Am. Dec. 393; *Piedmont Mfg. Co.* v. *Columbia & G. R. Co.* 19 S. C. 353.

A private carrier, or bailee for hire, may exempt himself from liability even for loss resulting from his own negligence or that of his servants.

Hutchinson, Carr. § 40; *Piedmont Mfg. Co.* v. *Columbia & G. R. Co.*, *Coup* v. *Wabash, St. L. & P. R. Co.*, and *Robertson* v. *Old Colony R. Co. supra.*

Plaintiff declared against the defendant as a common carrier. He bases his entire case upon alleged violations of defendant's common-law duties as a common carrier.

If defendant was not in fact a common carrier, with reference to the plaintiff's goods lost and injured, and with reference to the transportation of plaintiff's cars,—it is clear that plaintiff could not recover his declaration.

Hutchinson, Carr. 2d ed. § 750; *Kimball* v. *Rutland & B. R. Co. supra; White* v. *Great Western R. Co.* 2 C. B. N. S. 7; *Coup* v. *Wabash, St. L. & P. R. Co. supra; Lake Shore & M. S. R. Co.* v. *Bennett*, 89 Ind. 457; *Indianapolis, D. & W. R. Co.* v. *Forsythe*, 4 Ind. App. 326; *Austin* v. *Manchester, S. & L. R. Co.* 16 Q. B. 600; *Snow* v. *Indiana, B. & W. R. Co.* 109 Ind. 422; *Latham* v. *Rutley*, 2 Barn. & C. 20; *Shaw* v. *York & N. M. R. Co.* 13 Q. B. 347; *York, N. & B. R. Co.* v. *Crisp*, 14 C. B. 527; *Camp* v. *Hartford & N. Y. S. B. Co.* 43 Conn. 333; *Fairchild* v. *Slocum*, 19 Wend. 329; *Stump* v. *Hutchinson*, 11 Pa. 533.

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

The action is not *ex contractu* upon any contract, express or implied, general or special. It is in tort for negligence and for gross negligence,—wretched roadbed, worthless tracks, rotten ties, undersized and inadequate locomotive. For such gross negligence the action lies, without reference to whether the contract was general or special, express or implied.

Clark v. *St. Louis, K. C. & N. R. Co.* 64 Mo. 447; *Shaw* v. *York & N. M. R. Co.* 13 Q. B. 347; Hutchinson, Carr. § 73, and citations.

The release clause means a release for all negligence.

McManus v. *Lancashire & Y. R. Co.* 4 Hurlst. & N. 327; *Peek* v. *North Staffordshire R. Co.* 10 H. L. Cas. 473; *Shaw* v. *York & N. M. R. Co. supra; New York C. R. Co.* v. *Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627.

Meaning this, it is void.

Camp v. *Hartford & N. Y. S. B. Co.* 43 Conn. 333; *Clark* v. *St. Louis, K. C. & N. R. Co. supra; Chicago & N. W. R. Co.* v. *Chapman*, 133 Ill. 105, 8 L. R. A. 508; 3 Wood, Railway Law, 1816, and citations.

Plaintiff in error was a common carrier, and, notwithstanding the special contract, was subject to the liabilities of a common carrier.

Hannibal & St. J. R. Co. v. *Swift*, 79 U. S. 12 Wall. 262, 20 L. ed. 423; *Mallory* v. *Tioga R. Co.* 39 Barb. 488; *New Jersey R. & Transp. Co.* v. *Pennsylvania R. Co.* 27 N. J. L. 100; *Peoria & P. U. R. Co.* v. *Chicago, R. I. & P. R. Co.* 109 Ill. 135, 50 Am. Rep. 605; *Peoria & P. U. R. Co.* v. *United States Rolling Stock Co.* 136 Ill. 643; *Terre Haute & I. R. Co.* v. *Chicago, P. & St. L. R. Co.* 150 Ill. 502; *Nicol* v. *East Tennessee, V. & G. R. Co.* 89 Ga. 260.

Under the English statutes the company may make special contracts with their customers, provided they are just and reasonable and signed; and, secondly, whereas, the monopoly created by railways compels the public to employ them in the conveyance of their goods, the legislature may have thought fit to impose the further security that the court shall see that the condition or special contract is just and reasonable.

M'Manus v. *Lancashire & Y. R. Co.* 4 Hurlst. & N. 347; *Peek* v. *North Staffordshire R. Co.* 10 H. L. Cas. 473.

The law throughout the United States generally is substantially the same as that established by the act of 17 & 18 Victoria. The conditions must be just and reasonable, or they are void.

New York C. R. Co. v. *Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627; *Chicago & N. W. R. Co.* v. *Chapman*, 133 Ill. 96, 8 L. R. A. 508; *Austin* v. *Manchester, S. & L. R. Co.* 16 Q. B. 600; *Shaw* v. *York & N. M. R. Co.* 13 Q. B. 347; *York, N. & B. R. Co.* v. *Crisp*, 14 C. B. 527; *Indianapolis, D. & W. R. Co.* v. *Forsythe*, 4 Ind. App. 326.

Bunn, District Judge, delivered the opinion of the court:

Proper assignments of error having been made by plaintiff in error, the main question in this court, as it was below, is whether the railroad company, in carrying the plaintiff's circus people, animals, and outfit, under the special contract in evidence, assumed the relation of a common carrier for hire. If it did, then the verdict must stand. If it did not, then the contract itself was a good defense to the action; and the whole case seems to depend upon this question. The court is of opinion that the railroad company had a right to make the contract with the defendant in error; that the contract was not against public policy, but was valid and binding upon the parties who made it, according to its terms and conditions. The railroad company is charged in the declaration as a common carrier of the persons and property named in the contract, but the contract itself is wholly ignored, and the declaration framed as though no contract had ever been made. If the plaintiff had the right thus to disregard the contract, and sue the railroad company as a common carrier, the recovery must stand, because in that case the company would be liable for any defect in its road, and which common, or even extraordinary, prudence and foresight could remedy. It would also be liable for the negligence of its own employees, and for any insufficiency in the engine or engines employed to move the plaintiff's cars, which ordinary prudence and foresight may have remedied. But if the company, in carrying the plaintiff's property under the contract and in the circumstances in which the undertaking was entered into, was not acting as a common carrier of the plaintiff's goods, but in the capacity of an ordinary private carrier for hire, then the company had the right to make the contract, and both parties will be bound by its terms.

That the company, in carrying the goods under the contract, was a private, and not a common or public, carrier, is the conclusion which the court has reached. There was no evidence offered that the railroad company had ever carried similar goods for Wallace before in his own private cars, or that it had ever carried or held itself out to carry goods in that manner for others, and there is no presumption that railroad companies would do so. We know from common observation that they do not hold themselves out as common carriers of wild and domestic animals to be transported in the private cars of the owners, and loaded in a manner agreeable to the owners; persons, animals, horses, and other property being carried upon the same train, which is operated at irregular times and seasons, at the convenience of the owners of such cars. They ordinarily operate their freight trains and passenger trains separately, and upon time schedules, prepared in advance by experts for the company, and with a view to reduce the danger of accident to a minimum. Here was a special contract in writing, wholly different from the ordinary bill of lading, providing for the hauling of a special train of cars, belonging wholly to the defendant in error, to be loaded as he pleased with persons, wild animals, domestic animals, and other property, and to be run on special time, the hours of departure to depend upon the time when the plaintiff should have his cars loaded and ready to start. Wallace was to be wholly responsible for the loading and the unloading as well as for the care of the property while in transit, the only duty of the railroad company being to haul the cars. Another significant provision of the contract is that the property was to be carried at greatly reduced rates, in consideration of which the plaintiff was to assume all the risk of accidents, releasing the company therefrom. If this provision of the contract, as no doubt it was, was binding upon the railroad company, why not upon the plaintiff? The obligation was mutual. Why could not the railroad company say: "You wish your property carried in your own private cars, which is contrary to our usual rules and regulations, and at greatly reduced rates. You wish your entire circus troupe, horses, animals, and all the paraphernalia and accompaniments of a circus, carried for less money than at our rates as common carriers it would cost you to have the persons alone of your company transported, and you desire that they be carried at special times, also contrary to our rules as common carriers, and which materially increases risks in our business. Now, here are our roadbed and our engines. They have answered our own purposes of transportation fairly well. If you wish to take upon yourself all risk of damage by accident, we will accept your proposition, and carry at the rates proposed." There is nothing unlawful in this, unless we assume that the railroad company cannot carry property or persons at all, except as common carriers, which is against all rule and precedent. No common carriers undertake to carry every species of property, in respect to which they have not held themselves out as common carriers. They may contract as private carriers, and in that case they may make any reasonable contract. The railroad company as a common carrier could not enter into such a contract as this, because it cannot as a common carrier limit the liability imposed upon it from considerations of public policy. But the case is different in respect to property of which it is not a common carrier. If any authority were needed upon so plain a proposition it is not difficult to find.

In Hutchinson on Carriers, 2d ed. § 44, it is stated: "A common carrier may, however, undoubtedly become a private carrier or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry. The relation in such a case is changed from that of a common carrier to that of a private carrier, and where this is the effect of a special arrangement, the carrier is not liable as a common carrier and cannot be proceeded against as such."

Again, at section 73, it is stated: "And even as to such carriers as are prima facie public or common carriers, it may be shown that, in the particular instance or under the circumstances of the case, they did not undertake to transport and are not liable as common carriers."

Again, at section 56*a*, ¶2, it is stated: "In the second place, in order to charge one as a common carrier of goods, the goods in question must be of the kind to which his business is confined. No carrier undertakes to carry all kinds of goods, but only such as are of the description which he professes to carry. A common carrier is therefore not liable as such where, by special engagement, or as a matter of accommodation merely, he undertakes to carry a class of goods which it is not his business to carry."

Again, at section 56*b*, it is stated: "Common carriers of goods do not undertake to carry by any or all means, but only by those means and methods and over the route to which their business is confined. . . . And even if a carrier should, in a particular instance, undertake by a special contract to carry goods by unusual and exceptional methods or routes, his liability would be based upon his contract and not by the ordinary rules governing common carriers."

In the case of *New York C. R. Co.* v. *Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627, at page 377, 21 L. ed. 639, the court says: "A common carrier may undoubtedly become a private carrier, or a bailee for hire, when, as a matter of accommodation or special engagement, he undertakes to carry something which it is not his business to carry."

There are also two recently decided cases, one before the supreme court of Michigan and the other before the supreme judicial court of Massachusetts, where a question almost identical with the one at bar was adjudged in the same way. *Coup* v. *Wabash, St. L. & P. R. Co.* 56 Mich. 111; *Robertson* v. *Old Colony R. Co.* 156 Mass. 525.

The declaration charges the defendant specially as a common carrier. The court held it was not a common carrier in respect to the

property which it undertook to carry under the contract, but nevertheless instructed the jury that "the contract made it the duty of the defendant to furnish reasonably safe and sufficient motive power to haul the cars of the plaintiff over the specified portion of its road, and the defendant will be liable if it failed, while attempting to perform its contract, to furnish such character of engine or motive power, and damage resulted therefrom to the plaintiff's property or business. And under such contract defendant was bound to have a reasonably safe roadbed, over which the cars and property of the plaintiff could be transported. If its roadbed was not in a reasonably safe condition, but was out of repair, so as to be unsafe and dangerous, and the defendant knew this fact, or by reasonable diligence could have known it, and the derailment of plaintiff's cars, and injury and damages to his property, were occasioned by such insufficient and insecure track and roadbed, then the defendant would be liable for such injury and damage,"—thus allowing a recovery upon a cause of action nowhere hinted at in the plaintiff's declaration. The plaintiff, if he recover, should recover according to his declaration. *Kimball* v. *Rutland & B. R. Co.* 26 Vt. 247, 62 Am. Dec. 567; *White* v. *Great Western R. Co.* 2 C. B. N. S. 7.

But, independent of this principle, we do not think there is any middle ground upon which to rest a recovery in this case. The railroad company was either liable as a common carrier as charged in the declaration, or it was not, and, if not, then the contract it made with Wallace, by which he assumed the risk of accident, was valid and binding. By the contract the defendant in error assumed all risk from accident, and for a proper consideration released and exonerated the railroad company from all damage occasioned thereby. He has got what he bargained for, or, if not, can sue upon his contract, but he must abide by its conditions.

The judgment of the court below should be reversed, and the cause remanded, with instructions to the court below to award a new trial.

OREGON SUPREME COURT.

PORTLAND HIBERNIAN BENEVOLENT SOCIETY, *Respt.*,
v.
Penumbra KELLY, *Appt.*

(.....Or.....)

1. **The restriction of the benefactions of a charitable organization to its own members** or their families does not take it out of the exemption from taxation of certain property of charitable institutions by Hill's Ann. Laws, § 2732.

2. **An exemption from taxation of property used exclusively for charitable or benevolent purposes** cannot be extended to property occupied and used for other and different purposes, although the revenue derived from its use is devoted exclusively to charitable or benevolent objects.

3. **The state is not estopped from levying a tax** for the reason that no attempt has been made to assess the property for many years, during which the owner has borrowed money by a mortgage on the property for the erection of a building upon it, and agreed to pay the taxes on such mortgage.

4. **An injunction to restrain the collection of a tax** will not be granted merely because of an inaccuracy in the name on the assessment roll of the owner of the property.

(October 21, 1895.)

APPEAL by defendant from a judgment of the Circuit Court for Multnomah County in favor of plaintiff in an action brought to restrain defendant from enforcing the collection of taxes against plaintiff's property. *Reversed.*

The facts are stated in the opinion.

Messrs. **W. T. Hume** and **John H. Hall**, for appellant:

Persons who own land are chargeable with knowledge that it is liable to taxation, and if they neglect to pay what they know it is their duty to pay, they cannot escape liability on the ground of some error or inaccuracy in naming the owner.

Eads v. *Rutherford*, 114 Ind. 273; *Noble* v. *Indianapolis*, 16 Ind. 506.

Plaintiff must, before it can maintain this suit, pay or offer to pay the tax that it concedes is justly due, regardless of any mere informality in the assessment.

Dundee Morty. Trust Invest. Co. v. *Parrish*, 24 Fed. Rep. 197; *Welch* v. *Clatsop County*, 24 Or. 452; *German Nat. Bank* v. *Kimball*, 103 U. S. 733, 26 L. ed. 469; *Albuquerque Nat. Bank* v. *Perea*, 147 U. S. 87, 37 L. ed. 91; *Huntington* v. *Palmer*, 7 Sawy. 355.

A charitable institution within the meaning of the law is held to mean a public charity,—one whose benefits are extended to needy persons generally without regard to their relation to the members of the society or to the fees paid.

2 Am. & Eng. Enc. Law, p. 174; *Bangor* v. *Rising Virtue Lodge No. 10, F. & A. M.* 73 Me. 429, 40 Am. Rep. 369; *Morning Star Lodge No. 26, I. O. O. F.* v. *Hayslip*, 23 Ohio St. 144; *Gorman* v. *Russell*, 14 Cal. 535; *Donohugh's App.* 86 Pa. 306; *Delaware County Inst. of S.* v. *Delaware County*, 94 Pa. 163; *State* v. *Indianapolis*, 69 Ind. 375, 35 Am. Rep. 223; *Babb* v. *Reed*, 5 Rawle, 158, 28 Am. Dec. 650.

Where a portion of a building is used for commercial purposes, that is rented or leased

NOTE.—For *note* on effect of using property of religious or charitable institutions for revenue, see Book Agents of M. E. Church, South, v. Hinton (Tenn.) 19 L. R. A. 289.

to other parties for gain, although the entire proceeds may be used for the purposes for which the society was organized, it cannot be exempted from taxation as property devoted to a charitable use.

Methodist Epis. Church Trustees v. *Ellis*, 38 Ind. 3; *Orr* v. *Baker*, 4 Ind. 86; *American Sunday School Union* v. *Taylor*, 161 Pa. 307, 23 L. A. Rep. 695; *Pierce* v. *Cambridge*, 2 Cush. 611; *Proprietors of South Congre. Meeting-house* v. *Lowell*, 1 Met. 638; *Old South Soc.* v. *Boston*, 127 Mass. 378; *Frederick County Comrs.* v. *Sisters of Charity*, 48 Md. 34; *Appeal Tax Ct.* v. *Grand Lodge of A. F. & A. M.* 50 Md. 421; *Appeal Tax Ct.* v. *St. Peter's Academy*, 50 Md. 321; *Wyman* v. *St. Louis*, 17 Mo. 335; *Young Men's Christian Asso.* v. *New York*, 113 N. Y. 187; *Connecticut Spiritualist Camp-meeting Asso.* v. *East Lyme*, 54 Conn. 152; *Cincinnati College* v. *State*, 19 Ohio, 113.

In order that a charitable or religious society may be exempted from taxation in this state, it must apply to the sovereign or taxing power, *i. e.*, the legislature, and obtain the passage of a special act exempting it alone from taxation.

Cooley, Const. Lim. 4th ed. pp. 71, 72; *District Twp. of Dubuque* v. *Dubuque*, 7 Iowa, 275.

Messrs. **Gearin, Silvestone, Murphy, & Brodie,** for respondent.

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

The plaintiff, a corporation organized under the statute providing for the incorporation of churches, religious, benevolent, literary, and charitable institutions, brought this suit to restrain the sheriff of Multnomah county from enforcing the collection of taxes levied upon its property for state and county purposes for the year 1892, claiming that such property is exempt from taxation under the Constitution and laws of the state. From the agreed statement of facts it appears that plaintiff was incorporated in 1873. Its Constitution declares that "the objects of this society shall be charity and benevolence, for the purpose of contributing a weekly allowance for sickness, and the means of defraying the expenses consequent upon the death of a member, and to contribute for the above-named purposes such sums as a majority of the members may be pleased to contribute." It is further provided by its Constitution and by-laws that "every Irishman, or the son of an Irishman, or a son of a member of the society," between the ages of eighteen and forty-five years, "of good moral character, possessed of reputable means of support, and free from all infirmities that might render him burdensome to the society," and a resident of the city of Portland for sixty days preceding his application, may, upon first being duly elected, "become a member thereof by signing the Constitution and paying an initiation fee of $5." Every person who has been a member of the society for six months, and whose name is on the "list of active members," is entitled, in case of sickness, "to receive such sum as the society may direct, not to exceed $7 per week, for three months in succession," provided he furnishes a doctor's certificate that through sickness he is confined to his bed, and that he has not been instrumental in causing his sickness. In addition to this allowance, the society may extend benevolence to sick members as it may deem necessary, to be decided by a two-thirds vote of the members present at any regular meeting. On the death of a member in good standing, a sum of money not less than $25, nor more than $75, is to be paid for funeral expenses; and his widow or orphans are entitled to receive $25, and, if need be, in three months thereafter, a like sum. Upon the death of his wife, a member is entitled to receive the sum of $40 for funeral expenses. If there is no money in the treasury for sick or funeral expenses, when required, the board of directors is authorized to levy a special tax on the members for that purpose, and no other. It is provided that no money shall be drawn from the treasury for any but benevolent purposes, and none of the income or revenue of the society is to be used for any purpose other than as set out in the Constitution, except for the payment of principal and interest on its indebtedness, and the purchase and improvement of real estate. Provision is also made for the appointment of a committee of three members, whose duty it shall be, when notified of the illness of a member, to visit him as often as convenient, and report from time to time to the board of managers the condition of the member, lest sick dues might be drawn from the treasury contrary to the Constitution. The property assessed consists of lot 1, block 177, in the city of Portland, upon which is erected a three-story brick building, the lower story of which is rented for stores, the second story for offices (except one room, which is occupied by the plaintiff), and the third story for a public hall; the revenue derived from such rental being exclusively devoted to the objects and purposes of the society. Upon these facts the court below found that plaintiff was a charitable institution, within the meaning of the exemption law, and that the property in question was actually occupied by the plaintiff for the purposes for which it was incorporated, although the greater part of the building was leased to sundry persons, to be used for purposes wholly unconnected with the society, and entered a decree enjoining the collection of the tax. From this decree the defendant appeals.

Section 1, article 9, of the Constitution directs that "the legislative assembly shall provide by law for uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, educational, literary, scientific, religious, or charitable purposes as may be specially exempted by law." Under this provision no property can be relieved from taxation except such as may be in use for some of the purposes enumerated therein, and then only to the extent specially permitted by legislative enactment. The Constitution itself does not exempt any property from taxation, and it authorizes the legislature to do so only for municipal, educational, literary, scientific, religious, or charitable pur

poses. It follows, then, that, before property can be exempted from taxation, it must not only be used for some of the purposes specified in the Constitution, but must be specially authorized by law. Now, the statute which undertakes to exempt property from taxation, and by which the questions presented in this case must be solved, was passed by the territorial legislature in 1854, and, so far as not inconsistent with the Constitution, continued in force by section 7 of article 18 of that instrument, and is now section 2732 of Hill's Annotated Laws. By subdivision 3 of this section, it is provided that "the personal property of all literary, benevolent, charitable, and scientific institutions, incorporated within this state, and such real estate belonging to such institutions as shall be actually occupied for the purposes for which they were incorporated," shall be exempt from taxation. Under these constitutional and statutory provisions, it is manifest that real property, to be exempt from taxation, must belong to some incorporated literary, benevolent, charitable, or scientific institution, and must be actually occupied for literary, benevolent, charitable, or scientific purposes.

The contention for the defendant is that the real property upon which the tax in question was laid is not exempt from taxation, for the reasons (1) that plaintiff is not a charitable institution, within the meaning of the law, because its benefits are confined to its own members and their families; and (2) that the property assessed is not actually occupied for the purpose for which it was incorporated.

Upon the first point the argument of his counsel is that a charitable institution, within the meaning of the exemption law, is one whose benefits are extended to the public generally, or some indefinite portion thereof, without regard to the relation the recipient may bear to the members of the particular organization or society, or to the fees or dues paid. But the principal authorities relied upon by him in support of this position were determinations of controversies arising under constitutional or legislative enactments exempting from taxation property belonging to institutions devoted to "purely public charity," which it is held does not include charitable institutions whose benevolence is confined to their own members, or persons having some particular relationship to such members. *Philadelphia* v. *Masonic Home*, 160 Pa. 572, 23 L. R. A. 545; *Swift* v. *Beneficial Soc.* 73 Pa. 362; *Delaware County Inst. of S.* v. *Delaware County*, 94 Pa. 163; *Donohugh's App.* 86 Pa. 306; *Mitchell* v. *Franklin County Treasurer*, 25 Ohio St. 144; *Babb* v. *Reed*, 5 Rawle, 151, 28 Am. Dec. 650; *Burd Orphan Asylum* v. *Upper Darby School Dist.* 90 Pa. 21; *Hennepin County* v. *Brotherhood of C. of G.* 27 Minn. 460, 38 Am. Rep. 298. But under constitutional or legislative provisions which, like ours, provide for the exemption of certain property belonging to "charitable institutions," and used for charitable purposes, it is believed that such an institution is entitled to the benefit of the exemption, although its benefactions are confined to its own members or their families. Thus, in *Indianapolis* v. *Grand Lodge of Indiana*, 25 Ind. 518, it is held that an institution which extends charity to its own members only is a charitable institution, within the meaning of the law exempting such institutions from taxation, the court saying: "The third paragraph of the answer presents the question whether that is a charitable institution, in the sense of the statute, which confines its benefactions to those who have become members of the Masonic order, having paid the fees commonly required for that purpose. We think that this question must be answered in the affirmative. It is not essential to charity that it shall be universal. That an institution limits the dispensation of its blessings to one sex, or to the inhabitants of a particular city or district, or to the membership of a particular religious or secular organization, does not, we think, deprive it either in legal or popular apprehension of the character of a charitable institution. If that only be charity which relieves human want, without discriminating amongst those who need relief, then indeed it is a rarer virtue than has been supposed. And if one organization may confine itself to a sex, or church, or city, why not to a given fraternity? So narrow a definition of charity as the third paragraph presupposes is not, that we are aware of, ever attached to it, and we are not at liberty to circumscribe the effect of the statute, and defeat its intention, by affixing to its terms an unusually limited meaning." So also, in *Petersburg* v. *Petersburg Benev. Mechanics' Asso.* 78 Va. 431, it was held that an association which applies its revenues to the payment of current expenses, and to the relief of its indigent members and the families of such as have died in need, was a charitable institution. "These are charitable purposes," says the court, "and the relief afforded is none the less charity because confined to members of the association and the families of deceased members. It is not essential to charity that it shall be universal." And, again, in *Book Agents of M. E. Church, South*, v. *Hinton*, 92 Tenn. 188, 19 L. R. A. 289, it was held that a corporation created as an arm or agency of the Methodist Church, and charged with the duty of manufacturing and distributing books, periodicals, etc., in the interest and under the auspices of the church, and thereby raising a fund with which to support its worn-out preachers and their families, is a religious and charitable institution, within the meaning of the provision of the Constitution exempting such institutions from taxation. From an examination of this question and all the authorities within our reach bearing upon it, we take the result to be that an institution organized for benevolent and charitable purposes, free from any element of private or corporate gain, and which devotes its entire revenue to the payment of current expenses and the relief of the poor and needy, is a charitable institution, within the meaning of the law, although it may confine its benefits primarily to its own members and their families.

But, whether the plaintiff is such an institution or not, we are clear the property in

question is not exempt from taxation, because it is not actually occupied for charitable purposes. Subdivision 3 of section 2732, *supra*, under which the exemption is claimed, exempts only such real property belonging to incorporated literary, benevolent, charitable, or scientific institutions as shall be actually occupied for the purposes for which they were incorporated. It does not exempt from taxation the enumerated institutions as such, or real estate simply because it belongs to such institutions, or even because it is used for literary, scientific, charitable, or benevolent purposes, but it expressly confines the right of exemption to such real estate only belonging to them as shall be actually occupied in a particular manner and for a specified purpose; and this right, therefore, clearly cannot be extended to property occupied and used for other and different purposes, although the revenue derived from its use is devoted exclusively to the objects for which the institution was established. It is the actual occupancy of the property which determines its right to exemption, and not the use made of its proceeds. The plain and obvious meaning of the statute is that only the real estate actually occupied and in use by these different institutions for the purposes for which they were organized shall be exempt from taxation. While so occupied and used, it does not come in competition with the property of other owners; and the purpose for which it is used was supposed by the legislature to be a sufficient benefit to the public to justify its exemption from the burdens of taxation imposed upon other property. But, when such property is used for the purpose of accumulating money, the law imposes upon it the same burden of taxation as it imposes upon other property similarly situated. The statute does not undertake to discriminate between the uses which different societies or individuals will make of the proceeds of their business, and determine, for that reason, that one shall be taxed, and the other not. It deals with the property as it finds it, and not with what may be done with its proceeds in the future. Upon this question the authorities are practically unanimous, under similar statutory provisions. *Indianapolis* v. *Grand Master of G. L.* 25 Ind. 518; *Presbyterian Theological Seminary of N. W.* v. *People*, 101 Ill. 578; *Washburn College* v. *Shawnee County Comrs.* 8 Kan. 344; *Detroit Young Men's Soc.* v. *Detroit*, 3 Mich. 172; *Cincinnati College* v. *State*, 19 Ohio, 110; *Cleveland Library Asso.* v. *Pelton*, 36 Ohio St. 253; *First M. E. Church of Chicago* v. *Chicago*, 26 Ill. 482; *New Orleans* v. *St. Patrick's Hall Asso.* 28 La. Ann. 512; *New Orleans* v. *St. Anna's Asylum*, 31 La. Ann. 293; *Baltimore* v. *Grand Lodge of A. F. & A. M.* 60 Md. 280; *Frederick County Comrs.* v. *Sisters of Charity*, 48 Md. 34; *Appeal Tax Ct.* v. *Grand Lodge of A. F. & A. M.* 50 Md. 429; *Redemptorists* v. *Howard County Comrs.* Id. 449; *Salem Lyceum* v. *Salem*, 154 Mass. 15; *Chapel of Good Shepherd* v. *Boston*, 120 Mass. 213; *Mulroy* v. *Churchman*, 53 Iowa, 238; *Orr* v. *Baker*, 4 Ind. 86; *Phillips Exeter Academy Trustees* v. *Exeter*, 58 N. H. 306, 42 Am. Rep. 589; *Morris* v. *Lone Star Chapter No. 6 R. A. M.* 68 Tex. 698; *Proprietors of South Congre. Meeting-house* v. *Lowell*, 1 Met. 538; *Wyman* v. *St. Louis*, 17 Mo. 336; *State* v. *Ross*, 24 N. J. L. 498; *Mussenburg* v. *Grand Lodge F. & A. M.* 81 Ga. 212; *Ft. Des Moines Lodge No. 25 I. O. O. F.* v. *Polk County*, 56 Iowa, 34. See also notes to *Petersburg* v. *Petersburg Benev. Mechanics' Asso.* 8 Am. & Eng. Corp. Cas. 488; and *Book Agents of M. E. Church, South*, v. *Hinton* (Tenn.) 19 L. R. A. 289.

It is so manifestly just that all property shall bear its due proportion of the expenses of government that laws granting exemption from taxation are always strictly construed, and, before such exemption can be admitted, the intent of the legislature to confer it must be clear beyond a reasonable doubt. Thus, it is held that laws exempting from taxation "houses of religious worship," or "buildings erected and used for religious worship," or "property used for religious purposes," etc., do not exempt a parsonage erected by a religious society for the use of its minister, although occupied by him free of rent and built on grounds which would otherwise be exempt. *State* v. *Axtell*, 41 N. J. L. 117; *Hennepin County* v. *Grace*, 27 Minn. 503; *Ramsey County* v. *Church of Good Shepherd*, 45 Minn. 229, 11 L. R. A. 175; *Third Congregational Soc.* v. *Springfield*, 147 Mass. 396; *St. Mark's Church Wardens* v. *Brunswick*, 78 Ga. 541; *Gerke* v. *Purcell*, 25 Ohio St. 229; *Methodist Epis. Church Trustees* v. *Ellis*, 38 Ind. 3; *Vail* v. *Beach*, 10 Kan. 214. And a building belonging to the Young Men's Christian Association, which contains above the basement, in which are the gymnasium, bowling alley, and bath room, twenty-two rooms, only one of which is devoted to public worship, was held not exempt, under a law exempting "every building used exclusively for public worship." *Young Men's Christian Asso.* v. *New York*, 113 N. Y. 187. The Constitution of this state requires an equal and uniform rate of assessment and taxation of all property, excepting "such only for municipal, educational, literary, scientific, religious, or charitable purposes as may be specially exempted by law." Taxation is therefore the rule; exemption, the exception; and nothing can be held to be exempt by implication. It is only such property used for the purposes specified in the Constitution, as the legislature may specially exempt, which can escape taxation. Exemption is not a matter of right, but a pure matter of grace; and every person or corporation claiming that his or its property, or any part thereof, is exempt, must be able to show some clear constitutional or legislative provision to that effect. The legislature, in its wisdom, has provided that, of the real property belonging to literary, benevolent, charitable, or scientific institutions incorporated within this state, such only shall be exempt from taxation as shall be actually occupied for the purposes for which they were incorporated; and, under all the rules for the construction of exemption laws, this cannot be held to include real property which is occupied for other purposes, although the revenues received therefrom may be used for the pur-

poses of the corporation. Some of the authorities cited go to the extent of holding that when a portion only of a building belonging to such an institution is occupied for the purposes for which it was incorporated, and the remainder is occupied by tenants paying rent, the entire building is liable to taxation; but the general tenor of the authorities, and no doubt the better rule, is that in such case the assessor, in estimating the value of the property, should make a proper allowance for the portion of the building occupied by the society, so that the tax levied will be laid only upon the value of that which is not exempt, though the property may be assessed as a whole.

It is insisted by the plaintiff that the state is estopped from levying the tax in question for the reason that, while it has owned the property assessed since 1877, no attempt was made to assess it until the year 1890, and that, relying upon that fact, it borrowed in that year $33,000 on a mortgage, to enable it to erect the building now on the premises, and stipulated and agreed to pay the taxes on such mortgage. But the neglect or omission of the proper officers to assess the property cannot control the duty imposed by law upon their successors, or affect the legal construction of the statute under which its exemption from taxation is claimed. *Vicksburg, S. & P. R. Co.* v. *Dennis*, 116 U. S. 665, 29 L. ed. 770.

The case of *State* v. *Addison*, 2 S. C. N. S. 499, relied upon by plaintiff, is not in point. That was a proceeding to enforce a municipal tax. The city had by ordinance, in 1793, exempted all and every religious and charitable society from the payment of any city tax, and the city council for more than three quarters of a century had included the relators as among the societies thus exempted; and the court held that the action of the city council for so long a time would be received as the proper interpretation of their own enactment so long as it remained in force.

Again, it is claimed that, because the name appearing on the assessment roll as the owner of the property is "Hibernian Benevolent Society," and not the "Portland Hibernian Benevolent Society,"—the real owner,—the assessment is void, and should be enjoined. But we understand the rule to be that a court of equity will not interfere by injunction to restrain the collection of a tax merely because of alleged illegality or irregularity appearing upon the face of the assessment, but will leave the party to his remedy at law. 1 High. Inj. § 491; *Odlin* v. *Woodruff* (Fla.) 22 L. R. A. 699, and *note*. "In view of the authorities," says Lord, Ch. J., "the considerations which influenced a court of equity to restrain the collection of a tax are confined to cases where the tax itself is not authorized, or, if it is, that such tax is assessed upon property not subject to taxation, or that the persons imposing it were without authority in the premises, or that they have proceeded fraudulently." *Welch* v. *Clatsop County*, 24 Or. 457.

It follows that *the decree of the court below must be reversed*, and the complaint dismissed.

30 L. R. A.

Joseph SIMON, *Appt.*,
v.
H. H. NORTHUP *et al.*, County Court of Multnomah County, *Respts.*

John R. HANSON, *Appt.*,
v.
Sol. HIRSCH *et al.*, Bridge Committee, *Respts.*

(.....Or.....)

1. The legislature has power to require a city to incur a debt without its consent for the acquisition of public bridges and ferries, as is done by act 1895 relating to the city of Portland, in the absence of any constitutional prohibition.

2. A statute providing for the acquisition of bridges and ferries by a city, the issuance of bonds in payment therefor, the transfer of the property to the county, and the collection of taxes by the county to pay the bonds, does not embrace more than one subject, in violation of Const. art. 4, § 20.

3. The acquisition by a city of certain bridges and ferries which were already public highways, provided for by act 1895, is not included in the laying out, opening, and working of highways, for which special or local laws are forbidden by Const. art. 4, § 23, subd. 7.

4. A statute requiring a county tax to be levied and collected like other taxes, for the purpose of maintaining bridges and ferries, being in effect a requirement only that the sums required shall be included in the estimate for county purposes, does not violate Const. art. 4, § 23, subd. 10, prohibiting local or special laws for assessment and collection of taxes.

5. The transfer of the management and control of public bridges and ferries may be made by the legislature to any governmental agency, such as a county court, although the bridges and ferries belong to a city.

6. The requirement that a county shall pay the debt of a city within it, made by act 1895 providing for a county tax to pay the interest and principal on the bridge bonds of the city of Portland, is unconstitutional.

7. The maintenance of a ferry by the county of Multnomah at Sellwood is not within the subject of act 1895 providing for the acquisition of specified bridges and ferries by the city of Portland.

(June 3, 1895.)

APPEAL by plaintiff from a judgment of the Circuit Court for Multnomah County, Department 2, denying a writ of mandamus to compel defendants to take charge of certain bridges in accordance with the provisions of an act of the legislature. *Reversed.*

NOTE.—In connection with the very elaborate presentation in the above case of the subject of legislative power to direct expenditure of municipal or county funds, see also Johnson v. San Diego (Cal.) *post*, 178; Davock v. Moore (Mich.) 23 L. R. A. 783; Duval County Comrs. v. Jacksonville (Fla.) 29 L. R. A. 416.

APPEAL by plaintiff from a decree of the Circuit Court for Multnomah County, Department 3, refusing to enjoin defendants as Bridge Committee from carrying out the provisions of an act of the legislature passed for the purpose of regulating the control of certain bridges and ferries of the city of Portland. *Affirmed.*

The facts are stated in the opinion.

Messrs. **O. F. Paxton** and **Joseph Simon,** for appellant, Simon:

The subjects of the act are sufficiently expressed in the title to make the law valid under the Constitution.

Simpson v. *Bailey*, 3 Or. 515; *State* v. *Shaw*, 23 Or. 287; *Brewster* v. *Syracuse*, 19 N. Y. 116; *People* v. *Banks*, 67 N. Y. 568; *David* v. *Portland Water Committee*, 14 Or. 98; *McWhirter* v. *Brainard*, 5 Or. 429; *Singer Mfg. Co.* v. *Graham*, 8 Or. 21, 34 Am. Rep. 572; *O'Keefe* v. *Weber*, 14 Or. 57; *State* v. *Koshland*, 25 Or. 180; *State* v. *Linn County*, 25 Or. 503; Cooley, Const. Lim. pp. 192 *et seq.*

The power to control bridges and ferries over navigable streams is vested with the state or such subordinate agency of the state as its legislature may select for the purpose, and, until Congress acts on the subject, the power of the state over bridges across its navigable streams is plenary.

Gilman v. *Philadelphia*, 70 U. S. 3 Wall. 713, 18 L. ed. 96; *Escanaba & L. M. Transp. Co.* v. *Chicago*, 107 U. S. 678, 27 L. ed. 442; *Cardwell* v. *American River Bridge Co.* 113 U. S. 205, 28 L. ed. 959; *Scheurer* v. *Columbia Street Bridge Co.* 27 Fed. Rep. 172.

Public highways and bridges are matters of general or state, rather than of municipal, concern, and are under the paramount and primary control of the legislature.

Cooley, Taxn. pp. 130, 682; Dill. Mun. Corp. §§ 74, 689, note; Elliott, Roads & Streets, p. 23; *Maxwell* v. *Tillamook County*, 20 Or. 495; *Allen* v. *Hirsch*, 8 Or. 412.

The legislature has not undertaken to relieve the city of Portland from the payment of the bonds issued on account of the bridges and ferries, or cast the same upon the county.

If it had done so, and had required the county of Multnomah to assume such indebtedness, it would clearly be within the constitutional power of the legislature so to do.

Lane County v. *Oregon*, 74 U. S. 7 Wall. 71, 19 L. ed. 101; *Meriwether* v. *Garrett*, 102 U. S. 513, 26 L. ed. 204; *Augusta* v. *North*, 57 Me. 394, 2 Am. Rep. 55; Cooley, Taxn. pp. 15, 17.

The court will take judicial knowledge that the consolidated city of Portland is practically the county of Multnomah, and that more than three fourths of the people of that county reside within the city of Portland, and that more than three fourths of the taxable property of the county is situate within said city.

If the legislature should see fit to extend the boundaries of such quasi municipal corporation by including additional territory or even the remainder of the county, thereby determining the limits of the taxing district, it has done only that which is within the undoubted power of the legislature to do, and is in no wise different from the division of cities or counties or the consolidation thereof, the right of the legislature to do which has never been questioned.

Cooley, Taxn. p. 149; Cooley, Const. Lim. p. 291.

Money raised by taxation is not the private property of the county, and an act of the legislature diverting a portion of the moneys so raised to other purposes is not an application of property to private uses nor the taking of private property for public uses without compensation.

State v. *St. Louis County Ct.* 34 Mo. 546; *Love* v. *Schenck*, 12 Ired. L. 304; *Mobile County* v. *Kimball*, 102 U. S. 702, 26 L. ed. 241; *Tippecanoe County Comrs.* v. *Lucas*, 93 U. S. 108, 23 L. ed. 822; *Laramie County Comrs.* v. *Albany County Comrs.* 92 U. S. 307, 23 L. ed. 552.

The legislature may, unless restrained by the Constitution or some of the fundamental maxims of right and justice, exercise control over the county agencies and require such public duties and functions to be performed by them as fall within the general scope and objects of the municipal organization.

Dill Mun. Corp. § 23; *State* v. *McFadden*, 23 Minn. 40; *People* v. *Alameda County*, 26 Cal. 642; *Napa Valley R. Co.* v. *Napa County*, 30 Cal. 435; *Waterville* v. *Kennebec County Comrs.* 59 Me. 80; *Brewis* v. *Duluth*, 13 Fed. Rep. 334; 4 Am. & Eng. Enc. Law, p. 350; *Grant County* v. *Lake County*, 17 Or. 453; *State* v. *St. Louis County Ct.* 34 Mo. 552; *Pattison* v. *Yuba County Supers.* 13 Cal. 184.

The charters of municipal corporations may be altered or repealed at pleasure.

Pom. Const. L. § 587; Foote & Everett, Incorporated Companies, 147–149; Dill. Mun. Corp. 74, 74*a*; *Newton* v. *Mahoning County Comrs.* 100 U. S. 548, 25 L. ed. 710; *Laramie County Comrs.* v. *Albany County Comrs. supra.*

The legislature has undoubted authority to apportion a public burden among all the taxpayers of the state or among those of a particular section if in its judgment those of a single section may reap the principal benefit from the proposed expenditure.

Cook v. *Port of Portland*, 20 Or. 580, 13 L. R. A. 533; *Mobile County* v. *Kimball*, *supra*; *Gordon* v. *Cornes*, 47 N. Y. 608.

The legislature may require a county to join with a municipality in the cost of the construction of a bridge

Cooley, Taxn. pp. 130, 682; Beach, Pub. Corp. § 1472.

It is within the province of the legislature to require the county court to take possession of, maintain, and operate the bridges and ferries, and to provide the means therefor, and to create the sinking fund wherewith to retire the bonds as in the act provided for.

Philadelphia v. *Field*, 58 Pa. 320; *Talbot County Comrs.* v. *Queen Anne County Comrs.* 50 Md. 245; *Will County Supers.* v. *People*, 110 Ill. 511; *Carter* v. *Cambridge & B. Bridge Proprs.* 104 Mass. 236; *Thomas* v. *Leland*, 24 Wend. 65; *Scituate* v. *Weymouth*, 108 Mass. 128; *Agawam* v. *Hampden County*, 120 Mass. 528; *Linn County Comrs.* v. *Snyder*, 45 Kan. 626; *State* v. *Field*, 119 Mo. 593; Cooley, Taxn. p. 123.

The legislature may require a county to incur debts and obligations for a bridge within

the limits of another county when the purpose of the taxation is public and of special interest to the people sought to be taxed.

Talbot County Comrs. v. *Queen Anne County Comrs.* 50 Md. 259; *Skinner* v. *Henderson*, 26 Fla. 121, 8 L. R. A. 55; *Washer* v. *Bullitt County*, 110 U. S. 558, 28 L. ed. 249.

The property of a municipal corporation is held subject to the discretion of the lawmaking power of the state.

Darlington v. *New York*, 31 N. Y. 164, 88 Am. Dec. 248; *Richland County* v. *Lawrence County*, 12 Ill. 1; *Dennis* v. *Maynard*, 15 Ill. 477.

Messrs. **Bronaugh, McArthur, Fenton, & Bronaugh** and **Watson, Beekman, & Watson,** for respondents Northup *et al.*:

The bridge act of 1895, in so far as it relates to or pretends to create any obligation upon Multnomah county, is a local special law, and as such in violation of subdivisions 7 and 10, section 23, article 4, of the state Constitution.

Sutherland, Stat. Constr. § 127; *Maxwell* v. *Tillamook County*, 20 Or. 495; *Healy* v. *Dudley*, 5 Lans. 115; *People* v. *Newburgh & S. Pl. Road Co.* 86 N. Y. 7; *Frye* v. *Partridge*, 82 Ill. 273.

The legislative assembly cannot, by a mere legislative act, retroactive in its character, take an indebtedness of $750,000, or any other sum, resting upon one municipality, and transfer it to and make it an obligation upon another municipality without any opportunity to consent to either the amount or the obligation.

4 Am. & Eng. Enc. Law, p. 351; *Hampshire County* v. *Franklin County*, 16 Mass. 83; *People* v. *Hurlbut*, 24 Mich. 103, 9 Am. Rep. 103; *Hasbrouck* v. *Milwaukee*, 13 Wis. 55, 80 Am. Dec. 718; *Jackson County Supers.* v *La Crosse County Supers.* 13 Wis. 490; *Mills* v. *Charleton*, 29 Wis. 413, 9 Am. Rep. 578; *Grogan* v. *San Francisco*, 18 Cal. 613; *Brunswick* v. *Litchfield*, 2 Me. 32; *Bowdoinham* v. *Richmond*, 6 Me. 112, 19 Am. Dec. 197; *Atkins* v. *Randolph*, 31 Vt. 235; Cooley, Const. Lim. 688, 690; *People* v. *Lynch*, 51 Cal. 34, 21 Am. Rep. 677; *People* v. *Chicago*, 51 Ill. 31, 2 Am. Rep. 278; *People* v. *Batchellor*, 53 N. Y. 139, 13 Am. Rep. 480.

This act creates a debt against the county, or rather obligates the county for the entire bonded debt and interest, and requires the current expenses of operation, repairs, and renewals of these bridges and ferries to be borne by the county, without its consent. Aside from the statute being local and special, it is clearly violative of Const. art. 2, § 10.

People v. *May*, 9 Colo. 404; *Hockaday* v. *Board of County Comrs.* 1 Colo. App. 362; *Law* v. *People*, 87 Ill. 385; 15 Am. & Eng. Enc. Law, p. 1125; *Fuller* v. *Chicago*, 89 Ill. 282; *Buchanan* v. *Litchfield*, 102 U. S. 278, 26 L. ed. 133.

This act in so far as it relates to the Sellwood ferry, and in so far as it relates to the provisions of the act to require the county court to levy and collect a tax to pay the interest on these bonds, or to levy and collect a tax to pay operating expenses, or to levy and collect a tax to create a sinking fund to discharge the debt at maturity, is violative of Const. art. 4, § 20.

Messrs. **Cox, Cotton, Teal, & Minor,** with *Messrs.* **W. W. Thayer** and **Newton McCoy,** for appellant Hanson:

If the act is manifestly obnoxious to the whole theory of our government, it should temper the construction to be placed upon special provisions of the organic law. What is this theory? The greatest latitude in local government consistent with the public good.

Dill. Mun. Corp. § 9; *People* v. *Albertson*, 55 N. Y. 50; *People* v. *Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *People* v. *Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *People* v. *Lynch*, 51 Cal. 15, 21 Am. Rep. 677.

A corporation is properly investing the people of the place with the local government thereof.

Cuddon v. *Eastwick*, 1 Salk. 143; *People* v. *Albertson*, *People* v. *Hurlbut*, and *People* v. *Lynch*, *supra*.

The legislative assembly has no power in municipal matters to encroach upon their established forms and rights of government.

Cooley, Const. Lim. p. 230*x*, note 1.

If the object sought is local, while the legislature may empower, it cannot coerce, the city to accomplish it.

Cooley, Const. Lim. 231*x*; *Taylor* v. *Palmer*, 31 Cal. 240; *People* v. *Lynch*, *supra*; *Schumacker* v. *Toberman*, 56 Cal. 508; *Hasbrouck* v. *Milwaukee*, 13 Wis. 38, 80 Am. Dec. 718; *Mills* v. *Charleton*, 29 Wis. 400, 9 Am. Rep. 578; *People* v. *Chicago*, 51 Ill. 17, 2 Am. Rep. 278.

The bridges already purchased, at least, are property rights of which the city cannot be devested without its consent, inasmuch as they were bought by the city and paid for with its money.

The city is not a mere custodian of the bridges, but has a beneficial property interest in them, in that it is allowed to charge tolls to railways and street railways, while they are free to other vehicles and pedestrians. This is a source of revenue, and the act of the legislative assembly authorizing the acquisition of the bridges coupled with this privilege, gave the city an interest in them which cannot be devested or impaired without its consent, except by due process of law and upon just compensation paid.

Sedgw. Stat. & Const. L. 129; *Benson* v. *New York*, 10 Barb. 223; *People* v. *New York*, 32 Barb. 102; *Grogan* v. *San Francisco*, 18 Cal. 590.

A special law within the meaning of section 23 of article 4 of the Constitution is a private act.

Allen v. *Hirsch*, 8 Or. 412; *Crawford* v. *Linn County*, 11 Or. 498.

The act in question is a public law.

Endlich, Interpretation of Statutes, § 502; *Unity* v. *Burrage*, 103 U. S. 454, 26 L. ed. 407.

Subdivisions 7 and 10 of section 23 of article 4 of the Constitution apply only to roads and highways traversing the rural districts.

East Portland v. *Multnomah County*, 6 Or. 65.

Therefore, if the bridges and ferry mentioned in the act are considered as highways they are not within the constitutional inhibition because they are wholly within the limits of the city of Portland.

Elliott, Roads & Streets, p. 23.

The legislature has undoubted authority to apportion a public burden among all the taxpayers of the state or among those of a particular section, if in its judgment those of the single section reap the most benefit from its expenditure.

Cook v. *Port of Portland*, 20 Or. 580, 13 L. R. A. 533.

The legislature has undoubted power to require a municipal corporation as a governmental agency to establish and pay for necessary public improvements.

David v. *Portland Water Committee*, 14 Or. 98; *Winters* v. *George*, 21 Or. 251; *State* v. *George*, 22 Or. 142, 16 L. R. A. 737; *Cook* v. *Port of Portland*, *supra*.

The act in question is valid for it must be construed as a supplement to or amendment of the charter.

Warren v. *Crosby*, 24 Or. 558; *Hoffman* v. *Branch*, Id. 588.

The result of the county's inability to take the bridges and ferry from the "committee" will be that the whole act as to them must fall for such reason alone.

Sutherland, Stat. Constr. § 176; *Warren* v. *Charlestown*, 2 Gray, 84; *State* v. *Sinks*, 42 Ohio St. 345; *Shawnee County Comrs.* v. *State*, 49 Kan. 492.

This act is void for being in conflict with article 4, section 23, subdivisions 7 and 10, of the Constitution. This inhibits special or local laws "for laying, opening, and working on highways, and for the election or appointment of supervisors."

Maxwell v. *Tillamook County*, 20 Or. 495; Sutherland, Stat. Constr. § 129; *Hammer* v. *State*, 44 N. J. L. 667; *Hudson County Freeholders* v. *Buck*, 49 N. J. L. 228; *Frye* v. *Partridge*, 82 Ill. 267; *State* v. *Mitchell*, 31 Ohio St. 592.

Messrs. **Joseph Simon** and **O. F. Paxton** for respondents, Hirsch *et al.*:

The bridge act is valid and the committee has to issue and sell bonds of the city and acquire and operate bridges.

Winters v. *George*, 21 Or. 251; *State* v. *George*, 22 Or. 142, 16 L. R. A. 737.

The act embraces but one subject and matters properly connected therewith, and the title of the act sufficiently expresses its purpose.

Simpson v. *Bailey*, 3 Or. 515; *McWhirter* v. *Brainard*, 5 Or. 429; *Singer Mfg. Co.* v. *Graham*, 8 Or. 21, 34 Am. Rep. 572; *O'Keefe* v. *Weber*, 14 Or. 57; *David* v. *Portland Water Committee*, Id. 98; *State* v. *Shaw*, 22 Or. 287; *State* v. *Koshland*, 25 Or. 180; *State* v. *Linn County*, Id. 503; *Brewster* v. *Syracuse*, 19 N. Y. 116; *People* v. *Banks*, 67 N. Y. 568; Cooley, Const. Lim. 4th ed. pp. 192 *et seq.*

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

These two cases, which for convenience were heard together in this court, involve the constitutionality of an act of the legislature of 1895 providing for the acquisition by the city of Portland of the Morrison street bridge, Stark street ferry, and the upper deck of the steel bridge, and requiring the supervision, management, and control of said bridges and ferry, when so acquired, and of all the free bridges and ferries of the city acquired under the acts of 1891 and 1893, to be turned over to the Multnomah county court, to be thereafter supervised, managed, and controlled by said court. The provisions of the act, in brief, are: That a committee, designated as a bridge committee, is thereby appointed, and charged with the duty of acquiring in the name and on behalf of the city of Portland, by purchase or condemnation, the Morrison street bridge and Stark street ferry, and of leasing the upper deck of the steel bridge, and for that purpose it is authorized to issue and dispose of the bonds of the city, not to exceed in amount the sum of $200,000. After the two bridges specified and the ferry are thus acquired and are ready for use, the bridge committee is required to turn them over to the county court of Multnomah county. The act further provides that the bridge committee appointed under the act of 1891, and which now has control of the Madison and Burnside street bridges and Albina ferry, shall immediately turn over and deliver to said court all the bridges and ferries and property connected therewith in its possession and under its control, and the county court is required to take charge of, maintain, and operate the same, as well as the bridges and ferry to be acquired under this act, as free bridges and ferries, and to that end is given power and authority to employ all such agents or servants as it may deem necessary, and to make all needful rules and regulations for the conduct, management, and use of such bridges and ferries by the city, its inhabitants, and the public in general. The county court is required to levy and collect, in the manner and form as other taxes are levied and collected, a tax each year upon all the taxable property within the county sufficient, with such revenues as may be received from said bridges and ferries, to maintain and keep them in good condition and repair during the ensuing year, and to pay the annual rental for the upper deck of the steel bridge; and it is also required to levy and collect a tax sufficient to pay the interest to accrue upon the bonds authorized by this act to be issued, and also upon the bridge bonds already outstanding against the city, amounting to $550,000; and, at the expiration of ten years from the passage of the act, the county court is required to levy and collect an additional tax, sufficient to raise a sum of money annually equal in amount to one twentieth part of the bonds then outstanding, to be used as a sinking fund, for the purpose of paying off and retiring such bonds. It is declared by the act, however, that the bonds already issued, and those to be issued, in accordance with its provisions, are to remain as existing, valid, and binding obligations of the city of Portland, and the city is directed and required to pay, as the same matures, the interest on the bonds, and the principal thereof when due, in the event that the county court of Multnomah county fails or neglects to do so. It is further provided that the county court shall establish and maintain a free ferry across the river at Sellwood at a

cost not to exceed $2,400 per annum, and for that purpose it shall cause to be used such of the ferry boats as may be acquired by it under this act. The bridge act of 1891 and the amendment thereto of 1893 are repealed. It is stoutly contended that the act in question is unconstitutional for the several reasons hereinafter noticed, and, while we are satisfied that the contention is well founded in some respects, and are conscious that in others the validity of the act is not free from doubt, yet we cannot declare it wholly void because some of its provisions are so and others are involved in doubt. The courts will never exercise the extraordinary power of declaring an act of the legislature unconstitutional unless there is a plain, palpable, and clear conflict between the statute and the Constitution, which, in our opinion, does not exist in this case. *King* v. *Portland*, 2 Or. 152; *Cook* v. *Port of Portland*, 20 Or. 580, 13 L. R. A. 533.

In the first place, the entire act is challenged upon the ground that it is incompetent for the legislature to compel the city of Portland to incur a debt for the construction of public bridges within its boundaries, and much was said at the argument about the inexpediency and injustice of such legislation, and the effect previous legislation of this character has already had upon the financial affairs of the city. But the question is one of power alone, and, however unjust, inexpedient, or even oppressive such legislation may be, the courts are powerless to declare it invalid if it is within the legitimate exercise of legislative powers. A municipal corporation is but the creature of the legislature, and in its governmental or public capacity is one of the instruments or agents of the state for governmental purposes, possessing certain prescribed political and municipal powers, to be exercised by it on behalf of the general public rather than for itself; and over it, as such agent, the authority of the legislature is supreme, and without limitation or restriction other than such as may be found in the Constitution. There is a line of authorities which hold, and perhaps properly, that a municipal corporation cannot be burdened with a debt without its consent for a matter of local, as distinguished from state, purposes. *People* v. *Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *People* v. *Chicago*, 51 Ill. 17, 2 Am. Rep. 278; *People* v. *Batchellor*, 53 N. Y. 128, 13 Am. Rep. 480. But it seems to be substantially agreed that when the debt or liability is to be incurred in the discharge of some duty which is imposed upon the municipality exclusively for public purposes, and in the performance of which the general public, as distinguished from the inhabitants of the particular municipality, have an interest, it is within the power of the legislature to compel it to perform such duty and incur a debt therefor. That the making and establishment of public highways and bridges, and the assessment and collection of taxes, are within the legitimate legislative powers, and are among the ordinary subjects of legislation, cannot be questioned. Nor do we think it can be successfully denied that the bridges and ferries referred to in the act under consideration will, when acquired, belong to the city of Portland in its public or governmental capacity, and that in the acquisition of them it is but discharging a public or state duty which it is entirely proper for the legislature to impose upon it; and therefore, if there is no limitation in the Constitution, it is no objection to the validity of an act for that purpose that a debt or liability against the corporation is to be created without its consent. Cooley, Taxn. 682; Dill. Mun. Corp. § 74; *Winters* v. *George*, 21 Or. 251; *State* v. *George*, 22 Or. 142, 16 L. R. A. 737; *Philadelphia* v. *Field*, 58 Pa. 320; *Baltimore United German Bank* v. *Katz*, 57 Md. 145; *Davis* v. *New York C. & H. R. R. Co.* 47 N. Y. 400. That the construction of bridges and highways in a city, and the incurring of a debt therefor, should ordinarily be left to the judgment and discretion of the proper municipal authorities is manifestly just and in harmony with the right of local self-government and the theory of our political institutions, but the policy of such legislation is not for the courts. When the power is conceded, the courts cannot inquire into the expediency or manner of its exercise, or the motives or reasons prompting the particular act. We conclude, therefore, that the act in question is not invalid because it compels the city of Portland to incur a debt, without its consent, for the acquisition of public bridges and ferries.

It is next contended that the act embraces more than one subject, and therefore is in violation of section 20, article 4, of the Constitution, which declares that "every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title." The design of this provision of the Constitution was to prevent matters wholly foreign, and having no relation to each other, from being embraced in one bill, and "this purpose is fully accomplished when the law has but one general object, which is fairly indicated by its title." *People* v. *Mahaney*, 13 Mich. 495. The subject or general object of the law in question, as expressed in its title, is the acquisition, control, and management of certain specified bridges and ferries across the Willamette river at Portland, and the details by which it is to be accomplished are matters properly connected therewith, and do not constitute more than one subject within the meaning of the Constitution. Whether the body of the act contained any provisions which are void because not properly within the subject expressed in the title will be considered later.

It is also contended that the act is in conflict with subdivision 7, section 23, article 4, of the Constitution, which forbids the passage by the legislature of special or local laws "for laying, opening, and working on highways, and for the election or appointment of supervisors." It may be conceded that the act in question is special and local, but still we do not think it comes within the provision of the Constitution referred to. This provision was probably designed to require the legislature to provide by general law for the laying, opening, and working of the ordinary highways and public roads of the state, and to prevent any interference

with the general highway system by special or local acts. But if it is applicable to public highways within a municipal corporation, the act under review clearly does not come within its provisions. It does not in any sense provide for the laying or opening of a highway. The bridges and ferries referred to therein were, at the time of the passage of the act, and for a long time before had been, open and in use by the public as highways. Their character as such was already established. The bridges and ferries purchased, acquired, and constructed by the commission appointed under the act of 1891 were then free and open highways, and, while it is true that the public easement was subject to the payment of tolls for passage over the bridges and ferry to be acquired under its provisions, they were nevertheless public highways, and the rights of the owners were to be extinguished before their supervision and control were to be transferred to the county court. By the transfer to the county contemplated by this act, these bridges and ferries were to continue as public highways, but their character as such is in no way derived from the act itself, and therefore it does not provide for the laying or opening of a highway and the case of *Maxwell* v. *Tillamook County*, 20 Or. 495, which declares an act which did so provide invalid, is not in point. The effect of the act of 1895 is simply to transfer the management, control, and maintenance of certain existing public highways from one governmental agency, constituted and appointed by the legislature, to another, designated by the same authority, but it does not undertake to lay out or open or provide for the laying or opening of such highways. Nor do we think the act in question is for the working of highways within the meaning of the provision of the Constitution under consideration. This provision, so far as the working of highways is concerned, was intended to apply to such roads and highways as are a part of the general highway system of the state, and can be maintained and kept in repair under a general law, and not to the public bridges and ferries of a city, which are exempt from the operation of such laws, and which, in the nature of things, cannot be so kept up and maintained. Elliott, Roads & Streets, 329. Indeed, it was said by Judge McArthur in *East Portland* v. *Multnomah County*, 6 Or. 65, that this provision of the Constitution only applies and is limited to the roads and highways traversing the rural districts, and not to the streets and alleys of a city; and in *Lafayette* v. *Jenners*, 10 Ind. 79, it is said by way of argument that a street is not a highway in any sense within the meaning of a constitutional provision like ours, and it is not apparent that this construction would fail to accomplish the purposes intended by the framers of the Constitution. But whether this is so in the matter of opening and laying of highways it is unnecessary to consider at this time, for no such question is presented by this record. But it does not seem to us that the legislature is inhibited by this provision of the Constitution from transferring, by special or local law, the supervision and control of an existing public brige or ferry constructed by and within the boundaries of a municipal corporation from such corporation to a county, and requiring the latter to maintain and keep it in repair. The Constitution of 1874 of the state of New York contains a provision forbidding the passage by the legislature of any private or local bill "laying out, opening, altering, working, or discontinuing roads, highways, or alleys," and this provision was invoked to defeat a private and local act of the legislature of that state which authorized the conveyance by a certain turnpike company of a portion of its road to park commissioners, and which made provision for the improvement and ornamentation of the road authorized to be conveyed, and for the payment of the costs of such improvement, and for the keeping of the same in repair; but the court of appeals held that the constitutional provision was only designed to prevent any interference with the general highway system of the state, or with keeping the ordinary highways and public roads in repair under that system, and the supervision of the officers designated, and in the use of the means and the labor provided by law, and that the act in question did not in any of its provisions provide for the opening or working of a highway in the sense in which that term is used in the Constitution, although the road referred to belonged at the time to a private corporation, which was charging and collecting tolls thereon. *People* v. *Banks*, 67 N. Y. 568. This case, in many of its features, is similar in principle to the case at bar, and it seems to us the doctrine announced there is controlling here.

It is next objected that the act is violative of subdivision 10, section 23, article 4 of the Constitution, which prohibits the passage by the legislature of special or local laws "for the assessment and collection of taxes for state, county, township, or road purposes." The evident purpose of this provision was to prohibit the legislature from passing a special or local law providing a mode or manner for the assessment and collection of taxes in the enumerated cases which would interfere with or contravene the method of assessing and collecting taxes as provided by the general law, but not, in our opinion, to inhibit the legislature from authorizing or requiring a county to levy and collect a tax at the same time and in the same manner as other taxes are levied and collected for specified public purposes, and that is all the law in question required. It does not purport to provide a special manner for the assessment and collection of taxes, but only requires the county of Multnomah to include in its estimate for county purposes a sum sufficient to meet certain expenses which, by the act in question, the county is required to pay, and a tax sufficient to meet these expenses is to be assessed and collected as other taxes are assessed and collected; and hence we do not think it is a special and local law for the assessment and collection of taxes within the meaning of the Constitution.

It is also contended that the legislature cannot take from the city of Portland the

supervision, management, and control of the public bridges and ferries belonging to it, and transfer them to the county of Multnomah. In the first place, these bridges and ferries are not now, and never have been, under the supervision of the city of Portland, but are managed and controlled by a committee or commission appointed for that purpose by the legislature, and this act only purports to transfer their management and control from such committee to another state or governmental agent. But, if it were otherwise, the law is now too well settled to be questioned that the public highways of a city are not the private property of the municipality, but are for the use of the general public, and that, as the legislature is the representative of the public at large, it has, in the absence of any constitutional restriction, paramount authority over such ways, and may grant the use or supervision and control thereof to some other governmental agency so long as they are not diverted to some use substantially different from that for which they were originally intended. 2 Dill. Mun. Corp. 656, and authorities there cited; Cooley, Const. Lim. 5th ed. 335, and note. In accordance with this principle, it was held, in *Portland & W. V. R. Co.* v. *Portland*, 14 Or. 188, 58 Am. Rep. 299, that an act of the legislature granting the use of the public levee of the city of Portland to a railway company for railway purposes was a valid exercise of legislative powers. So also it was held in *People* v. *Walsh*, 96 Ill. 232, 36 Am. Rep. 135, that it was competent for the legislature to transfer the control of the streets of a city to park commissioners, to be by them controlled for boulevard and driveway purposes. A city occupies, as it were, a dual relation to the state,—the one governmental or political, and the other proprietary or private. In its governmental or political capacity it is nothing more than a mere governmental agent, subject to the absolute control of the legislature, except as restricted by the Constitution, and such property and easements as it may have in public streets and ways are held by it in such capacity, and at the will of the legislature. But, on the other hand, such property as it may hold or acquire in its proprietary or private capacity is as much protected by the Constitution as the property of the private citizen, and of which it cannot be deprived except for public purposes, and only then upon just compensation. To the latter effect are the authorities cited and relied upon by the defendant, and they are therefore not in point in this discussion.

It is next contended that it is not within the power of the legislature to compel the property of Multnomah county to be taxed for the payment of a debt of the city of Portland, incurred in the purchase and construction of the Madison and Burnside street bridges and Albina ferry, and to be incurred under the act in question before the county is required to receive or accept the Morrison street bridge, Stark street ferry, or the upper deck of the steel bridge. On this question there seems to be but little authority, but we think it clear upon principle that such legislation cannot be sustained. As Parker, Ch. J., says: "It certainly must be admitted that, by the principles of every free government, and of our Constitution in particular, it is not in the power of the legislature to create a debt from one person to another, or from one corporation to another, without the consent, express or implied, of the party to be charged." *Hampshire County* v. *Franklin County*, 16 Mass. 83. A question involving the authority of the legislature to compel a town to be taxed for the payment of debts previously contracted for the purpose of acquiring title to and constructing a public park partly within the boundaries of the town sought to be charged, was before the court of appeals of New York (*Re Assessment of Lands*, 60 N. Y. 398), and in holding such legislation invalid the court, speaking through Mr. Justice Miller, said: "Had the respondents been originally assessed for benefit conferred under a proper law it might then be said that the assessment was for public use, and not for a subsisting debt, and such an assessment could have been enforced. But such is not this case. And those assessed are required, by the proceedings of the commissioners, to aid in the discharge of a debt previously contracted, and to contribute money which is to be paid into a sinking fund, and to be appropriated for the payment of bonds, already issued, for the location and improvement of the park. There is no principle, that I am aware of, which sanctions the doctrine that it is within the taxing power of the legislature to compel one town, city, or locality to contribute to the payment of the debts of another. The government has no such authority, and this case is entirely without a precedent. If such assessments were authorized they might not be limited to adjoining towns, cities, or villages, but applied to those located at great distances from each other. Such legislation would be unjust, mischievous, and oppressive, and cannot be tolerated." It is competent for the legislature, in the exercise of its plenary powers over public highways of the city of Portland, to transfer the management and control of the bridges and ferries in question from the commission appointed by it to the county, and to determine and provide the mode in which the burden of maintaining and keeping them in repair shall be borne in the future (*Situate* v. *Weymouth*, 108 Mass. 128), but it is not within its power to summarily declare that a debt of the city of Portland shall be paid by the county although in fact incurred for the construction of such bridges and ferries. Nor do we think the fact that the city of Portland is within the county of Multnomah, and perhaps contains a large proportion of the inhabitants and taxable property of the county, in any way affects the question. The two corporations are separate and distinct entities, and, so far as we can see, it is no more competent for the legislature to compel the county to pay the debts of the city than the city to pay those of the county. It would indeed be, as Miller, J., says, "without a precedent," to compel every property owner in the county outside of the city to suffer a lien upon his property for the next

thirty years for its proportionate share of the interest and principal due and to become due on a debt of the city already contracted and outstanding. If such legislation can be sustained, there is nothing to prevent the legislature from compelling property in the county to be taxed for any or all debts of the city incurred for public or governmental purposes, and it would hardly be contended that legislation so manifestly unjust and mischievous could be sustained. The legislature may perhaps compel a municipal corporation to recognize and pay a debt, although not binding on it in a strict legal sense, when there is an equitable or moral obligation on the corporation to pay it. Dill. Mun. Corp. § 75. But no such authority exists when there is neither a legal, moral, nor equitable obligation resting on the corporation sought to be charged, as in this case, where it is proposed to summarily transfer the debt from one corporation to another.

And, finally, it is claimed that so much of the act of 1895 as requires the county to levy a tax for the maintenance and repair of the specified bridges and ferries, and to maintain a ferry at Sellwood, is invalid because not within the subject as expressed in the title of the act. The title of the act by its terms is limited to the acquisition and control of certain specified bridges and a particular ferry to be acquired under its provisions, and to the bridges and ferries in the possession and under the control of the present bridge commission, and we do not think the provision requiring the county to maintain a ferry at Sellwood can be said to be within the subject of the act as so limited, or properly connected therewith, and hence such provision must be declared invalid. But it is clearly stated in the title that one of the purposes of the act is to require the county court of Multnomah county "to assume the management, control, and supervision of such bridges and ferries," and this is certainly broad enough to sustain a provision requiring the county to provide the funds with which to pay the expenses of such management, control, and supervision, and such provision is germane to and properly connected with the subject expressed in the title, and valid.

Having examined all the objections urged, we conclude that the act under consideration is constitutional and valid except in so far as it requires the county of Multnomah to levy a tax and pay the interest and principal on the bridge bonds of the city of Portland, and to maintain a ferry at Sellwood.

CALIFORNIA SUPREME COURT.

P. L. JOHNSON *et al.*, *Respts.*,
v.
City of SAN DIEGO, *Appt.*

(.....Cal.....)

1. Liability for a pro rata share of the debts of the city continued on the territory excluded from San Diego, under Stat. 1889, p. 356, providing that it shall not "relieve in any manner whatsoever any part of such territory from any liability for any debt contracted by such municipal corporation prior to such exclusion."

2. The power of the legislature to change and readjust the burden of municipal indebtedness after the division of a city, and after having declared in the act of separation in what manner it should be borne by the divisions, still remains; and such future adjustments may be made as the equities may suggest.

(October 9, 1895.)

APPEAL by defendant from a judgment of the Superior Court for San Diego County in favor of plaintiffs, and from an order denying a motion for a new trial in an action brought to determine the amount of the bonded indebtedness of the defendant city, which was chargeable upon complainant's property which had been segregated from such city. *Affirmed.*

The facts are stated in the opinion.

Messrs. **William H. Fuller** and **Clarence L. Barber** for appellant.

Messrs. **S. M. Shortridge** and **Gibson & Titus** for respondents.

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

Appeals from the judgment and from the order denying a new trial. Under an act of the legislature approved March 19, 1889 (Stat. 1889, p. 356), a portion of the territory formerly embraced within the corporate limits of the city of San Diego was excluded therefrom. The act referred to was in its nature permissive. It provided for the calling of an election upon petition, at which election the qualified electors within the territory proposed to be segregated should vote separately from the other voters of the municipal corporation, and the votes cast in such territory should be canvassed separately from the votes cast by the other electors of the municipality. If a majority of the votes cast in the territory proposed to be excluded and a majority of the votes cast in the municipality proper should both be for the segregation, then, after certain formalities had been complied with, the territory should cease to be a part of the municipal corporation, "provided [so runs the law] that nothing contained in this act shall be held to relieve in any manner whatsoever any part of such territory from any liability for any debt contracted by such municipal corporation prior to such exclusion: and provided further that such municipal corporation is hereby author-

NOTE.—See also Simon v. Northup (Or.) *ante*, 171, and *footnote* therewith.

30 L. R. A.

See also 30 L. R. A. 171.

ized to levy and collect from any territory so excluded from time to time, such sums of money as shall be found due from it on account of its just proportion of liability for any payment on the principal or interest of such debts; such assessment and collection shall be made in the same manner and at the same time that such assessment and collection are levied and made upon the property of such municipal corporation for any payment on account of such debts: and provided further that any such territory so excluded from any municipal corporation may at any time tender to the legislative body of such municipal corporation the amount for which such territory is liable on account of such debts, and after such tender is made such authority as is herein given municipal corporations to levy and assess taxes on such excluded territory shall cease." Under this law, the territory known as the "Coronado Beach," which contains the land of these plaintiffs, was excluded from the corporate control of the city of San Diego. At the time of this exclusion, the city of San Diego had a bonded indebtedness of $484,000; and, after this exclusion, the city continued to assess and levy taxes upon the detached territory to meet the requirements of this bonded indebtedness, which taxes these plaintiffs duly paid. In 1893 the legislature passed an act entitled "An Act Providing for the Adjustment, Settlement, and Payment of Any Indebtedness Existing against Any City or Municipal Corporation at the Time of Exclusion of Territory therefrom and the Division of Property thereof" (Stat. 1893, p. 536). Plaintiffs availed themselves of the provision of this act to have the court determine what proportion, if any, of the bonded indebtedness of San Diego was properly chargeable against the excluded territory. The demurrer of the defendant city to their petition was overruled; and the court, after hearing evidence, found the existence of the bonded indebtedness; that all of the moneys received by the city and evidenced by this indebtedness had been expended for a sewer system, for the purchase of school sites and the erection of schoolhouses, for refunding a pre-existing debt of the city, and for clearing its titles to certain real estate, and for buying certain rights of way; and that no portion of the money had been expended upon or within the excluded territory. The value of the property belonging to the city at the time of the segregation was found to be $600,000, all of which remained within its boundaries and under its control after the segregation. It was further found that the city of San Diego had never made any improvements in the excluded territory, and had never owned any property in it. The ratio of the value of the excluded territory to that of the city immediately preceding the exclusion was as 1 to 14. Under these findings, and in strict accord with the dictates of the statute, the court adjudged that there was nothing due or to become due from the excluded territory to the city.

The chief contention of the defendant, raised upon demurrer, pressed in its motion for a nonsuit, and urged against the judgment, may be thus stated: The property owners of the city and the property owners of the excluded territory, when, in accordance with the permissive act of the legislature (Stat. 1889, p. 356), they elected to segregate Coronado Beach, did so under a contract expressed in the act itself, by which the property owners of the excluded territory were allowed to remove their land from the jurisdiction of the city, with the understanding that they should continue to pay their *pro rata* share of the municipal debts existing at the time of the exclusion; that the rights of the city vested under this contract cannot be destroyed or impaired by subsequent legislation; and that, therefore, to the parties to this controversy the statute of 1893 has no applicability.

This contention is first met by the respondents with the declaration that the act of 1889 did not impose or mean to impose a *pro rata* liability upon the excluded territory, but only a liability for a just proportion of the debt, which proportion was a subject of future ascertainment or determination; and much nice argument is advanced in its support. But the language of the proviso, that "nothing contained in the act shall be held to relieve in any manner whatsoever any part of such territory from any liability for any debt contracted by such municipal corporation prior to such exclusion," would seem to be a comprehensive pronunciation that the segregated territory should, after exclusion, be held by the same liabilities as bound it before; and, as before its exclusion it was liable for its *pro rata* share of these debts, it must be that after exclusion it remained subject to the same liabilities. We think, therefore, that, by the only just and reasonable interpretation of which the act in question is susceptible, the legislature, in permitting the division, exercised its undoubted power to adjust the burden of the existing corporate debt, and decreed that the excluded territory should continue to bear its former proportion of that burden.

The question that is left for consideration is that of the power of the legislature to change and readjust the burden of such an indebtedness after having, in the act of separation, declared in what manner it should be borne. Municipal corporations, in their public and political aspect, are not only creatures of the state, but are parts of the machinery by which the state conducts its governmental affairs. Except, therefore, as restrained by the Constitution, the legislature may increase or diminish the powers of such a corporation,—may enlarge or restrict its territorial jurisdiction, or may destroy its corporate existence entirely. Says Cooley: "Restraints on the legislative power of control must be found in the Constitution of the state, or they must rest alone in the legislative discretion. If the legislative action in these cases operates injuriously to the municipalities or to individuals, the remedy is not with the courts. The courts have no power to interfere, and the people must be looked to, to right, through the ballot box, all these wrongs." Cooley, Const. Lim. 6th ed. p. 229. "A city," says Mr. Justice

Field, in *Jefferson City Gaslight Co.* v. *Clark*, 95 U. S. 644, 24 L. ed. 521, "is only a political subdivision of the state, made for the convenient administration of the government. It is an instrumentality, with powers more or less enlarged, according to the requirements of the public, and which may be increased or repealed at the will of the legislature." This right of legislative control, arising from the very nature of the creation of such corporations, is established under the well-settled doctrine that such corporations have no vested rights in powers conferred upon them for civil, political, or administrative purposes; or, as Dillon states it: "Legislative acts respecting the political and governmental powers of municipal corporations not being in the nature of contracts, the provisions thereof may be changed at pleasure where the constitutional rights of creditors and others are not invaded." Dill. Mun. Corp. 4th ed. § 63.

The act of the legislature in relieving Coronado Beach from the corporate control of San Diego, and in adjusting the burden of the city's debt, was undoubtedly the exercise of a proper power directed to the political and governmental affairs of the municipality. That the legislature, by the terms of the act segregating the territory, had the right to dispose of the common property, and provide the mode and manner of the payment of the common debt, imposing its burden in such proportions as it saw fit, is a proposition undisputed and indisputable. It is equally well-settled law that, when the act of segregation is silent as to the common property, and common debts, the old corporation retains all the property within its new boundaries, and is charged with the payment of all of the debts. Upon these two propositions the cases are both numerous and harmonious. *People* v. *Alameda County*, 26 Cal. 641; *Hughes* v. *Ewing*, 93 Cal. 414; *Los Angeles County* v. *Orange County*, 97 Cal. 329; *Depere* v. *Bellevue*, 31 Wis. 120, 11 Am. Rep. 602; *Laramie County Comrs.* v. *Albany County Comrs.* 93 U. S. 307, 23 L. ed. 552; *Lycoming County* v. *Union County*, 15 Pa. 166, 53 Am. Dec. 575; *Mount Pleasant* v. *Beckwith*, 100 U. S. 514, 25 L. ed. 699; *Layton* v. *New Orleans*, 12 La. Ann. 515; *Beloit* v. *Morgan*, 74 U. S. 7 Wall. 619, 19 L. ed. 205. There is authority, however, holding that, when the legislature has spoken in the original act, rights vest under it which may not be impaired; and it is upon these cases that appellants rely. Thus, in *Bowdoinham* v. *Richmond*, 6 Me. 112, 19 Am. Dec. 197, the supreme court of Maine decided in 1829 that as the act of the legislature dividing the town of Bowdoinham, and incorporating a part of it into a new town, by the name of Richmond, enacted that the latter should be held to pay its proportion towards the support of all paupers then on expense in Bowdoinham, a later act exonerating the new town from this liability was void. The court held that by the former act a vested right of action arose in favor of the old town against the new, and that the later act, in destroying this right, impaired the obligation of the contract on the part of Richmond created by the first act. Just how the court reached the conclusion that a contract was created by the first act is not plain, but it seems to have been based somewhat upon the conviction that the assent of the old town was necessary to the segregation. The opinion, however, looks for authority to the case of *Hampshire County* v. *Franklin County* (decided in 1819), 16 Mass. 75. In that case the legislature had created the county of Franklin out of territory formerly a part of the county of Hampshire. The act was silent as to the disposition of the public property and the public debt. By an act passed two years later, the legislature provided in effect that if, at the time of the segregation, there were funds belonging to the county of Hampshire in excess of its debts, the new county should be entitled to such proportion of those funds as the assessed value of the property of the new county bore to the assessed value of the property of the old. The supreme court decided, in accordance with the undoubted rule, that as the first act was silent upon the subject, all of the common property within its limits belonged to the old county, which was likewise charged with all existing debts. It further held that rights vested under this act, and that the later act providing for an apportionment, violated these rights in attempting to give the property of Hampshire to Franklin county; in other words, that the later act created a debt from Hampshire to Franklin county which before had not existed. It is to be noticed that in this case the original act was silent as to common property and debts, but as, in such case, the law steps in and makes disposition of them, the silence was deemed equivalent to an affirmative declaration of the legislature making disposition which could not afterwards be modified.

But, distinguished as are the courts which have announced this doctrine, their views have not been followed, and the decisions themselves have been elsewhere criticised and rejected, until it may be safely said that it is the general rule that, where the original act does not make disposition of the common property and debts, the legislature may at any subsequent time, by later act, apportion them in such manner as seems to be just and equitable. Under the decisions adopting this rule, the theory of vested rights and contractual relations is rejected as being a false quantity in the dealings of the sovereign state with its governmental agents and mandatories; and while it is not denied that the state may make a contract with a municipal corporation, or may permit municipal corporations to enter into binding contracts with each other, which contracts it cannot impair, these contracts must be in their nature private, although the public may derive a common benefit from them, and the contracting cities are as to them measured by the same rules and entitled to the same protection as would a private corporation. The subject of such a contract, however, can never be a matter of municipal polity or of civil or political power, for the legislature itself cannot surrender its supremacy as to these things, and thus abandon its prerogatives, and strip

itself of its inherent and inalienable right of control.

Of the cases so holding, either directly or impliedly, a few may profitably be mentioned: In *Richland County* v. *Lawrence County*, 12 Ill. 1, the facts were that the former county had been carved out of the territory of the latter by an act making no disposition of the county property. The state had given to the county of Lawrence a large sum of money, which it held at the time of segregation. By a later act the legislature declared that the new county should be entitled to receive from the old a certain proportion of this fund, which sum the old county refused to pay under the claim of vested right and ownership. The supreme court upheld the act, declaring that there was no contract between the state and the old county, which was merely the state's agent. The case of *Hampshire County* v. *Franklin County*, *supra*, is unfavorably reviewed. In *Perry County* v. *Conway County*, 52 Ark. 430, 6 L. R. A. 665, the original act detaching territory, made no apportionment of the debt. A later act, which did so, was attacked as unconstitutional. The supreme court there said: "The earlier doctrine (still followed by some courts) was that the act detaching the territory must apportion the debt, and that it could not be subsequently taken from the old and imposed upon the new county. *Hampshire County* v. *Franklin County*, 16 Mass. 75; *Bowdoinham* v. *Richmond*, 6 Me. 112, 19 Am. Rep. 197. The better doctrine is, that the power of the legislature to impose the debt of the one county upon another, depending upon the existence of a moral obligation from the new county, or the county receiving new territory, to pay part of the old debt, the legislature may so ordain whenever it finds the moral obligation to exist." In *Dunmore's App.* 52 Pa. 374, four boroughs were erected in a township which was heavily in debt. By act afterwards passed, the burden of the debt was to be apportioned by commissioner between the boroughs and the township. The supreme court of Pennsylvania upheld the act. In *Layton* v. *New Orleans*, 12 La. Ann. 515, the act of the legislature consolidating several municipalities into one government, known as the "City of New Orleans," provided that the debts of each should be liquidated by taxation upon its own inhabitants. Afterwards, by another act, it was provided that the debts should be paid by taxation uniformly upon all the property of the new city. The court held that the earlier act was not a contract, and no rights vested under it; and that, as in these matters the legislature is supreme, it could change its policy and readjust these debts. In *Baltimore* v. *State*, 15 Md. 376, 74 Am. Dec. 572, the court says: "The doctrine that there is a fundamental principle of right and justice inherent in the nature and spirit of the social compact that rises above and restrains the power of legislation, cannot be applied to the legislature when exercising its sovereignty over public charters granted for the purpose of government." Says Dill. Mun. Corp. 4th ed. § 189: "But upon the division of the old corporation, and the creation of a new corporation out of part of its inhabitants and territory, or upon the annexation of part to another corporation, the legislature may provide for an equitable apportionment or division of the property, and impose upon the new corporation, or upon the people and territory thus disannexed, the obligation to pay an equitable proportion of the corporate debts. The charters and constituent acts of public and municipal corporations are not, as we have before seen, contracts, and they may be changed at the pleasure of the legislature, subject only to the restraints of special constitutional provisions, if any there be. And it is an ordinary exercise of the legislative dominion over such corporations to provide for their enlargement or division, and, incidental to this, to apportion their property, and to direct the manner in which their debts or liabilities shall be met, and by whom. The opinion has been expressed that the partition of the property must be made at the time of the division of, or change in, the corporation, since, otherwise, the old corporation becomes, under the rule just before stated, the sole owner of the property, and hence cannot be deprived of it by a subsequent act of the legislature. But, in the absence of special constitutional limitations upon the legislature, this view cannot, perhaps, be maintained, as it is inconsistent with the necessary supremacy of the legislature over all its corporate and unincorporated bodies, divisions, and parts, and with several well-considered adjudications." To the same general effect are the cases of *Laramie County Comrs.* v. *Albany County Comrs.* 92 U. S. 307, 23 L. ed. 552; *Mount Pleasant* v. *Beckwith*, 100 U. S. 514, 25 L. ed. 699; *Scituate* v. *Weymouth*, 108 Mass. 128; *Willimantic School Soc.* v. *First School Soc.* 14 Conn. 457; *Guilford* v. *Chenango County Supers.* 13 N. Y. 143.

In this state the power of the legislature to make such subsequent adjustments was early declared in *People* v. *Alameda County*, 26 Cal. 641. Alameda county was created out of the territory of Contra Costa county in 1853. At the time of the separation, Contra Costa county owed for a bridge which had been constructed upon the territory set apart for Alameda county. The original act made no provision for the payment of this indebtedness, which thus remained a charge against the old county. By two separate later acts, the legislature provided for the apportionment of the debt, putting a part of the burden upon Alameda county. These acts were upheld as a proper exercise of legislative power. And, indeed, it is not easy to see how the opposite view can be maintained. Since the legislative power, within constitutional limitations, is supreme in the matter, since, in the first apportionment, the people affected are entitled to no voice (except through their representatives), and since the act of the legislature is not in the nature of a contract, it cannot logically be held that the power has been exhausted by its first exercise. The right still remains to make such future adjustments as the equities may suggest. Nor, in the operation of the act in question upon the city of San Diego, can we

perceive any hardship. It had at the time of the segregation $600,000, acquired while Coronado Beach was a part of its territory, and partially acquired, doubtless, by taxation upon this land. All of this property it retains. All of the moneys evidenced by the bonded indebtedness were expended within its present territorial limits, and no dollar of it went to improve the excluded territory. Having all of the common property and all of the fruits of the common debt, it is certainly not onerous or oppressive that it should be asked to pay for what has been expended for its exclusive benefit. In a certain sense, it is true that Coronado Beach was also benefited by these expenditures. In the same sense, San Mateo county is benefited by the public improvements of the city and county of San Francisco; but it has never been asserted that for such benefits a sister county should be called upon to pay.

The judgment and order appealed from are affirmed.

We concur: **Beatty**, Ch. J.; **Harrison**, J.; **Temple**, J.; **Van Fleet**, J.; **Garoutte**, J.

WEINSTOCK, LUBIN, & COMPANY, *Respts.*,
v.
H. MARKS, *Appt.*

(.....Cal.....)

1. The words "mechanics' store" may be made a tradename, and the user thereof entitled to protection from the use of such words by a competitor in business for the purpose of deceiving the public, and especially the customers of the former.

2. A mandatory injunction to compel a person to distinguish his place of business in some mode or form that shall be a sufficient indication that it is a different place of business from that of a competitor should be granted, where he has imitated the building of another dealer in the same business so closely as to deceive customers and with intent to deceive them, and has omitted the use of any name or sign which could designate the true proprietorship of the store; but it would be too strict a rule to compel him to show the proprietorship of his store.

(October 12, 1895.)

APPEAL by defendant from a judgment of the Superior Court for Sacramento City in favor of plaintiff in an action brought to compel defendant to cease interfering with plaintiff's business and tradename. *Reversed in part.*

The facts are stated in the opinion.

NOTE.—This is believed to be the first case in which a court has compelled a defendant for the purpose of distinguishing his business from that of a rival to perform acts of a positive kind as distinguished from the prohibition of acts causing infringement.

As to the power of equity to grant mandatory injunctions, see Moundsville v. Ohio River R. Co. (W. Va.) 20 L. R. A. 161.

Messrs. **Holl & Dunn** for appellant.

Messrs. **Johnson, Johnson, & Johnson** for respondent.

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

Plaintiff is a corporation carrying on a large clothing and dry-goods business in the city of Sacramento. Defendant is also a dealer in clothing of the same general character, and is carrying on business in a building adjoining plaintiff's place of business. The present action is one of injunction, and by its decree, among other things, the court ordered defendant to refrain from further use of the name "Mechanical Store" as the designation of his place of business, and further decreed that defendant maintain and place in a conspicuous part of his store, and also in a conspicuous place on the outside or front thereof, a sign showing the proprietorship of his said store, in letters sufficiently large to be plainly observable by passers-by and customers entering therein. Defendant appeals from the foregoing portions of the judgment.

The judgment is based upon certain findings of fact made by the trial court upon the evidence offered at the trial, and no complaint is now heard that this evidence does not fully support these findings. It therefore follows that the merit of this appeal presents itself upon a consideration of those findings and the decree based thereon. These findings of fact are full and in detail, and, for present purposes, we deem it sufficient to state the general tenor and effect of some of them. (1) The court finds that on or about the 8th day of October, 1874, H. Weinstock and D. Lubin entered into a copartnership under the firm name and style of Weinstock & Lubin, of the city of Sacramento, and, as such partners, engaged in the business of dealing in wearing apparel for men, women, and children, and that said Weinstock & Lubin selected as the name of their place of business "Mechanics' Store," and designated the same by that appellation, by which name their said store thenceforth was continually known; that, in the management and conduct of their business, they fixed a price upon each and every article carried by them in the stock of said store, and marked the said prices in figures upon each article, and sold such articles at the prices so marked, and never deviated therefrom; and they advertised the said method of doing business extensively throughout the entire Pacific coast by means of newspapers, etc., by means whereof their said method of doing business became widely known to the trade and public throughout the entire Pacific coast, and by reason whereof it became and was well known to the trade and public in California and the other states and territories of the Pacific coast that at the store of said Weinstock & Lubin only one price was charged for goods sold therein, and that no deviation from said price was permitted. (2) That, by care, attention, skill, and strict adherence to business and the rules as aforesaid, this plaintiff has materially increased the volume and importance and value of said business, and enhanced

the good will thereof, and the said plaintiff has established for the said store and business throughout the said states and territories a wide and honorable reputation, and thereby said business has become extensive and valuable and profitable, and the public have become accustomed to plaintiff's said method of doing business, and have been induced to rely, and do rely, upon the good faith of the plaintiff in managing and conducting its business in the manner aforesaid, and by reason thereof have been induced to bestow and do bestow upon the plaintiff their custom, trade, patronage, and business. (3) That on or about 1885 the defendant, who had previously been engaged in business elsewhere, and was without any established reputation of his own, and whose business was unknown to the trade and general public, removed his business from the place he then occupied to the premises on the east of and near the premises of this plaintiff, and the defendant then and there engaged in a similar line of trade as this plaintiff, and ever since then he has maintained and conducted, and still maintains and conducts, the said store at said place, and carries on the said business therein; and he named his store in the year 1887 or thereabouts the "Mechanical Store." (4) That the defendant, well knowing the foregoing facts, and contriving, intending, and designing fraudulently to injure this plaintiff, and to obtain undue advantage of plaintiff, and to deprive the plaintiff of its business, and fraudulently and unlawfully to increase his own business, and to pirate and make use of and appropriate to himself the good will of the plaintiff's business, and the said reputation and honorable esteem and confidence that the plaintiff enjoyed in the minds of the people of the Pacific coast, and in order to create confusion in the public mind, and to take advantage of the standing that the plaintiff by its aforesaid acts had acquired in said territory, and fraudulently designing to deceive the public and people intending to trade with the plaintiff, and to divert the custom of the plaintiff to himself, and to deprive the plaintiff of its customers and of the trade, and to induce the people to trade with the defendant under the belief that they were trading with the plaintiff, and for the purpose of deceiving plaintiff's customers and persons intending to trade with plaintiff into believing that the defendant's store was that of the plaintiff, and thereby inducing them to enter said store of defendant to trade with said defendant, to his profit, and in order to carry out his fraudulent and corrupt designs as aforesaid,—the defendant has persistently carried out a system of deceit and misrepresentations concerning his store and its ownership, in connection with plaintiff's store and business, as follows: That in 1891 plaintiff, at its place of business, erected a store, the front of which is of peculiar architecture, containing arches and alcoves, of which there was none other similar in the city of Sacramento; that afterwards the defendant, at his said place of business, and adjoining plaintiff's store, erected a building which, so far as the first or lower story is concerned, was and is similar in architecture in every respect to the store of plaintiff, so much so that passers-by were liable to go into the store of defendant thinking that they were entering the store of plaintiff, and that customers of plaintiff in many instances did so enter the store of defendant thinking they were in the store of plaintiff; that defendant had no sign inside of his store or on the outside of his store by which customers could for themselves ascertain the true proprietorship thereof; that the erection of the defendant's building exactly the same as plaintiff's building in every particular, and the adoption of the use of the words "Mechanical Store," and the absence of any name or sign upon or in defendant's store designating the true proprietorship of defendant's store, were all done by the defendant for the purpose of deceiving the public, and more especially plaintiff's customers, and enticing and pirating and securing the patronage of said customers from plaintiff to defendant. (5) That, by the aforesaid means the defendant has diverted from the plaintiff a large part of plaintiff's trade and custom; has induced many persons to trade with the defendant who otherwise would have traded with the plaintiff; has sold large quantities of goods in his said store to persons who, but for said acts of defendant, would have purchased said goods of the plaintiff; has deprived the plaintiff of a large share of its legitimate profits; has injured the business and reputation of the plaintiff; has impaired the confidence of the public in the plaintiff and its method of doing business; and has deprived the plaintiff of a large number of its customers and patrons.

The foregoing chapter of facts makes interesting reading, and we first turn our attention to that portion of the judgment restraining defendant from the further use of the words "Mechanical Store" as a designation of his place of business. We see but little difficulty in arriving at a conclusion upon this branch of the case. Defendant assails the judgment in this particular with but a single weapon. He insists that the words "Mechanics' Store" are not the subject of trademark, and that therefore plaintiff can have no exclusive right to them. As we view the picture presented by the findings of fact, the question as to what may or may not be the subject of trademark is not the problem to be solved. That these words are of a kind that may be used as a tradename we have no doubt, and, having established that fact, we are required to pursue the investigation no further. That certain names and designations which may not become technical or specific trademarks may become the names of articles or of places of business, and thereby the use thereof receive the protection of the law, cannot be doubted, for the cases everywhere recognize that fact. The learned judge said in *Lee* v. *Haley*, L. R. 5 Ch. 155: "I quite agree that they [the plaintiffs] have no property in the name, but the principle upon which the cases on this subject proceed is, not that there is property in the word, but that it is a fraud on a person who has established a trade, and carries it on under a given name, that some other person should assume the same name, or the same name

with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name." A similar doctrine is declared in *Glen & H. Mfg. Co.* v. *Hall*, 61 N. Y. 226, 19 Am. Rep. 278, and also in the late case of *Coats* v. *Merrick Thread Co.* 149 U. S. 562, 37 L. ed. 847. This court said in *Pierce* v. *Guittard*, 68 Cal. 71, 58 Am. Rep. 1: "We are of opinion that it is not necessary to decide whether the plaintiff's label with the accompanying words and devices constituted a trademark, and as such the exclusive property of the plaintiff, for the reason that it is a fraud on a person who has established a business for his goods, and carries it on under a given name or with a particular mark, for some other person to assume the same name or mark, or the same with a slight alteration in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name or mark." The same general principle is also recognized and approved in *Schmidt* v. *Brieg*, 100 Cal. 672, 23 L. R. A. 790. While in these two cases the fact appears that the defendants were selling an inferior article, and thereby deceiving and defrauding the public, it is not apparent that such fact was a necessary element in pointing the judgment. Neither do we consider it so upon principle; and in cases without number, restraining defendants from trespassing upon the good will of plaintiff's business, such fact was an element foreign to the litigation. It may be said that the adjudged cases for relief are based solely upon the ground of loss and damage to the tradesman's business, by unlawful competition. In *Lery* v. *Walker*, Cox, Man. Trademark Cas. No. 639, the learned judge declared: "The court interferes solely for the purpose of protecting the owner of a trade or business from a fraudulent invasion of that business by somebody else. It does not interfere to prevent the world outside from being misled into anything."

While our statutes attempt to deal with trademarks, and provide for the filing thereof with the secretary of state, with accompanying affidavits, etc., yet tradenames are equally protected upon analogous principles of law. And that the words "Mechanics' Store" may be made a tradename, and the user thereof become entitled under the law to protection from pirates preying upon the sea of commercial trade, we have no doubt. We think the defendant should be restrained from the use of the words "Mechanical Store." The court has declared the fact to be, and it is not challenged by defendant that these words were used as a designation of his store for the purpose of deceiving the public, and especially plaintiff's customers, and thereby securing the advantages and benefits of the good will of plaintiff's business. To say that such conduct upon the part of defendant is unfair business competition is to state the fact in the mildest terms. In *Celluloid Mfg. Co.* v. *Cellonite Mfg. Co.* 32 Fed. Rep. 97, Justice Bradley, of the Supreme Court of the United States, in speaking to the question of similarity in name, said: "It is not identical with the complainant's name. That would be too gross an invasion of the complainant's right. Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another. What similarity is sufficient to effect the object has to be determined in each case by its circumstances. We may say, generally, that a similarity which would be likely to deceive or mislead an ordinary unsuspecting customer is obnoxious to the law." In this case the trial court determined that there was a sufficient similarity in the names to deceive the public; that the defendant adopted the name for the purpose of deceiving the public and securing plaintiff's business; and that such results had followed. These things being true, the decree must go against him.

The remaining branch of the case presents a novel and original proposition of law. In its facts we apprehend no case like it can be found, either in this country or England. The decree orders the defendant to place, both upon the outside and inside of his store, a sign, plainly legible to customers and passers-by, indicating his proprietorship; and, while the power of the court to issue mandatory injunctions in many cases must be conceded, yet cases where such power has been exercised have generally involved matters of nuisance, or at least cases where courts have ordered the subject-matter of the litigation to be placed in its original condition; as, for instance, the removing of obstructions to ancient lights. But let us for a moment turn our attention to the facts of this case. The store of plaintiff was known as the "Mechanics' Store." By various kinds of advertising, and attention, honesty, and skill in the conduct of the business, it increased the volume thereof and enhanced its good will, and throughout the Pacific coast established for it a wide and honorable reputation as a fair and reliable house with which to deal. Plaintiff erected a store building of peculiar architecture, there being none like it in the city of Sacramento; and defendant thereupon erected a store building, immediately adjoining that of plaintiff, in every respect of similar architecture. It further appears that defendant erected this particular kind of building for the purpose of deceiving the public, and securing the patronage of plaintiff's customers; and for the same purpose he refrained from placing any sign in or upon the building indicating the proprietorship of the business, or designating it in any way so that it might be distinguished from the store of plaintiff. And, by reason of these acts of defendant, many of plaintiff's customers were deceived into purchasing goods in defendant's store, believing that they were trading in plaintiff's store; and defendant thus diverted from the plaintiff a large part of its trade and custom, and thereby injured its business and curtailed the value of its good will. Upon this bald statement of facts, it cannot be gainsaid that defendant has done the plaintiff wrong; and it is said that for every wrong there is a remedy. These facts certainly indicate a case of un

lawful business competition, and courts of equity have ever been ready to declare such things odious. It is strange if plaintiff may be deprived of the fruits of a long course of honest and fair dealing in business by such wicked contrivances, and, upon appeal to the courts for relief, should be told there is no relief. This cannot be so, for the whole law of trademarks, tradenames, etc., is recognized, approved, and enforced for the very purpose of protecting the honest tradesman from a like loss and damage to that which threatens this plaintiff; and the fact that the question comes to us in an entirely new guise, and that the schemer has concocted a kind of deception heretofore unheard of in legal jurisprudence, is no reason why equity is either unable or unwilling to deal with him. It has been said by some judge or law writer that "no fixed rules can be established upon which to deal with fraud, for, were courts of equity to once declare rules prescribing the limitations of their power in dealing with it, the jurisdiction would be perpetually cramped and eluded by new schemes which the fertility of man's invention would contrive." By device, defendant is defrauding plaintiff of its business. He is stealing its good will,—a most valuable property,—only secured after years of honest dealing and large expenditures of money; and equity would be impotent, indeed, if it could contrive no remedy for such a wrong.

The fundamental principle underlying this entire branch of the law is that no man has the right to sell his goods as the goods of a rival trader. Mr. Browne, in his work upon Trademarks, declares the wrong to be, "not in imitating a symbol, device, or fancy name, for any such act may not involve the slightest turpitude; the wrong consists in unfair means to obtain from a person the fruits of his own ingenuity or industry,—an injustice that is in direct transgression of the decalogue, 'Thou shalt not covet . . . any thing that is thy neighbor's.' The most detestable kind of fraud underlies the filching of another's good name, in connection with trafficking." We think the principle may be broadly stated that when one tradesman resorts to the use of any artifice or contrivance for the purpose of representing his goods or his business as the goods or business of a rival tradesman, thereby deceiving the people by causing them to trade with him when they intended to and would have otherwise traded with his rival, a fraud is committed,—a fraud which a court of equity will not allow to thrive. In *Howard* v. *Henriques*, 3 Sandf. 725, the court, in speaking of the competitor in business, said: "He must not by any deceitful or other practice, impose upon the public, and he must not by dressing himself in another man's garments, and by assuming another man's name endeavor to deprive that man of his own individuality and thus despoil him of the gains to which by his industry and skill he is fairly entitled." It may well be said that the defendant by duplicating plaintiff's building, with its peculiar architecture and immediately adjoining, entering into the same line of business, with no mark of identification upon his store, has dressed himself in plaintiff's garments; and, having so dressed himself with a fraudulent intent, equity will exert itself to reach the fraud in some way. In the leading case of *Lee* v. *Haley*, *supra*, the whole question is condensed by the final conclusion of the court into the principle of law "that it is a fraud on the part of a defendant to set up a business under such a designation as is calculated to lead and does lead other people to suppose that his business is the business of another person." If the same evil results are accomplished by the acts practiced by this defendant which would be accomplished by an adoption of plaintiff's name, why should equity smile upon the one practice and frown upon the other? Upon what principle of law can a court of equity say, "If you cheat and defraud your competitor in business by taking his name, the court will give relief against you, but, if you cheat and defraud him by assuming a disguise of a different character, your acts are beyond the law?" Equity will not concern itself about the means by which fraud is done. It is the results arising from the means—it is the fraud itself—with which it deals.

The foregoing principles of law do not apply alone to the protection of parties having trademarks and tradenames. They reach away beyond that, and apply to all cases where fraud is practiced by one in securing the trade of a rival dealer; and these ways are as many and as various as the ingenuity of the dishonest schemer can invent. In *Glenny* v. *Smith*, 11 Jur. N. S. 965, the court held: "Where a trademan, in addition to his own name upon his shop front, placed upon his sunblind and upon his brass plate the words 'From Thresher & Glenny' (in whose employment he had been), the court, being of opinion that this was done in such a way as to be likely to mislead, and there being evidence that persons had been actually misled, granted an injunction to restrain such a use of the name of the firm 'Thresher & Glenny.'" In *Knott* v. *Morgan*, 2 Keen, 213, the "London Conveyance Company" had its omnibuses painted green, and its servants clothed in the same colors. Another adopted the same name, and likewise its vehicles were so painted and its servants so clothed. It was conceded that plaintiff could have no exclusive property right in any of these things, but the court issued its injunction, declaring that plaintiff had "a right to call upon this court to restrain the defendant from fraudulently using precisely the same words and devices which they have taken for the purpose of distinguishing their property, and thereby depriving them of the fair profits of their business by attracting custom on the false representation that carriages, really the defendant's, belong to, and are under the management of, the plaintiffs." The author, by a note, approves the doctrine here declared, saying: "There was an obvious attempt to trade upon the plaintiff's reputation,—a constructive fraud,—coupled with pecuniary loss, which was made the ground for the issuance of a broad injunction." The same principle is reiterated by the same learned judge in *Croft* v. *Day*, 7 Beav. 84, in the

following words: "It has been very correctly said that the principle in these cases is this: that no man has a right to sell his own goods as the goods of another. You may express the same principle in a different form, and say that no man has a right to dress himself in colors, or adopt and bear symbols, to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose, either that he is that other person, or that he is connected with and selling the manufacture of such other person, while he is really selling his own. It is perfectly manifest that to do these things is to commit a fraud, and a very gross fraud." In the very recent case of *Coats* v. *Merrick Thread Co.* 149 U. S. 566, 37 L. ed. 850, the court said: "There can be no question of the soundness of the plaintiff's proposition that, irrespective of the technical question of trademark, the defendants have no right to dress their goods up in such manner as to deceive an intending purchaser, and induce him to believe he is buying those of the plaintiffs. . . . They have no right, by imitative devices, to beguile the public into buying their wares under the impression they are buying those of their rivals." To the same point, see *Dr. Jaeger's Sanitary Woolen System Co.* v. *Le Boutillier*, 5 Misc. 78; *Apollinaris Co.* v. *Scherer*, 27 Fed. Rep. 18; *Burgess* v. *Burgess*, 3 De G. M. & G. 896; *Von Mumm* v. *Prash*, 56 Fed. Rep. 830.

Having decided that defendant's acts constitute a fraud upon plaintiff, and that a court of equity will administer relief, the question then presents itself, What shall be the form of the decree? How may the court reach the wrong? The defendant had the right to erect his building, and erect it in any style of architecture his fancy might dictate. He had the right to erect it in the particular locality where it was erected. He had the right there to conduct a business similar to that of plaintiff. He had a right to do all these things, for, of themselves, they did not offend against equity, but when they were done with a fraudulent intent, when they were done for the purpose of tolling away the customers of plaintiff by a deception, a fraud is practiced, and equity will do what it can to right the wrong. The decision of the trial court in effect ordered defendant to place signs both inside and outside his building, showing to the world the proprietorship thereof. We think this decree holds defendant to a rule too strict, in that it requires the proprietorship of the store to be shown. In this particular we think the decree should be modified so as to require that the defendant, in the conduct of this business, shall distinguish his place of business from that in which the plaintiff is carrying on its business, in some mode or form that shall be a sufficient indication to the public that it is a different place of business from that of the plaintiff. For the foregoing reason, the judgment in this respect only is reversed, and the cause remanded, with directions to the trial court to modify the same, as heretofore suggested; and thereupon *it is ordered that said judgment stand affirmed.* Appellant is to pay the costs of this appeal.

We concur: **Harrison, J.; Van Fleet, J.**

UTAH SUPREME COURT.

M. C. SULLIVAN *et al.*, *Appts.*,
v.
NORTHERN SPY MINING COMPANY, *Respt.*

(.....Utah.....)

The discoverer of a flow of percolating waters on the public lands may, by digging wells and improving them and constantly using the water for a beneficial purpose, acquire a right to take water from such wells as against one who by subsequent location acquires title to the land.

(June 17, 1895.)

APPEAL by plaintiff's from a judgment of the District Court for Juab County in favor

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NOTE.—*Appropriation of percolating waters on public lands.*

SULLIVAN v. NORTHERN SPY MINING COMPANY seems to be the first case in which the question of the right to appropriate, by means of wells, percolating waters found in public lands as against the subsequent patentee, has been considered. There are a few cases which have discussed questions analogous to the subject, which may throw some light on it.

The right to such appropriation is not an extension or application of a common-law right. Roath v. Driscoll, 20 Conn. 541.

For in Ballard v. Tomlinson, L. R. 24 Ch. Div. 121, 24 Am. L. Reg. (N. S.) 636, 54 L. J. Ch. 454, 52 L. T. N. S. 942, 33 Week. Rep. 533, 49 J. P. 692, it is said that every one has unlimited right to appropriate percolating water while it is under his own land, and may take it all so as to prevent it going onto the land of others.

The common-law rights in percolating water generally will be found stated in a *note* to Southern P. R. Co. v. Dufour (Cal.) 19 L. R. A. 92.

If the water has risen to the surface, so as to form a stream, of course it may be appropriated in states recognizing the doctrine of prior appropriation, so that it cannot be interfered with on the surface. DeNecochea v. Curtis, 80 Cal. 397.

As to what states recognize the doctrine of prior appropriation, see *note* to Isaacs v. Barbour (Wash.) *post*, —.

The water flowing from springs may be appropriated by the construction of ditches up to the mouth of the springs. Ely v. Ferguson, 91 Cal. 138.

30 L. R. A.

See also 46 L. R. A. 820.

of defendant in an action brought to recover damages for alleged interference by defendant with water rights belonging to plaintiff. *Affirmed.*

The facts are stated in the opinion.

Messrs. **O. W. Powers** and **D. N. Straup,** for appellants:

Barney only had a license to use the water in consideration of his making some repairs on the well. A licensee has the right to do any act which is necessary to the full enjoyment of the license, but the terms of the license must be strictly followed and cannot be extended or varied.

Lyford v. *Putnam*, 35 N. H. 563; *Dempsey* v. *Kipp*, 62 Barb. 311.

The license or privilege to use the water was given to Mr. Barney personally, and it has been repeatedly held that a license is strictly confined to the original parties.

Jackson, Hull, v. *Babcock*, 4 Johns. 418; *Dellaro* v. *United States*, 72 U. S. 5 Wall. 599, 18 L. ed. 681; *Paine* v. *Northern P. R. Co.* 14 Fed. Rep. 407; 13 Am. & Eng. Enc. Law, p. 545.

A well is not "a natural source of supply" within the meaning of the law of February 20, 1880 (2 Utah Comp. Laws 1888, p. 134), pertaining to primary water rights.

2 Bouvier, Law Dict. p. 808; Anderson, Law Dict. p. 1111; *Johnson* v. *Rayner*, 6 Gray, 110; *Mixer* v. *Reed*, 25 Vt. 257.

Unless the territorial statute, by the use of the words "or other natural source of supply," intended to and actually did apply to wells, the common law in regard to the use of water from wells is still in force in this territory, and the water from wells on private property is not subject to appropriation like the water from "natural streams, watercourses, lakes, or springs."

Acton v. *Blundell*, 12 Mees. & W. 350; *Roath* v. *Driscoll*, 20 Conn. 541, 52 Am. Dec. 352; *Wheatley* v. *Baugh*, 25 Pa. 528, 64 Am. Dec. 721; *Haldeman* v. *Bruckhart*, 45 Pa. 519, 84 Am. Dec. 511; Rights in Subterranean Waters, 2 Am. L. Reg. N. S. 65; *Bassett* v. *Salisbury Mfg. Co.* 28 N. H. 438, 3 Am. L. Reg. 239.

Water filtrating or percolating in the soil belongs to the owner of the freehold, like the rocks and minerals found there. It exists there free from the usufructuary rights of others.

Hanson v. *McCue*, 42 Cal. 303, 10 Am. Rep. 299; *Harwood* v. *Benton*, 32 Vt. 737; *Cross* v. *Kitts*, 69 Cal. 222, 58 Am. Rep. 558.

Where there is nothing to show that the waters of a spring or well are supplied by any defined flowing stream, the presumption will be that they have their source in the ordinary percolations of water through the soil. Percolating waters, and those whose sources are unknown, belong to the realty in which they are found.

Kinney, Irrigation, § 49; *Wheatley* v. *Baugh*, 64 Am. Dec. 727, note; *Nosier* v. *Caldwell*, 7 Nev. 363; *Delhi* v. *Youmans*, 50 Barb. 316, 45 N. Y. 362, 6 Am. Rep. 100; *Taylor* v. *Welch*, 6 Or. 199.

Where a spring is fed solely by percolating waters which seep into it from swamp or wet land surrounding the same, and not by any running stream of water, there is no water at such spring to which the right of use can be acquired, either by statutory appropriation or by adverse user.

Kinney, Irrigation, § 298; *Southern P. R. Co.* v. *Dufour*, 95 Cal. 615, 19 L. R. A. 92.

No notice of intention to appropriate the water of the well in question was ever given. In order to appropriate the water there must be an actual bona fide intention to apply the same to some beneficial use or purpose, and one of the first steps necessary for the appropriator to take is to give notice of that intent.

Osgood v. *Eldorado Water & Deep Gravel Min. Co.* 56 Cal. 571; *Kimball* v. *Gearhart*, 12 Cal. 27; Kinney, Irrigation, § 157.

Messrs. **Marshall & Royle** for respondent.

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

The main question in this case, and the only one, in fact, which we deem it necessary to consider, is, Can the discoverer of a flow of percolating waters on the public lands, by digging wells and improving the same and constantly using the water for a beneficial purpose, acquire a right to take water from such

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[F] And in Cross v. Kitts, 69 Cal. 217, 58 Am. Rep. 558, the right to acquire title to percolating waters by appropriation is recognized,—so far, at least, as to entitle a grantee of the water right to hold the same against a subsequent grantee of the mining claim on which the water was brought to the surface.

So, the water of a spring which goes to feed a creek, although part of the way by underground or unknown channels, cannot be diverted to the injury of a prior appropriator of the water of the creek. Strait v. Brown, 16 Nev. 317, 40 Am. Rep. 497.

But it was subsequently held that no right can be acquired by appropriation in a spring on state land which is formed by percolating water, so that a subsequent owner of the land could cut off the supply by excavating on his own land. Southern P. R. Co. v. Dufour, 95 Cal. 615, 19 L. R. A. 92.

And also, in a Nevada case, it was held that the mere fact that water from a spring has been appropriated by the one in possession of the land will not prevent the digging of a well on adjoining land, although the effect is to cut off the water from the spring so that it ceases to flow. Mosier v. Caldwell, 7 Nev. 363.

In one Colorado case it was said that it is a matter of no moment whether water reaches a certain point by percolation through the soil, by a subterranean stream or an obvious surface channel. If by any of these natural methods it reaches the point and is there appropriated in accordance with law, the appropriator has a property in it which cannot be devested by a wrongful diversion by another, nor can there be any substantial diminution. McClellan v. Hurdle, 3 Colo. App. 430. But in that case the water was part of the sunken stream, and was not merely percolating water or that of a spring proper.

If water flows underground in a well-defined and constant stream, an appropriation of it at the point where it rises to the surface will give a right of it which will be protected against subsequent appropriators. Kenney v. Carillo, 2 N. M. 430.

H. P. F.

wells as against an owner of the land on which the well is located, where the owner of the land acquired title by a location made subsequent to the digging of the wells? Many other questions are raised on this appeal, but their materiality all depends on the answer to the question just stated. If this question is answered in the affirmative, the judgment must be affirmed; if answered in the negative, it must be reversed; so we do not deem it necessary to examine the other questions presented.

We are not aware of any case having been decided in these arid regions, in which this precise question has been passed upon. The doctrine may be said to be settled that the owner of lands has a right to dig thereon, and to appropriate and use percolating waters therein, although by so doing he may dry up the wells or spring of an adjacent proprietor. See *Hanson* v. *McCue*, 42 Cal. 303, 10 Am. Rep. 299; Kinney, Irrigation, §§ 49, 298; *Southern P. R. Co.* v. *Dufour*, 95 Cal. 615, 19 L. R. A. 92. But this rule does not determine the case at bar. The facts here, so far as necessary to be stated, are: The plaintiffs are the owners of a mining claim in Tintic mining district, located in 1889. When this claim was located there was a well dug in the ground, and one Barney had a house at or near this well, and was engaged in hauling water from the well to the defendant. The defendant continued to procure water from the well, and plaintiffs bring this suit to recover damages, alleging trespass. The undisputed facts are that the predecessors in interest of Barney and the defendant, in about 1870, discovered evidences of percolating waters at the point where the well was dug, and by digging a hole about 3 feet deep procured a supply of water. These discoverers were miners, and were working a mine, part of which, at least, the defendant now owns. It seems that this hole or well, if it may be called such, was so shallow that cattle and horses on the range came to it and trod down its banks, so that the discoverers arranged with one Barney that if he would repair the well, wall it up, and protect it, he might use water therefrom. Barney did this, and put in a pump. For about twenty years it remained in this condition. The well, being in the midst of a desert, was used as a source of water supply for several mines in the neighborhood, and was all the time on public lands of the United States. In 1889 the plaintiffs located the ground, including the well and Barney's house, as a mining claim. In 1890 Barney conveyed whatever right he had in the premises to the defendant, and it continued to procure water from the well. The well is shown to be from 10 to 15 feet deep, and to furnish a very abundant supply of water. The question is, Has the defendant an easement in plaintiff's land to continue to take water from the well constructed by its predecessors? The Federal government, as proprietor of the public lands, early recognized the necessity of permitting persons in this arid region to acquire an interest in water sources on the public lands distinct from the lands themselves. It had always been the settled law that the owner of land was likewise the owner of all waters situate thereon or percolating therein. This may be said to have been the universal rule in the United States, prior to the settlement of California. Local decisions, arising from the necessities of the people, soon altered it there, and in 1866 Congress passed an act (14 Stat. at L. 253; Rev. Stat. § 2339), which provided, among other things, as follows: "Whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same." By the act of July 9, 1870 (16 Stat. at L. 218; Rev. Stat. § 2340), it was further provided: "All patents granted, or pre-emption, or homesteads allowed, shall be subject to any vested and accrued water right, or rights to ditches and reservoirs used in connection with such water rights as may have been acquired under or recognized by the preceding section." The question is, then, Is the right of defendant to use water, under the facts stated, one that is recognized by the local customs and laws? Section 2730, Utah Comp. Laws, provides: "A right to the use of water for any useful purpose, such as domestic purposes, irrigating lands, propelling machinery, washing or sluicing ores and other like purposes, is hereby recognized and acknowledged to have vested and accrued as a primary right to the extent of and reasonable necessity for such use thereof under any of the following circumstances: First, whenever any person or persons shall have taken, diverted, and used any of the unappropriated water of any natural stream, watercourse, lake, or spring, or other natural source of supply." We think it would be a very strained construction to hold that a hole dug 3 feet deep, into which the waters naturally gathered, was not a natural source of supply, while it is conceded if the water come to the surface and flowed along a few feet, and was then collected in a like hole, it would be a natural source of supply. We are inclined to give these statutes a much broader construction. In our opinion, wherever the industry of the pioneer has appropriated a source of water, either on the surface of or under the public lands, he and his successors acquire an easement and right to take and use such water to the extent indicated by the original appropriation, and that a private owner who subsequently acquires the land takes it burdened with this easement, and we also hold that this easement carries with it such rights of ingress and egress as are necessary to its proper enjoyment. This right of an appropriator is, of course, subject to the rule of law which will permit the owner to sink an adjoining well on his own premises, although he should thereby dry up that of the first appropriator.

The determination of this question disposes of the whole case, and *it is therefore ordered that the judgment be, and it is, affirmed.*

Merritt, Ch. J., and King, J., concur.

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

Elizabeth G. DE HASS, *Plf. in Err.*,
v.
Kate R. DIBERT, Admrx., etc., of John H. Dibert, Deceased.

SAME, *Plf. in Err.*,
v.
Martha DIBERT, Admrx., etc., of John Dibert, Deceased.

SAME, *Plf. in Err.*,
v.
John D. ROBERTS, Survivor, etc., of John Dibert & Company.

(70 Fed. Rep. 227.)

1. **The negotiability of a note with accompanying interest coupons is not destroyed** by clauses declaring that the contract shall be construed by the laws of the state in which it is executed, that it shall draw a specified higher rate of interest after maturity, and that, if any coupon is not paid when due, the whole debt shall mature at that time without demand, and the first unpaid coupon shall become a part of the principal and bear interest at the higher rate specified.
2. **An assignment without recourse** by the payee of a negotiable note payable to order will not prevent an indorsement by the assignee from making him liable as indorser of negotiable commercial paper.
3. **An agreement to pay interest at 12 per cent after maturity,** in a note made in Kansas expressly made subject to the laws of that state, is not usurious.

(October 24, 1895.)

ERROR to the Circuit Court of the United States for the Western District of Pennsylvania to review judgments in favor of defendants in actions brought to enforce the alleged liability of indorsers upon certain promissory notes. *Reversed.*

Before Dallas, Circuit Judge, and Butler and Wales, District Judges.

The facts are stated in the opinion.

Messrs. **T. W. Shreve** and **Shiras & Dickey,** for plaintiff in error:

All notes which are non-negotiable in form merely, and not in substance, may be so indorsed by a party thereto as to bind him as a commercial indorser to his immediate indorsee, and if he use fit words in his indorsement, to the holder, each new indorsement of an instrument upon which an indorser may be bound as a commercial indorser is a new contract in the nature of a bill of exchange. But for an indorsement to have that effect the instrument upon which the indorsement is placed is such in terms and substance that the bill of exchange thereby created will have all the requisites of a negotiable instrument.

Patterson v. *Poindexter,* 6 Watts & S. 234, 40 Am. Dec. 554.

The cases bearing apparently against the claim that the defendant is bound on the said indorsement are cases in which the instrument indorsed was non-negotiable in substance, lacked some essential element of negotiability besides the mere formal words of negotiability.

Gray v. *Donahoe,* 4 Watts, 400; *Wright* v. *Hart,* 44 Pa. 454; *Citizens' Nat Bank* v. *Piollet,* 126 Pa. 194, 4 L. R. A. 190; *First Nat. Bank* v. *Gay,* 71 Mo. 627; *Kline* v. *Keiser,* 87 Pa. 485.

An indorsement of a non-negotiable instrument by the payee will not render it negotiable, nor give the indorsee an action against prior parties; although it will render such indorser liable to his indorsees, and will, if he use fit words in the indorsement, render him liable to all subsequent indorsees.

Randolph, Com. Paper, § 177; Story, Prom. Notes, § 128; *Carruth* v. *Walker,* 8 Wis. 252, 76 Am. Dec. 235; *Brenzer* v. *Wightman,* 7 Watts & S. 264; *Patterson* v. *Poinderter,* 6 Watts & S. 227, 40 Am. Dec. 554; *Leidy* v. *Tammany,* 9 Watts, 353; *Seymour* v. *Van Slyck,* 8 Wend. 404; *Dean* v. *Hall,* 17 Wend. 214; *Aldis* v. *Johnson,* 1 Vt. 136; Chitty, Bills, 219; *First Nat. Bank* v. *Falkenhan,* 94 Cal. 144; *Helfer* v. *Alden,* 3 Minn. 232.

The indorser of a note not negotiable is liable to his indorsee in the same manner as in case of a negotiable note.

Minot's Mass. Digest, citing *Jones* v. *Fales,* 4 Mass. 245; *Sanger* v. *Stimpson,* 8 Mass. 260; *Seymour* v. *Van Slyck, supra; McMullen* v. *Rafferty,* 89 N. Y. 456; *Dean* v. *Hall,* and *Aldis* v. *Johnson, supra.*

Each indorsement is a new and substantive contract.

Slacum v. *Pomery,* 10 U. S. 6 Cranch, 224, 3 L. ed. 206.

The effect of the transfer by John D. Knox & Co. was not to destroy utterly the original negotiability of the said note, and the effect of the indorsement of John Dibert & Co., to the order of F. S. DeHass, was to make them liable as indorsers to the holder.

Dan. Neg. Inst. § 698d; *Holmes* v. *Hooper,* 1 Bay, 160.

Where there is an express stipulation that a certain rate shall run after maturity, interest at that rate is recoverable.

17 Am. & Eng. Enc. Law, p. 416, and note.

A note otherwise negotiable is not rendered non-negotiable by reason of the provision: "If this note is not paid at maturity the same shall bear 12 per cent interest from date."

Parker v. *Plymell,* 23 Kan. 402.

The negotiability of a note is not destroyed by a clause therein stating that it was accompanied by a collateral security, and how the latter might be sold by the holder of the note if not paid at maturity.

Valley Nat. Bank v. *Crowell,* 148 Pa. 284.

Under the general mercantile law the nego-

NOTE.—The present case, reversing the decision of the circuit court, decides what is believed to be an entirely new question in the law of negotiable paper, in respect to the effect of an indorsement by one to whom the paper has been transferred by mere assignment without recourse.

As to effect of transfer without recourse, see also Maine Trust Bkg. Co. v. Butler (Minn.) 12 L. R. A. 370, and *note.*

liability of a promissory note is not affected by provisions therein that the title to the personal property for which it was given should remain, as security, in the vendor, the payee of the note, until all notes of a series to which it belonged were paid, and that the note should become due and payable to the holder on the failure of the maker to pay the principal or interest of any of the notes of the series.

Chicago R. Equip. Co. v. *Merchants' Nat. Bank*, 136 U. S. 268, 34 L. ed. 349; *Ernst* v. *Steckman*, 74 Pa. 13, 15 Am. Rep. 542.

Making a note payable on or before a certain fixed future date will not make the time of payment so uncertain as to destroy the negotiability of the note.

First Nat. Bank v. *Skeen*, 101 Mo. 683, 11 L. R. A. 748, and notes.

Mr. **Robert S. Frazer,** for defendant in error:

The original note for $3,000 is not a negotiable instrument.

Woods v. *North*, 84 Pa. 407, 24 Am. Rep. 201; *Killam* v. *Schoeps*, 26 Kan. 313, 40 Am. Rep. 313; *First Nat. Bank* v. *Gay*, 71 Mo. 627; *Overton* v. *Tyler*, 3 Pa. 337, 45 Am. Dec. 645.

An inflexible rule of the common law requires that a promissory note payable to the order of any person to be negotiated so as to carry to the holder the right of a bona fide holder of a negotiable promissory note should be first indorsed by the person to whose order it is made payable.

Briggs v. *Latham*, 36 Kan. 205; *Calvin* v. *Sterritt*, 41 Kan. 215; *Hatch* v. *Barrett*, 34 Kan. 223; *McCrum* v. *Corby*, 11 Kan. 464; *South Bend Iron Works* v. *Paddock*, 37 Kan. 510; *Fear* v. *Dunlap*, 1 G. Greene, 334; *Graham* v. *Wilson*, 6 Kan. 490; *Story* v. *Lamb*, 52 Mich. 525; *First Nat. Bank* v. *Gay, supra; Osgood* v. *Artt*, 17 Fed. Rep. 575.

A bill or note payable to the order of the payee may be assigned without indorsement, but if thus assigned instead of being transferred by a proper indorsement, the assignee will take the paper subject to all equities in the same manner as though the instrument were not negotiable, or as though it were overdue. The holder of a note not indorsed is a mere assignee, and his rights are to be settled by the same rules that govern the case of an assignee of any other chose in action.

White v. *Brown*, 14 How. Pr. 282; *Hedges* v. *Sealy*, 9 Barb. 214; *Haskell* v. *Mitchell*, 53 Me. 468, 89 Am. Dec. 711.

If the $3,000 note is a negotiable instrument, and if the interest coupons shall not be paid when due, the whole of the principal matures and becomes due at that time without demand, and the principal debt and unpaid coupons represent and stand for the amount due. In that case the $3,000 note becomes a note for $3,150 and we would be charged with interest on interest, which the courts have universally held is not allowable, either as an incident or as compensation for the detention of the money.

Stokely v. *Thompson*, 34 Pa. 210.

Under the provisions of the note when default was made in the payment of an instalment of interest the whole of the principal matured, and the contract then ceased. In such cases the legal rate of interest only should be allowed thereafter as damages.

Holden v. *Freedman's Sav. & T. Co.* 100 U. S. 72, 25 L. ed. 567; *Excell* v. *Daggs*, 108 U. S. 143, 27 L. ed. 682.

The note and mortgage, having been made at the same time and in relation to the same subject, are part of one transaction. They constitute one transaction and one contract, and must be construed together as if they were parts of one instrument.

Meyer v. *Graeber*, 19 Kan. 166; *Muzzy* v. *Knight*, 8 Kan. 456.

Uncertain stipulations such as are contained in the mortgage ought to have no place in negotiable paper.

Johnston v. *Speer*, 92 Pa. 229, 37 Am. Rep. 675; *Woods* v. *North*, 84 Pa. 407, 24 Am. Rep. 201.

Butler, District Judge, delivered the opinion of the court:

The suits were brought on indorsements of a promissory note and its accompanying interest coupons, and by agreement of parties were tried together. After a jury had been sworn, a paper was filed consenting to a verdict for the plaintiff in $3,837.60, subject to the opinion of the court on the following questions reserved:

"1. Whether under the evidence, to wit, the writing sued on, and the attached guaranty and the mortgage securing said obligation, and the writing sued on, dated the 15th day of June, 1887, for $3,000, payable to the order of John D. Knox & Co., is a negotiable commercial instrument.

"2. Whether the indorsement of John Dibert & Company after the assignment, without recourse made by John D. Knox & Company, the payees, upon the writings sued *pro ut*, same in evidence, made the said John Dibert & Company liable as indorsers of negotiable commercial paper, the transfer from John D. Knox & Co. to John Dibert & Co., and the transfer of John Dibert & Co. to F. S. De Hass, having been made in the state of Kansas.

"3. Whether the plaintiff is entitled to recover interest at the rate of 12 per cent per annum from the date of protest of the writings sued on to the date of verdict, the law of Kansas authorizing the making of contracts bearing such rate of interest."

The court filed an opinion in the plaintiff's favor as respects the first question, in the defendant's favor as respects the second, and entered judgment for the latter.

The promissory note sued on and accompanying interest coupons, with the indorsements thereon, are as follows:

"Know all men by these presents: For value received we promise to pay John D. Knox & Co., or order, $3,000 lawful money of the United States, five years after date hereof, with interest thereon at the rate of 8 per cent per annum, payable semiannually on the 15th day of December and June in each year, according to the tenor of ten interest coupons for $120 each, hereto annexed and bearing even date therewith.

"Said principal and interest being payable at the banking house of John D. Knox & Co., Topeka, Kan. It is expressly declared and agreed that this note and coupons hereto at-

tached are made and executed under, and are to be construed by, the laws of the state of Kansas, in every particular, and are given for an actual loan of $3,000. This note and these coupons are to draw 12 per cent interest per annum after maturity, and are secured by a first mortgage on real estate.

"And if any of the interest coupons shall not be paid when due, the whole of the principal shall mature and be due at said time without demand, and said principal debt and said unpaid coupons shall represent and stand for the amount due, and the unpaid coupon first matured shall become a part of the principal, and the whole of said principal and the first unpaid coupon shall bear 12 per cent per annum interest thereon from the maturity of said coupon until paid.

"Topeka, Kansas, this 15th day of June, A. D. 1887.

"R. J. McFarland,
"Ida McFarland."

Indorsed: "For value received we hereby assign and transfer the within bond, together with all our interest in and rights under the same, without recourse, to John Dibert & Co.

"John D. Knox & Co.

"Pay to the order of F. S. De Hass.

"John Dibert & Co.

"E. G. De Hass,
"Executrix of F. S. De Hass."

"$120.00. Topeka, Kansas, June 15th, 1887.

"Fifty-four months after date we promise to pay to the order of John D. Knox & Co., $120 at the banking house of John D. Knox & Co., Topeka, Kansas, with interest after maturity at the rate of 12 per cent per annum. This coupon being for six months' interest on a principal note for $3,000 value received.

"Due December 12, 1891.

"R. J. McFarland.
"Ida McFarland.

"Loan No. 3,151."

Indorsed: "For value received we hereby assign and transfer the within bond, together with all interest in and rights under the same, without recourse to John Dibert & Co.

"John D. Knox & Co.

"Pay to the order of F. S. De Hass.

"John Dibert & Co.

"E. G. De Hass,
"Executrix of F. S. De Hass."

"$120.00. Topeka, Kansas, June 15th, 1887.

"Sixty months after date we promise to pay to the order of John D. Knox & Co., $120 at the banking house of John D. Knox & Co., Topeka, Kansas, with interest after maturity at the rate of 12 per cent per annum. This coupon being for six months' interest on a principal note for $3,000, value received.

"Due June 15th, 1892.

"R. J. McFarland.
"Ida McFarland.

"Loan No. 3,151."

Indorsed: "For value received we hereby assign and transfer the within bond, together with all our interest in and rights under the same, without recourse, to John Dibert & Co.

"John D. Knox & Co.

"Pay to the order of F. S. De Hass.

"John Dibert & Co.

"E. G. De Hass,
Executrix of F. S. De Hass."

The plaintiff excepted to the entry of judgment, and assigns the same as error.

Should judgment have been so entered? As respects the first question reserved, we agree with the circuit court. The note and coupons are mercantile instruments, not only according to the laws of Kansas, by which the parties bound themselves, but according to the law-merchant as well; and we deem it unnecessary to add anything to what the court has so well said on the subject.

As respects the second point raised, we cannot adopt the conclusion reached. If the payee's transfer of the paper had been by indorsement, instead of assignment, no question could have arisen. The assignment relieved the maker from the effect of his promise to pay "to order," and thus subjected the paper to defense by him in the hands of subsequent indorsees. The suit, however, is not against him, but against the indorser, John Dibert & Co.; and the question presented is therefore, What is the effect of the indorsement? It must be decided by the terms of the statute of 3 & 4 Anne, and the construction given them by the courts. Originally promissory notes were not recognized as mercantile instruments, but were treated as common choses in action; and were therefore not transferable. The statute placed them on equality with bills of exchange, provided for their transfer by indorsement, giving to such transfer the effect accorded to indorsements of bills of exchange; and thus made them mercantile instruments. Soon after the date of the statute the question arose: Is a promissory note from which the term "order," or "bearer," has been omitted, embraced by it, and therefore transferable by indorsement, with the consequences, as respects the indorser and indorsee, therein provided for? By the omission the maker reserved to himself the right to defend against payment after transfer; and it was therefore urged that the instrument is not covered by the statute, and consequently that the indorsement creates no obligation. The English courts, however, decided otherwise; holding that the instrument is within the spirit of the statute; that it is consequently transferable by indorsement; and that such transfer has the same consequences between the indorser and indorsee as it would have if the term had not been omitted; thus holding the paper to be a mercantile instrument, the indorsement of which creates a contract to pay according to its face—if the maker fails to do so. The courts said the indorsement is substantially the drawing of a new note in the terms of the old; or of an inland bill of exchange whereby the indorser orders the maker to pay the money due him to the indorsee. From the date of the earliest decision of the question (in *Hill* v. *Lewis*, 1 Salk. 132) to the present time there has been no variation in this respect by the English courts, though the point has been repeatedly raised; and the decision has been uniformly followed in this country. As the supreme court of Pennsylvania said in *Leidy* v. *Tammany*, 9 Watts, 356: "The English courts, looking upon the statute as a remedial one, entitled to a liberal construction in accordance with its spirit, extended

it to notes not made transferable by their tenor, when they are deemed mercantile instruments." This statement is fully sustained by *Hill* v. *Lewis*, 1 Salk. 132; *Hodges* v. *Steward*, Id. 125; *Smith* v. *Kendall*, 6 T. R. 123; *Burchell* v. *Slocock*, 2 Ld. Raym. 1545; *Gooshen & M. Turnp. Road* v. *Hurtin*, 9 Johns. 217, 6 Am. Dec. 273; *Leonard* v. *Mason*, 1 Wend. 522; *Codwise* v. *Gleason*, 3 Day, 12; *Smallwood* v. *Vernon*, 1 Strange, 479; *Leidy* v. *Tammany*, 9 Watts, 353. In the last of these cases, where the general subject is fully and ably considered, the court says, although without the word "order" or "bearer" being inserted, the payee cannot transfer the note so as to enable his transferee to maintain an action in his own name against any party to it "except the indorser, yet it is now well settled that the indorsee may maintain an action against the indorser; so that as against him the note and indorsement will have the same operation as if he had express authority to transfer." In *Hill* v. *Lewis*, 1 Salk. 132, it is said that an indorsement is, under the statute, equivalent to making a new bill in the terms of the one indorsed. In *Ballingalls* v. *Gloster*, 3 East, 482, the court says: "There is no distinguishing the case of an indorser from that of a drawer, it having long ago been decided that every indorser is in the situation of a new drawer, every indorsement a new bill, and that the indorser stands as to the indorsee, in the law merchant, the same as the drawer." This is repeated in *Smallwood* v. *Vernon* and others of the cases cited. In *Heylyn* v. *Adamson*, 2 Burr. 676, Lord Mansfield likened the indorser to the drawer of a bill of exchange, saying that while as between the maker and payee there is no such similarity the "resemblance begins with the indorsement, for that is an order on the maker by the indorser to pay the amount due him to the indorsee, and is thus within the very definition of a bill of exchange." In *Slocum* v. *Pomery*, 10 U. S. 6 Cranch, 222, 3 L. ed. 205, Chief Justice Marshall says: "The indorsement of a bill is understood to be, not simply a transfer of the paper, but a new substantive contract."

Later the question arose: Is the indorser of an overdue promissory note (even when drawn to order or bearer) within the statute, and responsible accordingly? It was urged that he is not, because by the delay the maker is let in to defend, as if the terms "to order" or "bearer" had been omitted. The courts of England, however, as well as of this country, following the reasoning in the former class of cases, held otherwise. *Brown* v. *Davies*, 3 T. R. 83; *Bank of North America* v. *Barriere*, 1 Yeates, 360; *Boteer* v. *Hastings*, 36 Pa. 285; *Barnet* v. *Offerman*, 7 Watts, 130; *Snyder* v. *Riley*, 6 Pa. 165, 47 Am. Dec. 452. In *Bank of North America* v. *Barriere*, the court says: "Every indorsement of a bill is considered a new drawing. After the day of payment in a note has expired, the indorser cannot be looked upon otherwise than as a new drawer;" and he was consequently held responsible as such. In *Brown* v. *Davies*, Justice Buller said: "When a note has been indorsed after it became due, I consider it a note newly drawn by the indorser;" and the defendant was held responsible accordingly.

About the same time a third question arose: Is the indorsement of nonmercantile paper—such as a written promise to pay money conditionally, or to pay in something else than money, etc.—within the statute, and the indorser liable as such? To this question the courts of England and of this county returned a negative answer; holding that such paper stands as it did at common law, constituting a mere chose in action, and is not therefore transferable in the sense of the law merchant. *Patterson* v. *Poindexter*, 6 Watts & S. 227, 40 Am. Dec. 554; *Gray* v. *Donahoe*, 4 Watts, 400; *Wright* v. *Hart*, 44 Pa. 454; *Citizens' Nat. Bank* v. *Piollet*, 126 Pa. 194, 4 L. R. A. 190; *South Bend Iron Works* v. *Paddock*, 37 Kan. 510; *Story* v. *Lamb*, 52 Mich. 525; *First Nat. Bank* v. *Gay*, 71 Mo. 627; *Fear* v. *Dunlap*, 1 G. Greene, 334; *Aniba* v. *Yeomans*, 39 Mich. 171.

How, then, should the case before us be decided? It is not covered by the terms of the statute, nor are its facts embraced in either of the three classes of cases cited. It must be determined, therefore, by the light which its proper analogies shed on the subject. These analogies are, we believe, found in the first two classes of cases cited. In all material respects it closely resembles them: in principle it seems identical with them. Here the paper is, as it was there, mercantile in character, and consequently negotiable. In the law merchant this latter term signifies transferable by indorsement, with the consequence there attached to such transfers. The negotiability of paper (except as between the original parties) does not depend, as we have seen, upon the maker's authorization of a transfer, as by promising to pay to order, or bearer (as is sometimes inaccurately said), but upon the character of the paper. In the last of the three classes of cases mentioned the paper involved, contained such a promise, but as it was not mercantile in character, the indorsement had not the effect of a mercantile contract. As said by the court in *Patterson* v. *Poindexter*, 6 Watts & S. 234, 40 Am. Dec. 554: "The contract of indorsement is a parasite which like the chameleon takes its hue from the thing with which it is connected." On the other hand, the paper involved in the first of these classes (which did not contain such a promise) was held to be mercantile, and consequently negotiable. In our case it is true the situation of the indorsee is simply that of an equitable assignee as against the maker; but so was that of the indorsees in the first class of cases cited, and substantially so, at least, was that of the indorsees involved in the second class. Here the effect of the maker's promise to pay "to order" was lost by the payee's failure to indorse, while in the second class it was lost by his failure to indorse before the note matured. In both the promise to pay to order or bearer was thus annulled (as if erased), and the note made to read as if such promise had been omitted—rendering the instrument identical with those involved in the first class.

The circuit court likened the case to those of the third class—from which, as we believe for the reasons stated, it is plainly distinguishable. There the instruments involved were not mercantile—although drawn to "order" or "bearer." The cases relied upon by the court all rest on this plain distinction. The indorsement there was of a mere chose in action. In *Gray* v. *Donahoe*, Chief Justice Lewis points out the distinction between such cases and those of the first class mentioned, very clearly. The note before him was drawn "to order," but was payable in "current funds at Pittsburg." While he therefore held it to be nonmercantile and consequently non-negotiable,—saying that "nothing but money is properly the subject of a negotiable contract,—he added: "A note not negotiable in form, as between the original parties, may be negotiable between subsequent ones;" citing *Leidy* v. *Tammany*.

The third question reserved, on which the circuit court did not pass, must now be disposed of. The paper is made payable in Kansas, and, as we have seen, the parties expressly submitted themselves to the laws of that state. They fixed the rate of interest at 12 per cent after default, which the laws of Kansas justify. This question must therefore receive an affirmative answer.

The judgment must be reversed, and the record remitted to the Circuit Court for further proceedings, in accordance with this opinion.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

HARTFORD FIRE INSURANCE COMPANY *et al.*, *Plffs. in Err.*,
v.
CHICAGO, MILWAUKEE, & ST. PAUL RAILROAD COMPANY.

(70 Fed. Rep. 201.)

1. **The public policy of a state or nation must be determined** by its Constitution, laws, and judicial decisions, not by the varying opinions of laymen, lawyers, or judges, as to the demands of the interests of the public.
2. **Decisions by state courts** as to the validity of a contract against liability for negligence are not conclusive upon the Federal courts.
3. **A stipulation against liability for negligence** of a railroad company setting fire to buildings erected on its right of way under a lease may be included in the lease without violating public policy.

(October 7, 1895.)

ERROR to the Circuit Court of the United States for the Northern District of Iowa to review a judgment in favor of plaintiff in an action brought to hold defendant liable for loss sustained by fire alleged to have been set out by its negligence. *Affirmed.*

Before Caldwell, Sanborn, and Thayer, Circuit Judges.

Statement by **Sanborn**, Circuit Judge:

On February 1, 1890, the Chicago, Milwaukee, & St. Paul Railway Company, the defendant in error, leased to Simpson, McIntire, & Co., a copartnership, certain portions of its depot grounds at Monticello, in the state of Iowa, "upon the express condition that the said railway company, its successors and assigns, shall be exempt and released, and said parties of the second part [Simpson, McIntire, & Co.], for themselves, and for their heirs, executors and administrators, and assigns, do hereby expressly release them from all liability or damage by reason of any injury to or destruction of any building or buildings now on, or which may hereafter be placed on, said premises, or of the fixtures, appurtenances, or other personal property remaining inside or outside of said buildings, by fire occasioned or originated by sparks or burning coal from the locomotives, or from any damage done by trains, or cars running off the track, or from the carelessness or negligence of employees or agents of said railway company." Simpson, McIntire, & Co. had, or constructed, a cold-storage building and warehouse on the leased premises, stocked it with butter and eggs, and insured the buildings and stock with the Hartford Fire Insurance Company and seven other insurance companies, which are the plaintiffs in error, and the buildings and stock were burned. The insurance companies brought an action against the railway company in the court below, and alleged in their complaint that they had insured Simpson, McIntire, & Co. against loss by fire on their cold-storage building, warehouse, and stock; that these were destroyed by a fire caused by the negligence of the railway company on November 11, 1892; that the insurance companies had paid Simpson, McIntire, & Co. $23,450 on account of their loss by this fire; that they were thereby subrogated to the rights of Simpson, McIntire, & Co. against the railway company, and were entitled to recover from it that amount with interest. The railway company answered this complaint, and one of the defenses it pleaded was the condition of the lease to Simpson, McIntire, & Co., by which they exempted and released the railway company from all liability for damage to their buildings and stock caused by fire set by the railway company. The plaintiffs in error demurred to this defense on the ground that this stipulation of the lease was against public policy and void. Their demurrer was overruled, and judgment was rendered against them

NOTE.—The question above decided has also been decided in several other recent cases. See Griswold v. Iowa C. R. Co. (Iowa) 24 L. R. A. 647; Stephens v. Southern P. Co. (Cal.) 29 L. R. A. 751; King v. Southern P. Co. (Cal.) Id. 755.

See also 40 L. R. A. 101.

thereon. The writ of error in this case was sued out to reverse this judgment, and the ruling upon the demurrer is the error assigned.

Messrs. **Charles A. Clark** and **Richard W. Barger,** for plaintiffs in error:

Railway companies using, as they do, the dangerous agencies of steam and fire for the purposes of locomotion, may be required to take additional safeguards for protection of adjoining property from the danger of destruction by fire.

Hart v. *Western R. Corp.* 13 Met. 99, 46 Am. Dec. 719; *Lyman* v. *Boston & W. R. Corp.* 4 Cush. 288; *Pratt* v. *Atlantic & St. L. R. Co.* 42 Me. 579; *Smith* v. *Boston & M. Railroad,* 63 N. H. 25; *Rademacher* v. *Milwaukee & St. P. R. Co.* 41 Iowa, 297, 20 Am. Rep. 592; *Union P. R. Co.* v. *De Busk,* 12 Colo. 294, 3 L. R. A. 350.

Statutes making railway companies absolutely liable for damages caused by fires set out by locomotives are constitutional, and are upheld and enforced by the courts.

Union P. R. Co. v. *Arthur,* 2 Colo. App. 159; *Mathews* v. *St. Louis & S. F. R. Co.* 121 Mo. 298, 25 L. R. A. 161; *McCandless* v. *Richmond & D. R. Co.* 38 S. C. 103, 18 L. R. A. 440; *Lyman* v. *Boston & W. R. Corp. supra; Regan* v. *New York & N. E. R. Co.* 60 Conn. 124; *Martin* v. *New York & N. E. R. Co.* 62 Conn. 331; *Missouri P. R. Co.* v. *Mackey,* 127 U. S. 205, 32 L. ed. 107; *Minneapolis & St. L. R. Co.* v. *Herrick,* 127 U. S. 210, 32 L. ed. 109.

Statutes attempting to exempt railways from liability for damages caused by fires negligently set out would be unconstitutional and void.

Cooley, Const. Lim. 3d ed. *351-354; *Thirteenth & F. Street Pass. R. Co.* v. *Boudrou,* 92 Pa. 481, 37 Am. Rep. 707; *Cleveland & P. R. Co.* v. *Rowan,* 66 Pa. 393; *Park* v. *Detroit Free Press Co.* 72 Mich. 560, 1 L. R. A. 599; *Hincks* v. *Milwaukee,* 46 Wis. 559, 32 Am. Rep. 735; *Durkee* v. *Janesville,* 28 Wis. 464, 9 Am. Rep. 500.

The Iowa statute does not make the railways absolutely liable for damages from fires set out, but makes the fact of the fire prima facie proof of negligence on the part of the railway, which might be rebutted by it by showing freedom from negligence.

Small v. *Chicago, R. I. & P. R. Co.* 50 Iowa, 338; *Slosson* v. *Burlington, C. R. & N. R. Co.* 51 Iowa, 295; *Libby* v. *Chicago, R. I. & P. R. Co.* 52 Iowa, 292; *Rose* v. *Chicago & N. W. R. Co.* 72 Iowa, 625.

The simple fact that a fire is set by a locomotive makes a prima facie case against the company.

Engle v. *Chicago, M. & St. P. R. Co.* 77 Iowa, 661; *Babcock* v. *Chicago & N. W. R. Co.* 62 Iowa, 593; *Seska* v. *Chicago, M. & St. P. R. Co.* 77 Iowa, 137.

This statute is constitutional.

Rademacher v. *Milwaukee & St. P. R. Co.* 41 Iowa, 297, 20 Am. Rep. 592.

The contributory negligence of the injured party is no defense in case of fire set out by the railway company.

West v. *Chicago & N. W. R. Co.* 77 Iowa, 655; *Engle* v. *Chicago, M. & St. P. R. Co. supra.*

Railway companies are held to a very stringent degree of liability if it is shown that fires are set out by them.

Greenfield v. *Chicago & N. W. R. Co.* 83 Iowa, 274; *Hamilton* v. *Des Moines & K. C. R. Co.* 84 Iowa, 132; *Babcock* v. *Chicago & N. W. R. Co.* 62 Iowa, 593, 72 Iowa, 197.

Among the obligations imposed upon railway corporations is that of using reasonable diligence in furnishing its road with safe equipment, including locomotive engines, and of operating its road without negligence.

Griswold v. *Illinois C. R. Co.* (Iowa) 21 Ins. L. J. 961.

Neither as a precedent nor as an authority is the decision overruling that case binding upon this court.

It is the duty of men to manage their own affairs carefully and circumspectly for the avoidance of injury to others, and a neglect of this duty, resulting in harm to any person, places them under an obligation from the law to compensate him.

Bishop, Non-Cont. L. pp. 1072, 1074.

The mere tendency of a contract to promote unlawful acts renders it quite illegal as against the policy of the law, without regard to any circumstances indicating the probable commission of such acts.

Bishop, Cont. § 476; *Bestor* v. *Wathen,* 60 Ill. 138; *Woodstock Iron Co.* v. *Richmond & D. Extension Co.* 129 U. S. 663, 32 L. ed. 819; *Fuller* v. *Dame,* 18 Pick. 472; *Oxanyan* v. *Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539; *Providence Tool Co.* v. *Norris,* 69 U. S. 2 Wall. 45, 17 L. ed. 868; *Hamilton* v. *Hamilton,* 89 Ill. 351; *Thomas* v. *Caulkett,* 57 Mich. 394, 58 Am. Rep. 369.

Public policy should be held to defeat all contracts by which a party undertakes to put another at the mercy of his own faulty conduct.

Cooley, Torts, 687; *Johnson* v. *Richmond & D. R. Co.* 86 Va. 975; *Chicago, M. & St. P. R. Co.* v. *Wabash, St. L. & P. R. Co.* 61 Fed. Rep. 993, 4 Inters. Com. Rep. 578; *Woodstock Iron Co.* v. *Richmond & D. Extension Co.* 129 U. S. 657, 32 L. ed. 825; *Fuller* v. *Dame,* 18 Pick. 472; *Pope Mfg. Co.* v. *Gormully,* 144 U. S. 233, 36 L. ed. 418; *Home Ins. Co.* v. *Morse,* 87 U. S. 20 Wall. 451, 22 L. ed. 368; *Grand Trunk R. Co.* v. *Stevens,* 95 U. S. 660, 24 L. ed. 535.

A common-law carrier may by special contract limit his common-law liability, but he cannot stipulate for exemption from the consequence of his own negligence or that of his servants.

New Jersey Steam Nav. Co. v. *Merchants' Bank,* 47 U. S. 6 How. 344, 12 L. ed. 465; *York Mfg. Co.* v. *Illinois C. R. Co.* 70 U. S. 3 Wall. 107, 18 L. ed. 170; *New York C. R. Co.* v. *Lockwood,* 84 U. S. 17 Wall. 357, 21 L. ed. 627; *Southern Exp. Co.* v. *Caldwell,* 88 U. S. 21 Wall. 264, 22 L. ed. 556; *Ogdensburg & L. C. R. Co.* v. *Pratt,* 89 U. S. 22 Wall. 123, 22 L. ed. 827; *Bank of Kentucky* v. *Adams Exp. Co.* 93 U. S. 174, 23 L. ed. 872; *Grand Trunk R. Co.* v. *Stevens,* 95 U. S. 655, 24 L. ed. 535; *Hart* v. *Pennsylvania R. Co.* 112 U. S. 328, 28 L. ed. 720; *Little Rock & Ft. S. R. Co.* v. *Cravens,* 57 Ark. 112, 18 L. R. A. 527; *State* v. *Missouri P. R. Co.* 29 Neb. 550; *Pensacola Teleg. Co.* v. *Western U. Teleg. Co.* 96 U. S. 1,

24 L. ed. 708; *Western U. Teleg. Co.* v. *American U. Teleg. Co.* 65 Ga. 160, 38 Am. Rep. 781.

The duty of the carrier extends to the providing of proper and reasonable station facilities, such as platforms, warehouses, approaches, and the like.

Hutchinson, Carr. § 295d; *Mason* v. *Missouri P. R. Co.* 25 Mo. App. 473; *McCullough* v. *Wabash W. R. Co.* 34 Mo. App. 23; *Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128, 35 L. ed. 73; *Oregon Short Line & U. N. R. Co.* v. *Ilwaco R. & N. Co.* 51 Fed. Rep. 613; *Indian River S. B. Co.* v. *East Coast Transp. Co.* 28 Fla. 387.

Contracts attempting to exempt such railway company from the negligence of itself or its servants are contrary to public policy and void.

New York C. R. Co. v. *Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627; *Hart* v. *Pennsylvania R. Co.* 112 U. S. 338, 28 L. ed. 720; *Bank of Kentucky* v. *Adams Exp. Co.* 93 U. S. 181, 23 L. ed. 875; *Liverpool & G. W. Steam Co., Limited*, v. *Phenix Ins. Co.* 129 U. S. 440, 32 L. ed. 792; *Southern Exp. Co.* v. *Caldwell*, 88 U. S. 21 Wall. 267, 22 L. ed. 558; *York Mfg. Co.* v. *Illinois C. R. Co.* 70 U. S. 3 Wall. 107, 18 L. ed. 170; *Thomas* v. *West Jersey R. Co.* 101 U. S. 71, 25 L. ed. 950; *Central Transp. Co.* v. *Pullman's Palace Car Co.* 139 U. S. 51, 35 L. ed. 65.

As to merchandise in transit, a railway company cannot by contract exempt itself from liability if such merchandise is destroyed by fire set out by its own negligence or the negligence of its employees.

Whart. Neg. § 598; *Condict* v. *Grand Trunk R. Co.* 54 N. Y. 500; *Empire Transp. Co.* v. *Wamsutta Oil Ref. & M. Co.* 63 Pa. 14, 3 Am. Rep. 515; *New Jersey R. Co.* v. *Kennard*, 21 Pa 204; *Steinweg* v. *Erie Railway*, 43 N. Y. 123, 3 Am. Rep. 673; *Davidson* v. *Graham*, 2 Ohio St. 131.

Even if the railway company did not contract as common carrier the exemption which it pleads is still contrary to public policy and void.

Hutchinson, Carr. 2d ed. § 62, by Mechem; *Kansas P. R. Co.* v. *Peavey*, 29 Kan. 169; *Little Rock & Ft. S. R. Co.* v. *Eubanks*, 48 Ark. 460; *Lake Shore & M. S. R. Co.* v. *Spangler*, 44 Ohio St. 476; *Roesner* v. *Hermann*, 10 Biss. 486. And see Thomp. Neg. § 1025.

Every contract is declared void which contravenes any legal principle or enactment.

Aubert v. *Maze*, 2 Bos. & P. 374; *Cannan* v. *Bryce*, 3 Barn. & Ald. 183; *Greenough* v. *Balch*, 7 Me. 461; *White* v. *Buss*, 3 Cush. 448.

One cannot in advance waive his rights of action by the wholesale for injuries inflicted upon him.

Home Ins. Co. v. *Morse*, 87 U. S. 20 Wall. 451, 22 L. ed. 368; *Wildey* v. *Collier*, 7 Md. 273, 61 Am. Dec. 346; *Norman* v. *Cole*, 3 Esp. 253.

Whether forbidden by statute or condemned by public policy, the result is the same. No legal right can spring from such a source.

Meguire v. *Corwine*, 101 U. S. 111, 25 L. ed. 900; *Hall* v. *Coppell*, 74 U. S. 7 Wall. 558, 19 L. ed. 248; *Woodstock Iron Co.* v. *Richmond & D. Extension Co.* 129 U. S. 644, 32 L. ed. 824; *Wardell* v. *Union P. R. Co.* 103 U. S. 658, 26 L. ed. 512; *West* v. *Camden*, 135 U. S. 521, 34 L. ed. 258; *Irwin* v. *Williar*, 110 U. S. 499, 28 L. ed. 225; *Teal* v. *Walker*, 111 U. S. 252, 28 L. ed. 419.

Federal courts must decide the question of public policy for themselves, and are not bound by decisions of state courts.

Public policy is that principle of law which holds that no subject or citizen can lawfully do that which has a tendency to be injurious to the public, or against the public good.

People v. *Chicago Gas Trust Co.* 130 Ill. 268, 8 L. R. A. 497; *Craft* v. *McConoughy*, 79 Ill. 346, 22 Am. Rep. 171, 29 Cent. L. J. 309.

Questions of public policy arise out of the common law, and are governed by common-law principles.

Gibbs v. *Consolidated Gas Co.* 130 U. S. 409, 32 L. ed. 984; *Fowle* v. *Park*, 131 U. S. 88, 33 L. ed. 67; *Oregon Steam Nav. Co.* v. *Winsor*, 87 U. S. 20 Wall. 64, 22 L. ed. 315; *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 704, 28 L. ed. 571; *Louisville & N. R. Co.* v. *Palmes*, 109 U. S. 244, 27 L. ed. 922; *Larin* v. *Emigrant Industrial Sav. Bank*, 18 Blatchf. 13; *United States* v. *Muscatine*, 75 U. S. 8 Wall. 575, 19 L. ed. 490.

That law is thoroughly well settled.

Liverpool & G. W. Steam Co., Limited, v. *Phenix Ins. Co.* 129 U. S. 443, 32 L. ed. 793; *Carpenter* v. *Providence Washington Ins. Co.* 41 U. S. 16 Pet. 511, 10 L. ed. 1051; *Swift* v. *Tyson*, 41 U. S. 16 Pet. 18, 10 L. ed. 871; *Myrick* v. *Michigan C. R. Co.* 107 U. S. 109, 27 L. ed. 327; *Chicago* v. *Robbins*, 67 U. S. 2 Black, 418, 17 L. ed. 298; *Brooklyn City & N. R. Co.* v. *National Bank*, 102 U. S. 14, 31, 26 L. ed. 61, 67; *Hough* v. *Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; *Baltimore & O. R. Co.* v. *Baugh*, 149 U. S. 370, 37 L. ed. 773.

Courts of the United States determine the common law for themselves.

Washington & G. R. Co. v. *Gladmon*, 82 U. S. 15 Wall. 401, 21 L. ed. 114; *Indianapolis & St. L. R. Co.* v. *Horst*, 93 U. S. 291, 23 L. ed. 898; *Hough* v. *Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; *Northern P. R. Co.* v. *Mares*, 123 U. S. 710, 31 L. ed. 296; *Inland & S. Coasting Co.* v. *Tolson*, 139 U. S. 551, 35 L. ed. 270; *Texas & P. R. Co.* v. *Volk*, 151 U. S. 77, 38 L. ed. 80; *Lane* v. *Vick*, 46 U. S. 3 How. 464, 11 L. ed. 681; *Jefferson Branch Bank* v. *Skelly*, 66 U. S. 1 Black, 443, 17 L. ed. 177; *Proprietors of Bridges* v. *Hoboken Land & Imp. Co.* 68 U. S. 1 Wall. 145, 17 L. ed. 577; *Lake Shore & M. S. R. Co.* v. *Prentice*, 147 U. S. 106, 37 L. ed. 101; *Newport News & M. V. Co.* v. *Howe*, 52 Fed. Rep. 362, 6 U. S. App. 172; *Western U. Teleg. Co.* v. *Wood*, 57 Fed. Rep. 471, 21 L. R. A. 706; *Northern P. R. Co.* v. *Peterson*, 51 Fed. Rep. 182, 4 U. S. App. 574; *Baltimore & O. R. Co.* v. *Baugh*, 149 U. S. 370, 37 L. ed. 773; *Lake Shore & M. S. R. Co.* v. *Spangler*, 44 Ohio St. 476; *Foxcroft* v. *Mallett*, 45 U. S. 4 How. 353, 11 L. ed. 1008; *Carpenter* v. *Providence Washington Ins. Co.* 41 U. S. 16 Pet. 511, 10 L. ed. 1051; *Manhattan L. Ins. Co.* v. *Broughton*, 109 U. S. 126, 27 L. ed. 880; *Louisville & N. R. Co.* v. *Palmes*, 109 U. S. 256, 27 L. ed. 926; *Gibson* v. *Lyon*, 115 U. S. 446, 29 L. ed. 442; *Chicago* v. *Robbins*, 67 U. S. 2 Black, 418, 17 L. ed. 298; *Smith* v. *Alabama*, 124 U. S. 478, 31 L. ed. 512; *Oates* v. *First Nat. Bank*, 100 U. S. 239, 25 L. ed. 580; *Pana* v. *Bowler*,

107 U. S. 529, 27 L. ed. 424; *Olcott* v. *Fond du Lac County Suprs.* 83 U. S. 16 Wall. 689, 21 L. ed. 386; *Pine Grove Twp.* v. *Talcott*, 36 U. S. 19 Wall. 677, 22 L. ed. 233; *Pleasant Twp.* v. *Ætna L. Ins. Co.* 138 U. S. 70, 34 L. ed. 866; *Burgess* v. *Seligman*, 107 U. S. 20, 27 L. ed. 359; *Clark* v. *Bever*, 139 U. S. 116, 35 L. ed. 96; *Carroll County Suprs.* v. *Smith*, 111 U. S. 562, 28 L. ed. 519; *Anderson* v. *Santa Anna Twp.* 116 U. S. 365, 29 L. ed. 636; *Bolles* v. *Brimfield*, 120 U. S. 762, 30 L. ed. 788; *East Alabama R. Co.* v. *Doe*, *Visscher*, 114 U. S. 352, 29 L. ed. 140; *Buncombe County Comrs.* v. *Tommey*, 115 U. S. 127, 29 L. ed. 307; *Ober* v. *Gallagher*, 93 U. S. 207, 23 L. ed. 832; *Johnson County Comrs.* v. *Thayer*, 94 U. S. 642, 24 L. ed. 135; *Mohr* v. *Manierre*, 101 U. S. 421, 25 L. ed. 1054; *United States* v. *Muscatine*, 75 U. S. 8 Wall. 582, 19 L. ed. 493; *Venice* v. *Murdock*, 92 U. S. 501, 23 L. ed. 585; *Chicago & A. R. Co.* v. *Wiggins Ferry Co.* 119 U. S. 623, 30 L. ed. 522.

If the contract when made was valid by the laws of the state as then expounded by all departments of the government, and administered by its courts of justice, its validity and obligation cannot be impaired by any subsequent action or legislation or decision of its courts altering the construction of the law.

Ohio L. Ins. & T. Co. v. *Debolt*, 57 U. S. 16 How. 432, 14 L. ed. 1003; *Gelpcke* v. *Dubuque*, 68 U. S. 1 Wall. 206, 17 L. ed. 526; *Havemeyer* v. *Iowa County Suprs.* 70 U. S. 3 Wall. 298, 18 L. ed. 38; *Thompson* v. *Lee County*, 70 U. S. 3 Wall. 327, 18 L. ed. 177; *Lee County Suprs.* v. *United States*, 74 U. S. 7 Wall. 181, 19 L. ed. 163; *Douglass* v. *Pike County*, 101 U. S. 677, 25 L. ed. 968.

At the time the fire in this case occurred, the original decision of the supreme court of Iowa in *Griswold* v. *Illinois C. R. Co.* (Iowa) 21 Ins. L. J. 961, had been made, and was in full force and effect, holding the attempted exemption of the railway company from liability on account of negligence to be contrary to public policy and void.

The Federal courts are not bound by decisions of state courts on questions of public policy.

Groves v. *Slaughter*, 40 U. S. 15 Pet. 503, 10 L. ed. 820; *Rowan* v. *Runnels*, 46 U. S. 5 How. 134, 12 L. ed. 85; *Ohio L. Ins. & T. Co.* v. *Debolt*, 57 U. S. 16 How. 432, 14 L. ed. 1003; *Delmas* v. *Merchants' Mut. Ins. Co.* 81 U. S. 14 Wall. 667, 20 L. ed. 759; *Bank of West Tennessee* v. *Citizens' Bank*, 80 U. S. 13 Wall. 432, 20 L. ed. 514, 81 U. S. 14 Wall. 9, 20 L. ed. 514; *Bethell* v. *Demaret*, 77 U. S. 10 Wall. 537, 19 L. ed. 1007; *Thorington* v. *Smith*, 75 U. S. 8 Wall. 1, 19 L. ed. 361; *Planter's Bank* v. *Union Bank*, 83 U. S. 16 Wall. 483, 21 L. ed. 473; *Confederate Note Case*, 86 U. S. 19 Wall. 548, 22 L. ed. 196; *Wilmington & W. R. Co.* v. *King*, 91 U. S. 3, 23 L. ed. 186; *Cook* v. *Lillo*, 103 U. S. 792, 26 L. ed. 460; *Tarver* v. *Keach*, 82 U. S. 15 Wall. 67, 21 L. ed. 82; *Worthy* v. *Marston*, 81 U. S. 14 Wall. 10, 20 L. ed. 826; *Osborn* v. *Nicholson*, 80 U. S. 13 Wall. 654, 20 L. ed. 689; *White* v. *Hart*, 80 U. S. 13 Wall. 646, 20 L. ed. 685; *Liverpool & G. W. Steam Co., Limited*, v. *Phenix Ins. Co.* 129 U. S. 443, 32 L. ed. 793; *Boyce* v. *Tabb*, 85 U. S. 18 Wall. 548, 21 L. ed. 757; *Marshall* v. *Baltimore & O. R. Co.* 57 U. S. 16 How. 330, 14 L. ed. 960; *Bank of United States* v. *Owens*, 27 U. S. 2 Pet. 540, 7 L. ed. 512; *Burke* v. *Child*, 88 U. S. 21 Wall. 449, 22 L. ed. 624; *Collins* v. *Blantern*, 2 Wils. 347; *Western U. Teleg. Co.* v. *Cook*, 61 Fed. Rep. 624; *Gelpcke* v. *Dubuque*, 68 U. S. 1 Wall. 205, 17 L. ed. 525; *Gibson* v. *Lyon*, 115 U. S. 446, 29 L. ed. 443; *Smith* v. *Alabama*, 124 U. S. 478, 31 L. ed. 512; *Olcott* v. *Fond du Lac County Suprs.* 83 U. S. 16 Wall. 689, 21 L. ed. 386; *Pine Grove Twp.* v. *Talcott*, 86 U. S. 19 Wall. 677, 22 L. ed. 233; *Pleasant Twp.* v. *Ætna L. Ins. Co.* 138 U. S. 70, 34 L. ed. 866; *Burgess* v. *Seligman*, 107 U. S. 20, 27 L. ed. 359; *Clark* v. *Bever*, 139 U. S. 116, 35 L. ed. 97; *Carroll County Suprs.* v. *Smith*, 111 U. S. 562, 28 L. ed. 519; *Anderson* v. *Santa Anna Twp.* 116 U. S. 365, 29 L. ed. 636; *Bolles* v. *Brimfield*, 120 U. S. 762, 30 L. ed. 788; *East Alabama R. Co.* v. *Doe*, *Visscher*, 114 U. S. 352, 29 L. ed. 140.

Mr. **Charles B. Keeler,** for defendant in error:

The supreme court of Iowa finally held that such exemption or release was not in violation of the fire statute of Iowa, or contrary to any public policy of the state, but was lawful and would be enforced by the courts of Iowa.

Griswold v. *Illinois C. R. Co.* (Iowa) 24 L. R. A. 647.

The insurance companies, upon payment of their policies, were subrogated, in law, to such rights (and only such) as said lessees held against their lessor.

Phœnix Ins. Co. v. *Erie & W. Transp. Co.* 117 U. S. 312, 29 L. ed. 873; *Jackson Co.* v. *Boylston Mut. Ins. Co.* 139 Mass. 508, 52 Am. Rep. 728; Wood, Land. & T. p. 435; 12 Am. & Eng. Enc. Law, p. 1000.

Federal courts adopt the local law of real property, as ascertained by the decisions of state courts, whether founded on statute, or a part of the unwritten law of the state.

Jackson, St. John, v. *Chew*, 25 U. S. 12 Wheat. 153, 6 L. ed. 583; *Green* v. *Neal*, 31 U. S. 6 Pet. 291, 8 L. ed. 402; *Swift* v. *Tyson*, 41 U. S. 16 Pet. 18, 10 L. ed. 871; *Suydam* v. *Williamson*, 65 U. S. 24 How. 427, 16 L. ed. 742; *Beauregard* v. *New Orleans*, 59 U. S. 18 How. 497, 15 L. ed. 469; *Williams* v. *Kirtland*, 80 U. S. 13 Wall. 306, 20 L. ed. 683; *Brooklyn City & N. R. Co.* v. *National Bank*, 102 U. S. 57, 26 L. ed. 77; *Bondurant* v. *Watson*, 103 U. S. 281, 26 L. ed. 447; *Bucher* v. *Cheshire R. Co.* 125 U. S. 583, 31 L. ed. 799.

The decision of the supreme court of Iowa in *Griswold* v. *Illinois C. R. Co.* (Iowa) 21 Ins. L. J. 961, should be followed by this court, because it is based, in part at least, upon a construction of state statutes.

The public policy of a state means the local self-interest of that commonwealth. Each must determine for itself what its own policy or self-interest shall dictate.

Doyle v. *Continental Ins. Co.* 94 U. S. 535, 24 L. ed. 148.

The policy of the state is the law of that commonwealth, whether enacted by statutes or expressed by courts.

Bank of Augusta v. *Earle*, 38 U. S. 13 Pet. 519, 10 L. ed. 274; *Vidal* v. *Philadelphia*, 43 U. S. 2 How. 127, 11 L. ed. 205; *Teal* v. *Walker*, 111 U. S. 242, 28 L. ed. 415; *Lancaster* v. *Amsterdam Imp. Co.* 140 N. Y. 576, 24 L. R. A. 322 (1894); *Green* v. *Van Buskirk*, 72 U. S. 5

Wall. 312, 18 L. ed. 601; *Swann* v. *Swann*, 21 Fed. Rep. 299; *United States* v. *Trans-Missouri Freight Asso.* 58 Fed. Rep. 58, 24 L. R. A. 73, 4 Inters. Com. Rep. 443; *Rogers* v. *Kennebec S. B. Co.* 86 Me. 261, 25 L. R. A. 491; *Bucher* v. *Cheshire R. Co.* 125 U. S. 555, 31 L. ed. 795; *Detroit* v. *Osborne*, 135 U. S. 492, 34 L. ed. 260; *Etheridge* v. *Sperry*, 139 U. S. 266, 35 L. ed. 171; *Brown* v. *Grand Rapids Parlor Furniture Co.* 58 Fed. Rep. 286, 22 L. R. A. 817; *Union Nat. Bank* v. *Bank of Kansas City*, 136 U. S. 235, 34 L. ed. 346; *Printing & N. Registering Co.* v. *Sampson*, L. R. 19 Eq. 465; *Griswold* v. *Illinois C. R. Co.* (Iowa) 24 L. R. A. 647; *Richmond* v. *Dubuque & S. C. R. Co.* 26 Iowa, 202; *Kellogg* v. *Larkin*, 3 Pinney, 123, 56 Am. Dec. 164.

The lessees being where they were either as trespassers or as mere licensees, no active duty of care towards them or their property was imposed upon the railway, in the operation of engines and trains, but only the negative duty of not wilfully or wantonly destroying it by fire.

Cleveland, C. C. & St. L. R. Co. v. *Tartt*, 64 Fed. Rep. 827; *Crane Elevator Co.* v. *Lippert*, 63 Fed. Rep. 945; *Gaynor* v. *Old Colony & N. R. Co.* 100 Mass. 214; *Wright* v. *Boston & G. R. Co.* 142 Mass. 300; *Barstow* v. *Old Colony R. Co.* 143 Mass. 536; *Illinois C. R. Co.* v. *Godfrey*, 71 Ill. 506, 22 Am. Rep. 112; *Illinois C. R. Co.* v. *Hetherington*, 83 Ill. 516; *Blanchard* v. *Lake Shore & M. R. Co.* 126 Ill. 423; *McClaren* v. *Indianapolis & V. R. Co.* 83 Ind. 319; *Splittorf* v. *State*, 108 N. Y. 214; *Richards* v. *Chicago, St. P. & K. C. R. Co.* 81 Iowa, 430; *Chicago, M. & St. P. R. Co.* v. *Wallace*, 66 Fed. Rep. 506; *Coup* v. *Wabash, St. L. & P. R. Co.* 56 Mich. 111, 56 Am. Rep. 374; *Robertson* v. *Old Colony R. Co.* 156 Mass. 525; *Forepaugh* v. *Delaware, L. & W. R. Co.* 128 Pa. 217, 5 L. R. A. 508; *Piedmont Mfg. Co.* v. *Columbia & G. R. Co.* 19 S. C. 353; *New York C. R. Co.* v. *Lockwood*, 84 U. S. 17 Wall. 377, 21 L. ed. 639; *Liverpool & G. W. Steam Co., Limited*, v. *Phenix Ins. Co.* 129 U. S. 440, 32 L. ed. 792; Hutchinson, Carr. 2d ed. §§ 44, 73; *Hosmer* v. *Old Colony R. Co.* 156 Mass. 506; *Bates* v. *Old Colony R. Co.* 147 Mass. 264; *Hart* v. *Pennsylvania R. Co.* 112 U. S. 331, 28 L. ed. 717; *Phœnix Ins. Co.* v. *Erie & W. Transp. Co.* 117 U. S. 321, 29 L. ed. 879.

The state court in the *Griswold Case* upheld instead of impaired the obligation of such leases, consequently no question was raised, under the 25th section of the judiciary act, which United States courts were authorized to consider or review.

Bethell v. *Demaret*, 77 U. S. 10 Wall. 540, 19 L. ed. 1003; *Bank of West Tennessee* v. *Citizens' Bank*, 81 U. S. 14 Wall. 10, 20 L. ed. 515; *Delmas* v. *Merchants Mut. Ins. Co.* 81 U. S. 14 Wall. 666, 20 L. ed. 759; *Worthy* v. *Marston*, 81 U. S. 14 Wall. 12, 20 L. ed. 826; *Balkam* v. *Woodstock Iron Co.* 154 U. S. 187, 38 L. ed. 956; *Anderson* v. *Santa Anna Twp.* 116 U. S. 356, 29 L. ed. 633; *Clark* v. *Bever*, 139 U. S. 96, 35 L. ed. 88; *Burgess* v. *Seligman*, 107 U. S. 20, 27 L. ed. 359.

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

Is a condition, in a lease by a railway company of a portion of its right of way, that it shall not be liable to the lessee for any damage to any buildings or personal property thereon, caused by fire set by its locomotives, or by the negligence of its officers or servants, in violation of public policy, and therefore void? This is the question in this case. The public policy of a state or nation must be determined by its Constitution, laws, and judicial decisions; not by the varying opinions of laymen, lawyers, or judges as to the demands of the interests of the public. *Vidal* v. *Philadelphia*, 43 U. S. 2 How. 127, 197, 11 L. ed. 205, 233; *United States* v. *Trans-Missouri Freight Asso.* 7 C. C. A. 15, 73, 58 Fed. Rep. 58, 24 L. R. A. 973, 4 Inters. Com. Rep. 443; *Swann* v. *Swann*, 21 Fed. Rep. 299. If this was a question of local law, or of the public policy of the state of Iowa alone, it would require little consideration by this court. There are many provisions of the statutes of the state of Iowa relating to the duties of individuals and corporations to use care to prevent damage from fire. The two which bear most directly upon the question under consideration in this case are sections 1289 and 1308 of the Code of that state, which provide "that any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating of any such railway" (McClain's Anno. Code (Iowa) 1888, § 1972); and "no contract, receipt, rule, or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule, or regulation been made or entered into" (Id. § 2007). In *Griswold* v. *Illinois C. R. Co.* (Iowa) 24 L. R. A. 647, the supreme court of Iowa considered these statutes and the public policy of that state, and, after repeated argument and the most careful deliberation, held that a provision in a lease by a railway company of a portion of its right of way, on which the lessee had placed an elevator and warehouse and personal property, which exempted the railroad company from liability for damages by fire negligently communicated by its servants to these buildings and their contents, violated no law of that state, was not injurious to the public interests, and was not against public policy. This was the decision of the highest judicial tribunal of that state. It constitutes an authoritative construction of the statutes of the state (*Dempsey* v. *Oswego Twp.* 4 U. S. App. 416, 435, 2 C. C. A. 110, 51 Fed. Rep. 97; *Rugan* v. *Sabin*, 10 U. S. App. 519, 3 C. C. A. 578, 53 Fed. Rep. 415; *Travelers' Ins. Co.* v. *Oswego Twp.* 7 C. C. A. 669, 674, 59 Fed. Rep. 58; *Madden* v. *Lancaster County*, 12 C. C. A. 566, 570, 65 Fed. Rep. 188), and a very persuasive authority that the contract here in question is not contrary to public policy.

Upon the latter question, however, it is not conclusive upon the national courts. Whether or not such a provision of a contract is against public policy is a question of general law, and not dependent solely upon any local statute or usage. Over this question the national courts exercise concurrent

jurisdiction with those of the state, and, while the decisions of the latter are always entitled to the weight of persuasive authority, the Federal courts must in the end exercise their own judgment. *New York C. R. Co.* v. *Lockwood*, 84 U. S. 17 Wall. 357, 368, 21 L. ed. 634, 637; *Myrick* v. *Michigan C. R. Co.* 107 U. S. 102, 27 L. ed. 325; *Carpenter* v. *Providence Washington Ins. Co.* 41 U. S. 16 Pet. 495, 511, 10 L. ed. 1044, 1051; *Swift* v. *Tyson*, 41 U. S. 16 Pet. 1, 10 L. ed. 685; *Brooklyn City & N. R. Co.* v. *National Bank*, 102 U. S. 14, 26 L. ed. 61; *Burgess* v. *Seligman*, 107 U. S. 20, 33, 27 L. ed. 359, 365; *Smith* v. *Alabama*, 124 U. S. 465, 478, 31 L. ed. 508, 512; *Bucher* v. *Cheshire R. Co.* 125 U. S. 555, 583, 31 L. ed. 795, 799; *Liverpool & G. W. Steam Co., Limited*, v. *Phenix Ins. Co.* 129 U. S. 397, 443, 32 L. ed. 788, 793.

We turn accordingly to the consideration of this question. Before entering upon its discussion, it is important to note the terms and effect of the lease before us, and the situation of the parties and of the property which was destroyed. Before the lease was made, the lessees had no right to enter upon, or to place any property upon, the leased premises, and the railway company owed to the lessee no duty to exercise ordinary care not to set fire to any property on those premises, because, presumptively, there was none there, and because, if any one put any there, the only duty of the company was not wilfully and wantonly to injure it, because it would be there in violation of law. If, however, the railway company should lease the right of way to Simpson, McIntire, & Co., and should permit them to put buildings and personal property thereon, it would thereby subject itself to a new burden and assume a new duty,—the duty of exercising ordinary care to prevent the burning of their property on these premises by the operation of its railroad. It was apparently willing to discharge all the duties it owed to the public, and to every individual of the public, and it did not undertake, by this lease, to limit or restrict its liability to discharge any of those duties, but it simply undertook to prevent its assumption of a new duty. Its quasi public character as a railroad company, its position as a common carrier, imposed upon it no duty to lease any of its right of way to these lessees, or to any one else, nor had they, or any one, any right to the use of the leased premises before this lease was made. The property that was burned was the private property of the lessees. None of it was in process of transportation by the railway company, none of it was awaiting delivery by the company to its consignees after transportation, and none of it had been received by the company for transportation. The warehouses and the property in them bore the same relation to the carrying business of the company, according to this record, that the store and contents of any merchant or commission man would bear to it. Neither the lease, nor the relation of the property to the railway company, arose out of the discharge of any duty imposed upon the corporation by its position of a common carrier, or by its character of a quasi public corporation.

The question, then, is, Was it a violation of public policy for the lessees to agree, under these circumstances, that, if they were permitted to put their buildings and property upon the right of way of the railroad company, and to use them thereon, the duties and liabilities of the latter to them, and to the public, should remain as they were before the lease was made, and should not be increased by any additional burden? No act of Congress, no statute, no decision of any court (except a decision of the supreme court of Iowa, which was overruled by *Griswold* v. *Illinois C. R. Co. supra*), which prohibits such an agreement or declares it to be against public policy, has been called to our attention. Counsel for plaintiffs in error present a carefully prepared and exhaustive argument, by analogy, to show that such an agreement is detrimental to the public welfare, and against public policy, but their contention rests entirely upon that argument. If the analogy fails, the argument fails. The argument runs in this way: A contract by a railroad company with one of its employees, or with a passenger, or with a shipper, to exempt itself from liability for negligence in operating its railroad is against public policy and void. *St. Louis & S. F. R. Co.* v. *Payne*, 29 Kan. 169; *Little Rock & Ft. S. R. Co.* v. *Eubanks*, 48 Ark. 460; *New York C. R. Co.* v. *Lockwood*, 84 U. S. 17 Wall. 357, 21 L. ed. 627; *Southern Exp. Co.* v. *Caldwell*, 88 U. S. 21 Wall. 264, 267, 22 L. ed. 556, 558; *York Mfg. Co.* v. *Illinois C. R. Co.* 70 U. S. 3 Wall. 107, 18 L. ed. 170; *Bank of Kentucky* v. *Adams Exp. Co.* 93 U. S. 174, 181, 183, 185, 23 L. ed. 872, 875–877; *Liverpool & G. W Steam Co., Limited*, v. *Phenix Ins. Co.* 129 U. S. 440, 441, 32 L. ed. 791, 792. The contract to exempt the railway company from liability for damage to the property of these lessees, caused by fires resulting from the negligence of the railway company, is similar to contracts with its employees, passengers, and shippers to exempt it from liability to them for negligence in operating its railroad. Therefore, the provision for exemption in this lease is against public policy, and void. But the analogy fails in that vital part which constitutes the reason and foundation of the rule established by the authorities cited. Its fallacy is, that the law imposes upon a railroad company the absolute duty to operate its railroad, to employ suitable men to operate it, to exercise ordinary care to furnish them with a reasonably safe place in which to render their services, and with reasonably safe machinery and appliances with which to perform them. Any breach of this duty is a violation of the law which imposes the duty. It is also an immeasurable injury to the public interests, because it endangers the lives and limbs of citizens, which are of the highest value to the state and nation. A contract which exempts the carrier from negligence in the discharge of these duties is void, because it relieves it of an absolute duty which the law imposes upon it, and because it unreasonably

endangers the lives of employees and passengers. But the law imposes no duty upon a railroad company to lease its right of way, or to use ordinary care not to set fires that would burn property placed upon it by strangers without its permission. In the former case, public policy and the law impose upon the carrier the duty to hire employees, to operate its railroad with reasonable care, in order to protect its employees from injury, and therefore it may not contract to be relieved from the law and the duty. The carrier has no choice. It must perform these duties, or forfeit its charter. In the latter case, no duty to lease is imposed. The company has the option—the choice—to lease or to refuse to lease; and if it does lease, and does stipulate for indemnity from damages caused by its negligence in firing the property of the lessee placed upon the leased premises by its permission, that contract in no way relieves it from the discharge of any duty to the public, or to any citizen, that the law or public policy had imposed upon it.

Again, the law imposes upon a railroad company the absolute duty to accept passengers and freight when offered, and to carry the former with the utmost, and the latter with ordinary, care. The passenger is often obliged to travel, and the shipper to send his goods, by railroad. In making their contracts, they do not stand on an equal footing with it. They cannot stop to negotiate and settle the terms of a contract every time they desire to use the railroad. They would often perfer the abandonment of the contracts to such negotiations. On the other hand, the railroad company, with its trained employees, and its monopoly of the transportation facilities sought, has the ability and the power to exact the contract it desires. This inequality in the situation of the parties, which would, if permitted, enable the railroad company to obtain unfair contracts from passengers and shippers, and the fact that contracts with them, which exempt the company from liability for negligence, relieve it from an absolute duty imposed by the law, and thus violate it, and at the same time increase the danger to the lives and property of the people from the operation of a railroad, constitute the reasons for the decisions that have established and maintain the rule that such contracts are against public policy. *New York C. R. Co.* v. *Lockwood*, 84 U. S. 17 Wall. 357, 369, 378, 379, 21 L. ed. 627, 637, 639, 640; *York Mfg. Co.* v. *Illinois C. R. Co.* 70 U. S. 3 Wall. 107, 112, 18 L. ed. 170, 171; *United States Exp. Co.* v. *Kountze*, 75 U. S. 8 Wall. 342, 353, 19 L. ed. 457, 460; *Liverpool & G. W. Steam Co., Limited*, v. *Phenix Ins. Co.* 129 U. S. 397, 440, 443, 32 L. ed. 788, 791, 792; *Southern Exp. Co.* v. *Caldwell*, 88 U. S. 21 Wall. 264, 267, 268, 22 L. ed. 556, 558.

But the defendant in error and Simpson, McIntire, & Co., did not stand on unequal footing. The lessees were not compelled to lease of the railroad company. The latter had no monopoly of land in Iowa. Each party had the option to execute, or to refuse to execute, the lease. The condition exempting the company from liability for damages to the property of the lessees caused by fire set by the negligence of the company relieved the company from no duty it was required by law to perform but simply provided that it should not assume an additional burden, which it had the option to take or to refuse. Thus, in the case at bar, all the reasons for the rule avoiding contracts exempting common carriers from liability for negligence failed. And it is difficult to perceive how the proposition that this rule should govern this case can be successfully maintained.

It is said that it was the duty of the railroad company to furnish suitable warehouses for the receipt of butter and eggs offered to it for transportation, and already transported, but awaiting delivery to the consignees, that it was bound to exercise ordinary care not to burn the contents placed in such warehouses by it as a carrier, and that, if it employed Simpson, McIntire & Co. to receive and store the goods of its shippers, it was bound to exercise the same degree of care to protect the goods in their possession. *Corington Stock-Yards Co.* v. *Keith*, 139 U. S. 128, 133, 136, 35 L. ed. 73, 75, 76. It is a conclusive answer to this contention that there is nothing in this record to show that the railroad company ever had employed Simpson, McIntire, & Co. to receive or store any of the goods of its shippers. Moreover, if it had done so, it is not perceived why the contract of these lessees to take the risk of, and to hold the railroad company harmless from, any damage to such property from fires caused by the negligent operation of the railroad, would not have been valid. It goes without saying that the railroad company could have legally employed an insurance company to indemnify it against loss by fire occasioned by the negligence of its servants. If there were goods of its customers burned in the warehouse, the lessees had, in effect, insured the railroad company against damages for their loss, and the insurance companies had insured the lessees. No reason is perceived why these contracts were not valid.

It is said that a statute which should provide that a railroad company should not be liable to the owner of property for damages to it by fire, caused by the negligence of the company, would be unconstitutional and void, because it would authorize the taking of private property without due process of law, and without compensation, and that therefore the contract here in question is void. But a statute enacting that a private individual who should construct a building or store personal property upon the right of way of a railroad company should be deemed guilty of negligence, and should not be permitted to maintain any action against the company for its destruction by fire, occasioned by the negligence of the latter in the operation of its railroad, would not be obnoxious to this objection, nor detrimental to the public interest, and it is not perceived how a contract to that effect could be.

The public policy of this nation, with reference to contracts of common carriers exempting them from liability for negligence, was established and declared by the decisions of the Supreme Court in *New York*

C. R. Co. v. *Lockwood*, 84 U. S. 17 Wall. 357, 384, 21 L. ed. 627, 641; *Southern Exp. Co.* v. *Caldwell*, 88 U. S. 21 Wall. 264, 267, 268, 22 L. ed. 556, 558; and *Liverpool & G. W. Steam Co., Limited*, v. *Phenix Ins. Co.* 129 U. S. 397, 440, 441, 32 L. ed. 788, 791, 792. In the leading case of *New York C. R. Co.* v. *Lockwood*, *supra*, Mr. Justice Bradley declared the rules by which the validity of such contracts must be determined to be: "First, that a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law; secondly, that it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants; thirdly, that these rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter."

In *Liverpool & G. W. Steam Co., Limited*, v. *Phenix Ins. Co.* 129 U. S. 397, at page 441, 32 L. ed. 788, 792, Mr. Justice Gray thus states the rule in a single paragraph: "Special contracts between the carrier and the customer, the terms of which are just and reasonable and not contrary to public policy, are upheld—such as those exempting the carrier from responsibility for losses happening from accident, or from dangers of navigation that no human skill or diligence can guard against; or for money or other valuable articles, liable to be stolen or damaged,—unless informed of their character or value; or for perishable articles or live animals, when injured without default or negligence of the carrier. But the law does not allow a public carrier to abandon altogether his obligations to the public, and to stipulate for exemptions which are unreasonable and improper, amounting to an abnegation of the essential duties of his employment."

The burden is on the party who seeks to put a restraint upon the freedom of contracts to make it plainly and obviously clear that the contract is against public policy. *United States* v. *Trans-Missouri Freight Asso.* 7 C. C. A. 15, 82, 58 Fed. Rep. 58, 24 L. R. A. 73, 4 Inters. Com. Rep. 443; *Printing & N. R. Co.* v. *Sampson*, L. R. 19 Eq. 462; *Tallis* v. *Tallis*, 1 El. & Bl. 391; *Rousillon* v. *Rousillon*, L. R. 14 Ch. Div. 351, 365; *Stewart* v. *Erie & W. Transp. Co.* 17 Minn. 372, 391 (Gil. 348); *Marsh* v. *Russell*, 66 N. Y. 288; *Phippen* v. *Stickney*, 3 Met. 384, 389. In our opinion the plaintiffs in error fall far short of sustaining this burden, and our conclusions are:

The reasons why an unreasonable and unjust contract between a common carrier and another, exempting the former from liability for negligence, is against public policy and void, are, that it attempts to release the carrier from the discharge of the essential duties imposed upon it by law, that the parties to the contract are not upon an equal footing, and that it tends to endanger the lives and limbs of passengers and employees. A contract in a lease by a railroad company of a portion of its right of way, that it shall not be liable to the lessees for any damage, caused by fire set by the negligence of itself or of its employees, to the buildings or personal property which the lessees have or place on the leased premises, does not fall within this rule, and is not void because it does not fall within its reasons. A railroad company does not assume by such a contract to relieve itself of any of its essential duties as a common carrier or as a quasi public corporation. The contract leaves it under the same duties and liabilities to which it was subject before it was made. It is bound to the same diligence, fidelity, and care, after a lease containing such a contract is executed, that it would have been required to exercise if no such agreement had been made. *Southern Exp. Co.* v. *Caldwell*, 88 U. S. 21 Wall. 264, 267, 268, 22 L. ed. 556, 558. The only effect of the contract is to prevent the assumption by the railroad company of a new duty, which it was entirely free to assume or to refuse to assume. It does not tend to endanger the lives of the employees or passengers of the company, and the parties to it stand upon an equal footing when the lease is made because each is free to make or refuse to make the contract.

For these reasons *the judgment below must be affirmed*, with costs, and it is so ordered.

Caldwell, Circuit Judge, dissenting:

I concur in the conclusion reached in this case, but dissent from this statement in the majority opinion, namely: "Upon the latter question, however, it is not conclusive upon the national courts. Whether or not such a provision of a contract is against public policy is a question of general law, and not dependent solely upon any local statute or usage."

The contract referred to is a lease of real estate situated in Iowa. The lease was made and executed, and its covenants were to be performed, in that state. The supreme court of Iowa held the lease and all its conditions valid under the laws of that state. No decision of the Supreme Court of the United States has been cited, and it is believed none can be found, holding that this decision of the supreme court of Iowa is not binding on this court. But, however this may be, there is no difference of opinion between the supreme court of Iowa and this court as to the validity of the lease and all its conditions, and there is therefore no occasion for this court to express an opinion upon the question whether it would be found by the decision of the supreme court of Iowa if the two courts differed in opinion on the question of public policy. What is said on this subject is not necessary to the decision of the case, and, moreover, is not law. A "local statute," declaring such a condition in a lease to be either valid or void, would undoubtedly be obligatory on this and all other courts. There are weighty reasons why a question of this character should not be lightly considered. The most serious blot on the American system of jurisprudence is that whereby a question affecting the rights and liabilities of a citizen may be differently decided by courts of different governments, whose judgments are equally binding and final. This unfortunate condition of our

jurisprudence results from our dual system of government. It has no existence in any other country, and ought to be confined within the narrowest limits possible in this. Nothing can be more repugnant to one's sense of justice, or to a uniform and harmonious administration of the law, than to require the citizen to be bound by conflicting decisions of courts of different governments. Under the operation of this unseemly rule, a suit against one in a state court may be decided one way, and a suit against the same party in the Federal court, involving the very same question, may be decided the other way. As a result of these diverse rules of decision, each party to a suit engages in an unseemly struggle to get into that jurisdiction whose rules of decision are believed to be most favorable to his side of the case. It was the hope that this court would overrule the decision of the supreme court of Iowa in a similar case that caused the removal of this case into the circuit court. The class of questions as to which different rules of decision may obtain, and the Federal courts may disregard the decision of the state courts thereon, has not been very clearly defined. What is said here has reference, of course, to nonfederal questions, such as the one raised in this case. As to Federal questions, there is but one rule of decision, and one court of last resort. The general statement has been often made that the Federal courts are not bound to follow the decisions of state courts on questions of general jurisprudence, when unaffected by state legislation; but no exact enumeration has ever been made, or ever can be made, of the questions that come within this general definition. Moreover, the decisions of the supreme court relating to the subject are not uniform or harmonious. The question as presented by this record is not free from doubt. It is a question upon which the court should not express an opinion, except when necessary to the decision of the case, and that necessity does not exist in this case.

John R. HANNA *et al.*, *Appts.*,
v.
STATE TRUST COMPANY *et al.*

(70 Fed. Rep. 2.)

A court of chancery cannot, against the objection of the first mortagee, authorize the receiver of a private corporation appointed at the suit of a second mortgagee to borrow money to carry on the corporate business on certificates to be made a first and paramount lien on the corporate property.

(September 23, 1895.)

APPEAL by defendants Hanna and Clark from an order of the Circuit Court of the United States for the District of Colorado, permitting a receiver which had been appointed for the Denver Land & Water-Storage Company to issue certificates to raise money for the improvement and preservation of the property which should be a prior lien to that of the first mortgage on the property. *Reversed.*

Before Caldwell, Sanborn, and Thayer, Circuit Judges.

Statement by **Caldwell, Circuit Judge:**

On the 1st day of November, 1889, the Denver-Arapahoe Land Company, a Colorado corporation, executed to the appellant John R. Hanna its trust deed on 11,320 acres of land in Arapahoe and Douglas counties, Colo., to secure to the appellant Rufus Clark the payment of its promissory notes aggregating the sum of $97,000. On the same day the same corporation executed to the Mercantile Trust company of New York, as trustee, a deed of trust on 4,480 acres of land in Arapahoe county, Colo., to secure an issue of its first-mortgage bonds amounting to $140,000. On the 1st day of March, 1890, the Denver Water-Storage Company, a Colorado corporation, executed to the State Trust Company of New York, as trustee, a deed of trust on about 1,100 acres of land in Douglas county, Colo., together with the Castlewood dam and reservoir, irrigating canals, ditches, etc., to secure the payment of its first-mortgage bonds amounting to the sum of $300,000. Each of these deeds of trust covers different properties, and is the first and valid lien upon the property covered by it. On or about the 1st day of May, 1891, the Denver Land & Water-Storage Company was organized, pursuant to the laws of Colorado, by the consolidation of the Denver-Arapahoe Land Company and the Denver Water-Storage Company, and by virtue of such consolidation acquired, subject to the deeds of trust above described, all of the property covered by or embraced therein. Immediately after its organization the Denver Land & Water-Storage Company executed a deed of trust upon the entire property acquired by the consolidation mentioned, subject to the several deeds of trust executed by the constituent companies, and above set forth, to the State Trust Company of New York, as trustee, to secure an issue of its general or consolidated mortgage bonds to the amount of $800,000. On the 4th day of June, 1894, the State Trust Company of New York, as trustee in the consolidated mortgage last above mentioned, filed its bill of complaint in the circuit court of the United States for the district of Colorado against the Denver Land & Water Storage Company, alleging that it had made default, and failed to pay the taxes on its lands or interest upon its bonds, and that it was insolvent, and prayed for the foreclosure of its mortgage and the appointment of a receiver. This bill admitted the priority of the underlying deeds of trust executed by the constituent companies, and that any relief granted in the suit, by foreclosure or otherwise, must be subject to the rights and equities existing under the prior mortgages. On the day the bill was filed the Denver Land & Water-Storage Company appeared and answered, admitting its insolvency, and confessing all the allegations

NOTE.—As to the question involved in the above case, see also Farmers' Loan & T. Co. v. Grape Creek Coal Co. (C. C. S. D. Ill.) 16 L. R. A. 603, and *note*.

See also 34 L. R. A. 303; 39 L. R. A. 623.

to the bill. The court thereupon appointed a receiver. On the 24th of July, 1894, the State Trust Company filed its amended and supplemental bill of complaint, to which the Mercantile Trust Company of New York, and the appellants John R. Hanna and Rufus Clark were made defendants. This amended bill prayed relief as follows: That the said Mercantile Trust Company, John R. Hanna, and Rufus Clark might be brought in as defendants in the action, and required to set up their respective rights upon the real estate covered by the deeds of trust executed by the Denver-Arapahoe Land Company; that the respective rights of the trustees under the several mortgages or deeds of trust might be judicially ascertained and determined by the court; that the properties covered by the respective deeds of trust might be marshaled, and judicially ascertained and adjusted; that the amounts due upon the notes and bonds issued under the several deeds of trust might be adjudicated and determined; that the said deeds of trust might be foreclosed; that the receiver theretofore appointed in the action might be continued as receiver of all the property covered by each and all of said deeds of trust; that the said John R. Hanna, Rufus Clark, and the Mercantile Trust Company, and the holders of any of the notes, bonds, or securities issued under said deeds of trust, might be enjoined and restrained from commencing any action or proceeding in the circuit court of the United States for Colorado, or any other court, for the foreclosure of the said deeds of trust, and from enforcing their said notes and bonds, or for the collection thereof, against the Denver Land & Water-Storage Company, or its property and effects, except in this action.

On the 16th day of August, 1894, a special master appointed in the cause made a report, from which it appears that the company was endeavoring to carry on a colonization business, and was engaged in selling small tracts of land, for fruit raising and garden purposes, to settlers, or those who proposed to become settlers, or colonists; that in many cases the company sold these tracts of land (usually ten acres), under executory contracts, for small amounts of cash down, and deferred payments extending over a period of five years, when the various purchasers were to receive the deeds. The company agreed to plant these tracts with fruit trees, and cultivate and care for them during the five years. On the 16th of August the receiver filed his petition, stating, substantially, that the property of the Denver Land & Water-Storage Company consists of 17,000 acres of land in the counties of Arapahoe and Douglas, Colo., and an extensive dam or reservoir, known as the "Castlewood Dam," and a system of canals and irrigating ditches connected therewith, and a large number of land-purchase contracts and land-purchase notes, referred to in the report of the special master; that the original plan of the Denver Land & Water-Storage Company contemplated the colonization of these lands; the amount of the land-purchase contracts and notes, as shown by the report of the special master; the agreements made by the Denver Land & Water-Storage Company to plant and cultivate the lands, already referred to, and that in consideration thereof the various purchasers have made large payments, and have a right, in justice and equity, to demand performance of the contracts of the Denver Land & Water-Storage Company, and that otherwise the fruit trees upon the tracts sold under the planting and cultivation contracts will die, and the payments made by the purchasers will be absolutely lost; and that, moreover, it is of vital importance to the company that it should collect the balance due upon the land-sale notes and contracts mentioned, which collection is entirely dependent upon the keeping up of the tracts of land, and the performance by the company of the contracts with the purchasers aforesaid. The petition then presents a number of reasons and arguments why, in the judgment of the receiver, certificates should be issued, and calls attention to the default in taxes upon the company's lands, alleged to amount to about $4,000. The particulars of the three underlying mortgages and the consolidated mortgage are then given, and the receiver calls the court's attention to the opportunity which presents itself for engaging in the colonization of the company's barren lands, if he is authorized to issue certificates of indebtedness to raise funds with which to properly present the merits and advantages of the Denver Land & Water-Storage Company's property. On the 15th day of September, 1894, the court made an order, upon the receiver's petition, which authorized the issue of receiver's certificates to pay taxes due upon the lands, and to redeem the same from tax sales, and making such certificates a first and paramount lien upon the property upon which the taxes were paid. The order also contained this provision: "(5) It is further ordered, adjudged, and decreed that in addition to the amounts which may be necessary to pay the taxes now in arrears upon the property set forth and described in paragraphs 2, 3, and 4 of this order, the receiver shall have, and is hereby granted, authority to borrow such additional sum of money as shall, together with said amounts for taxes, amount in the aggregate to a sum not exceeding $10,000, and to issue therefor his certificates of indebtedness, which said certificates of indebtedness shall be first and paramount liens upon all the property, rights, and franchises now owned or controlled by the said the Denver Land & Water-Storage Company, defendant herein, wheresoever situated, and subject to the jurisdiction of this court. And said additional sums of money shall be used and applied by said receiver for the purpose of preserving the property of the Denver Land & Water-Storage Company in his possession and custody, and carrying out and maintaining the contracts of the company now in existence under and by which the company has heretofore sold tracts of land to various parties, which said contracts are referred to in the report of said receiver, and for such other purposes as are set out in said petition, with references to the maintenance, preservation,

and protection of the property of the company, or as the court may from time to time direct." From this order, John R. Hanna, trustee in the deed of trust dated November 1, 1889, and Rufus Clark, the beneficiary named therein, and the holder of a large amount of the bonds secured by the mortgage to the Mercantile Trust Company, appealed to this court.

Messrs. **Enos Miles** and **John S. Macbeth,** for appellants:

The power to allow receivers' certificates exists and has been only exercised in railroad cases, and then on the ground of the public character of these institutions, and the interest the general public have in the continued operation of the public highways.

Beach, Railways, § 402; Jones, Railroad Securities, §§ 559 *et seq.*

Even in railroad cases, the priority of receivers' certificates over existing mortgages in almost all instances in which the courts have authorized receivers to borrow money and make their certificates a first lien upon the property, either the suits were filed by the bondholders themselves, with an offer to postpone their liens, or the mortgagees have themselves asked for these orders, or expressly assented to them, or the state legislature has imposed upon the chancellor the obligation, when an incorporated railroad becomes insolvent, of operating the road for the use of the public.

Hoover v. *Montclair & G. L. R. Co.* 29 N. J. Eq. 4; Jones, Railroad Securities, § 551, and cases cited in note; Beach, Receivers, §§ 393, 394; High, Receivers, § 398c.

The attempt to invoke the exercise of the peculiar power of the chancellors in relation to receivers' certificates in other than railroad cases has failed.

Raht v. *Attrill,* 106 N. Y. 423, 60 Am. Rep. 456; *Farmers' Loan & T. Co.* v. *Grape Creek Coal Co.* 50 Fed. Rep. 481, 16 L. R. A. 603; *Laughlin* v. *United States Rolling-Stock Co.* 64 Fed. Rep. 25.

If such power exists or is inherent in a chancellor in the exercise of his equitable powers, there was no sufficient nor any showing in the case at bar to warrant the exercise of this exceptional and extraordinary jurisdiction against the objection of appellants.

Jones, Railroad Securities.

Courts have always held that such an order as the one complained of shall only be made under extraordinary and exceptional circumstances, and, with ample opportunity given to all parties to examine witnesses and accounts, and to produce testimony, a court should not authorize the issue of receivers' certificates without clear proof of the correctness of the facts alleged as a ground for their issuance, and of the necessity for raising the money.

Ex parte Mitchell, 12 S. C. 83; *Meyer* v. *Johnston,* 53 Ala. 349; High, Receivers, § 398.

Messrs. **A. E. Pattison, Henry W. Hobson,** and **A. C. Campbell,** for appellees:

It is the duty of the court of chancery to protect and preserve the property—to prevent it from being wasted, dissipated, and destroyed.

Kennedy v. *St. Paul & P. R. Co.* 2 Dill. 448; *Stanton* v. *Alabama & C. R. Co.* 2 Woods, C. C. 506; *Jerome* v. *McCarter,* 94 U. S. 738, 24 L. ed. 138.

The editor of the Lawyers' Reports Annotated, in commenting upon the case of *Farmers' Loan & T. Co.* v. *Great Creek Coal Co.* 50 Fed. Rep. 481, in a *note* to 16 L. R. A. 603, wherein Circuit Judge Gresham made the distinction between quasi public and private corporations, says: "The distinction taken in this case between quasi public and private corporations has not always been observed in practice, although in the cases in which it has been disregarded it seems that no question has been raised as to the power of the court to permit the receivers to charge property in their possession for current expenses." See also *Neafie's App.* (Pa.) 11 Cent. Rep. 186; *Karn* v. *Rorer Iron Co.* 86 Va. 754; *Ellis* v. *Vernon Ice, L. & W. Co.* 86 Tex. 109.

As to the general power of a court of chancery to authorize a receiver to issue certificates, the same to be a prior lien.—

See *Meyer* v. *Johnston,* 53 Ala. 237; *Kerrison* v. *Stewart,* 93 U. S. 155, 23 L. ed. 843; *Wallace* v. *Loomis,* 97 U. S. 147, 24 L. ed. 895; *Hoover* v. *Montclair & G. L. R. Co.* 29 N. J. Eq. 4; *Bank of Montreal* v. *Chicago, C. & W. R. Co.* 48 Iowa, 519; *Shaw* v. *Little Rock & Ft. S. R. Co.* 100 U. S. 605, 25 L. ed. 757; *Hale* v. *Nashua & L. Railroad,* 60 N. H. 333; *Dow* v. *Memphis & L. R. Co.* 20 Fed. Rep. 260; *Union Trust Co.* v. *Illinois Midland R. Co.* 117 U. S. 434, 29 L. ed. 963; *Kent* v. *Lake Superior Ship Canal, R. & I. Co.* 144 U. S. 75, 36 L. ed. 352; *Kneeland* v. *Luce,* 141 U. S. 491, 35 L. ed. 830.

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

The precise question in this case is whether a court of chancery which has appointed a receiver for an insolvent private corporation in a foreclosure suit brought by a second mortgagee may, against the objection of the first mortgagee, authorize its receiver to issue receiver's certificates to raise money to carry on the business of the insolvent corporation and to improve its lands, and make such certificates a first and paramount lien upon the lands covered by the first mortgage. So far as we are advised, the power to do this has been denied in every case in which the question has arisen. One of the first cases in which the question arose was *Raht* v. *Attrill,* 106 N. Y. 423, 60 Am. Rep. 456. In that case a hotel company mortgaged its property to raise funds to build a hotel. Before the completion of the hotel the corporation became insolvent, and upon the application of its principal stockholder a receiver was appointed; and upon an application and showing that the wages of the men who worked on the hotel building were unpaid, and that they threatened, unless paid, to burn the building, the court made an order authorizing the receiver to issue certificates, which were declared to be a lien prior to the trust mortgage, to raise funds to pay the wages due the laborers. A referee reported that, if the money had not been raised to pay the wages due the men, the hotel and other property of the corporation "would, in all probability, have been destroyed or seriously injured." In

the progress of the case the mortgagee denied that the court had authority or power to set aside the prior lien of the mortgage and make the receiver's certificates, issued under the circumstances mentioned, a first and prior lien upon the property. The court delivered an exhaustive opinion, covering every aspect of the question. We quote some of its utterances. The court said: "The lien of the mortgage attaches not only to the land in the condition in which it was at the time of the execution of the mortgage, but as changed or improved by accretions, or by labor expended upon it while the mortgage is in existence. Creditors having debts created for money, labor, or materials used in improving the mortgaged property acquire on that account no legal or equitable claim to displace or subordinate the lien of the mortgage for their protection. . . . The act of the court in taking charge of property through a receiver is attended with certain necessary expenses of its care and custody; and it has become the settled rule that expenses of realization, and also certain expenses which are called 'expenses of preservation,' may be incurred under the order of the court, on the credit of the property, and it follows, from necessity, in order to the effectual administration of the trust assumed by the court, that these expenses should be paid out of the income, or, when necessary, out of the corpus of the property before distribution, or before the court passes over the property to those adjudged to be entitled. . . . It would be difficult to define, by a rule applicable in every case, what are expenses of preservation which may be incurred by a receiver by authority of the court. It was said by James, L. J., in *Re Regent's Canal Iron Works Co.* L. R. 3 Ch. Div. 411, that 'the only costs for the preservation of the property would be such things as have been stated, the repairing of the property, paying rates and taxes which would be necessary to prevent any forfeiture, or putting a person in to take care of the property.' Wherever the true limit is, we think it does not include the expenditure authorized by the order of August 17, and that such an expenditure is, and ought to be, excluded from the definition. There must be something approaching a demonstrable necessity to justify such an infringement of the rights of the mortgagees as was attempted in this case."

After referring to the cases in which the receivers of insolvent railroad corporations have been authorized to issue certificates which were declared to be a first lien on the property of the corporations, the court said: "It cannot be successfully denied that the decisions in these cases vest in the courts a very broad and comprehensive jurisdiction over insolvent railroad corporations and their property. It will be found, on examining these cases, that the jurisdiction asserted by the court therein is largely based upon the public character of railroad corporations; the public interest in their continued and successful operation; the peculiar character and terms of railroad mortgages, and upon other special grounds not applicable to ordinary private corporations. . . . These cases furnish, we think, no authority for upholding the order of August 17, or for subverting the priority of lien which, according to the general rules of law, the bondholders acquired through the trust mortgage on the property of the company. It would be unwise, we think, to extend the power of the court in dealing with property in the hands of receivers to the practical subversion or destruction of vested interests, as would be the case in this instance if the order of August 17 should be sustained. It is best for all that the integrity of contracts should be strictly guarded and maintained and that a rigid, rather than a liberal, construction of the power of the court to subject property in the hands of receivers to charges, to the prejudice of creditors, should be adopted."

We concur in the doctrine expressed in this case. See, to the same effect, *Farmer's Loan & T. Co.* v. *Grape Creek Coal Co.* 50 Fed. Rep. 481, 16 L. R. A. 603; *Laughlin* v. *United States Rolling-Stock Co.* 64 Fed. Rep. 25; *Fidelity Ins. T. & S. D. Co.* v. *Roanoke Iron Co.* 68 Fed. Rep. 623; *Snively* v. *Loomis Coal Co.* 69 Fed. Rep. 204; and *Hooper* v. *Central Trust Co.* (Md.) 29 L. R. A. 262.

The contention of the appellees is that the order made by the circuit court finds sanction in the cases of *Wallace* v. *Loomis*, 97 U. S. 146, 24 L. ed. 895; *Fosdick* v. *Schall*, 99 U. S. 235, 25 L. ed. 339; *Barton* v. *Barbour*, 104 U. S. 126, 26 L. ed. 672; *Miltenberger* v. *Logansport, C. & S. W. R. Co.* 106 U. S. 286, 27 L. ed. 117; *Union Trust Co.* v. *Souther*, 107 U. S. 591, 27 L. ed. 488,—and other later cases of like character, in which receivers of insolvent railroad corporations were authorized to issue receivers' certificates for various purposes, which were made a first and paramount lien on the property of the insolvent railroad company. But the doctrine of these cases has no application to this case. They rest on the peculiar character of railroad property and of a railroad corporation. The distinction between railroad corporations, which are of a quasi public character, and purely private corporations, has been often pointed out, and need not be repeated here. It is enough to say that the supreme court itself has said that the doctrine of the cases cited has only been applied in railroad cases. In *Wood* v. *Guarantee Trust & S. D. Co.* 128 U. S. 416, 32 L. ed. 472, the court said: "The doctrine of *Fosdick* v. *Schall* has never yet been applied in any case except that of a railroad. The case lays great emphasis upon the consideration that a railroad is a peculiar property, of a public nature, and discharging a great public work. There is a broad distinction between such a case and that of a purely private concern. We do not undertake to decide the question here, but only point it out."

The bill in this case is one to foreclose a second mortgage. To such a bill the prior mortgagees are not even necessary parties. *Jerome* v. *McCarter*, 94 U. S. 734, 24 L. ed. 136. The validity and priority of the liens of the mortgages under which the appellants claimed is distinctly admitted in the original and amended bills. The purpose of filing

the amended bill making the prior mortgagees defendants seems to have been to enjoin them from foreclosing their mortgages, and subject the lands covered by their mortgages to a prior lien for money borrowed to carry on the business of the corporation and improve its lands. It prays that the receiver may be empowered to manage and operate the property of the insolvent corporation, which consists in irrigating, improving, and colonizing, or settling, arid lands; and, to the end that the receiver may not be interfered with in the conduct of the business, it prays that the holders of all mortgages prior to the complainants' may be enjoined from foreclosing the same. The amended bill would seem to be founded on the theory that a private corporation conducting any kind of business may, when it becomes insolvent, obtain immunity from the compulsory payment of its debts by procuring a junior mortgagee, or some other creditor, to file a bill alleging the insolvency of the corporation, and praying for the appointment of a receiver with authority to manage and conduct its business. Upon the filing of such a bill, it is supposed to be competent for the court, in addition to appointing a receiver to carry on the business of the corporation, to enjoin its creditors, including the holders of the prior liens on its property, from collecting their debts by due course of law, and to continue such injunction in force so long as the court, in its discretion, sees fit to carry on the business of the insolvent corporation. When a receiver is appointed under such a bill, he usually makes haste, as the receiver did in this case, to assure the court that, if he only had some capital to start on, he could greatly benefit the estate by carrying on the business that bankrupted the corporation. In this case, the company being insolvent, and its property mortgaged for more than it was worth, there was no way of raising money to set the receiver up in business, except by the court giving its obligations, in the form of receiver's certificates, and making them a paramount lien on all the property of the corporation, by displacing the appellants' prior liens thereon. As commonly happens in cases of this character, the receiver, the insolvent corporation, and the junior mortgagee united in urging the court to arm its receiver with the desired powers. They ran no risk in so doing. The corporation was insolvent, and a foreclosure of the prior mortgage would leave the junior mortgagee without any security; so that it had nothing to lose, and everything to gain, in experiments to enhance the value of the mortgaged property, so long as the cost of those experiments was made a prior lien thereon. The effect of the proceeding was to burden the prior mortgagee with the whole cost of the expenditures and experiments made for the betterment of the property on the petition, and for the benefit of the insolvent corporation and the junior mortgagee. The representation is always made, in such cases, that the receiver can carry on the business much more successfully than was done by the insolvent corporation. This commonly proves to be an error. *Rahl* v. *Attrill*, 106 N. Y. 430, 60 Am. Rep. 456. But, if it were true, it would afford no ground of equitable jurisdiction, for it is not a function of a court of equity to carry on the business of private corporations, whether solvent or insolvent. It is obvious that if the holders of the first mortgages and the other creditors of the insolvent corporation were allowed to proceed, in the customary and lawful mode, to collect their debts, it would put an end to the business of the receiver, and they are therefore enjoined from foreclosing their mortgages or collecting their debts. The chancery court thus assumes, in effect, all the powers and jurisdiction of a court of bankruptcy or insolvency, but without any bankrupt or insolvent law to guide or direct it in the administration of the estate. Its only guide is that varying and unknown quantity called "judicial discretion." The powers claimed for a court of equity in such cases are, indeed, much greater than a court of bankruptcy can exercise. There never was a bankrupt court, under any bankrupt act, authorized, at its discretion, to displace or nullify valid liens on the bankrupt's property, or itself to create liens paramount thereto. The rights of the citizen, lawfully acquired by contract, are under the protection of the Constitution of the United States, and, like the absolute rights of the citizen, are not dependent for their existence or continuance upon the discretion of any court whatever. Constitutional rights and obligations are no more dependent on the discretion of the chancellor than they are on the discretion of the legislature. "Rights," says the Supreme Court of the United States; "under our system of law and procedure, do not rest in the discretionary authority of any officer, judicial or otherwise." *Re Parker*, 131 U. S. 221, 33 L. ed. 123. If junior lien creditors of an insolvent private corporation could do what has been attempted in this case, every private corporation operating a sawmill, gristmill, mine, factory, hotel, elevator, irrigating ditches, or carrying on any other business pursuit, would speedily seek the protection of a chancery court, and those courts would soon be conducting the business of all the insolvent private corporations in the country. If it were once settled that a chancery court, through a receiver appointed on the petition of a junior mortgagee, could carry on the business of such insolvent corporations at the risk and expense of those holding the first or prior liens on the property of the corporation, such liens would have little or no value. It is no part of the duty of a court of equity to conduct the business of insolvent private corporations, any more than it is to carry on the business of insolvent natural persons. If it may take under its control the property of an insolvent private corporation, and authorize a receiver to carry on its business, and make the debts incurred by the receiver in so doing paramount liens on all the property of the corporation, and enjoin its creditors in the meantime from collecting their debts, it is not perceived why it may not proceed in the same way with the estate of an insolvent natural person.

Without pursuing the subject further, we refer to what is said, and to the cases cited, in *Scott* v. *Farmers' Loan & T. Co.* 69 Fed. Rep. 17. The order appealed from is void, whether the suit in which it was made is treated as one to foreclose a second mortgage, or as a bill in equity to administer the estate of an insolvent corporation. It was open to the complainant to take and execute a decree foreclosing its second mortgage, and it is good practice in such cases to require this to be done, on pain of dismissing the bill. And if the complainant desired that money be spent, beyond the income of the property, in carrying on the business of the corporation or improving the mortgaged property, it was at liberty to furnish the means for that purpose; but it had no equity to ask that the expense and the hazards of doing so should be saddled on the first mortgagee, and the court had no jurisdiction or power to place it there.

Taxes are the first and paramount lien on all property, and must be paid. When taxes are due on property in the hands of a receiver, and he has no funds to pay them, the court will authorize him to borrow money for that purpose, and make the obligation given for the money so borrowed a prior lien on the property on which the taxes were due. This is not fixing a new or additional lien on the property, or displacing any prior lien. It is simply changing the form of the lien from one for taxes to one for money borrowed to pay the taxes.

The order and decree of the Circuit Court appealed from, which authorizes the receiver to borrow money to "be used and applied by said receiver for the purpose of preserving the property of the Denver Land & Water-Storage Company in his possession and custody, and carrying out and maintaining the contracts of the company, now in existence, under and by which the company has heretofore sold tracts of land to various parties, which said contracts are referred to in the report of said receiver, and for such other purposes as are set out in said petition with reference to the maintenance, preservation, and protection of the property of the company," and which authorizes the receiver to issue his certificates of indebtedness for the money borrowed for these purposes, and makes such certificates of indebtedness the first and paramount lien "upon all the property, rights, and franchises now owned or controlled by the said the Denver Land & Water-Storage Company," is void, in so far as it makes the certificates issued by the receiver a first and paramount lien on the lands embraced in the mortgages of the appellants, and *is therefore reversed.*

MISSISSIPPI SUPREME COURT.

FIDELITY & CASUALTY COMPANY, *Appt.*,
v.
Georgiana JOHNSON.

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

1. An application to compel the attendance of a witness, which will delay the trial, is properly refused where the attempt would be idle because he is without the jurisdiction of the court and beyond the reach of its process.

2. Death by hanging at the hands of a mob is an accident within the meaning of a policy against injuries through "external, violent, and accidental means."

(February 25, 1895.)

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

NOTE.—*What constitutes an accident within the meaning of an accident insurance policy.*

I. *Definitions; general rules.*
II. *Intentional injuries.*
  a. *Self-inflicted.*
  b. *Inflicted by others.*
  c. *Proviso against liability for intentional injuries.*
III. *Accident and disease.*
  a. *Distinguished.*
  b. *Accident caused by disease.*
  c. *Disease caused by accident.*
  d. *Disease aggravated by accident.*
IV. *Other instances.*

I. *Definitions; general rules.*

An accident is the happening of an event without the aid and the design of the person, and which is unforeseen. Paul v. Travelers' Ins. Co. 112 N. Y. 472, 3 L. R. A. 443; North West. Com. Travellers' Asso. v. London Guarantee & Acc. Co. 10 Manitoba L. Rep. 537.

An accident is also defined to be "an event happening without the concurrence of the will of the person by whose agency it was caused. North West. Com. Travellers' Asso. v. London Guarantee & Acc. Co. *supra*.

Any event which takes place without the foresight or expectation of the person acted upon or affected by the event is an accident, within the meaning of an insurance policy. *Ibid.* Richards v. Travelers' Ins. Co. 89 Cal. 170; Ripley v. Railway Pass. Assur. Co. 2 Big. L. & Acc. Ins. Rep. 738, affirmed on other grounds, 83 U. S. 16 Wall. 336, 21 L. ed. 469.

The term "accidental" as used in an insurance policy is to be taken in its ordinary, popular sense, as meaning, "happening by chance, unexpectedly taking place, not according to the usual course of things, or not expected." Dozier v. Fidelity & Casualty Co. 46 Fed. Rep. 446, 13 L. R. A. 114; United States Mut. Acc. Asso. v. Barry, 131 U. S. 100, 33 L. ed. 60, affirming Barry v. United States Mut. Acc. Asso. 23 Fed. Rep. 712.

Some violence, casuality, or *vis major* is necessarily involved in an accident. Sinclair v. Maritime Pass. Assur. Co. 3 El. & El. 478, 30 L. J. Q. B. 77, 7 Jur. N. S. 367, 4 L. T. N. S. 15, 9 Week. Rep. 342.

An accident, within the meaning of an insurance

See also 31 L. R. A. 686; 32 L. R. A. 654; 34 L. R. A. 301; 39 L. R. A. 826; 40 L. R. A. 651; 42 L. R. A. 188; 43 L. R. A. 693.

The insurance was against bodily injuries sustained through external, violent, and accidental means. The premium was to be paid in four monthly instalments by giving an order on the paymaster of the Illinois Central Railroad Company, by which corporation the insured was employed. The insured was hanged by a mob, and this action was brought on the policy.

Further facts appear in the opinion.

Mr. **A. C. McNair** for appellant.

Messrs. **W. B. Mixon** and **J. B. Sternberger** for appellee.

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

There was no error in the court's action in overruling the appellant's application to compel the attendance of appellee's witness Barnes in open court. Section 1756, Code 1892, provides for the procuring the attendance in open court of a witness whose deposition has been taken by the opposing party. The language of the section is as follows: "Depositions taken, certified, and returned in pursuance of law shall be admissible as evidence in the cause, but when the deposition of any witness shall be taken, the party against whom the witness was examined may procure the attendance of such witness at the trial of the cause, and may put the witness on the stand in open court as the witness of the party who procured his deposition, and may cross-examine him as the witness of such party, who shall be entitled to re-examine the witness in open court; but the party procuring such oral examination shall be liable for all the costs thereof." At the time this motion was made, and by the court overruled, Barnes was, and for a long while had been, living in New Orleans, La. He was without the jurisdiction of the court, and beyond the reach of its process. The attempt to procure his attendance then and there would have been futile and vain, and the court properly refused to delay the trial of the case, and to make this idle attempt to do a thing which was plainly impossible. The statute has no reference to such case.

It is contended that payment of dues to the paymaster of the Illinois Central Railroad was not payment to the Casualty Company, and that it was incumbent on appellee to prove payment of dues by the insured to the paymaster, and then to follow this up and prove payment by the paymaster to the Casualty Company. This is a mistaken view. The seventh condition in the indorsement on the policy of insurance is as follows: "(7) In case the assured shall fail to leave in the hands of the paymaster the instalments of premium as agreed in said order [that is, the order of the assured on the paymaster to retain the instalments out of the assured's wages], this policy shall be void." The as-

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policy, is not less an accident because of the negligence of the person injured. Champlin v. Railway Pass. Assur. Co. 6 Lans. 71; Freeman v. Travelers' Ins. Co. 144 Mass. 573.

But injury to the arm of a passenger who inadvertently puts it out of a car window while the train is running at its usual speed was held, in Morel v. Mississippi Valley L. Ins. Co. 4 Bush, 535, to be due to the fault of the passenger himself, and therefore not covered by a policy of insurance against railway accidents.

There is no discussion by the opinion in this case of the doctrine of negligence of the insured as affecting insurance, and the decision is believed to be contrary to the almost unanimous decisions in insurance cases of all kinds.

While the burden of proof is upon the plaintiff in an action upon an accident policy to make out a case, it is generally held that there is a presumption that an unexplained personal injury is accidental. But the authorities on this point have not been here collected.

II. *Intentional injuries.*

a. *Self-inflicted.*

Cutting one's own throat while insane without knowing the result and not intending thereby to kill oneself constitutes "death by external, violent, and accidental means," within the meaning of a policy. Blackstone v. Standard Life & Acc. Ins. Co. 74 Mich. 562, 3 L. R. A. 486.

So, the shooting by which a person takes his own life must be regarded as the result of accident, if it was done when insane, with unconsciousness that the act would take his life. Mut. Ben. L. Ins. Co. v. Daviess, 87 Ky. 541.

Death caused by accidentally taking and drinking poison is from "external, violent, and accidental means." Healey v. Mutual Acc. Asso. 133 Ill. 556, 9 L. R. A. 371, reversing 35 Ill. App. 17; Travelers' Ins. Co. v. Dunlap, 39 Ill. App. 515; Metropolitan Acc. Asso. v. Froiland, Id. 522; Mutual Acc. Asso. v. Tuggle, 39 Ill. App. 509, reversed on another point, 20 L. R. A. 138 Ill. 423; Hill v. Hartford Acc. Ins. Co. 22 Hun, 197; Ingersoll v. Knights of Golden Rule, 47 Fed. Rep. 272.

A mistake in taking an overdose of opium causing death, when opiates had been prescribed to induce sleep, was held to be by other than "external, violent, and accidental means." That such death was accidental is not denied by the court, but it is said that violence is not an ingredient in the act. Bayless v. Travellers' Ins. Co. 14 Blatchf. 143.

In numerous other cases the question of liability for self-inflicted injuries has been considered under a provision excluding liability for death by "suicide," "by one's own hand," "by poison," "by self-inflicted injuries," or similar provisions. So far as such cases turn on the proviso, conceding the accidental character of the injury, they are not here considered.

b. *Inflicted by others.*

The doctrine of LOVELACE v. TRAVELERS' PROT. ASSO. OF AMERICA and FIDELITY & C. CO. v. JOHNSON is sustained by nearly all the decisions.

Death caused by the wrongful act of another person, although intentional, may be accidental so far as the insured is concerned, within the meaning of the policy. Warner v. United States Mut. Acc. Asso. 8 Utah, 431.

An injury not anticipated or expected by the insured, though intentionally inflicted by another, is an accidental injury, within the meaning of an insurance policy. Accident Ins. Co. v. Bennett, 90 Tenn. 256.

So, a blow intentionally struck by another person is accidental within the meaning of an insurance policy against accidents. Richards v. Travelers' Ins. Co. 89 Cal. 170.

So, intentional shooting in an affray is an accident, within the meaning of an insurance policy, so far as concerns the person shot. Supreme Council O. of C. F. v. Garrigus, 104 Ind. 133, 54 Am. Rep. 298.

The same is decided in Robinson v. United States Mut. Acc. Asso. 68 Fed. Rep. 825. In this case it

sured's duty as to the payment was fully performed when he left the instalment in the hands of the paymaster.

The court refused to charge the jury for appellant as asked in its 12th instruction. This instruction reads as follows: "If the jury believes from the evidence in this case that John Johnson came to his death by the hands of a mob, his death was not the result of an accident, and this case is not within the terms and conditions of the policy sued on, and the jury will find for defendant." By the terms of the policy, indemnity against "bodily injuries sustained through external, violent, and accidental means" was secured by the insured. That Johnson came to his death by external and violent means is not denied; but death by hanging at the hands of a mob, it is said by appellant's counsel, is foreign to our preconceived ideas as to what constitutes an accident. According to lexicographers, an accident is a sudden, unforeseen, and unexpected event. It has been held by courts, adopting this or any similar definition, that, where a man was killed by robbers, this was a case of death by accident, in the sense in which that word is used in accident insurance policies. So, too, it has been held that death from a blow struck by one who has attempted to blackmail the assured was an accident covered by an accident insurance policy. In these and all like cases in which death occurs by violent means, external to the man, and against or without intention or concurrence of will on the part of the man, death may probably be called an accident. A learned and laborious writer states the true rule for determining whether injuries are accidental. With great simplicity, clearness, and strength, Biddle says: "An injury may be said objectively to be accidental, though subjectively it is not; and, if it occurs without the agency of the insured, it may logically be termed accidental, though it was brought about designedly by another person." See Biddle on Insurance, and the numerous cases cited by him in his elaborate consideration of this subject in his chapter 10, vol. 2, beginning at page 780. See, too, 2 Bacon, Ben. Soc. chap. 15, and the many cases there cited. There is, upon authority, hardly room for controversy as to the rightfulness of the action of the court below in refusing to charge the jury that death by hanging at the hands of a mob was not an accident.

There is evidence to support the verdict, and we are not authorized to substitute another finding, more in consonance with our views of the testimony, for that of the jury, which rests upon sufficient proof. We find no reversible error, and *the judgment of the trial court is affirmed.*

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was found that the victim was unarmed and had made no menacing gestures at the time he was shot, and the court regarded him as the victim of the nervous apprehension of the person who shot him.

That a person waylaid and killed by robbers meets death by violent and accidental means within the meaning of an insurance policy was declared by Withey, J., in the United States district court for the western district of Michigan in the case of Ripley v. Railway Pass. Assur. Co. 2 Fig. L. & Acc. Ins. Rep. 738, but recovery in the case was denied as the policy covered accidents only "while traveling by public or private conveyance," and the robbery was committed while the insured was walking, after leaving a steamer, to finish his journey, of which about 8 miles remained. It was held that while thus walking he was not traveling by public or private conveyance, and the decision on this question was confirmed in 83 U. S. 16 Wall. 236, 21 L. ed. 469.

The doctrine of the above cases is also recognized, either expressly or by implication, in nearly all the cases found *infra*, II. c. *Proviso against liability for intentional injuries.*

But as an exception to these cases, it was held, on the other hand, in American Acc. Co. v. Carson (Ky.) 30 S. W. Rep. 879, that wounds inflicted upon an officer by a person resisting arrest were not incurred through accidental means. But a further provision in the policy against liability for intentional injuries is another ground of the decision.

c. *Proviso against liability for intentional injuries.*

While injuries intentionally inflicted by an assault constitute an accident so far as the person injured is concerned, if he did not expect or voluntarily bring on the assault, such injuries give no right of action on a policy stipulating against intentional injuries inflicted by the insured or any other person. Phelan v. Travelers' Ins. Co. 38 Mo. App. 640. A brief in this case cites to the same effect an unreported decision of Judge Thayer as circuit judge in St. Louis, Feb. 17, 1887, in the case of Schreck v. Insurance Co.

So in De Graw v. National Acc. Soc. 51 Hun, 142, it was held that wounds inflicted upon a person in a felonious assault are included among the "intentional injuries inflicted by the insured or any other person" which are excluded from the indemnity of an accident policy.

A stipulation against liability for "intentional injuries inflicted by the insured or any other person" will defeat any liability for death caused by the intentional act of another person, and the intention of the insured is immaterial. Travelers' Ins. Co. v. McCarthy, 15 Colo. 351, 11 L. R. A. 297; Fischer v. Travelers' Ins. Co. 77 Cal. 246, 1 L. R. A. 572.

Such is the doctrine established by all the cases. Thus, murder is within a proviso against liability for "intentional injuries inflicted by the insured or any other person. Hutchcraft v. Travelers' Ins. Co. 87 Ky. 391; Travelers' Ins. Co. v. McConkey, 127 U. S. 661, 32 L. ed. 308.

The intentional killing of a deputy sheriff by a resisting prisoner will not sustain a recovery on a policy for accidental injuries which provides that it shall not cover "intentional injuries" inflicted on the insured by any other person. American Acc. Co. v. Carson (Ky.) 30 S. W. Rep. 879.

So, a proviso against liability for death as "the result of design either on the part of the insured or of any other person" does not apply to the shooting of a person by an officer seeking to arrest him, if he did not design to shoot him or know the identity of the man he was shooting. Utter v. Travelers' Ins. Co. 65 Mich. 545.

Death caused by a fight, although conceded to be accidental, is held to be excluded from a policy by a provision against liability for death caused by fighting, even if the slayer was insane, where both parties voluntarily engaged in the fight. Gresham v. Equitable Acc. Ins. Co. 87 Ga. 497, 13 L. R. A. 838.

To similar effect, a person who fell and caught the thumb of his hand on a chair, and thereby injured it, while engaged in a fight, although the other party was the aggressor, cannot recover under an accident policy stipulating against liability for injuries caused directly or indirectly, wholly or

MISSOURI SUPREME COURT (Division 1).

Margaret V. LOVELACE, *Respt.*,
v.
TRAVELERS' PROTECTIVE ASSOCIATION OF AMERICA, *Appt.*

(126 Mo. 104.)

The death of a person who is shot by one whom he is trying to eject by force from a hotel office is a death by accident, and not a risk voluntarily assumed, where he makes the attempt without knowing that the other person is armed.

(December 22, 1894.)

APPEAL by defendant from a judgment of the St. Louis Circuit Court in favor of plaintiff in an action brought to recover the amount alleged to be due on a policy of accident insurance. *Affirmed.*

The facts are stated in the opinion.

Mr. **Henry T. Kent** for appellant.

Mr. **Valle Reyburn,** for respondent:

In construing the benefit certificate issued by defendant, and its constitution and by-laws applicable thereto, a liberal construction favorable to plaintiff should be adopted.

Bacon, Ben. Soc. ¶ 178; Cook, Life Ins. § 18, p. 20; Niblack, Mut. Ben. Soc. ¶¶ 172, 172a; *Healey* v. *Mutual Acci. Asso.* 133 Ill. 556, 9 L. R. A. 371; *Utter* v. *Travelers' Ins. Co.* 65 Mich. 543; *Paul* v. *Travelers' Ins. Co.* 112 N. Y. 472, 3 L. R. A. 443.

The death of Lovelace was by accident, and not from natural causes, in contemplation of law, and within the language of the membership certificate as defined by the provisions of defendant's constitution.

Cook, Life Ins. p. 78, § 49, p. 81, § 50, p. 82, § 51; *Supreme Council O. of C. F.* v. *Garrigus*, 104 Ind. 133, 54 Am. Rep. 298; *Accident Ins. Co.* v. *Bennett*, 90 Tenn. 256; *Richards* v. *Travelers' Ins. Co.* 89 Cal. 170; *Hutchcraft* v. *Travelers' Ins. Co.* 87 Ky. 300; *Ripley* v. *Railway Pass. Assur. Co.* 2 Big. L. & Acc. Ins. Rep. 739; May, Ins. 3d ed, § 520.

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

This is an action upon a benefit certificate, in the nature of an insurance policy, issued to Charles H. Lovelace by the Travelers' Protective Association of America, the defendant, a benevolent association incorporated under

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in part, by fighting. United States Mut. Acc. Asso. v. Millard, 43 Ill. App. 143.

III. *Accident and disease.*

a. *Distinguished.*

Death resulting from malignant pustule caused by contact with putrid animal matter containing bacteria of the kind known as "bacilli anthrax" is death from disease, and not from accidental means, within the meaning of an accident policy. Bacon v. United States Mut. Acc. Asso. 123 N. Y. 304, 9 L. R. A. 617, reversing 44 Hun, 599.

Sunstroke or heat-prostration causing the death of a supervising architect is a disease, and not an accident, within the meaning of an insurance policy. Dozier v. Fidelity & Casualty Co. 46 Fed. Rep. 446, 13 L. R. A. 114.

So, it was held in Sinclair v. Maritime Pass. Assur. Co. 3 El. & El. 478, 30 L. J. Q. B. 77, 7 Jur. N. S. 367, 4 L. T. N. S. 15, 9 Week. Rep. 342, that death caused by sunstroke while a person is engaged in the performance of his regular business does not arise from accident. This was the case of the master of a vessel insured against "accident at sea," and his death occurred on the southwest coast of India. But the question was decided with respect to the character of the disease called "sunstroke," and not with any reference to the fact that it was on shipboard or while at sea.

On conflicting testimony as to whether death was caused by a hurt or by typhoid fever, it was found by the jury in Standard L. & Acc. Ins. Co. v. Thomas, 13 Ky. L. Rep. 563, that it was the result of accident.

See also, on this subject, the cases of Southard v. Railway Pass. Assur. Co.; Clidero v. Scottish Acc. Ins. Co.; Cobb v. Preferred Mut. Acc. Asso.; and McCarthy v. Travelers' Ins. Co., in IV. *infra.*

b. *Accident caused by disease.*

Drowning in a brook while in an epileptic fit is within a policy covering death by "accidental, external, and visible means," although it excludes death "from natural disease or weakness or exhaustion consequent upon disease." Winspear v. Accident Ins. Co. L. R. 6 Q. B. Div. 42, 50 L. J. Q. B. 292, 43 L. T. N. S. 459, 29 Week. Rep. 116, 45 J. P. 110.

But death by drowning, which ensues upon a fall into the water which is caused by disease, although it is an accidental death, will not sustain a cause of action on a policy which stipulates against liability for death caused, either directly or indirectly, by disease. Manufacturers' Acc. Indemnity Co. v. Dorgan, 58 Fed. Rep. 945, 22 L. R. A. 620.

A person who fell without apparent external cause, and struck his forehead violently upon the floor, while his heart and brain are shown to have been much diseased is held to be within the exception of a policy against liability for death or disability caused wholly or in part by bodily infirmities or disease. Sharpe v. Commercial Travelers' Mut. Acc. Asso. 139 Ind. 92.

So, death by falling in a fit in front of a moving train is caused by accident, and covered by an accident policy which insures against accidental injuries, and it is not a case within an exception in the policy against liability for death "arising from fits . . . whether consequent upon such accidental injury or not," whether such death results "directly or jointly with such accidental injury." Lawrence v. Accidental Ins. Co. L. R. 7 Q. B. Div. 216, 50 L. J. Q. B. 522, 45 L. T. N. S. 29, 29 Week. Rep. 802, 45 J. P. 781.

That an injury from a fall due to a temporary and unexpected disorder is caused by violent, external, and accidental means within the meaning of a policy of insurance confining liability to injuries so caused, is also declared in the late case of Meyer v. Fidelity & Casualty Co. (Iowa) 65 N. W. Rep. 323.

c. *Disease caused by accident.*

Death from apoplexy resulting from an effusion of blood caused by a concussion or contusion of the brain produced by a fall is within an accident policy. Hall v. American Masonic Acc. Asso. 86 Wis. 518; National Ben. Asso. v. Grauman, 107 Ind. 288.

Death from blood poisoning as a result of the inoculation of some substance into a wound at the time of an accident causing the wound is the result of such accident, within the meaning of an insurance policy. Martin v. Equitable Acc. Asso. 61 Hun, 467.

Death caused by embolism or thrombus, which

the laws of Missouri. The pleadings need not be recited. No point is raised touching the formal presentation of the case. Counsel for both parties, with commendable frankness and brevity, have put the material facts into compact form to facilitate the solution of the controversy. It was submitted to the trial judge, without a jury, upon an agreed statement and depositions. The only question now urged is a question of law. Mr. Lovelace was a member in good standing in the defendant association when he met with his death, August 8, 1892. The plaintiff is his mother, the beneficiary in his membership certificate. The contract of insurance is contained in the certificate, and in parts of the constitution of the association, which, counsel mutually agree, control the issue of the litigation. In the statement introducing the report of the case, copies of these documents are given. No point is raised touching proofs of loss, notice, or any formal matter. The defendant meets the case broadly on its merits. The decisive question before us is, Was the death of the assured an "accident," within the true meaning of the contract of insurance? The question was presented by an instruction that, under the evidence, plaintiff was not entitled to recover, which the trial court refused to give. On the contrary, the court found for the plaintiff, and gave judgment accordingly for $4,119.30 (which included some interest). Defendant then appealed, after the usual preliminaries.

The following facts show the circumstances of the death of Mr. Lovelace: He was a commercial traveler. On the 5th day of August, 1892, he came as a guest to the hotel in Hazelhurst, Miss. He was a friend of the proprietor, and spoke to some member of the latter's family on the porch of the hotel before entering the office. Another man named Graves was in the office of the hotel, making more or less noise, and cursing at times, when Lovelace arrived, about half past 11 o'clock at night. The only witness besides Graves who saw the killing was one Scott. From his testimony it seems that that night the proprietor, Mr. Brown, was sick, and there was no one in charge of the office. Scott was putting in the chairs from the porch, when Lovelace walked in and said, "Who has got charge of the office to-night?" Scott answered, "No one," and that he was going to bed. Lovelace then said, "It looks like somebody ought to be about it;" and Lovelace then turned to Graves, and said, "Look here, young man, you have got to get out of here, drinking and cursing that way," and Graves replied, "What have you got to do with it?" Lovelace answered, "I am a guest at the hotel, and I think a heap of the family; and I think in the absence of Mr. Brown, it is sorter my duty to see after things." Graves said, "You had better put me out." Lovelace replied, "I will do it in a pair of minutes," and Graves said, with an oath, he would like to see him (Lovelace) put him out. Lovelace said, "I will do that —— quick." Scott then walked between them, and separated them; Lovelace started up stairs, but it seems that he turned again, and went back to the register. Lovelace then said with an oath, "Don't you shake your hand in my face." (Graves had made a gesture which Lovelace interpreted as he stated.) They were then a few feet apart.

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was the direct result of the breaking of an arm by accident, is a death caused by accidental means. Peck v. Equitable Acc. Asso. 52 Hun, 255.

Where an angular draw-bar of several hundred pounds' weight fell upon a sensitive and delicate portion of one's person, bearing him down to the earth and hurting him, although he did not leave work until night, but became seriously ill during the night, it was held, in Owens v. Travelers' Ins. Co. (Marion Co. Super. Ct. Ind.) 12 Ins. L. J. 75, that the accident was the cause of the illness and resulting death.

Death from erysipelas resulting from an accidental injury is within an accident policy covering death of which an accident was the proximate and sole cause, and is not within an exception of death "directly or indirectly in consequence of disease, nor . . . wholly or in part by bodily infirmities or disease." Accident Ins. Co. v. Young, 20 Can. S. C. 280, 12 Can. L. T. 217, affirming on this point, Young v. Accident Ins. Co. Mont. L. Rep. 6 Super. Ct. 3.

But an accident policy does not cover death from erysipelas caused by a wound, where the policy contains a clause excluding liability for death from "rheumatism, gout, hernia, erysipelas, or any other disease of secondary cause arising within the system of the insured before or at the time or following such accidental injury, whether causing such death directly or jointly with such accidental injury." Smith v. Accident Ins. Co. L. R. 5 Exch. 302, 39 L. J. Exch. 211, 22 L. T. N. S. 861, 18 Week. Rep. 1107.

Death from hernia caused by a violent accident in striking against the knob of a door while running is within an accident policy, and not within an exception of death "wholly or partially, directly or indirectly, from . . . hernia." Miner v. Travelers' Ins. Co. 3 Ohio Dec. 289, 2 Ohio N. P. 103.

So, it is held in Travelers' Ins. Co. v. Murray, 16 Colo. 296, that death from hernia resulting from accident is within an accident policy, though it makes an exception of death or disability from hernia.

So, in England death from hernia caused by external violence is within a policy insuring against accidental injuries, and is not within an exception of death from hernia, erysipelas, etc., or "any other disease or cause arising within the system of the insured before or at the time of or following such accidental injury (whether causing death or disability, directly or jointly with such accidental injury)." Fitton v. Accidental Death Ins. Co. 17 C. B. N. S. 122, 34 L. J. C. P. 28.

Pneumonia caused by taking cold while confined to bed as the result of an accident, when this would not have resulted if the person had been in a normal state of health, is regarded as the effect of the accident. Isitt v. Railway Pass. Assur. Co. L. R. 22 Q. B. Div. 504.

An accident causing peritonitis which results in death is within a policy limiting liability to cases where an injury is the proximate cause of death, even if the insured was very liable to a recurrence of the disease by reason of former attacks. Freeman v. Mercantile Mut. Acc. Asso. 156 Mass. 351, 17 L. R. A. 753. See also *note* on "*Proximate Cause of Death within the Meaning of a Life Insurance Policy*," with this case in 17 L. R. A. 753.

But death from typhoid fever supervening upon an accidental injury is not within the protection of a policy which denies liability except where the injury is the proximate and sole cause of death. Whitehouse v. Travelers' Ins. Co. (U. S. C. C. N. H.) 7 Ins. L. J. 23. This case seems hardly reconcilable with the others.

Graves replied, "You put me out. You have not got any more to do with this than I have." Lovelace then declared he would slap Graves, and applied an opprobrious epithet to him. Lovelace then slapped and pushed Graves back until the latter struck the wall or door, which was closed; and, while they were thus together, Graves drew a pistol from his pocket, and shot Lovelace several times, in consequence of which he afterward died. Lovelace weighed 175 pounds. He would have pushed Graves, who was much lighter and smaller, out of the door, if it had been open. Lovelace did not know Graves at the time. The next day he asked what boy that was that shot him.

The foregoing gives a sufficient description of the scene, as defendant claims it occurred. The substance of the contention on that side is that Mr. Lovelace lost his life at the hands of Graves in a fight with the latter, brought on by the language and acts of the former. It was not claimed, however, that Lovelace knew that Graves was armed when the difficulty began. The defendant asserts that "it is not an accidental killing, such as to make the defendant liable, where the death was the result of a rencounter, or where the party killed was the voluntary agent in bringing on the difficulty resulting in his death, or placed himself in such a position as to induce it." On the other hand, the plaintiff insists that the occurrence was an "accident." The contract in this case is to be interpreted so as to give effect to the intention of the parties, as expressed by the language they have used. That intention is, moreover, to be construed as the reasonable and natural one imported by their words. Rutherford, Inst. 2d Am. ed. p. 413. "In case of death by accident," is the language immediately in view. In the same contract we note that the defendant was to pay $100 "in case of his death from natural causes." The form of the contract is very simple. It is free from those limiting terms which, in two of the three cases cited by the defendant, formed the basis of the judgments therein. We are merely called on to say whether his death was by "accident," within the intention of these parties. They did not define the term, further than its use in contradistinction to "death from natural causes" may be considered as having some significance. We hence should give the word its usual, natural, and popular meaning,—there being nothing to indicate a different purpose in its use. In that sense, was Lovelace's death an accident? We find the following definitions of "accident" in the law dictionaries: "Death by accident means death from any unexpected event which happens as by chance, or which does not take place according to the usual course of things." Anderson (1889). "An unusual or unexpected event." Abbott (1879). "An unforeseen event, occurring without the will or design of the person whose mere act causes it; an unexpected, unusual, or undesigned occurrence." Black (1891). "An event which, under the circumstances, is unusual, and unexpected by the person to whom it happens." Bouvier (1883). "A casualty; an act of Providence; an event that takes place without one's foresight or expectation." Burrill (1887). "An extraordinary incident; something not expected."

A pistol wound causing tetanus with great bodily pain and delirium or fever may be found to be the proximate cause of death, where a person insured against accidents, excluding suicide, sane or insane, and intentional injuries, cuts his throat in a period of delirium or uncontrollable frenzy. Travelers' Ins. Co. v. Melick, 65 Fed. Rep. 178, 27 L. R. A. 629.

On the other hand, death by suicide while insane, when the insanity was caused by a prior accidental fall and injury, is too remote to be regarded as caused by accident. Streeter v. Western U. Mut. L. & Acc. Soc. 65 Mich. 199.

So, where one took poison while insane as the result of an accident several months before, it was held that his death was not the proximate result of the accident so as to make the insurer liable on an accident policy. Harris v. Travelers' Ins. Co. Chicago Super. Ct. 1868, cited in 7 Am. L. Rev. 589.

d. Disease aggravated by accident.

An accident policy covering total disability only gives no right of action, where an injury within the terms of the policy caused only partial disability until it was aggravated by a subsequent injury, which was not covered by the policy. Rhodes v. Railway Pass. Ins. Co. 5 Lans. 71.

The death of a person resulting from a fall, when death would not have resulted if he had not had gall-stones, is not covered by a policy which excludes death "accelerated or promoted by any disease or bodily infirmity, or any natural cause arising within the system of the assured, whether accelerated by accident or not." Cawley v. National Employers' Acc. & Gen. Assur. Asso. 1 Cab. & El. 597.

Where a person subject to kidney disease met with an accident when free from any active symptoms of the disease, which returned again about five weeks after the accident, it was held that there was no proof that the accident was the cause of his death resulting from the disease. McKechnie v. Scottish Acc. Ins. Co. 17 Sess. Cas. (S. C.) 6, cited in note in 1 Beach on Insurance, § 222. What seems to be the same case is a little more fully presented in 2 Bacon on Benefit Societies, pp. 982, 990, and cited as Anderson v. Scottish Ins. Co. 27 Scott. L. Rep. 20, where it appears that the policy contained a provision against liability for death arising from natural disease, although accelerated by accident.

IV. Other instances.

An involuntary death by drowning is a death by accidental means. Mallory v. Travelers' Ins. Co. 47 N. Y. 52, 7 Am. Rep. 410; Manufacturers' Acc. Indemnity Co. v. Dorgan, 58 Fed. Rep. 945, 22 L. R. A. 630; Tucker v. Mutual Ben. L. Co. 50 Hun, 50; Knickerbocker Casualty Ins. Co. v. Jordan (Ohio Dist. Ct.) 11 Ins. L. J. 475; Boyd (or McDonald) v. Refuge Assur. Co. 17 Sess. Cas. 955, 27 Scott. L. Rep. 764; Winspear v. Accident Ins. Co. L. R. 6 Q. B. Div. 42, 50 L. J. Q. B. 222, 43 L. T. N. S. 459, 29 Week. Rep. 116, 45 J. P. 110; Trew v. Railway Pass. Assur. Co. 9 Week. Rep. 671, 30 L. J. Exch. 317, 6 Hurlst. & N. 839, 4 L. T. N. S. 853, 7 Jur. N. S. 878, reversing 5 Hurlst. & N. 211, 29 L. J. Exch. 218, 8 Week. Rep. 191; Lancaster v. Washington L. Ins. Co. 62 Mo. 121.

So, drowning while bathing in very shallow water, caused by sudden insensibility from unexplained causes, was held to be within an accident policy. Reynolds v. Accidental Ins. Co. 22 L. T. N. S. 820, 18 Week. Rep. 141.

A wound produced by an accident, which causes one to fall into the water and drown, makes a case of accidental death. Mallory v. Travelers' Ins. Co. *supra*.

Wharton Law Lex. (1883). The larger dictionaries of the English language furnish these, among other, definitions of "accident," *viz.*: "In general, anything that happens or begins to be without design or as an unforeseen effect. . . . Specifically, an undesirable or unfortunate happening; . . . a casualty or mishap." Century (1889). "Literally, a befalling; an event that takes place without one's foresight or expectation; an undesigned, sudden, and unexpected event; . . . often an undesigned and unforeseen occurrence of an afflictive or unfortunate character; a casualty; a mishap; as, to die by an accident." Webster, International (1892). "An event proceeding from an unknown cause, or happening without the design of the agent; an unforeseen event; incident; casualty; chance." Worcester (1888). On several occasions the courts have approved or quoted some of the foregoing definitions in dealing with the subject of accident insurance. *Schneider* v. *Provident L. Ins. Co.* (1869) 24 Wis. 30, 1 Am. Rep. 157; *Providence L. Ins. & Invest. Co.* v. *Martin* (1869) 32 Md. 315; *Ripley* v. *Railway Pass. Assur. Co.* (1870) 2 Big. L. & Acc. Ins. Rep. Cas. 741, Fed. Cas. No. 11,854; *North American L. & Acc. Ins. Co.* v. *Burroughs* (1871) 69 Pa. 51, 8 Am. Rep. 712; *Supreme Council O. of C. F.* v. *Garrigus* (1885) 104 Ind. 140, 54 Am. Rep. 298. In other cases they have freely used the word in decisions, in the broad meaning which those definitions express. *Vincent* v. *Stinehour* (1835) 7 Vt. 62, 29 Am. Rep. 145; *Bostwick* v. *Stiles* (1868) 35 Conn. 195; *Clements* v. *London & N. W. R. Co.* [1894] 2 Q. B. 482. Some special cases on accident policies, different from that now before us, furnish, nevertheless, opinions of learned judges which cast some useful light on the present controversy. In *Sinclair* v. *Maritime Pass. Assur. Co.* (1861) 4 L. T. N. S. 15, a case wherein the court of queen's bench denied a right of recovery for death caused by a sunstroke sustained by the master of a ship in China, holding that such death was not "a personal injury arising from an accident at sea," it was said by Chief Justice Cockburn: "It is difficult to define the term 'accident,' as used in a policy of this nature, so as to arrive with perfect accuracy at the boundary line between death from accident and death from natural causes. At the same time we think we may safely assume that in the term 'accident,' as so used, some violence, casualty, or *vis major*, is necessarily involved." In *Fenwick* v. *Schmalz* (1868) L. R. 3 C. P. 313, Willes, J., held that a snowstorm was not an accident (as mentioned in a charter party), because it is one of the ordinary operations of nature. He said it "is an incident, rather than accident." He then remarked: "An accident is not the same as an occurrence, but is something that happens out of the ordinary course of things." In *Ripley* v. *Railway Pass. Assur. Co.* (1870), already cited, it is said: "In the more popular and common acceptation of the word, 'accident,' if not in its precise meaning, includes any event which takes place without the foresight or expectation of the person acted upon or affected by the event." Death by drowning (*Winspear* v. *Accident Ins. Co.* (1880) L. R. 6 Q. B. Div. 42), and by fright (*McGlinchey* v. *Fidelity*

But a person found dead in a plunge bath in which the water was from 4½ to 5 feet deep, and about 8 or 10 feet square, and at a temperature of more than 100 degrees, was held, in Tennant v. Travelers' Ins. Co. 31 Fed. Rep. 322, to have died from other causes than "external, violent, and accidental means," where he was a heavy drinker of intoxicating liquors, and the evidence showed that such a bath would be likely to bring on an epileptic fit, as he was subject to such fits. Whether this could be called an accident or not is not decided, as under the policy death must be caused by means which were also external and violent.

The rupture of the tympanum of an ear by the external violence of the water in diving is an accidental injury resulting from violent and external causes. Rodey v. Travelers' Ins. Co. 3 N. M. 316.

The death of a person by freezing on a prairie in consequence of the accidental breaking down of his vehicle, together with the sudden and unexpected change of the weather to great severity, is a death by external, violent, and accidental means. North West. Com. Travellers' Asso. v. London Guarantee & Acc. Co. 10 Manitoba L. Rep. 537.

Death caused by choking on food which, in an attempt to swallow it, accidentally passes into the windpipe, is due to "external, violent, and accidental means." American Acc. Co. v. Reigart, 94 Ky. 547, 21 L. R. A. 651.

Death from asphyxia occasioned by deadly gas in a shallow well, into which one descends to fix a pump, is caused by "external, violent, and accidental means." Pickett v. Pacific Mut. L. Ins. Co. 144 Pa. 79, 13 L. R. A. 661.

Death from the inhalation of illuminating gas while asleep, without any intention to commit suicide, is due to "external, violent, and accidental means." Paul v. Travelers' Ins. Co. 112 N. Y. 472, 3 L. R. A. 443, affirming 45 Hun, 313.

Cases as to the effect of provisos against liability for inhaling gas, taking poison, etc., are not included here.

A rupture on the loin caused by jumping in great haste from a railroad car at a station, going to another depot and coming back in haste, running part of the way, is not caused by accident within the meaning of an insurance policy, when there was no stumbling, slipping, or falling or anything accidental in the movements of the person. Southard v. Railway Pass. Assur. Co. 34 Conn. 574. (Decision by Judge Shipman of the U. S. Dist. Ct. as arbitrator.)

Where a person on rising from bed and while in the act of putting on his stockings felt something give way inside, and died shortly afterwards, when examination showed that his colon had fallen out of place and become folded causing great distention and resulting pressure upon the heart, stopping its action, it was held that his death was not caused by "violent, accidental, external, and visible means," and within the opinion of Lord Adam the death was not accidental within the meaning of the policy. Clidero v. Scottish Acc. Ins. Co. 29 Scott. L. Rep. 303. (Quoted at some length in Beach on Insurance, § 248.)

Injury to the retina of one's eye by rupture caused by carrying heavy baggage on a warm day is not effected by "external, violent, and accidental means," where there was nothing unusual in the transaction except the result to the eye. Cobb v. Preferred Mut. Acc. Asso. (Ga.) 22 S. E. Rep. 976.

Whether the rupture of a blood vessel while exercising with Indian clubs was due to "external, violent, and accidental means" was held, in McCarthy v. Travelers' Ins. Co. 8 Biss. 362, to depend on the question whether or not any unforeseen, accidental, or involuntary movement of the body, or any unforeseen or unexpected circumstances, in-

& C. Co. (1888) 80 Me. 251) have been held to be deaths by accident under policies of much narrower scope than that now before the court.

We have quoted these various cases, definitions, and comments, not with a view to approve or criticize any one of them, but to indicate the very wide range of meaning borne by the word "accident," when unaccompanied with any limitation in the context. We shall not attempt to furnish any general definition of an accident in the particular case before us, further than the conclusion we shall announce may imply. The learned counsel for defendant concedes the force of the argument deduced from the ordinary meanings of the word, but insists that they cannot apply where the insured has voluntarily assumed the risk which proves to be fatal,—in this instance by entering into the altercation which led to his death. But there is one weak point in that contention. There is no proof whatever that the insured had any cause or reasonable ground to anticipate that he would be shot or killed when he undertook to attempt to eject Graves from the hotel. There is no proof that Graves exhibited a weapon, or made any remarks indicating a purpose to shoot, before the affray. The mere fact that Lovelace engaged in or brought on a fight in the manner described did not of itself indicate that he sought death, or had reason to expect it as a consequence of his action. In *Schneider* v. *Provident L. Ins. Co.* (1869) 24 Wis. 28, 1 Am. Rep. 157, a party was allowed to recover upon an accident policy, though it appeared he had been negligent in attempting to board a moving train of cars. The court said: "There is nothing in the definition of the word 'accident' that excludes the negligence of the injured party as one of the elements contributing to produce the result. . . . An accident may happen from an unknown cause; but it is not essential that the cause should be unknown. It may be an unusual result of a known cause, and therefore unexpected by the party. And such was the case here, conceding that the negligence of the deceased was the cause of the accident." Page 30. That decision was approvingly followed in the case from the 32 Md. report already cited. In *Keene* v. *New England Mut. Acc. Asso.* (1894) 161 Mass. 149, a recovery on an accident policy was sustained where the assured was run down while passing over a street crossing of a railway track in front of a moving freight car, notwithstanding the policy required the assured to "use all due diligence for personal safety." In *Cornish* v. *Accident Ins. Co.* (1889) L. R. 23 Q. B. Div. 453, it appeared that the insured met his death by attempting, in broad daylight, to cross the main line of a railway in front of a coming train, which struck and killed him. The English court of appeal held that there could be no recovery upon a policy which excepted, from the risks insured against, accidents happening by "exposure of the insured to obvious risk of injury." But Lindley, L. J. (who delivered the leading opinion) placed the ruling upon the language just quoted, remarking, in so doing: "We accept the view of the jury that this accident may be called an 'ordinary misadventure,' but the question is whether the policy covers it." He thus characterized the mishap as an "accident," notwithstanding the gross negligence of the insured. In *Travelers' Ins. Co.* v. *McConkey* (1888) 127 U. S. 661, 32 L. ed. 308, where the insured had been killed by a shot (whether fired by himself or by another was in issue), the Supreme Court of the United States

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terfered with the exercise, thereby producing the result. If the bursting of the blood vessel resulted merely from the exercise in the ordinary way it was held to be the result of disease and not of accident.

But death from an accidental strain while pitching hay or from an accidental blow from a pitchfork handle is within an accident policy. North American L. & Acc. Ins. Co. v. Burroughs, 69 Pa. 43, 8 Am. Rep. 212.

Dislocation of the cartilage of the knee in stooping is within an accident insurance policy against any bodily injury caused by violent, accidental, external, and visible means, and excepting injuries arising from natural disease, or weakness, or exhaustion consequent upon disease, when the insured before the accident has not suffered from weakness of the knee or knee joint. Hamlyn v. Crown Acc. Ins. Co. [1893] 1 Q. B. 750.

The death of a person which occurred about an hour after his horse had been frightened and ran, and was brought under control after running a considerable distance, is regarded as due to "external, violent, and accidental means," whether it resulted from fright or from the exertion. McGlinchey v. Fidelity & Casualty Co. 80 Me. 251.

Injury to the spine, caused by lifting a heavy burden in the course of business, is within the provisions of a policy of insurance against injury arising from accident, if occasioned by any external or material cause. Martin v. Travelers' Ins. Co. 1 Fost. & F. 605.

A person killed in jumping from a car from which other persons jumped safely at the same time may be held by the jury to have met death by accident, as an injury results through accidental means if there is anything unforeseen, unexpected, or unusual in the act which precedes it. United States Mut. Acc. Asso. v. Barry, 131 U. S. 100, 33 L. ed. 60, affirming Barry v. United States Mut. Acc. Asso. 23 Fed. Rep. 712.

Injury while getting from the platform upon moving cars was also held accidental in Schneider v. Provident L. Ins. Co. 24 Wis. 28, 1 Am. Rep. 157.

The death of a yard switchman or a yard brakeman while handling broken cars in the performance of his service is an accident. National Ben. Asso. v. Jackson, 114 Ill. 533.

Stepping from a car into a hole in a bridge which had not been observed was held to be an accident within the meaning of an insurance policy, in Burkhard v. Travelers' Ins. Co. 102 Pa. 262, 48 Am. Rep. 205.

A death caused by stumbling and falling against an engine when running to get the mail from a passing train is from "external, violent, and accidental means." Equitable Acc. Ins. Co. v. Osborn, 90 Ala. 201, 13 L. R. A. 267.

Falling without foresight or expectation is accidental within the meaning of an insurance policy. Providence L. Ins. & Invest. Co. v. Martin, 32 Md. 310.

Death is accidental when it results from a fall from a window. Travelers' Ins. Co. v. Harvey, 82 Va. 949.

Many other cases similar to these have arisen in which injuries have been held accidental, and in which the accidental character of the injuries was too plain for dispute, and was not involved in the questions contested. R. A. R.

30 L. R. A.

based a similar rule, denying a recovery, on the express terms of the policy, excepting from its scope "intentional injuries inflicted by the insured or any other person." A like ruling was made in construing the same language of an accident policy in this state. *Phelan* v. *Travelers' Ins. Co.* (1890) 38 Mo. App. 640. In other cases it has been held that death produced by the direct violence of a third party is none the less an accident, as regards the insured, because the injury was intentionally inflicted by the third party. *Hutchcraft* v. *Travelers' Ins. Co.* (1888) 87 Ky. 300; *Richards* v. *Travelers' Ins. Co.* (1891) 89 Cal. 170. But in the former case a recovery was denied because of a clause in the policy similar to that quoted above from the *McConkey Case*. It has been declared, with reference to fire insurance, that even gross negligence of the insured will not defeat a recovery in the absence of stipulations having such an effect. *Shaw* v. *Robberds* (1837) 6 Ad. & El. 75; *St. Louis Ins. Co.* v. *Glasgow* (1844) 8 Mo. 713, 41 Am. Dec. 661; *Johnson* v. *Berkshire Mut. F. Ins. Co.* (1862) 4 Allen, 388; *Enterprise Ins. Co.* v. *Parisot* (1878) 35 Ohio St. 35, 35 Am. Rep. 389. In *Supreme Council O. of C. F.* v. *Garrigus* (1885) 104 Ind. 133, 54 Am. Rep. 298, it was ruled that where the insured engaged in a fight without fault on his part, in consequence of which he received injuries resulting in his death, the latter was an "accident," within the meaning of a benefit certificate. In view of the definitions and legal precedents above quoted and cited, and of the very general terms of the policy under consideration, we conclude that its reasonable and natural meaning includes within the term "accident" such a death as Lovelace met. Whether he acted lawfully as a guest of the hotel, during the absence and illness of the proprietor, in attempting to remove Graves from the hotel office by force, we think needless to investigate. It may be assumed that by his course of conduct he voluntarily assumed the risks of a fight; but there is nothing in the circumstances to show that he voluntarily assumed the risk of death. We consider his killing an "accident," in the popular and ordinary sense in which that word is generally used. It certainly was an accident so far as he was concerned. We do not doubt that such should be the construction given to the word in the contract in suit, and that, in so concluding, we give effect to the true purpose and intent of the parties to the document. The learned trial judge reached the same conclusion.

The judgment is affirmed.

Black, Ch. J., and **Brace** and **Macfarlane**, JJ., concur.

OHIO SUPREME COURT.

Philander W. H. TUTTLE *et al.*, *Plffs. in Err.*,
v.
Henry BURGETT, Admr., etc., of William Burgett, Deceased.

(53 Ohio St. 498.)

*1. **Where no place of performance of an obligation is agreed upon** by the parties, the obligee, as a general rule, may designate any reasonable place of performance.

2. **Under a mortgage conditioned that the mortgagor shall furnish the mortgagee and his wife, during life, comfortable rooms,** food, clothing, medicine, and medical attendance in sickness, and provide them with the necessaries and comforts suitable for persons of their age and situation in life, no place being specified where such support shall be furnished them, they are not obliged to receive it at the house of the mortgagor, but are entitled to have it furnished at such reasonable place or places as they may select.

3. **When, with knowledge of such selection, the mortgagor fails to furnish the support** required by his contract, and declares his intention not to do so, or pay for any support which may be furnished by others, the condition of the mortgage is broken, and an action of foreclosure may be maintained for the reasonable value of the support provided by others, though it was provided without the request of the mortgagor, or demand upon him to furnish the support required.

4. **The oral declarations of a party to a written instrument,** made before or at the time of its execution, of an intention or purpose not therein expressed, or different from that to be derived from its terms, are not within the rule which permits extrinsic evidence of the situation of the parties and of the surrounding circumstances when the instrument was executed, and are inadmissible in an action on the instrument where its reformation is not sought.

5. **A grantee who has agreed to support his grantor during life,** in consideration of the conveyance of the property, will not be discharged from his obligation by the bringing of a suit to set aside the conveyance and recover back the property, where the suit has been abandoned and dismissed without trial, and the grantee has not been disturbed in the possession or enjoyment of the property.

(November 26, 1895.)

ERROR to the Circuit Court for Ashtabula County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to foreclose a mortgage. *Affirmed.*

Statement by **Williams, J.**:

William Burgett, who was the owner of a valuable farm in Ashtabula county, and of a considerable amount of personal property, together estimated to be worth about

*Headnotes by the COURT.

NOTE.—In connection with the above case as to the construction and effect of a contract for support of persons, see also Vancleave v. Clark (Ind.) 3 L. R. A. 519; McArthur v. Gordan (N. Y.) 12 L. R. A. 667.

$10,000, being of advanced years, and his wife an invalid, conveyed his farm, his wife joining in the conveyance, and transferred his personal property, to his son-in-law, Philander W. H. Tuttle, upon the consideration that he would support Burgett and his wife during life, furnish them with comfortable rooms, food, clothing, medicine, and medical attendance in sickness, provide for each of them the necessaries and comforts suitable for persons of their situation in life, and at their death place a marble slab properly inscribed at the grave of each, and also pay to William Burgett $50 a year so long as he should live.

To secure the performance of his obligation, Tuttle and his wife united in the execution of a mortgage of the farm back to Burgett. The condition of the mortgage, which, it is admitted by the pleadings, contains the entire contract relating to the support of Burgett and wife, is as follows:

"The condition of this deed is such that, whereas the said P. W. H. Tuttle has this day received the above-described lands together with an amount of personal property this day delivered, in consideration of supporting said William Burgett and Mary Burgett, during the term of their natural lives. To furnish each of them with comfortable rooms, food, clothing, medicine, and medical attendance in sickness, and at their death to place at the grave of each of them a marble slab, properly inscribed. To pay to William Burgett $50 each year, and to carefully provide for each of them the necessaries and comforts of life, suitable for persons of their age and situation in life.

"Now, if the said P. W. H. Tuttle, his heirs, assigns, executors, or administrators, shall well and truly perform all covenants and agreements, according to the tenor thereof, to the said William Burgett and Mary Burgett, the above deed shall be void; otherwise the same shall remain in full force and virtue in law."

The deed and mortgage were executed on the 4th day of April, 1884, and soon thereafter Burgett and his wife left the farm where they had lived for many years and went to reside with Tuttle in the village of Geneva some miles distant from the farm, and remained there receiving their support from Tuttle and his wife until February following, when they became dissatisfied and went to the home of their son Henry, which was near the farm, and after staying there a short time went to the home of their son-in-law, Woodruff, and remained there until the date of their death, which occurred on the 28th day of January, 1886, both dying on the same day. While Burgett and his wife were at Henry's, he took care of them, providing everything necessary for their comfortable support, under an agreement with his father that he should be paid a reasonable compensation therefor; and they were in like manner provided for by Woodruff while they remained at his house, under a like agreement. Administration having been granted on the estate of William Burgett, Henry and Woodruff presented their claims for the support furnished by each respectively, which were allowed, and suit was brought in the court of common pleas of Ashtabula county, to foreclose the mortgage for the amount due on them.

When Burgett and his wife were leaving Tuttle's house, he forbade their going, and declared, in substance, in the presence of Henry, that he would not provide support for them while they were away, nor pay for any furnished to them, and afterward gave that information to Woodruff. Tuttle alleges in his answer that he was always ready and willing to furnish and provide at his home in Geneva everything he was required to do by the condition of the mortgage, but was prevented by the absence of Burgett and his wife.

Soon after leaving Tuttle's, Burgett brought a suit to set aside the deed and mortgage and recover back the farm and personal property, charging that the conveyance and transfer were obtained by fraud and undue influence while he and his wife were incapacitated by age, sickness, and their enfeebled condition to transact business.

These charges were denied by Tuttle, and after Burgett's death the action was dismissed without trial. The bringing of that action was set up as a defense in the foreclosure suit, the claim being that it constituted an abandonment and repudiation of the contract and released Tuttle from the further performance of the condition of the mortgage. Other issues were made which it is not necessary to notice. After trial and judgment in the common pleas court the cause was taken on appeal to the circuit court, where all the issues were found for the plaintiff, and a decree of foreclosure rendered, from which error is prosecuted here. It appears from the bill of exceptions that the court, on objection made by the plaintiff's counsel, excluded evidence offered by the defendant of verbal declarations which it was claimed Burgett had made while the negotiations between him and Tuttle were in progress, to the effect that if the arrangement was consummated Burgett expected he and his wife would live at Tuttle's, in Geneva, or that they were to live there. Any further facts necessary to an understanding of the questions raised in the case will be stated in the opinion.

Mr. **F. R. Smith,** with *Messrs.* **Burrows & Jerome,** for plaintiffs in error:

Tuttle was not bound to support the mortgagees elsewhere than at his own home.

Parker v. *Parker*, 126 Mass. 433; *Currier* v. *Currier*, 2 N. H. 75.

In *Jenkins* v. *Stetson*, 9 Allen, 133, the court says: "By ceasing to receive support" the obligee intended "to get rid of the performance of her part of this mutual obligation." And such conduct on her part was held to be a waiver of her support, and estopped her from complaining that the support was not furnished.

Messrs. **Howland & Starkey,** for defendant in error:

The contract was silent as to the place of performance, the mortgagee therefore had the right to choose the place, putting the mortgagor to no needless expense.

Tope v. *Tope*, 18 Ohio, 520; *Wilder* v. *Whitte-*

more, 15 Mass. 262; *Hubbard* v. *Hubbard*, 12 Allen, 586; *Thayer* v. *Richards*, 19 Pick. 398; *Lucas* v. *Nichols*, 5 Gray, 310; *Parker* v. *Parker*, 126 Mass. 437; *McArthur* v. *Gordon*, 126 N. Y. 597, 12 L. R. A. 667; *Rowell* v. *Jewett*, 69 Me. 293; *Borst* v. *Crommie*, 19 Hun, 209; *Loomis* v. *Loomis*, 35 Barb. 624; 1 McVey, Dig. p. 133, ¶ 162.

The condition in this mortgage was the promise of Tuttle. If he wished to limit his liability he should have used proper words. If he desired to limit the performance of his promise to a certain place he should have named the place in the contract.

State v. *Worthington*, 7 Ohio, pt. 1, p. 171.

After Tuttle had broken the condition of the mortgage and was refusing to furnish support Burgett had a right to treat the contract as broken and bring his action for such relief as seemed to him then most suitable.

Hochster v. *De la Tour*, 2 El. & Bl. 678; *Frost* v. *Knight*, L. R. 7 Exch. 111; *Cort* v. *Ambergate, N. & B. & E. J. R. Co.* 17 Q. B. 127.

Tuttle's declaration and conduct made a demand for support unnecessary and constituted a breach in law. A demand for support would have been useless.

Pettee v. *Case*, 2 Allen, 546; *Barnes* v. *Barnes*, 9 Mackey, 479.

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

In behalf of the plaintiffs in error, it is claimed (1), that under the agreement of the parties as expressed in the condition of the mortgage, Burgett and his wife were obliged to receive their maintenance and support at the residence of Tuttle, and therefore the failure or refusal to furnish it elsewhere constituted no breach of the condition; or (2), if such is not the legal effect of the condition as written, it was competent to prove by the verbal declarations of Burgett, made contemporaneously with the execution of the contract, or prior thereto, that the support and maintenance were to be provided at the house of the mortgagor; and (3), that the commencement of the suit by Burgett to set aside the conveyance was an abandonment and repudiation of the contract by him, which excused further performance of it by Tuttle.

1. The agreement as expressed in the mortgage contains no stipulation which makes it a condition to the right of the mortgagee and his wife to the support which Tuttle thereby agreed to furnish, that it be accepted at the home of the latter, or requires that it be either furnished or received at that, or any other specified place. It is silent on that subject, and creates a general obligation on the part of Tuttle to supply Burgett and wife with whatever he agreed to furnish them, without limitation as to the place where performance of the agreement should be made, or might be required. The obligation is expressed in the language of the promisor who executed the mortgage, and according to a well-established rule, should be taken most strongly against him, if there be doubt or ambiguity in its terms. If it were the intention of the parties that performance of the obligation could be required only at a particular place, that intention could easily have been expressed, as could any other condition qualifying the rights of the promisee. As a general rule, where no place is mentioned for the performance of an obligation, it is to be performed to the obligee in person who may designate any reasonable place of performance; and that rule has been held applicable, in many cases, to contracts of the kind we have under consideration. *Wilder* v. *Whittemore*, 15 Mass. 262; *Crocker* v. *Crocker*, 11 Pick. 252; *Thayer* v. *Richards*, 19 Pick. 398; *Pettee* v. *Case*, 2 Allen, 546; *Hubbard* v. *Hubbard*, 12 Allen, 586; *McArthur* v. *Gordon*, 126 N. Y. 597, 12 L. R. A. 667; *Stillwell* v. *Pease*, 4 N. J. Eq. 74; *Rowell* v. *Jewett*, 69 Me. 293.

In some of the cases cited the question arose upon the construction of wills requiring devisees or legatees to provide support for persons named; while in others it was made on mortgages with conditions similar to that of the mortgage in question; and the rule as stated is recognized in all of them. In the case of *Wilder* v. *Whittemore* it was held that, "upon a mortgage conditioned that the mortgagor shall maintain and support the mortgagee during life, the mortgagee has the right to support wherever he shall choose to reside, so that needless expense be not created to the mortgagor." And in *Pettee* v. *Case*, the court held that the condition of a mortgage, not differing in any essential feature from the one before us, was broken when the mortgagor after knowledge that the persons entitled to support are at a reasonable place, where they intend to receive their support, declares to the person in whose family they are that he will not pay for their support at that place, and does not pay therefor, though no special demand is made upon him for the support.

It is said, in the opinion of the court, that under such a contract the mortgagor "was bound to support the mortgagees, without their making a demand for support. And they were not bound to receive support at his house, but had a right to be supported wherever they might choose to live, provided they cause no needless expense."

We concur in that interpretation, and find nothing in the obligation of the plaintiff in error which requires a different construction, or gives it any different effect. Contracts of this nature, entered into by persons of declining years when their capacity for business has in some measure become impaired, with children or relatives who receive not only a full consideration for their engagement, but usually something in way of bounty also, should receive a liberal construction in favor of such elderly people, and the courts have enforced a corresponding performance in their behalf. A comfortable support and maintenance, which Tuttle's agreement bound him to furnish, must have been understood by the parties to be such as would comfortably situate Burgett and his wife, as well as supply them with adequate food and clothing, and other necessaries of life; and to afford them that comfort they should be allowed reasonable liberty in the

choice of their situation and surroundings, there being no express limitation in that respect contained in the contract. To deny them that privilege, and compel them to remain under the control of the party whose pecuniary interest is to be relieved of the burden at the earliest moment, would place them in a condition of dependence scarcely less in degree than that of persons under guardianship, and occasion a constant dissatisfaction and discomfort which would defeat an important purpose, and the real spirit of the contract, though there should be the strictest observance of its letter in the supplies provided for them; and that restraint should not be imposed unless it is made to appear with reasonable certainty that such was the agreement of the parties.

The cases of *Parker* v. *Parker*, 126 Mass. 433, and *Currier* v. *Currier*, 2 N. H. 75, are cited in support of the construction claimed by the plaintiff in error. In the former of these cases, in giving construction to a will by which the testator gave to his widow during life the use of all his property, including the homestead farm where he and his family had always lived, and to his unmarried daughter a small sum of money, "a home and maintenance during the time she remained unmarried," it was held to be the intention of the testator that the daughter should have "the home and maintenance" given her, on the farm where the family lived. It was evidently expected by the testator that the widow would remain on the homestead devised to her, and that the daughter, while she remained unmarried, should live at home with her mother. In giving that construction to the will, the court said: "Where a testator provides in his will that his wife, child, or other person shall be supported and maintained by his executor, or where the condition of a deed or mortgage recites that the grantee or mortgagor shall support the grantor or mortgagee, and the instrument does not point out that the support shall be provided in a particular place, then the party so entitled may have the support where, under reasonable limitations, he may choose to reside. But if the instrument points out the place where the support shall be furnished, it is not the right of the party entitled to receive it to demand that it shall be furnished elsewhere. Each case must be decided on its own facts, looking to the instrument and the surrounding circumstances." In the *Currier Case*, a son-in-law, in consideration of a conveyance of land made to him by his father-in-law, agreed to pay the latter's debts and provide necessary support for him and his wife; or, on failure to do so, to lease to them for life the farm where he resided; which latter clause, it was held, sufficiently indicated the home of the son-in-law as the place of performance of his agreement. The court says that where, in contracts of that description, the parents retain a life lease or mortgage interest in the farm they occupied before, "the place of performance would then seem to be the house before occupied by the parents." What would be the proper interpretation of a mortgage, securing an engagement to support the mortgagee, taken upon lands granted to the mortgagor as the consideration of his promise, was not before the court, and the statement of what seemed to that court would be the proper construction of such an instrument concerning the place of performance is against the weight of authority, as will be seen by reference to the cases we have hereinbefore cited, which, in our opinion, establish the better rule. But conceding the force of the circumstances mentioned as indicating the home occupied by the parents, or that of the testator, as the place for the performance of such an engagement, they are without force as tending to fix any other place where the support shall be furnished, and therefore neither of the cases relied on by the plaintiff in error sustain his contention that his home in Geneva, remote from the Burgett homestead, was the place where he should perform his contract; and, as neither of the parties claim the homestead was such place of performance, the cases lose their applicability, and leave the obligation of Tuttle in that class where no particular place of performance is specified.

2. The record shows that on the trial in the circuit court, counsel for the plaintiff in error asked of one of his witnesses what Burgett said, prior to the execution of the deed and mortgage, "as to where he was to live if this contract was entered into." An objection to the question was sustained, and an exception taken, counsel stating that he expected "the answer would be that at the time the contract was made it was understood between them, and Mr. Burgett said that he expected, if the contract was made, to live at Mr. Tuttle's, in Geneva; that he was going to live with Mr. Tuttle; that one inducement in making the contract was to get off the farm." The exclusion of that testimony is assigned for error, and it is contended that it was admissible under the rule which permits proof of the circumstances surrounding the parties when a written contract is entered into.

There can be no doubt that in giving construction to a written instrument regard may be had to the situation of the parties, and the surrounding circumstances; and these may be shown by parol, to enable the court called on to interpret the instrument the better to understand its terms, and arrive at the intention of the parties when not clearly expressed. But we do not understand that the oral declarations of a party, made prior to or at the time of the execution of the instrument, of an intention or purpose not therein expressed, or different from that properly derived from its terms, are within the rule; and unless the evidence excluded by the court below had that effect, it was wholly immaterial and its exclusion of no legal significance. It was competent to show, as was done at the trial, that after the deed and mortgage were delivered, Burgett and wife went to live at the home of Tuttle; but, since by the terms of the mortgage they were entitled to receive their support and maintenance at such reasonable place as they might select, the fact that they accepted it for a time at Tuttle's house was not inconsistent

with their claim that they had a right to receive it elsewhere; nor did it establish a practical construction of the mortgage at variance with that claimed by the plaintiff in the action.

3. The claim most earnestly pressed by the plaintiff in error is, that the suit of Burgett to set aside his conveyance and recover back the property transferred to Tuttle relieved the latter from the further performance of his agreement. It may be accepted as a general principle, that where one party refuses performance of his part of an executory agreement, or denies his obligation to perform, the other party cannot be compelled to perform his part of the contract; but the application of that principle here is not so apparent. Burgett had fully performed his part of the contract made with Tuttle, by the conveyance of the farm and delivery of the personal property in accordance with its terms. Nothing remained for him to do; but the contract was executory on the part of Tuttle only. Having concluded he had been overreached in the transaction, Burgett sued to rescind and recover what he had parted with under it. Tuttle might have accepted the offer of rescission thus made, which, if followed with a reconveyance and surrender of the property, or by a decree restoring the property, would undoubtedly have discharged him from all further liability. But he resisted the suit which was abandoned and dismissed without trial, leaving the parties in the same situation as if it had never been commenced; and if the claim he now makes were sustained, he would be enabled to retain both the property and the consideration he agreed to pay for it. That, we think he cannot be allowed to do. While he retained the property his obligation to furnish a support for Burgett and his wife was a continuing one so long as they lived, which could only be discharged by performance, or voluntary relinquishment. The trial court found there had been a failure to perform; and the suit afforded satisfactory evidence of a purpose on the part of Burgett to secure the whole of the property for his use, instead of so much only as could be enforced under the mortgage, from which an intention to forego the benefits of the mortgage, if he failed to establish his right to the restoration of the property, could not reasonably be inferred. The case of *Jenkins* v. *Stetson*, 9 Allen, 128, on which reliance is placed by plaintiff in error, rests upon the general principle we have stated. There a suit was brought on a bond by which the plaintiff agreed to support a widow and her two daughters during their natural lives, in consideration of which the daughters agreed to leave to him and his heirs all of their personal property, including what they should receive from their father's estate. The mother and one of her daughters having died, the surviving daughter took up her residence with a brother-in-law, and afterward left her personal estate, by will, to her sisters. There was no evidence that the plaintiff had been requested to furnish any support to the daughter after she went to her brother-in-law's house, but she was requested by the plaintiff to return to his house and receive her support there. It was held that, under the circumstances of that case, a failure by the plaintiff to tender the support at the brother-in-law's house was not a breach of the bond. But it was not held that the daughter was not entitled to receive it there if she had so requested, nor that a failure to so furnish after demand made would not have been a breach. The proposition declared is: "It is not sufficient proof of a breach of a bond to support another during his natural life, to show that he left the house of the person bound to furnish such support and resided elsewhere for several years, without at any time requesting him to fulfil his agreement or in any way exhibiting to him an intention or desire to hold him to the performance thereof." It will be observed that the agreement under which the party was entitled to support in that case, was executory on her part, she having agreed to leave all her personal property to the plaintiff as the consideration for his promise to support her; and that she did not perform her part of the agreement, but left her property to other persons. That feature of the case, the court says, tended "very strongly to show that it was her intention, without the knowledge or assent of the plaintiff, to avoid the obligation of the contract into which she had entered with him, and, by ceasing to receive support at his hands, to get rid of the performance of her part of this mutual obligation. Under such circumstances, a tender of performance by the plaintiff was unnecessary, and no inference of a failure or omission by the plaintiff to fulfil the agreement would have been warranted."

We see nothing in that case which conflicts with the conclusion we have reached in this one. Here the contract, as we have seen, entitled Burgett and his wife to have performance of it by Tuttle at such reasonable place as they should select, and he having declared his intention not to furnish them support while absent from his house, no demand upon him was necessary to an action on the mortgage for the reasonable value of their support by others while so absent.

Judgment affirmed.

STATE of Ohio, *ex rel.* John C. SCHWARTZ, *Plff. in Err.*,
v.
Howard FERRIS.

(53 Ohio St. 1.)

*1. **Funds raised by the taxation of franchises,** rights, and privileges may be ap-

*Headnotes by the COURT.

NOTE.—For recent cases on constitutionality of statutes providing for inheritance taxes, see State v. Alston (Tenn.) 28 L. R. A. 178; State v. Hamlin (Me.) 25 L. R. A. 632; Minot v. Winthrop (Mass.) 26 L. R. A. 259.

For some earlier cases on the subject, see *notes* to *Re* Howe's Estate (N. Y.) 2 L. R. A. 825; *Re* Romaine's Estate (N. Y.) 12 L. R. A. 401.

See also 39 L. R. A. 170; 40 L. R. A. 280; 41 L. R. A. 446; 45 L. R. A. 316; 47 L. R. A. 525.

plied to purposes of general revenue, or any other purpose authorized by statute.

2. **A law of a general nature, which is in full force** in every part of the state, complies with § 26 of art. 2 of the Constitution, requiring laws of a general nature to have a uniform operation throughout the state.

3. **The act of April 20, 1894, entitled "An Act to Impose a Direct Inheritance Tax"** (91 Ohio Laws, 166), by its exemption from taxation of the right to receive or succeed to estates not exceeding $20,000 in value, and taxing the whole right of receiving or succeeding to estates which exceed that sum in value, and in taxing at a higher rate per centum the right to receive or succeed to estates of larger value than to estates of smaller value, is in conflict with section 2 of the bill of rights of the Constitution of this state, which declares that "all political power is inherent in the people. Government is instituted for their equal protection and benefit;" and the whole act is therefore unconstitutional and void.

4. **The first section of the 14th Amendment to the Constitution of the United States,** which provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws," is not, as to the question in this case, broader than the 2d section of our bill of rights.

(June 27, 1895.)

ERROR to the Circuit Court for Hamilton County to review a judgment in favor of defendant in a mandamus proceeding to compel him as probate judge to take the necessary steps to collect an inheritance tax upon the property of George K. Duckworth, deceased, as required by law. *Affirmed.*

Statement by **Burket, J.**:

This case was commenced in the circuit court of Hamilton county, in the name of the state on relation of John C. Schwartz, prosecuting attorney, against Howard Ferris, judge of the probate court of said county, in mandamus in the nature of procedendo, to compel the judge of said court to proceed and perform his official duties under the act of April 20, 1894, entitled "An Act to Impose a Direct Inheritance Tax" (91 Ohio Laws, 166), as applicable to the estate of George K. Duckworth, who was a resident of said county, and died on the 8th day of May, 1894, leaving an estate of over $50,000. The petition says that letters of administration have been granted to the widow, Lucy B. Duckworth; that the prosecuting attorney has made proper application to the said probate judge for the appointment of appraisers to appraise the property of said estate for the purpose of having said direct inheritance tax assessed; that said probate judge refused, and still refuses, to make such appointment, on the ground that said statute is unconstitutional. To this petition the probate judge filed a demurrer, which was sustained by the circuit court on the ground that the statute is unconstitutional, and to which plaintiff excepted. Judgment was thereupon rendered in favor of defendant below. A petition in error was then filed in this court to reverse the judgment of the circuit court.

Messrs. **John C. Schwartz** and **Thomas H. Darby,** for plaintiff in error:

Article 12, § 2, of the Constitution only applies to taxes on property for general revenue.

Baker v. *Cincinnati*, 11 Ohio St. 540; *Western U. Teleg. Co.* v. *Mayer*, 28 Ohio St. 535; *Anderson* v. *Brewster*, 44 Ohio St. 585; *Adler* v. *Whitbeck*, Id. 565; *Ashley* v. *Ryan*, 49 Ohio St. 504; *Pittsburgh, C. & St. L. R. Co.* v. *State*, 49 Ohio St. 189, 16 L. R. A. 380; *Wasson* v. *Wayne County Comrs.* 49 Ohio St. 622, 17 L. R. A. 795.

The direct inheritance tax is not a tax on property.

The character and purpose of a law, not less than its constitutionality, are to be determined by its operation and effect.

Wasson v. *Wayne County Comrs.* 49 Ohio St. 636, 17 L. R. A. 795; *State* v. *Hipp*, 38 Ohio St. 199.

Laws substantially the same as the one under discussion have been many times before the courts of this country, state and Federal, and in all cases save one (*Curry* v. *Spencer*, 61 N. H. 624), have been upheld, and they have been construed to be, not a tax on the property itself, but a bonus or price exacted from the recipient of this favor at the hands of the state.

Eyre v. *Jacob*, 14 Gratt. 428, 73 Am. Dec. 367; *Miller* v. *Com.* 27 Gratt. 116; *Peters* v. *Lynchburg*, 76 Va. 930; *Schoolfield* v. *Lynchburg*, 78 Va. 366; *State* v. *Dalrymple*, 70 Md. 299, 3 L. R. A. 372; *Tyson* v. *State*, 28 Md. 577; *Pullen* v. *Wake County Comrs.* 66 N. C. 361; *Mager* v. *Grima*, 49 U. S. 8 How. 491, 12 L. ed. 1169; *Wallace* v. *Myers*, 38 Fed. Rep. 185, 4 L. R. A. 171; *Scholey* v. *Rew*, 90 U. S. 23 Wall. 331, 23 L. ed. 99; *Re Howard*, 5 Dem. 487; *Minot* v. *Winthrop*, 162 Mass. 113, 26 L. R. A. 259 (1894); *State* v. *Hamlin*, 86 Me. 495, 25 L. R. A. 632.

Article 2, § 26, of the Constitution is not violated by this law because it has uniform operation throughout the state.

State v. *Ellet*, 47 Ohio St. 90; *Ex parte Falk*, 42 Ohio St. 638.

There is no other constitutional provision applicable, and in the absence of such there is no principle of equality which the courts are bound to recognize and enforce, but the remedy for unjust and discriminatory taxation is with the legislature, and not with the courts.

Kirby v. *Shaw*, 19 Pa. 261; *Youngblood* v. *Sexton*, 32 Mich. 414, 20 Am. Rep. 654; *Adler* v. *Whitbeck*, 44 Ohio St. 565; *McCulloch* v. *Maryland*, 17 U. S. 4 Wheat. 416, 4 L. ed. 603; *Veazie Bank* v. *Fenno*, 75 U. S. 8 Wall. 533, 19 L. ed. 482.

In the following cases graduated taxes have been upheld:

State v. *Schlier*, 3 Heisk. 281; *Ould* v. *Richmond*, 23 Gratt. 464, 14 Am. Rep. 139; *Allen* v. *Drew*, 44 Vt. 187.

The question as to the apportionment of taxation in Ohio, upon other subjects of taxation than property, is a purely legislative question.

Marmet v. *State*, 45 Ohio St. 65; *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 237, 33 L. ed. 895.

A collateral inheritance tax law is not in conflict with United States Const. 14th Amend.

State v. *Hamlin*, 86 Me. 495, 25 L. R. A.

632; *Northern Indiana R. Co.* v. *Connelly*, 10 Ohio St. 165.

Under this law the subjects of taxation are classified and the tax is uniform within these classes.

State v. *Schlier*, 3 Heisk. 281; *Ould* v. *Richmond*, 23 Gratt. 464, 14 Am. Rep. 139; *Allen* v. *Drew*, 44 Vt. 187.

Mr. **J. K. Richards,** also, for plaintiff in error.

Messrs. **Thomas McDougall** and **Alfred C. Cassett,** for defendant in error:

The inheritance tax is a tax on property for the purpose of general revenue.

The tax is either upon the person or the property, and to say that it is a tax on the "succession," as distinguished from the person or the property is to state something that is unthinkable.

Cooley, Taxn. p. 15; *State Tax on Foreign-held Bonds*, 82 U. S. 15 Wall. 319, 21 L.ed. 186.

A tax on property is an exaction by the state of a certain described property, irrespective of who its owner may be, and which the state collects from the property in whatever hands it may be found.

A tax on persons is an exaction by the state from certain prescribed persons, and which is irrespective of the form, substance, or *situs* of the property owned by such persons.

A tax on property, whose operation is to make an exaction from certain described property, shall be held to be a tax on the property itself, and shall be held within the restrictions to which such laws are subject, whatever it may be called in the act.

Pittsburgh, C. & St. L. R. Co. v. *State*, 49 Ohio St. 189, 16 L. R. A. 380.

The supreme court of Pennsylvania has uniformly decided this tax to be a tax on property itself.

Com. v. *Smith*, 5 Pa. 142; *Re Short's Estate*, 16 Pa. 63; *Hood's Estate*, 21 Pa. 106; *Strode* v. *Com.* 52 Pa. 181; *Clymer* v. *Com.* Id. 189; *Com.* v. *Coleman*, Id. 468; *Drayton's App.* 61 Pa. 172; *Miller* v. *Com.* 111 Pa. 321; *Re Bittinger's Estate*, 129 Pa. 338.

The law must be construed as it is written.

It is not within the province of the court to disregard the plain language of the statute and conjecture what the legislature might have meant.

Re Hathaway's Will, 4 Ohio St. 383; *Woodbury* v. *Berry*, 18 Ohio St. 456; *State* v. *Peck*, 25 Ohio St. 26; *Woodworth* v. *State*, 26 Ohio St. 196; *Grogan* v. *Garrison*, 27 Ohio St. 50.

The inheritance tax is a tax for the purpose of general revenue.

Pittsburgh, C. & St. L. R. Co. v. *State*, 49 Ohio St. 189, 16 L. R. A. 389.

The direct inheritance tax must comply with the provisions of art. 12, § 2, Ohio Const.

Zanesville v. *Richards*, 5 Ohio St. 589; *Hill* v. *Higdon*, Id. 243, 67 Am. Dec. 289; *Reeves* v. *Wood County*, 8 Ohio St. 333; *Baker* v. *Cincinnati*, 11 Ohio St. 534; *Cincinnati Gas Light & C. Co.* v. *State*, 18 Ohio St. 237; *State* v. *Frame*, 39 Ohio St. 399; *Western U. Teleg. Co.* v. *Mayer*, 28 Ohio St. 521; *State* v. *Reinmund*, 45 Ohio St. 214; *State* v. *Hipp*, 38 Ohio St. 199; *Adler* v. *Whitbeck*, 44 Ohio St. 539; *Anderson* v. *Brewster*, Id. 576; *Marmet* v. *State*, 45 Ohio St. 63; *Ashley* v. *Ryan*, 49 Ohio St. 504.

The direct inheritance tax law violates art. 12, § 2, Ohio Const.

Where the burden of a tax falls on the thing which is the subject of taxation, the tax is to be considered as laid on the thing rather than on him who is charged with the duty of paying it into the treasury.

Brown v. *Maryland*, 25 U. S. 12 Wheat. 436, 6 L. ed. 684; *Welton* v. *Missouri*, 91 U. S. 275, 23 L. ed. 347; *Western U. Teleg. Co.* v. *Texas*, 105 U. S. 460, 26 L. ed. 1067; *Western U. Teleg. Co.* v. *Atty. Gen.* 125 U. S. 530, 31 L. ed. 790; *State* v. *Hipp*, 38 Ohio St. 199.

While it purports, generally speaking, to levy a tax upon decedent's estates, it makes an unlawful exemption of estates less than $20,000 in value.

Exchange Bank v. *Hines*, 3 Ohio St. 13; *Zanesville* v. *Richards*, 5 Ohio St. 593; *Fields* v. *Highland County Comrs.* 36 Ohio St. 476.

The law does not tax the property by a uniform rule or rate per cent.

Zanesville v. *Richards*, *supra*; *State* v. *Gorman*, 40 Minn. 232, 2 L. R. A. 701; *Exchange Bank* v. *Hines*, 3 Ohio St. 15.

Messrs. **Paxton, Warrington, & Boutet, Edward S. Rawson, W. F. Ampt,** and **Boynton & Horr,** also for defendant in error.

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

This case has been argued with marked ability on both sides, and the arguments have greatly aided the court in reaching its final conclusions. We have carefully examined and considered all the cases cited by counsel, and many others, and shall state rather the conclusions reached than lengthy arguments in support thereof.

The 1st section of the statute in question is as follows: "Section 1. Be it enacted by the general assembly of the state of Ohio, that all property within the jurisdiction of this state, and any interest therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, including annuities, which shall pass by will or by the intestate laws of this state, or by deed, grant, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor, to the use of the father, mother, husband, wife, brother, sister, niece, nephew, lineal descendant, adopted child, or person recognized as an adopted child and made a legal heir under the provisions of section 4182 of the Revised Statutes of Ohio, or the lineal descendant thereof, the lineal descendant of any adopted child, the wife or widow of a son, the husband of a daughter of decedent, or of any one in trust for such person or persons, shall be liable to a tax as follows, to wit: When the value of the entire property of such decedent exceeds the sum of $20,000 and does not exceed the sum of $50,000, 1 per cent; when it exceeds $50,000 and does not exceed $100,000, 1½ per cent; when it exceeds $100,000 and does not exceed $200,000, 2 per cent; when it exceeds $200,000 and does not exceed $300,000, 3 per cent; when it exceeds $300,000 and does not exceed $500,000, 3½ per cent; when it exceeds $500,000 and does not exceed $1,000,000, 4

per cent; and when it exceeds $1,000,000, 5 per cent; 75 per cent of such tax to be for the use of the state, and 25 per cent for the use of the county wherein the same is collected; and all administrators, executors, and trustees shall be liable for all such taxes, with lawful interest, as hereinafter provided, until the same shall have been paid as hereinafter directed. Such taxes shall become due and payable immediately upon the death of the decedent, and shall at once become a lien upon said property." It is this first section that is claimed to be unconstitutional, and which was so held by the circuit court.

In view of the authorities cited, it must be conceded that the general assembly has the power to pass an inheritance tax for purposes of general revenue, unless prohibited by the Constitution of our state. Properly understood, it is not the right to transmit, but the right and privilege to receive, that is taxed. The right to dispose of property during the lifetime of the owner cannot be separated from the property itself, and therefore to tax the right of disposal by contract in the lifetime of the owner, even though to take effect at his death, is to tax the property itself. But the right to dispose of the property by will or descent, taking effect after the death of the owner, is not so closely connected with the right of property, and it is not so clear that such right may not be taxed. But when the right to receive the property is considered, it is clear that the right is distinct and separate from the property itself, and the state may tax this right to receive property, and this is so whether the property is disposed of by the owner during his lifetime or at his death. This right to receive property is under the control of the legislature, and it has the power to regulate and lay such burdens thereon as it may see fit, within the provisions of the Constitution. To regulate by taxation or otherwise the privilege or right to receive property, is not in conflict with the 1st section of the bill of rights, which recognizes the inalienable right of acquiring, possessing, and protecting property. Were it otherwise, all our laws as to wills, descent, distribution, and conveyances would be unconstitutional.

It is urged, however, that the statute in question does not tax the right or privilege of receiving property, but taxes the property itself. It must be conceded that the language used in the statute is upon its face clearly a taxation of the property itself, and not of the right to acquire property. And for myself, I think this is the true construction of the act. Others of the court, however, think that when the operation and effect of the statute are considered, it may be regarded as taxing the right or privilege, rather than the property. Certain it is that the only thing that can be constitutionally taxed is the right or privilege of succession, and a statute having such taxation in view should express its purpose in words applicable to such subject-matter of taxation.

It is conceded by all parties that, if this statute imposes a tax on property, it is unconstitutional. As a majority of the court are of opinion that it is not a tax on property, but upon the right to receive property, the statute must, as to this point, be sustained.

It is also contended that this tax is a tax on property, because it is made a lien upon the real estate received; and cases are cited sustaining this view. *Re Bittinger's Estate*, 129 Pa. 344. The statute in that case provides as follows: "The tax on real estate shall remain a lien on the real estate on which the same is charged until paid" (Pa. act May 6, 1887; Pub. Laws, 79); while the statute in this state provides simply that the inheritance tax "shall at once become a lien upon said property." But, aside from the difference in the words of the statute, there is no force in the contention. If the legislature has the power to assess a tax upon the right to receive and succeed to property, it clearly has the right to make such tax a lien upon the property received by the use of such right; and the making of such lien does not change the tax from a tax upon the right to receive to a tax upon the property received under the right.

Next, it is urged that, if the statute imposes a tax only upon the right or privilege to receive property, as the taxation thereby imposed is for general revenue, it is in conflict with section 2 of article 12 of the Constitution, which provides that laws shall be passed taxing by a uniform rule all property according to its true value in money. The claim is that for purposes of general revenue property only can be taxed. The Constitution is silent as to the application of the fund arising on taxation on subjects other than property. The Constitution being silent, it follows that, if such taxes can be levied and collected at all, their application is within the sole and exclusive power and discretion of the general assembly. The power of taxation, without limitation, is given in section 1, article 2, of the Constitution, which provides that "the legislative power of this state shall be vested in a general assembly, which shall consist of a Senate and a House of Representatives." In *Western U. Teleg. Co.* v. *Mayer*, 28 Ohio St. 521, it was held that the general grant of legislative power vested in the general assembly by this section includes the power to collect revenue for public purposes, and the limitations on the exercise of this power are to be found in other provisions of the Constitution. In *Hill* v. *Higdon*, 5 Ohio St. 243, 67 Am. Dec. 289, it is said by the court: "In our present Constitution, as well as in the former, the general grant of legislative authority includes the power of taxation in all its forms. Restrictions upon its exercise are to be looked for in other parts of the instrument." The power of taxation granted in the 1st section of the 2d article, being unlimited, is broad enough to include the power to tax rights, privileges, and franchises. Is there any limitation upon this power found in any other section of the Constitution? The only section which it is claimed limits this power is section 2 of article 12. That section is in the following words: "Laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint-

stock companies or otherwise; and also all real and personal property, according to its true value in money; but burying grounds, public houses, houses used exclusively for public worship, institutions of purely public charity, public property used exclusively for any public purpose, and personal property to an amount not exceeding in value $200 for each individual, may, by general laws, be exempted from taxation; but all such laws shall be subject to alteration or repeal; and the value of all property so exempted shall, from time to time, be ascertained and published, as may be directed by law." It will be noticed that this section is not a limitation upon the power to tax rights, privileges, and franchises, because the limitation by this section imposed is as to the taxation of property; that is, moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, and also real and personal property. Nothing whatever is said about rights, privileges, or franchises, and therefore this section cannot fairly be construed as a limitation of the power to tax rights, privileges, and franchises, unless they are property, within the meaning of this section of the 12th article. That a franchise is not property, within the meaning of said section, was held by this court, for reasons which seem unanswerable, in *Exchange Bank* v. *Hines*, 3 Ohio St. 1. The court says on page 8: "A corporate franchise, therefore, being a mere privilege, or right of authority by the government, is not property of any description, and consequently not subject to taxation under the above provisions of the Constitution." It will be noticed that the court here says that a franchise is not such property as can be taxed under the above provisions of the Constitution. The provisions referred to are those contained in section 2 of article 12. That a franchise is valuable, and in that sense property, has sometimes been held; but it is not property, in the sense used in said section of the Constitution, and its taxation is not by that section limited or restricted.

With the power of taxation of rights, privileges, and franchises, granted by the 1st section of the 2d article, unlimited and unrestricted by other parts of the Constitution, what authority is there to limit and restrict this kind of taxation to purposes other than for general revenue? No warrant therefor is found in the Constitution. This court, in *Exchange Bank* v. *Hines*, *supra*, after quoting the 2d section of the 12th article, on page 10, by Bartley, Ch. J., says: "The manifest effect of this constitutional provision is to make property the basis, and the sole basis, of taxation." Again, on page 40, the court, by Thurman, J., says: "The objects of taxation declared in that instrument are the real and personal property and choses in action in the state." The part of the Constitution under consideration was the 2d section of article 12, and nothing whatever is said about the general grant of power found in section 1 of article 2. Throughout the whole case of *Exchange Bank* v. *Hines*, section 2 of article 12 is regarded as the granting of the power of taxation, instead of a limitation and restriction of the general power granted in section 1 of article 2. That such is not the true or correct construction of the Constitution is now universally conceded. That construction was not necessary to the decision of the question then before the court, but it did not lead to an incorrect determination of that case. It mattered not in that case whether the grant of power of taxation was found in section 1 of article 2 or in section 2 of article 12; nor whether section 2 of article 12 was a grant of power of taxation or a limitation of the power granted by the other section of the Constitution. The question for determination in that case was as to taxation of banks under section 3 of article 13, and that led to the question as to whether section 2 of that article permitted the deduction of debts from moneys and credits. The question before the court had relation to property only, and, construing section 2 of article 12 as a grant of power, instead of a limitation of power granted in another section, and as nothing except property is spoken of as taxable in said section 2, the court held that what was therein expressed as taxable by implication excluded everything else, and therefore announced the rule that under said section the sole basis of taxation is property. That property is not the sole basis of taxation under the power granted by section 1 of article 2 appears by many decisions of this court, among which are the following: *Western U. Teleg. Co.* v. *Mayer*, 28 Ohio St. 533; *Baker* v. *Cincinnati*, 11 Ohio St. 540; *Adler* v. *Whitbeck*, 44 Ohio St. 565; *Anderson* v. *Brewster*, 44 Ohio St. 585; *State* v. *Reinmund*, 45 Ohio St. 214; *Ashley* v. *Ryan*, 49 Ohio St. 504; *Metz* v. *Hagerty*, 51 Ohio St. 521.

The error of regarding the 2d section of article 12 as a grant of power of taxation, instead of a limitation upon that power, was carried into the decision of the case of *Zanesville* v. *Richards*, 5 Ohio St. 589, but was partly corrected in *Hill* v. *Higdon*, Id. 243, 67 Am. Dec. 289, and fully corrected in *Reeves* v. *Wood County*, 8 Ohio St. 333. The court, on page 592, in 5 Ohio St., by Ranney, Ch. J., says: "The public burdens are made to rest upon the property of the state, and whenever money is to be raised by taxation, the positive injunction is, that 'laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and also all real and personal property,—according to its true value in money.'" That the public burdens are not made, by the Constitution, to rest exclusively upon the property of the state, is shown by the cases above cited, and that which is spoken of as an injunction that laws shall be passed taxing by a uniform rule all moneys, etc., is, instead of an injunction, a restriction and limitation upon the general power of taxation granted by section 1 of article 2. In the *Zanesville Case*, *supra*, the question was whether an exemption of lands, not laid out into lots, within the city of Zanesville, from all taxes except for road purposes, was constitutional. The 2d section of article 12 was again regarded as the source of the power of taxa-

tion, but, as only taxes on property were under consideration, this led to no erroneous results in that case; and the court held that all lands within the city limits must be taxed for all purposes for which lots were taxed. The court says: "No tax, either for state, county, township, or corporation purposes, can be levied without express authority of law; and this section of the Constitution is equally applicable to, and furnishes the governing principle for, all laws authorizing taxes to be levied for either purpose." If by the applicability and governing principle is meant equality of taxation of property without exemption,—that is, that when some property in a city is taxed for state, county, township, or corporation purposes, all property within the city must be taxed for the same purposes without exemption,—it is correct. But if it means, as we think it does not, that subjects of value, other than what are regarded property within said section, cannot be taxed for state, county, township, or corporation purposes, it is incorrect. That the former was meant clearly appears from the subject-matter under consideration. The question as to the taxation of rights, privileges, and franchises was not under consideration, and the language used is not applicable thereto.

Speaking of the 94th section of the tax law, the court says, on page 592, that it seems to imply that municipal corporations might exist which were authorized to tax only such real estate as was laid out into lots when platted and recorded. The court does not so construe that section, and says that, if so construed, it would conflict with section 2 of article 12. The question under consideration being whether lands within the city not laid out into lots could be taxed for purposes other than road purposes, the court says: "We are clear in the opinion that if it [§ 94] means what is claimed for it, and intends to provide for the exemption of any part of the property in a municipal corporation otherwise subject to taxation, from contributing its proportion to the general revenue fund, it is in conflict with the 2d section of the 12th article of that instrument, and should be treated as a nullity." This is the first time in the line of decisions that "general revenue" is mentioned. It will be noticed that it is property, and not franchises, that cannot be exempted from contributing to the "general revenue" fund. It will further be noticed that it is not stated here that only tax on property can contribute to the general revenue fund. The full force of the decision is that property cannot be exempted from contributing to the general revenue fund. The court, in the *Zanesville Case*, says that property cannot be exempted from contributing to the general revenue fund; and when reference is made to that case in the case of *Hill* v. *Higdon*, *supra*, the word "property" is still retained; the court saying on page 246: "In the case of *Zanesville* v. *Richards*, decided at the present term, we have held that this section is equally applicable to, and furnishes the governing principle for, all laws levying taxes for general revenue, whether for state, county, township, or corporation purposes; and that it requires a uniform rate per cent to be levied upon all property, according to its true value in money, within the limits of the state, or the local subdivision for which the revenue is collected." The governing principle here referred to is that all property shall be taxed according to its true value, in money, when raising revenue for state, county, township, or corporation purposes, and that there can, in such cases, be no exemption of property, except as provided in said section. This very clearly appears when the whole case is read, and by what immediately precedes the part above quoted. The question in the case was whether special assessments for street improvements were constitutional or not. There was no question involved whether or not general revenue could be raised by a tax on franchises or privileges, and what is said as to taxation for general revenue is to show that in raising general revenue there can be no exemption of property other than is provided in section 2 of article 12. And when the court says, on page 249, that "the 2d section of the 12th article has established the principles upon which all taxes for general revenue purposes must be levied," the principles referred to are the principles of equality, and that all property must be taxed, without exemption, as provided for in said section. That this is so is shown by the language used by the court, the subject-matter under consideration, and the fact that those are the only principles found in said section. General revenue is not mentioned in the section. In order to sustain assessments for street improvements, the court, in this case of *Hill* v. *Higdon*, abandoned the position that the 2d section of article 12 was the source of the power of taxation, and the concession was made that "the general grant of legislative authority includes the power of taxation in all its forms," and that "restrictions upon its exercise are to be looked for in other parts of the instrument." The doctrine and line of decisions, that general revenue cannot be raised otherwise than by a tax on property, are both based upon the above cases of *Exchange Bank* v. *Hines*, *Zanesville* v. *Richards*, and *Hill* v. *Higdon*, none of which support the doctrine, but decide that in raising general revenue all property must be taxed, without exemption, as provided in said 2d section. The cases following the above three cases refer to the doctrine as well understood and settled by those cases, without examining the doctrine anew to see whether or not it is well founded. The doctrine is not necessary to a proper decision of any of the cases in which reference is made thereto, and all of them not heretofore overruled were correctly decided without its aid, including *Wasson* v. *Wayne County Comrs.* 49 Ohio St. 622, 17 L. R. A. 795; and *Pittsburgh, C. & St. L. R. Co.* v. *State*, 49 Ohio St. 189, 16 L. R. A. 380. In none of those cases is the doctrine sustained that general revenue cannot be constitutionally raised by taxation on franchises, rights, and privileges; but the doctrine sustained is that, when general revenue is to be raised by taxation on property, all the property of the state, county, town-

ship, or corporation must be taxed without exemption, as provided in said section 2 of article 12 of the Constitution. It follows, therefore, that imposing the tax in question upon the right to receive property does not render the act unconstitutional.

Next it is urged that the statute in question is in conflict with section 26 of article 2 of the Constitution, which provides that "all laws of a general nature shall have a uniform operation throughout the state." This section of the Constitution is not intended to guarantee the equal protection of all the inhabitants of the state but only to provide that laws of a general nature shall be in force in all parts of the state. *State* v. *Nelson*, 52 Ohio St. —, 26 L. R. A. 317, and the cases there cited.

In the next place, it is urged that the statute in question is unconstitutional in this: that it exempts estates of $20,000 and under from all taxation, and in case the estate exceeds $20,000 it taxes the entire estate without any exemption whatever; and also in this: that large estates are taxed at a higher rate per cent than smaller ones. Section 2 of the bill of rights provides as follows: "All political power is inherent in the people. Government is instituted for their equal protection and benefit." This statute is in direct conflict with this section of the bill of rights. If government is instituted for the equal protection and benefit of the people, it follows that laws which are passed under a government so instituted must likewise be for the equal protection and benefit of the people. This statute fails to protect equally the people who exercise the right and privilege of receiving or succeeding to property. The right to receive the first $20,000 of an estate not exceeding that sum is protected from taxation, while the right to receive the first $20,000 of an estate exceeding that sum is taxed the sum of $200. This is not equal protection. Again, the right to receive $50,000 worth of property of an estate not exceeding that sum is taxed $500, while the right to receive $50,000 of an estate exceeding that sum is $750. This is not equal protection. The same may be said of the other gradations provided for in the statute. The right or privilege of receiving or succeeding to property is valuable in proportion to the value of the property received. It cannot be consistently said that the right to receive $20,000 is of no value, and that the right to receive $20,001 is of the value of $200.01. Again, he who uses the right or privilege of receiving property of the value of $20,001, and pays therefor a tax of $200.01, is not equally benefited for the tax paid as he who uses the same right or privilege of receiving property of the value of $20,000, without paying any tax whatever for the use of such right. The exemption of $20,000, and the increase of the per cent as the value of the estate increases, renders this statute unconstitutional. Our Constitution requires equality in our tax laws, and also equality in their execution, as near as may be. The only exemption allowed as to taxation of property is personal property to the amount of $200 to each individual, and certain other property devoted to public or charitable uses. Two hundred dollars in value to each individual is the extent to which the legislature has the power to exempt personal property from taxation. The Constitution must be regarded as consistent with itself throughout, and as section 2 of article 12 permits an exemption from taxation of personal property not exceeding $200, a construction of section 2 of the bill of rights is thereby evinced to the effect that in taxation of subjects other than property an exemption up to $200 in value would be regarded as for the equal protection and benefit of the people. The exemption must be equally for all, and the rate per cent must be the same on all estates. There can be no discrimination in favor of the rich or poor. All stand upon an equality under the provisions of the Constitution, and it is this equality that is the pride and safeguard of us all. It was this principle, more than any other, that induced the decision in *Hocking Valley Coal Co.* v. *Rosser*, 52 Ohio St. —, 29 L. R. A. 386.

In support of the law it is urged that this exemption and gradation may be sustained upon the ground that the costs of administration in a small estate are proportionately larger than in a large one, and that therefore the small estate should be free from this taxation. The answer is that equality in taxation is required by the Constitution, and that our administration laws are enacted upon the principle of equal protection and benefit of the people, and this unequal mode of taxation is not required to remedy any defect in the burdens of these laws.

Again, it is urged in support of the law that an estate not exceeding $20,000 is in the nature of a necessity for the support of widow and children; that the widow and children succeeding to so moderate a property ought to be exempted from paying the state anything for that privilege. The answer to this, as well as to the former proposition, is that we are not here considering the policy or equity of this exemption, but the power of the legislature to make such discrimination, when prohibited from so doing by the 2d section of the bill of rights. When this power is once conceded, the manner of exercising the same is limited only by the will of the legislature. In determining constitutional questions, courts should not attempt to solve them by reasoning only along the lines of the principles of equity, but the reasoning should be along the lines of the Constitution, for it may be that the very object of the Constitution is to abandon and cut loose from what had theretofore been regarded as equity in particular cases, or upon a particular subject-matter. The question is, therefore, not what would be equitable, but what is constitutional. Equity cannot be permitted to override the Constitution.

Again, it is urged in favor of the statute that the state has the right to say that the heir or legatee or devisee of a large property enjoys a disproportionate privilege, because what he receives is in the nature of a luxury, and luxuries ought to be subject to higher taxes. The answer to this is that the value of the right to receive is in direct proportion

to the value of the property received, and must, under the Constitution, be taxed accordingly, if taxed at all. As to the higher tax on luxuries, it may be said that such a rule might find a place in tariff legislation, where all are free to indulge in the luxuries or not, as they see fit, but that such rule can find no support in taxation under a Constitution requiring equality in taxation, and laws to be for the equal protection and benefit of all.

Again, it is claimed in favor of the law that this statute is not purely for the raising of revenue, but for the regulation of the succession and transfer of property, and that the state has a right to say that it will regulate the matter of succession to great estates by making a greater charge for the privilege, and thus discourage the holding together of great estates until death. The answer is that the matter of succession and transfer of property is already fully regulated by our statutes as to wills, descent, distribution, and conveyances; and if further regulation is desired purely as regulation, aside from revenue, it would most likely be sought in the amendment of those statutes. The act is clearly one for taxation, and not for regulation, as shown by its provisions and title. The state finds no warrant in its Constitution for saying that it will make a greater rate of charge for the privilege of succeeding to large estates than to smaller ones, but, on the contrary, this is expressly prohibited by the requirement that laws shall be for the equal protection and benefit of the people. This requirement applies as well to laws for regulation as to laws for taxation.

It is also contended by those opposing the law that the statute is inoperative, for the reason that it fails to provide any machinery for the collection of a tax levied on property which passes by "deed, grant, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor." Whether there is sufficient machinery supplied in this and other statutes to enforce collection of such tax need not now be determined, as that question is not involved in this case, and does not go to the constitutionality of the statute, but to its enforcement if found constitutional.

As to the 1st section of the 14th amendment to the Constitution of the United States, which provides that no state shall "deny to any person within its jurisdiction the equal protection of its laws," it is sufficient to say that the provisions of this section of the Federal Constitution, as to this question, are not broader than the 2d section of our bill of rights, and that therefore a statute upon this subject, authorized by our bill of rights, would not be in conflict with this section of the Constitution of the United States.

While the facts in the case of *Northern Indiana R. Co.* v. *Connelly*, 10 Ohio St. 160, said to have been followed and relied upon by the circuit court, bear little, if any, relation to this case, the rule of decision in that case was in line with the 2d section of our bill of rights, and was therefore very properly followed by the circuit court.

Judgment affirmed.

Shauck, J., concurs in the third and fourth propositions of the syllabus, and in the judgment of affirmance.

Minshall, J., dissents from judgment of affirmance.

ILLINOIS SUPREME COURT.

Helen Elizabeth Dunham HAWES *et al.*, *Appt.*,
v.
City of CHICAGO.

(158 Ill. 653.)

1. An ordinance which is unreasonable, unjust, and oppressive will be held by the courts to be void.

2. The reasonableness or unreasonableness of a municipal ordinance is a question for the decision of the court in the light of all existing circumstances or contemporaneous conditions, the objects sought to be obtained, and the necessity or want of necessity for its adoption.

3. Power to make ordinances on a given subject, conferred by the legislature without prescribing the details, must be reasonably exercised, else the ordinances will be held invalid.

4. An ordinance compelling the substitution of a cement sidewalk in the place of a plank walk in front of a vacant 20-acre lot, which had been laid less than six months before in conformity with an ordinance, and which was in good condition and in all respects safe, convenient, and sufficient for public use, is unreasonable, unjust, and oppressive, and therefore void.

(November 1, 1895.)

APPEAL by property owners from a judgment of the Cook County Court which confirmed a special assessment for street improvement purposes. *Reversed.*

The facts are stated in the opinion.

Mr. **Kirk Hawes,** with *Mr.* **Ira J. Geer,** for appellants:

The power of the city council to declare what shall be a local improvement is an implied power, and an ordinance exercising that power, though regularly passed, must be reasonable, otherwise it is void.

Bloomington v. *Chicago & A. R. Co.* 134 Ill. 451; *Craw* v. *Tolono*, 96 Ill. 255, 36 Am. Rep. 143; *Bloomington* v. *Latham*, 142 Ill. 462, 18 L. R. A. 497; *Allen* v. *Drew*, 44 Vt. 174; 1

NOTE.—For necessity of benefits to support assessments for local improvements, see *note* to *Re* Madera Irrig. Dist. Bonds (Cal.) 14 L. R. A. 755.

See also 35 L. R. A. 272; 48 L. R. A. 442.

Dill. Mun. Corp. §§ 319-321; Cooley, Taxn. § 663; *Corrigan* v. *Gage*, 68 Mo. 541; *Wistar* v. *Philadelphia*, 80 Pa. 511, 21 Am. Rep. 112.

The city council has no power to pass an ordinance the effect of which is to substitute improvements or to change one style of improvement for another style of the same improvement.

Wistar v. *Philadelphia*, *supra*; *Hammett* v. *Philadelphia*, 65 Pa. 165, 3 Am. Rep. 615.

Messrs. **Harry Rubens, John F. Holland, Adolph Kraus,** and **Maher & Gilbert** for appellee.

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

This is an appeal from a judgment of confirmation of a special assessment made under an ordinance of the city of Chicago passed March 7, 1892, and providing for the construction of a cement sidewalk on Fiftieth street, from Lake avenue to Drexel boulevard. The commissioners appointed to assess the cost and expenses of the improvement upon the property benefited thereby returned into court an assessment roll, in which the property here in question, then owned by John H. Dunham, since deceased, was assessed in the sum of $1,915.50. Various objections in writing were filed by said Dunham and overruled by the court. The question of benefits was submitted to a jury, and the jury, in their verdict, reduced the assessment on the property to $1,638.75. Motions for a new trial and in arrest of judgment, as well as motions to dismiss the petition and to cancel the assessment, were made by the objector and overruled by the court, and exceptions taken, and the court entered judgment of confirmation for the amount fixed by the verdict of the jury, and the objector perfected an appeal to this court. John H. Dunham, the objector, thereafter died, and his death was suggested, and by leave of court Helen Elizabeth Dunham Hawes and Mary Virginia Dunham, who are his heirs at law and devisees under his will, now prosecute the appeal.

It is claimed by appellants that the ordinance providing for the construction of the cement sidewalk, and under which the assessment was made, is unreasonable, unjust, and oppressive, and therefore void. The uncontradicted evidence in the case shows that the tract of land, the south 50 feet of which is assessed for this improvement, is a 20-acre tract, having a frontage of 1256 feet along Fiftieth street, where it is proposed to construct this cement sidewalk; that there is not a house or a building of any kind upon it, and that it is an unsubdivided tract of land, and the only use to which it is put is that of a field for raising hay. Only five months before the passage of this ordinance for the construction of a cement sidewalk, the devisor of the appellants in this case, in compliance with a prior ordinance of the city duly passed for that purpose, constructed and put down along the line of this street, in the very place where this cement sidewalk is to be placed, a wood sidewalk 6 feet in width, made of plank laid crosswise on stringers or joists, in strict conformity to the regulations and requirements of the city, and this plank sidewalk, at the time this ordinance on which the present proceedings are based was passed, and at the time this case was heard in the court below, was in good order and condition. The uncontradicted evidence further shows that the street along which it is proposed to construct this cement sidewalk has never been improved by the city. It is neither curbed nor paved, sewered nor watered, surveyed nor graded. If it is to be considered as a street 66 feet wide, then there is a line of telegraph poles planted right through the center of it, and the north 33 feet of it have never been formally dedicated by the owner to public use nor condemned by any municipal corporation, and if the public have any right to it at all, it is a right by prescription or by implied dedication.

Such was and is the condition of this street in front of appellant's property, and yet, as appears from the record of the case, the common council of the city of Chicago, only five months after the construction, at a great expense, of a new plank sidewalk built in conformity with the order of the city council, 1256 feet long, passed a second ordinance ordering this new plank sidewalk torn up and a cement walk, at an assessed expense of $1,915.50 or $1,638.75, put down in its place. It is admitted by the city—at least not denied—that this plank or wooden sidewalk, at the time the ordinance for the cement sidewalk was passed and at the time this case was heard in the court below, was in good order and condition, and will answer equally as well, for the purposes of travel, as a cement walk. Now, can it for a moment be contended that it is not unreasonable, unjust, and oppressive to compel the owner of a vacant 20-acre lot first to construct and pay for a wood sidewalk, and then, within less than six months, and when it is in substantially as good condition as when first built, and in all respects safe, convenient, and sufficient for public use and travel, take it up, throw it away, and put down another in its place at an expense of over $1,600? It seems to us that it cannot be, especially when we take into consideration the fact that the street has never been improved, curbed, graded, paved, or sewered. And further, it is clear, from the evidence in the case, that if this judgment should be affirmed and appellant compelled to take up the wood sidewalk and put down one of cement, the cement sidewalk will be ruined by putting in the house drains every 25 feet along the line of the street, or at least seriously injured, and whenever the street is improved and dwellings are constructed along the line of the walk the walk itself is quite likely to be destroyed.

An ordinance must be reasonable, and if it is unreasonable, unjust, and oppressive the courts will hold it invalid and void. *Chicago* v. *Rumpff*, 45 Ill. 90, 92 Am. Dec. 196; *Tugman* v. *Chicago*, 78 Ill. 405. The question of the reasonableness or unreasonableness of a municipal ordinance is one for the decision of the court, and in determining that question the court will have regard to all the existing circumstances or contemporaneous conditions, the objects sought to be obtained,

and the necessity or want of necessity for its adoption. *Toledo, W. & W. R. Co.* v. *Jacksonville*, 67 Ill. 37; *Lake View* v. *Tate*, 130 Ill. 247, 6 L. R. A. 268; 1 Dill. Mun. Corp. § 327. And even where the power to legislate on a given subject is conferred on a municipal corporation, yet if the details of such legislation are not prescribed by the legislature, there the ordinance passed in pursuance of such power must be a reasonable exercise thereof, or it will be pronounced invalid. 1 Dill. Mun. Corp. § 328; *St. Paul* v. *Colter*, 12 Minn. 41, 90 Am. Dec. 278; *Dunham* v. *Rochester*, 5 Cow. 462; *State* v. *Belvidere*, 44 N. J. L. 350.

In Cooley on Taxation (p. 428), it is said: "A clear case of abuse of legislative authority in imposing the burden of a public improvement on persons or property not specially benefited would undoubtedly be treated as an excess of power, and void." In *Allen* v. *Drew*, 44 Vt. 174, the court, by Redfield, J., says: "We have no doubt that a local assessment may so transcend the limits of equality and reason that its exaction would cease to be a tax or contribution to a common burden, and become extortion and confiscation. In that case it would be the duty of the court to protect the citizen from robbery under color of a better name." In *Wistar* v. *Philadelphia*, 80 Pa. 505, 21 Am. Rep. 112, Chief Justice Agnew says: "But if we say the city may change its pavements at pleasure, and as often as it please, at the expense of the ground owner, we take a new step, and there must be explicit legislation to authorize such taxation. If, while the pavement is good and stands in no need of repair, the city may tear it up, relay, and charge the owner again with one excessively costly, it would be exaction—not taxation. We are not at liberty to impute such a design to the legislature, unless it has plainly expressed its meaning to do this unjust thing." And in *Wistar* v. *Philadelphia*, 111 Pa. 604, it is held that where a property owner has well and properly set curbstones in front of his property, at his own expense, on the proper line, in accordance with the style in common use, and they are in good order and repair, the expense of replacing them with others cannot be provided by an assessment upon his property. In *Corrigan* v. *Gage*, 68 Mo. 541, it was held that the ordinance for the paving of the sidewalk there in question was unreasonable and oppressive and subject to judicial inquiry, because such sidewalk was in an uninhabited portion of the city and disconnected with any other street or sidewalk, and the judgment of the court below was reversed. In *Bloomington* v. *Chicago & A. R. Co.* 134 Ill. 451, this court held that where the ordinance is grossly unreasonable, unjust, and oppressive, that may be shown in defense of the application for confirmation. In *Bloomington* v. *Latham*, 142 Ill. 462, 18 L. R. A. 487, we held that an ordinance directing that the cost of the land taken or damaged, or both, should be assessed upon and collected from the lands abutting upon the proposed alley or street, in proportion to the frontage thereof, was unreasonable and void. And in *Davis* v. *Litchfield*, 145 Ill. 313, 21 L. R. A. 563, and *Palmer* v. *Danville*, 154 Ill. 156, ordinances levying special taxes for local improvements were held to be unreasonable, arbitrary abuses of power, and void.

The rule is, that it requires a clear and strong case to justify a court in annulling the action of a municipal corporation, acting within the apparent scope of its authority. But in our opinion such a case appears in this record. We think that the ordinance in question, in so far as and to the extent that it affects the property of appellants, is unreasonable, unjust, and oppressive, and therefore void.

The judgment of confirmation as to the property of appellants is reversed, and the ordinance being void as to such property the cause will not be remanded.

Craig, J., dissents.

Norman N. PARKER, *Appt.*,
v.
Robert W. ORR.

(158 Ill. 609.)

1. **The rule that a voter should not be disfranchised or deprived of his right to vote** through mere inadvertence, mistake, or ignorance, if an honest intention can be ascertained from his ballot, is not changed by the Illinois ballot law of 1891, which expressly provides in section 26 that his ballot shall not be counted if he "marks more names than there are persons to be elected to an office, or if, for any reason, it is impossible to determine the voter's choice for any office to be filled."

2. **The requirement that a ballot be marked by a cross** "in the appropriate margin or place opposite the name," made by the Illinois ballot law, § 23 (3 Starr & C. chap. 46, p. 570), is directory, and not mandatory, and under it the voter's intention should be given effect if it can be gathered from his ballot without laying down a rule which may lead to a destruction of its secrecy.

3. **The use of a mark or character which furnishes the means to designing persons of avoiding the law** as to secrecy will require the rejection of a ballot under the Illinois ballot law, though it contains no prohibition of distinguishing marks, even if the mark or character used indicates an intention to vote a particular party ticket or for certain candidates.

4. **An honest attempt to follow the directions of the law** requiring a cross to be made in the appropriate margin or place opposite the name on the ballot must appear in order to permit the ballot to be counted.

5. **A ballot marked simply by writing the word "Democratic" at the head** of the Democratic ticket, or one marked by a single

NOTE.—For marks to distinguish ballots, see *note* to Rutledge v. Crawford (Cal.) 13 L. R. A. 761; also Sego v. Stoddard (Ind.) 22 L. R. A. 468, and cases cited in *footnote* thereto; Tebbe v. Smith (Cal.) 29 L. R. A. 673; Dennis v. Caughlin (Nev.) 29 L. R. A. 731; Buckner v. Lynip (Nev.) *post*, 354.

See also 32 L. R. A. 656; 34 L. R. A. 45.

mark across or through the circle or square, or marked with a circle or irregular character within the circle or square, or marked with crosses opposite the names of the candidates, but entirely outside of the squares; as well as a ballot signed by the name of the voter,—must be rejected as disregarding the plain directions of the law requiring the ballot to be marked by a cross in the appropriate margin or place opposite the name, and as furnishing the means whereby the secrecy of the ballot could be destroyed.

6. **Imperfect success in marking a cross** in the proper place to indicate a choice of candidates, where there was a clear intention to conform to the statute, and not to distinguish the ballot, will not require its rejection.

7. **A word which is read by one party as "get" and by the other as "yes,"** opposite a proposed constitutional amendment, is not regarded as such a distinguishing mark as to prevent counting the ballot for a candidate named on the same ballot.

8. **The erasure of names of candidates** by pencil marks drawn through them does not constitute a distinguishing mark which requires a rejection of the ballot as to other candidates.

9. **The fact that a ballot is marked by a cross in a circle at the head of each of two tickets** will not prevent counting the vote for a candidate named on one ticket for an office for which no candidate is named on the other, although it prevents counting the ballot for a candidate for any office for which both tickets present a candidate.

10. **A mark on a ballot, which bears no resemblance to a cross,** without any attempt to make a cross of any kind on the ballot, will not permit it to be counted.

11. **A mark made with ink and somewhat blurred,** even if it cannot be said to be a cross strictly speaking, if it shows an attempt to make a cross, may be sufficient to allow the ballot to be counted.

(November 1, 1895.)

APPEAL by plaintiff from a judgment of the Christian County Court in favor of defendant in a proceeding brought to contest his right to the office of superintendent of schools. *Affirmed.*

The facts are stated in the opinion.

Messrs. **J. E. Harrison** and **Ricks & Creighton,** for appellant:

The purposes of the ballot reform act of 1891 were to secure the freedom, purity, and uniformity and secrecy of the ballot in elections.

See title of act, p. 108, Sess. Laws 1891; *Sego* v. *Stoddard*, 136 Ind. 297, 22 L. R. A. 468; *People* v. *Onondaga County Canvassers*, 129 N. Y. 395, 14 L. R. A. 624; *Curran* v. *Clayton*, 86 Me. 42.

The election law (ballot act of 1891) is mandatory.

Parvin v. *Wimberg*, 130 Ind. 561, 15 L. R. A. 775; *Curran* v. *Clayton*, *supra*; *Ellis* v. *Glaser*, 102 Mich. 396, 405; *People* v. *Onondaga County Canvassers*, *supra*; McCrary, Elections, 3d ed. § 503.

The ballot reform act is a radical departure from former methods.

Whittam v. *Zahorik*, 91 Iowa, —; *Curran* v. *Clayton* and *Ellis* v. *Glaser*, *supra*.

The cross, made substantially as that set forth in § 23 of the ballot reform act of 1891, is the only mark that the voter can use to express his choice, and it must be placed in the circle or square, as the law directs.

Ellis v. *Glaser*, *Whittam* v. *Zahorik*, *Curran* v. *Clayton* and *Parvin* v. *Wimberg*, *supra*; *Kirk* v. *Rhoads*, 46 Cal. 399; *Re Vote Marks*, 17 R. I. 812.

If another mark be used, there is nothing to certify its meaning.

Re Vote Marks, *Ellis* v. *Glaser*, and *Whittam* v. *Zahorik*, *supra*.

A ballot with a straight mark or line in party circle cannot be counted.

Ellis v. *Glaser*, *Curran* v. *Clayton*, and *Whittam* v. *Zahorik*, *supra*.

A ballot with a cross outside the square or circle should not be counted.

Ellis v. *Glaser*, *supra*.

A cross near to but outside of the square opposite the name should not be counted.

Whittam v. *Zahorik*, *supra*.

A cross under or above the word "Democratic" should not be counted.

Whittam v. *Zahorik* and *Curran* v. *Clayton*, *supra*.

A cipher in the circle or square should not be counted.

Whittam v. *Zahorik*, *supra*.

A cross made with more than two intersecting straight lines should not be counted.

Ibid.

While the intention of the voter is one of the first purposes of interpretation of ballots, yet the counting of the vote does not depend solely upon the power to ascertain and declare his choice, but also on the expression of that choice in the manner provided by statute.

Ibid.; *Curran* v. *Clayton*, *supra*.

Although the choice of the voter may be apparent from the face of the ticket, still the vote will not be counted if not expressed in the manner provided by statute.

Whittam v. *Zahorik*, 91 Iowa, —; *Ellis* v. *Glaser*, 102 Mich. 396, 405.

The cards of instruction by the county clerk, and circular of instruction by the secretary of state, to voters, are made by the statute official, and are binding on the voters until the court has put a construction on the law differing with them.

3 Starr & C. Rev. Stat. chap. 46, §§ 18, 33; *Parvin* v. *Wimberg*, 130 Ind. 561, 15 L. R. A. 775; *Ellis* v. *Glaser*, *supra*.

Any mark placed upon the ballot by the voter other than that provided by the statute, or any mark not necessary to the legal expression of his choice, should vitiate the ballot as a distinguishing mark, as such mark could be used for identification, and thereby violate the secrecy of the ballot and lead to the corruption of the voter.

Parvin v. *Wimberg*, *supra*; *Curran* v. *Clayton*, 86 Me. 42; *Whittam* v. *Zahorik*, *supra*; *Sego* v. *Stoddard*, 136 Ind. 297, 22 L. R. A. 468; *People* v. *Onondaga County Canvassers*, 129 N. Y. 395, 14 L. R. A. 624.

Messrs. **J. C. McBride** and **Taylor & Abrams,** for appellee:

If the statute simply provides that certain acts or things shall be done within a particular time, or in a particular manner, and does not declare that their performance is essential to

the validity of the election, then they will be regarded as mandatory if they do, and directory if they do not, affect the actual validity of the election.

McCrary, Elections, last ed. § 190; Paine, Elections, § 498; *Goss* v. *State*, 34 Ind. 425; *Piatt* v. *People*, 29 Ill. 54; *Barnes* v. *Pike County Supvrs.* 51 Miss. 305; *Fry* v. *Booth*, 19 Ohio St. 25; *Tarboz* v. *Sughrue*, 36 Kan. 235; *DeBerry* v. *Nicholson*, 102 N. C. 465.

The policy of this state has always been toward a liberal construction of the provisions of election laws, so as to arrive at the intention of the will of the voter as expressed by him in his ballot.

Bowers v. *Smith*, 111 Mo. 45, 16 L. R. A. 754; *Dale* v. *Irwin*, 78 Ill. 180; *Beard* v. *State*, 34 Neb. 372.

All statutes tending to limit the citizen in his exercise of the right of suffrage should be liberally construed in his favor.

Sanner v. *Patton*, 155 Ill. 553; *People* v. *Wappinger's Falls*, 144 N. Y. 616; *Oxens* v. *State*, 64 Tex. 509.

When the question is for what or for whom a ballot should be counted, the intention of the voter should, if possible, be ascertained, and when ascertained it must control.

McKinnon v. *People*, 110 Ill. 305; *People* v. *Matteson*, 17 Ill. 167.

The writing of the name just above the title of the office has been held by this court to be sufficient to make it a vote for the office.

Kreitz v. *Behrensmeyer*, 125 Ill. 192.

The ballot having the name of Martin Lynch signed at the bottom of the ticket should be rejected.

Spurgin v. *Thompson*, 37 Neb. 39.

There are two classes of marks. One is where a plausible reason is or may be suggested for their existence, consistent with honesty and good faith; the other, where no such reason can be suggested. The former will rarely be allowed to invalidate a ballot, unless it appears that it was in fact used for corrupt purposes. The latter, unexplained, will generally be presumed to be for corrupt purposes.

State v. *Walsh*, 62 Conn. 260, 17 L. R. A. 369.

Wherever our statutes do not expressly declare that particular informalities avoid the ballot, it would seem best to consider their requirements as directory only.

State v. *Russell*, 34 Neb. 116, 15 L. R. A. 740.

The paper ballot is to prevail as the highest evidence of the voter's intention.

Beardstown v. *Virginia*, 76 Ill. 49; *Kreitz* v. *Behrensmeyer*, 125 Ill. 167.

The intention of the voter should, if possible, be ascertained, and that intention must control.

Rutledge v. *Crawford*, 91 Cal. 526, 13 L. R. A. 761.

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

This is a proceeding begun in the court below by the appellant, to contest the election of appellee to the office of superintendent of schools of Christian county. It appears from the petition filed that at the November election, 1894, Robert W. Orr was the nominee of the Democratic party, Nina S. White of the Republican party, and Eugene E. Chumley of the People's party; that by the canvass of the votes cast for these candidates, Orr received 3,215, White 3,195, and Chumley 489, whereupon a certificate of election was duly issued to Orr, who qualified and entered upon the duties of the office. Other tickets on the ballot had no candidate for that office.

It is insisted by petitioner that Miss White was in fact legally elected. The grounds of the contest are, that in each voting precinct of the county the judges failed to count a certain number of votes cast for either of the candidates, which should have been counted for White; that they counted for Orr votes which should have been counted for White, and counted votes for Orr not legally cast for him. The answer denies these grounds, and avers that in each of the precincts votes were cast for Orr which should have been, but were not, counted for him; that votes cast for him were counted for White, and that votes were counted for White which were not legally cast for her. On a recount of the ballots the court found that White received 3,168 votes and Orr 3,160, to which no objection was made. There were counted to Chumley 488, and 75 by agreement rejected, as being votes for neither party, leaving 111 in dispute. Of these the court counted 35 to White, 44 to Orr, and rejected the remaining 32 altogether, thus giving Orr a total of 3,204, and White 3,203, and declaring Orr duly elected by a majority of one vote.

It is contended by counsel for appellant that under our statute only a cross can be used upon the ballots to indicate the voter's choice of candidates, which cross must be in the form indicated in the statute and placed in the circle or square, and unless the elector so marks his ballot it must be rejected. In other words, they insist that the language of section 23 of the ballot law of this state (3 Starr & C. chap. 46, p. 570), which says the voter "shall prepare his ballot by making in the appropriate margin or place a cross (X) opposite the name of the candidate of his choice for each office to be filled," etc., is mandatory, and must be strictly complied with, else the ballot is void. They also insist that every mark upon a ballot cast, not necessary to indicate the voter's choice of candidates, as indicated in said section 23, should be treated as a distinguishing mark and render the whole ballot void. In support of these positions several decisions of the courts of other states are cited, but in view of the language of the statutes under which those cases were decided we do not regard them as in point here. For instance, the case of *Parvin* v. *Wimberg*, 130 Ind. 561, 15 L. R. A. 775, much relied upon by counsel for appellant, was decided upon a statute of that state, section 45 of which provides that in indicating the voter's choice of candidates a stamp shall be used by stamping the square immediately preceding their names, and it was held the use of the stamp and the placing it in and upon the square were mandatory. Section 23 of our statute does not say with what the cross shall be made, neither does it mention squares or circles opposite

the names of candidates, but requires the cross to be made "in the appropriate margin or place opposite the name," etc. If the desire is to vote for all the candidates of a party, the cross is to be placed at the "appropriate place preceding the appellation or title of such party," etc., nothing being said about a circle. It is true that by construing section 14, prescribing the form of the ballot, with section 23, it appears that by "appropriate margin or place" is meant the circle or square on the ballot; but there is not, as in the Indiana statute, a direct command that the cross shall be made in a square or circle. Neither does our statute, as we construe it, prescribe the form of the cross to be used. It provides that it shall be "by making . . . a cross (×) opposite the name," etc. Manifestly, placing the capital × in parenthesis was merely to indicate to the voter how the cross might be made, and it cannot be seriously insisted that the statute commands the cross to be so made. That is to say, even if it were held that the statute is mandatory, its requirements would be satisfied by complying with the language, "by making a cross," in either of three forms, viz., in the form of a capital ×, as indicated in the statute; in a form similar to a capital T, or by a crossing of two lines thus X. See Webster's International Dictionary, defining "cross." There is therefore a manifest difference in the requirement that a voter shall use a stamp, furnished for that purpose, to indicate his choice of candidates, and that he shall make a cross. A failure to use the stamp is a positive violation of the law; a failure to make a distinct, well-formed cross may be the result of inability or inadvertence. It would be impracticable, therefore, to give effect to our statute construed to be mandatory as to the form of the cross to be made to indicate the voter's choice.

It has always been held in this state that if the intention of the voter can be fairly ascertained from his ballot, though not in strict conformity with law, effect will be given to that intention,—in other words, that the voter shall not be disfranchised or deprived of his right to vote through mere inadvertence, mistake, or ignorance, if an honest intention can be ascertained from his ballot. See *McKinnon* v. *People*, 110 Ill. 305; *Behrensmeyer* v. *Kreitz*, 135 Ill. 591. The ballot law of 1891 does not, in our opinion, change the rule in this regard unless to give effect to such intention would tend to destroy the secrecy of the ballot. On the contrary, section 26 expressly provides: "If the voter marks more names than there are persons to be elected to an office, or if, for any reason, it is impossible to determine the voter's choice for any office to be filled, his ballot shall not be counted for such office,"—plainly meaning that if the voter's choice can be ascertained from his ballot it shall be counted, if it can be done consistently with other provisions and the object of the act. It was the intention of this amendment, as expressed in its title, to provide for the printing and distribution of ballots at public expense, for the nomination of candidates for public offices, to regulate the manner of holding elections and to enforce the secrecy of the ballot. "Wherever our statutes do not expressly declare that particular informalities do not avoid the ballot, it would seem best to consider their requirements as directory only. The whole purpose of the ballot as an institution is to obtain a correct expression of intention, and if in a given case the intention is clear, it is an entire misconception of the purpose of the requirements to treat them as essentials,—that is, as objects in themselves, and not merely as means." Wigmore, Australian Ballot System, 2d ed. p. 195. To say that any mark on a ballot other than a cross in the proper place makes it void is to go beyond the language of the statute and in direct conflict with section 26, *supra*.

The statute being directory, and not mandatory, as to the manner of voting prescribed in section 23, it remains to be determined what is its proper construction. In settling this question two objects must be kept in view, *viz.*, the secrecy of the ballot, and the intention of the voter. It was evidently the intention of the legislature to declare what should absolutely destroy a ballot or prevent its being counted by section 26, *supra*: "If the voter marks more names than there are persons to be elected to an office, or if, for any reason, it is impossible to determine the voter's choice for any office to be filled, his ballot shall not be counted for such office. No ballot without the official indorsement shall be allowed to be deposited in the ballot box, and none but ballots provided in accordance with the provisions of this act shall be counted." Observing this mandatory language, if a voter's intention can be gathered from his ballot, without laying down a rule which may lead to a destruction of its secrecy, that intention should be given effect. Nothing is said in the act about distinguishing marks, but if a mark or character is used which, though indicating an intention to vote a particular party ticket or for certain candidates, at the same time serves the purpose of indicating who voted it, thereby furnishing the means to designing persons of evading the law as to secrecy, the ballot should be rejected. It logically follows that the voter's intention must be manifested by a cross, substantially in the place designated, which the judges of elections, or the court on a recount, can see was an honest attempt to follow the directions of the law. For instance, on one of the ballots cast at this election the voter simply wrote at the head of the Democratic ticket the word "Democratic." On others a single mark was made across or through the circle or square. On others a circle within the circle or square was made, and on still others irregular characters were so used. On one ballot crosses were made opposite the names of candidates, but entirely outside of the squares. In those there was no attempt by the voter to indicate his choice by making a cross in the appropriate place. On another, seemingly regular in other respects, the name "Martin Lynch" is signed at the bottom. These marks and names may tend to show an intention on the part of the voter to vote tickets so marked, but they disregard the plain directions of the law, and

furnish the means whereby the secrecy of the ballot could be destroyed. Therefore we think all such ballots were properly rejected by the court below. On the other hand, ballots appear in the record on which it is clear that the voter attempted to make a cross in the proper place to indicate his choice of candidates, but succeeded more or less imperfectly. It being clear, in such cases, that the intention was to conform to the statute, and not to distinguish the ballot, they were properly counted.

On one of the ballots, opposite the word "yes," on the proposed constitutional amendment submitted, the word "get," as read by counsel for appellant, was written in the square, opposing counsel insisting that the word was meant for "yes." It is insisted by counsel for appellant that this word, as used, is as much a distinguishing mark as is the name "Martin Lynch" to the ballot above referred to. We do not think so. The name signed to the ballot could serve but one purpose, namely, to indicate who voted the ballot; the word "yes" or "get" tended to indicate the voter's choice upon the proposition submitted; and that it served the further purpose of distinguishing the ballot, is, to say the least, a very remote conjecture.

On several of the ballots counted for either candidate, names of candidates were erased by drawing a pencil through them, and these, it is insisted, are invalid because of distinguishing marks. What we have already said referring to section 26 is a sufficient answer to this contention.

Applying the rules indicated, to the ballots in this record, we find that of the thirty-two rejected all were properly excluded except eight, four of which should have been counted for each of these candidates. In these the voters made a well-defined cross in the Democratic or Republican circle at the head of the ticket (four in each), but also made a cross in another circle opposite a party name on which there was no candidate for superintendent of schools. While such ballots could not be counted for candidates upon both tickets, because the voter in that case marked more names than there were persons to be elected to the office, that rule cannot apply to these candidates,—that is to say, where a voter made a cross in the Republican circle and did the same in the Independent Republican circle, on which last-named ticket there was no candidate for superintendent of schools, he did not mark more names than there were persons to be elected to that office, but expressed his choice for Miss White. And so where a voter made a cross in the Democratic circle but did the same in the People's silver circle, on which there was no candidate for the office, the vote should have been counted for Orr.

Of the disputed votes counted for Orr, one was marked in the Democratic circle with a character like this:  and had no other marks upon it.* We are unable to discover in the mark any resemblance to a cross, or see wherein the voter attempted to make a cross of any kind, and therefore, under the rule laid down, the ballot should have been rejected.

It is earnestly insisted that another ballot counted for Orr, marked in the Democratic circle in this way:  should have been rejected. The marks were made with ink, and while it is somewhat blurred, and cannot be said to be a cross, strictly speaking, still we think it shows an attempt on the part of the voter to make such a mark, and was therefore properly counted. But if it were otherwise, the result which we reach upon the whole record would not be changed, because on one of those counted for Miss White the mark in the Republican circle is like this:  Certainly there is no more reason for saying that one of these characters was intended for a cross than the other. We think they were both properly counted.

On three of the tickets counted for Miss White a cross was made in the Republican circle, but on one of them the name "R. W. Orr" and on the other two "Robert W. Orr" was written under the name "Nina S. White," and a cross made in the square opposite, but extending somewhat below her name. It would seem that the voter in each of these cases intended to vote the Republican ticket, except for Miss White, but to vote for Orr as against her. If the cross in the square opposite the name "White" had been made directly opposite that of Orr, the vote would, under the provisions of the statute and our recent decision in *Sanner* v. *Patton*, 155 Ill. 553, have been a regular vote for Orr. We are, however, of the opinion that it is, to say the least, uncertain from these ballots which of the candidates the voter intended to vote for, and therefore, under section 26, *supra*, they should not have been counted for either.

Our conclusion then is, that, in any view of the case presented, appellee was entitled to his certificate of election, having at least a majority of three votes. The judgment of the county court must therefore be affirmed.

It may properly be added that it is the duty of every voter, under this law, to ascertain and follow the provisions of the statute and the directions of the secretary of state in his instructions sent out with the ballots, and that whenever, either through negligence or wilfulness, he disregards that duty, he does so at the peril of losing his vote.

Judgment affirmed.

*The above characters are fac similes of the marks on the original ballots.

Philander M. ALDEN *et al.*, Exrs., etc., of James S. Waterman, Deceased, *Appts.*,
v.
ST. PETER'S PARISH *et al.*

(158 Ill. 631.)

1. **Gifts to charitable uses** are excluded from the operation of the rule against perpetuities by the statute of 43 Eliz. chap. 4, which is in force in Illinois.
2. **A gift to the rector, church wardens, and vestrymen of an unincorporated religious society,** in trust to pay the salary of the rectors of the parish forever, or for church purposes only, is for a charitable use.
3. **Incorporation of a church society** cannot be presumed merely because the statute prescribes a mode by which such societies may incorporate.
4. **The fact that many unincorporated church societies** have been in existence is a matter of common knowledge.
5. **An unincorporated church society is not affected by a statute** limiting the quantity of real estate which can be held by incorporated church societies.

(November 1, 1895.)

APPEAL by complainants from a decree of the Circuit Court for Kane County in favor of defendants in an action brought to set aside a conveyance by complainants' testator to the defendant church of certain real estate. *Affirmed.*

Statement by **Carter, J.**:

Appellants filed their bill in equity in the circuit court of De Kalb county, at the October term, 1888, to set aside two certain deeds and for partition of the real estate purporting to be conveyed by said deeds. A change of venue was taken to the circuit court of Kane county, where a hearing was had and the bill dismissed for want of equity.

The bill represents that on or about September 10, 1877, James S. Waterman, late of said De Kalb county, was the owner in fee simple of the following described real estate: Lots 9, 10, 11, and 12, in J. S. and J. C. Waterman's subdivision of lots 1, 2, 3, and 4, of block 24, of the original village of Sycamore, in said De Kalb county, containing $\frac{22}{100}$ of an acre of land; that on that day said James S. Waterman, and Abbie L. Waterman, his then wife, now also deceased, made and delivered to the rector, church wardens, and vestrymen of St. Peter's parish, in the city of Sycamore and the diocese of Illinois, otherwise known as "St. Peter's parish in the city of Sycamore and the diocese of Illinois," a deed of conveyance of said lots; that on the 11th day of December, 1877, said grantors also executed a deed of conveyance of a farm in said De Kalb county, containing 160 acres of land, to said grantee, the express condition in each being "the love and affection" grantors have and bear unto the Protestant Episcopal Church and said parish. The deed of the town lots contains the following exception and reservation: "Excepting and reserving therefrom, during the lifetime of the grantors herein and the survivor of them, the rents, profits, and use and income of the two dwelling houses situated on said lots, and such suitable quantity of land immediately about them as may be necessary to the proper enjoyment of the same, with the right to improve and repair said houses, but not to remove or destroy them, said premises to be used for church purposes only, and not sold or encumbered, and shall revert to the grantors, their heirs and assigns, whenever this condition is broken." And the deed of the farm contained a condition and reservation in the following words: "This conveyance is made upon the express condition and trust that the rents, issues, and profits of the above-described land be devoted to and used for the payment, so far as it may go, of the salary of the rectors of said parish forever, and for no other purpose; and this conveyance is accepted upon the express understanding and agreement that the title hereby conveyed shall immediately revert to and be vested in the party of the first part, his heirs, executors, and administrators, when the income from said land shall be diverted to any other purpose, excepting and reserving therefrom, during the lifetime of the grantors herein and the survivor of them, the rents, profits, and use of the above-described land."

James S. Waterman died July 19, 1883, leaving a will, under which appellants were appointed and are still acting as testamentary trustees. He left also a widow surviving, who died before this bill was filed, and her representatives and devisees are now parties defendant.

The bill proceeds on the theory that said conveyances were and are absolutely void, because contrary to the laws of the state of Illinois in relation to the creation of perpetuities, and because the grantee, as a religious society, could not, under the statute, take more than 10 acres of land, and it is alleged that, by reason of the premises, Waterman, at the time of his death, still remained and was owner of all of said lands; that the said Abbie L. Waterman, widow of the said James S. Waterman, renounced, under said will, the provision therein made in her favor, and there being no issue of the said James S. Waterman, the said widow elected to take one half of all the real estate, and that she thereby became and was, at the time of her death, the owner of an undivided one half of all of said real estate; that under and by virtue of the terms of said will complainants became the holders of the legal title of an undivided one half of all of said land in trust for the uses and purposes mentioned in said will. The bill further alleges that

NOTE.—For presumption as to incorporation, see *note* to *Re* Gibbs' Estate (Pa.) 22 L. R. A. 276.

As to what constitutes a charity, see Philadelphia v. Overseers of Public Schools (Pa.) 29 L. R. A. 600; Webster v. Wiggin (R. I.) 28 L. R. A. 510; Philadelphia v. Masonic Home (Pa.) 23 L. R. A. 545; Crerar v. Williams (Ill.) 21 L. R. A. 454, and cases there referred to.

the said St. Peter's parish is, and was at the times of the execution and delivery of the said deeds of conveyance, a corporation formed for religious purposes under the laws of the state of Illinois for the incorporation of religious societies, and that under such laws the quantity of land mentioned and described in the deed of conveyance secondly above referred to could not, at the time of the execution and delivery of said deed, be owned or held by said St. Peter's parish, nor could the grantees in said deed take or hold the lands therein attempted to be conveyed for the purposes therein mentioned, and that for this reason also said last-mentioned deed was and is utterly void.

The answer denied the allegation that St. Peter's parish is, and was at the time of the execution of said deed, a corporation formed for religious purposes under the laws of the state of Illinois for the incorporation of religious societies; and on its becoming known that the allegation in the bill as to the incorporation of the church could not be made clear by the proofs, the complainants filed an amendment to the bill in the following words:

"Your orators further represent that it is claimed and pretended by the said St. Peter's parish that it was never incorporated as herein charged, but your orators charge that the contrary thereof is the fact, as herein shown. Your orators charge, however, and insist, that if in fact it should appear on the hearing hereof that said St. Peters' parish was not an incorporated organization, as herein stated, nevertheless it was at and long before the times of the delivery of the said deeds, and has been continually ever since, a church organization, formed and subsisting for religious purposes only, and to promote and advance the peculiar tenets of the religious sect known throughout Illinois as the Protestant Episcopal Church, and belonging to the diocese aforesaid from and about the time of organization, to wit, 1856, and differed from other churches of this state, members of said diocese, only in the lack of such corporate entity, and in virtue and effect, and to all intents and purposes, was precisely the same as if it had been duly incorporated, excepting only the legal, technical fact that it had not complied with the statute of the state of Illinois in filing its certificate of organization with the recorder of said De Kalb county, and therefore is and was within the statute of this state and the policy of its laws prohibiting religious corporations from owning and holding lands in excess of a stated amount, or it should be held, under the law, incapable of taking or holding title to any real estate whatever."

This paragraph was demurred to and the demurrer sustained, leaving the cause to go to a hearing on the rest of the bill. The bill further alleged that the condition contained in said first-mentioned deed has been broken because the lands described have been used for other than church purposes, and that if any title ever passed by said deed, such title has, by reason of the breaking of such condition, reverted, as provided in said deed.

The parish was organized in 1856 as a part of the machinery of the diocese of Illinois. At that time its purposes were religious altogether, and it has generally been maintained as a parish and church organization since that time. Some of the early records of De Kalb county and the early records of the church were missing and could not be produced on the trial. No certificate of organization of the church was found.

Mr. **William R. Plum,** for appellants:

A voluntary society organized for religious purposes is entitled to no greater right to hold lands in this state than corporations authorized by law, even if in fact it can hold any land in perpetuity. Public policy at least forbids it.

Voorhees v. *Reed*, 17 Ill. App. 22; *People* v. *Chicago Gas Trust Co.* 130 Ill. 296, 8 L. R. A. 497; Greenhood, Pub. Pol. 2, 5; Adams & Durham's Statutes 1831, 45; 1835, 340, 341; 1839, 46; 1845, 342, 343, 346, 347; 1859, 293–295; 1872, 372, 373. Tudor, Charitable Trusts, 372, 374, 375, 1920; Duke, Charitable Uses, 192, 125; Perry, Tr. 701; *Andrews* v. *Andrews*, 110 Ill. 223; *Gilmer* v. *Stone*, 120 U. S. 586, 30 L. ed. 734; *American & F. Christian Union* v. *Yount*, 101 U. S. 352, 25 L. ed. 888; *Carroll* v. *East St. Louis*, 67 Ill. 568, 16 Am. Rep. 632; *Santa Clara Female Academy* v. *Sullivan*, 116 Ill. 382, 56 Am. Rep. 776; *Rhoads* v. *Rhoads*, 43 Ill. 252; *Re McGraw*, 111 N. Y. 107, 2 L. R. A. 387; *Hamsher* v. *Hamsher*, 132 Ill. 273, 8 L. R. A. 556; *Atty. Gen.* v. *Tancred*, 1 W. Bl. 90; *Philadelphia Baptist Asso.* v. *Hart*, 17 U. S. 4 Wheat. 1, 4 L. ed. 499.

Corporations only are capable of holding lands in perpetuity.

Atty. Gen. v. *Tancred* and *Philadelphia Baptist Asso.* v. *Hart, supra; Inglis* v. *Sailors' Snug Harbor*, 28 U. S. 3 Pet. 99, 7 L. ed. 617.

Messrs. **Carnes & Dunton,** also for appellants:

Under the evidence defendant church should be held to be an incorporated church under the laws of the state.

At the time of its organization it was made its duty under section 45 of the act of 1845, then in force, to file the certificate provided by that act.

Not only public officers, but everybody else, are presumed to have complied with the laws of the land until the contrary appears.

St. Peter's Roman Catholic Cong. v. *Germain*, 104 Ill. 440; *Andrews* v. *Andrews*, 110 Ill. 223; *Calkins* v. *Cheney*, 92 Ill. 478; *Hamsher* v. *Hamsher*, 132 Ill. 284, 8 L. R. A. 556; *Willard* v. *Methodist E. Ch. of R. C.* 66 Ill. 55; 2 Cook, Stock & Stockholders and Corp. Law, 3d ed. § 693, p. 997; *Methodist E. U. Ch.* v. *Pickett*, 19 N. Y. 482.

The statute should be so construed as to include religious associations who have failed to comply with the statute law in incorporating.

Castner v. *Walrod*, 83 Ill. 171, 25 Am. Rep. 369; *Burgett* v. *Burgett*, 1 Ohio, 469, 13 Am. Dec. 634; *Cruse* v. *Aden*, 127 Ill. 232, 3 L. R. A. 327; *Anderson* v. *Chicago, B. & Q. R. Co.* 117 Ill. 26; *Peoria & P. U. R. Co.* v. *People*, 144 Ill. 458; *African M. E. Church* v. *Conover*, 27 N. J. Eq. 157; Washb. Real Prop. 566, ¶ 32; *Robie* v. *Sedgwick*, 35 Barb. 329; 2 Sugden,

Vendors, 883; *Jackson, Cooper*, v. *Cory*, 8 Johns. 387; 20 Am. & Eng. Enc. Law, p. 804, citing authorities.

Messrs. **Botsford & Wayne** for appellees.

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

The trial court found that the defendant society was not a corporation, and did not come within the provisions of the statute prohibiting corporations formed for religious worship from holding more than 10 acres of land, and found also that the condition of the first deed conveying the lots in question for church purposes only, had not been broken by the renting of such lots and using the rents for church purposes. After a careful consideration of the evidence, and the law applicable thereto, we are satisfied that the case was correctly decided by the learned chancellor in the circuit court.

It has been repeatedly held by this court that the statute 43 Elizabeth (chap. 4) is in force in this state, and that gifts to charitable uses are, by force of that statute, excluded from the operation of the rule against perpetuities. *Heuser* v. *Harris*, 42 Ill. 425; *Andrews* v. *Andrews*, 110 Ill. 223; *Crerar* v. *Williams*, 145 Ill. 625, 21 L. R. A. 454. It is also established that a gift for the support of churches, or to pay the expense of preaching any particular religious doctrine, comes within the equity, and therefore within the spirit, of that statute, as a gift for a charitable use. *Andrews* v. *Andrews*, and *Crerar* v. *Williams*, *supra*; *Hunt* v. *Fowler*, 121 Ill. 269.

It is true that the questions presented for decision by this record, so far as they (or those of a kindred nature) have heretofore come before this court for consideration, have arisen under wills, and not deeds. But we do not understand the counsel for appellants to insist that the deeds in question are void on the ground that, being made to the officers of an unincorporated society in trust for such society or its members or directly to such unincorporated society, there was no grantee capable, in law, of taking by deed. If the grant were not one made as a gift for a charitable or pious use, and so not brought within the saving provisions of the statute of 43 Elizabeth, it might be contended that the deeds would be void for want of a grantee capable of taking. *German Land Asso.* v. *Scholler*, 10 Minn. 331. But we are of the opinion, conceding that the religious society in question was not incorporated, that the conveyances were made to the rector, church wardens, and vestrymen of the society in their official capacity, in trust for a designated charitable and pious use, and are within the provisions of the statute in question, and are not void for want of a grantee capable of taking by deed, but will be upheld and enforced in equity, unless rendered invalid upon other grounds urged by counsel and referred to below. *Judd* v. *Woodruff*, 2 Root, 293; 20 Am. & Eng. Enc. Law, p. 804; *Ferraris* v. *Vasconcellos*, 31 Ill. 25.

The conveyances in question were made to the rector, church wardens, and vestrymen of this unincorporated religious society, the one conveying the 160 acres being "upon the express condition and trust that the rents, issues, and profits be devoted to and used for the payment, so far as it may go, of the salary of the rectors of said parish forever," and the other, conveying the lots, being upon condition that they were to be used for church purposes only. Both were given for the consideration of love and affection for the church and parish. It is clear that these conveyances constituted a gift in trust for a charitable use. *Ferraris* v. *Vasconcellos*, 23 Ill. 456; 31 Ill. 26; 20 Am. & Eng. Enc. Law, pp. 805–809. And in such a case a court of equity will be inclined to lend its aid in carrying out the purpose of the donor and to give effect to the trust, if it can be done consistently with existing laws. The questions so far considered have been so often and so uniformly decided that we deem any further discussion of them, and citation of authority in support of the position here assumed, unnecessary.

It is, however, contended—and this is the principal question in the case—that this society should be held to be an incorporated church or religious society under the laws of this state, or if it be not held to be a corporation, still, inasmuch as incorporated religious societies are, by the statute, prohibited from taking or holding more than 10 (now 20) acres of land, that on the grounds of public policy the prohibition must extend to all such societies, whether incorporated or not.

In support of the first branch of this contention, it is said that by the statute in relation to the incorporation of religious societies in force at the time of the organization of the church in 1856, *viz.*, the Act of 1845, chap. 25, p. 120 (see 1 Adams & D. Real Estate Stat. p. 342), it was made the duty of the society, or its trustees, to make and file with the recorder of deeds the certificate required by section 45 of that Act, and thus become incorporated; and it is further said that because of the destruction of one of the early records of the church, and also one of the early records of De Kalb county, it is left uncertain whether the duty imposed by the statute was performed or not, and that the presumption must be indulged that the duty imposed by the statute was performed, the law complied with, the certificate made and filed, and the society thus duly incorporated. It is, however, evident that the statute in question did not make it obligatory upon all voluntary religious societies to become incorporated, but merely prescribed the mode by which they might incorporate, and there being no evidence that this society ever took any of the steps prescribed by the statute to become incorporated, or that it ever assumed to act as a corporation, it would be carrying the doctrine of presumptive evidence too far to presume such incorporation. It is a matter of common knowledge that there have been in existence in this state many such unincorporated societies, and so far as the evidence discloses this was one of them. In *Ferraris* v. *Vasconcellos*, *supra*, where this court held that the steps taken in attempting to incorporate a religious so-

ciety under the act of 1845 were insufficient to create a corporation, Mr. Justice Walker said (p. 456): "The statute must be at least substantially complied with in its provisions, and all of its express requirements must be observed. We have no power to dispense with such requirements, and render illegal acts valid and binding. It is not within the province of the court to question the propriety of such requirements when imposed by the legislature, and in this case they are few, simple, and easily performed. But whether they are the most salutary is not a question which we can consider; they have been imposed as a condition to the organization of these corporations, and must be performed before corporate rights can attach. And this is expressly declared to be the legislative will by the latter clause of the 49th section."

The contention that public policy requires that the statutory limitation on the power to take and hold real estate should be imposed on these unincorporated religious societies by judicial decree, is, we think, equally untenable. Upon becoming incorporated certain legal rights are acquired and certain burdens assumed, as provided by the statute. Without incorporating, these societies cannot exercise these rights that pertain to corporations, and they ought not to be required to assume the corresponding burdens,—at least unless the statute so directs. As pointed out in *Ferraria* v. *Vasconcellos*, *supra*, and other cases, there are marked distinctions in the powers, property rights, and duties of the two kinds of organizations. *Robertson* v. *Bullions*, 11 N. Y. 243. There are many corporations closely allied to these church organizations which have been held not subject to the 10-acre limitation, yet it might, as reasonably as here, be contended that public policy requires that they be included in what is usually denominated religious corporations, or corporations organized for religious worship. *Hamsher* v. *Hamsher*, 133 Ill. 273, 8 L. R. A. 556; *Gilmer* v. *Stone*, 120 U. S. 586, 30 L. ed. 734; *Germain* v. *Baltes*, 113 Ill. 29. In *Andrews* v. *Andrews*, *supra*, it was urged that public policy requires that the value as well as the number of acres should be limited, but it was there said that it was "a sufficient answer to say that the statute has authorized such bodies to acquire and hold not exceeding 10 acres of land, without any limit as to value or income." Yet 10 acres of land in some parts of the state might not be of much value, while in a large city it would be worth many millions. It is for the lawmaking power to determine what the limit shall be and upon what bodies it shall be imposed, and unless that power imposes on unincorporated religious societies the same restrictions it has placed upon those becoming incorporated, it is not within the province of the courts to do so.

The decree of the Circuit Court will be affirmed.

WISCONSIN SUPREME COURT.

JOHN V. FARWELL COMPANY, *Appt.*,
v.
Lucy Ellen HILBERT *et al.*

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

1. A judgment by confession is irregular only, and not void, where it is founded on a valid debt and there is a sufficient warrant of attorney and release of errors, although the answer of confession required under Rev. Stat. § 2896, to be signed by defendant or some attorney in his behalf, is signed by plaintiff's attorney in the name of another attorney at his special instance and request, as attorney for defendant.

2. The enforcement of a judgment at law will not be enjoined merely for want of jurisdiction in the court which rendered it,

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NOTE.—*Injunctions against judgments entered on confession.*

I. *In favor of creditors.*
II. *For irregularities.*
III. *For fraud.*
IV. *Judgments against public policy.*
  a. *Usury.*
  b. *Compounding crimes.*
  c. *Gambling consideration.*
V. *Judgments against sureties.*
VI. *Judgments against corporations.*
VII. *Judgments against partners.*
VIII. *Judgments against executors and administrators.*
IX. *Statute of limitations.*
X. *Consideration not due.*
XI. *Valid defense must be shown.*
XII. *Negligence.*
XIII. *Remedy at law.*
XIV. *Other matters.*

I. *In favor of creditors.*

The general rule is that no one but a judgment creditor is entitled to an injunction against judgments taken against his debtor by others, but on this question there is some conflict. This does not appear to have been discussed in the case of JOHN V. FARWELL CO. v. HILBERT, but the question there was as to the right of a general creditor to attack a judgment by confession entered against the debtor on the ground of irregularities, and the court properly held that no one but the debtor himself could attack a judgment on such grounds.

In regard to the right of a general creditor to obtain an injunction in aid of his attachment against judgments confessed by the debtor, there is a conflict of authority, the determination being largely controlled by a number of cases, on the question as to the right of a creditor to attack fraudulent conveyances, many of which are not injunction cases. Where a creditor has a lien by virtue of an attachment, the weight of authority seems to be in favor of his right to obtain an injunction, but this must be taken in connection with the rule of law in each state as to the general right of a creditor to set aside fraudulent conveyances.

Some cases hold that an attaching creditor having a lien on the property is entitled to an injunction against the proceedings on the judgment fraudu-

unless such judgment is shown to be unjust or inequitable.

(November 26, 1895.)

APPEAL by plaintiff from a judgment of the Circuit Court for Dodge County in favor of defendants in an action brought to set aside certain judgments, and execution levies thereon, which were alleged to have been wrongfully confessed in fraud of plaintiff's rights. *Affirmed.*

Statement by **Pinney, J.:**

This action was brought to set aside two judgment notes and judgments entered thereon, and levies of execution made to satisfy the same, namely, a judgment note in favor of Lucy Ellen Hilbert against the defendants G. B. Hilbert and H. M. Johnson, for $5,423.19, dated August 27, 1892, upon which judgment was entered in her favor against them in the circuit court for Dodge county, December 30, 1893, for $5,421.51; and a judgment note in favor of the defendant James J. Hilbert against the defendant G. B. Hilbert for $2,105.05, dated December 11, 1893, upon which judgment was entered in his favor against said G. B. Hilbert, in the same court, on the 30th day of December, 1893, for $2,140.60. These executions were levied by the defendant Peters, sheriff of Dodge county, on the same day. The judgments were entered upon the stock of merchandise of the defendant G. B. Hilbert, which was sold thereunder, and the money realized was $4,500. It appeared that the plaintiff was also a creditor of the said G. B. Hilbert and H. M. Johnson for goods sold and delivered to

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lently confessed by the debtor to other parties. Blum v. Schram, 58 Tex. 524; People v. Van Buren, 136 N. Y. 252, 20 L. R. A. 446; Keller v. Payne, 16 N. Y. S. R. 245.

In People v. Van Buren, *supra*, it was held that an attaching creditor is entitled to an injunction restraining an execution sale of the debtor's property on judgments fraudulently confessed, where such debtor is insolvent, distinguishing the prior case of Thurber v. Blanck, 50 N. Y. 80, which was a case of an attaching creditor attempting to reach equitable assets, and the statute requiring the return of an execution unsatisfied as a condition precedent. Although there is much conflict of authority in other states as to the standing of an attaching creditor, this case holds that an attaching creditor ceases to occupy the defenseless position of a creditor at large, and becomes in a certain sense invested with the privileges of a creditor whose debt has been adjudged valid, and who finds himself embarrassed in its collection by fraudulent conduct of the debtor.

And attaching creditors are entitled to an injunction against execution sale under fraudulent judgments confessed in favor of other creditors, as they cannot maintain an action of replevin against the sheriff, the writ of execution giving him the right to possession, and an action against purchasers, if insolvent, would afford no redress, and they are not entitled to appear and plead in the action at law. Perry v. Sharpe, 8 Fed. Rep. 15.

And where a merchant was induced to sell on credit, and by fraud and collusion of the debtor judgment notes were given to another party, and levy made on the goods sold, this is such fraud as will entitle the vendor to an injunction against such sale. *Ibid.*

A judgment creditor is entitled to an injunction against proceedings under a judgment fraudulently and subsequently confessed by his debtor to other persons to prevent the collection of the complainant's judgment. Oakley v. Young, 6 N. J. Eq. 453.

And an injunction was granted at the instance of a creditor on the ground that the debtor had fraudulently executed a bond, and was about to confess judgment in order to defeat his creditor. Mahaney v. Lazier, 16 Md. 69.

So, judgments by confession which are fraudulent as to other creditors will authorize injunction against an execution sale of personal property, made to deprive creditors of their rights, where the debt was not yet due, and was secured by a real-estate mortgage; and the fraud will dispense with the deposit of the amount required by 2 N. Y. Rev. Stat. 190, § 147. Burns v. Morse, 6 Paige, 108.

And a trust fund assigned for creditors will be protected by enjoining an execution sale, under

judgments confessed that are void under N.Y. Laws 1887, chap. 503, forbidding preferences. Spelman v. Jaffray, 22 Abb. N. C. 315; Wilcox v. Payne, Id. 307; Riessner v. Cohn, Id. 312.

So, under Illinois assignment act of 1887, § 13, providing that all preferences shall be void, judgments by confession entered just prior to an assignment for creditors and in fraud thereof may be enjoined at the instance of a creditor, where the assignee for creditors refuses to institute such suit. Preston v. Spaulding, 120 Ill. 214.

So, trust funds assigned for creditors will be protected by enjoining a sale under judgments confessed preferring one of the officers of a corporation. Harding v. Fiske, 25 Abb. N. C. 348. See also Thomas v. Watson, Taney, C. C. 297, *infra*, IV.

And judgments by confession and the levy thereunder will be enjoined at the instance of a creditor, where the same is in contravention of the assignment act and fraudulent, and the assignee refuses to attack the same. Lindauer v. Lang, 29 Ill. App. 188.

An assignee for creditors is not a proper party defendant in an action by a creditor to enjoin a sale under judgments fraudulently confessed to defeat creditors, where it is claimed that the assignment is also fraudulent, as the remedy is by removing the assignee if he is not acting in good faith. Artman v. Giles, 155 Pa. 409.

Where a judgment against a grantor was purchased, and the grantee of an undivided part of the land told the purchaser of the judgment that it was valid, and that the amount thereof was due, asked delay in issuing execution, and thereafter the grantee, to defeat such execution, confessed a judgment to another party, having full notice of complainant's priority, the same will be set aside as a cloud on the title, preventing a sale for full value under the prior judgment. Oakley v. Young, 6 N. J. Eq. 453.

A partnership lien creditor may enjoin judgments confessed by his debtor to another party, where the debt was not due, as N. J. Rev. Stat. 946, § 5, prohibits a judgment on confession where it is not due. Blackwell v. Rankin, 7 N. J. Eq. 153. See Christy v. Sherman, 10 Iowa, 535, *infra*, VII.

Other cases refuse an injunction in favor of a creditor against judgments confessed by the debtor to others, and this refusal is on the ground that he is not a judgment creditor, or that he has a remedy at law, or that the judgment confessed is not fraudulent or unjust.

Attaching creditors cannot enjoin a sale under a judgment fraudulently confessed by his debtor, as they have a standing to rule the sheriff to pay the proceeds into court, and there question the validity of the confessed judgment. Artman v. Giles, 155 Pa. 409.

them while engaged in the mercantile business, to the amount of $946.79, for which it had caused a writ of attachment to be issued in its action against said Hilbert & Johnson, in the same court, and delivered to the sheriff of said county to be levied on the same stock of merchandise; and it was alleged that Hilbert & Johnson, on the 30th day of December, 1893, were insolvent, and unless the court should enjoin the payment of the proceeds of said stock of goods in satisfaction of said executions in favor of the defendants Lucy Ellen Hilbert and James J. Hilbert until it could recover judgment on its demand and intervene to claim said money, the plaintiff's claim and remedy to collect it out of said stock or the proceeds thereof, would be lost. It was further alleged that said defendant Lucy Ellen Hilbert is the wife of the defendant James J. Hilbert, and that they are the parents of G. B. Hilbert; that on or about August 20, 1892, said G. B. Hilbert and H. M. Johnson formed a partnership to carry on the mercantile business at Waupun, and that the defendant Lucy Ellen Hilbert purchased a stock of goods for her said son to start him in said business, and it was claimed that the money so used for that purpose was a gift to him; that on or about the 12th of January, 1893, said Hilbert & Johnson obtained credit of the plaintiff to the amount of $2,417.53, upon which a balance of $946.79 still remains unpaid, on the representation that they were the sole owners of the stock, and had paid for the same in cash, and owed no debts except such as they had incurred, since their purchase, for goods in their business, and that the said Lucy Ellen

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In Martin v. Michael, 23 Mo. 50, 66 Am. Dec. 656, it was held that an attaching creditor before judgment was not entitled to an injunction against proceedings on the judgment confessed by his debtor to another, but in Hulett v. Stockwell, 27 Mo. App. 328, which was not against a judgment on confession, it was held that a landlord having a lien was entitled to an injunction to protect the removal of the property.

And in Rollins v. Van Baalen, 56 Mich. 610, an injunction was refused against proceedings under judgments obtained by fraudulent confession in favor of other parties against their debtors, where complainant had only a claim under attachment.

The fact that security was given and judgment confessed to a director of a corporation will not authorize setting the same aside at suit of the receiver on the ground of being fraudulent, but under N. J. Nix. Dig. 371, § 9, such judgment confessed in contemplation of insolvency will not be allowed to have any priority over other claims. Stratton v. Allen, 16 N. J. Eq. 229. See also Kilgore v. Nicholson, 26 La. Ann. 633, *infra*, VI.

A judgment confessed by a third party to indemnify a surety cannot be impeached in a collateral attack by a creditor of the principal where it is claimed to be fraudulent but the creditor has not established his claim or lien. Philadelphia v. Dobson, 10 Pa. Co. Ct. 34.

And a general creditor is not entitled to an injunction. Kelly v. Herb, 157 Pa. 41.

And in Shedd v. Bank of Brattleboro, 32 Vt. 709, it was held that irregularities in a writ of attachment, and that a judgment was confessed by one partner against all the firm, will not be ground for enjoining the judgment on complaint of a judgment creditor, as the complainant cannot take advantage of irregularities.

An injunction will not be granted in favor of a judgment creditor against a judgment confessed by one member of a firm, where the other member consents to such confession, unless the same is shown to be unjust and inequitable, as the same rule applies as in case of want of service of process, and there is a remedy in the law court. Hier v. Kaufman, 134 Ill. 215.

Under the Colorado statutes, giving an attaching creditor a conditional lien from the time of the levy, a partnership creditor, having levied a valid attachment on property of an insolvent firm, is entitled to an injunction against a judgment confessed by the firm to others, that is not recorded as required by the statute, and that is fraudulent. Schuster v. Rader, 13 Colo. 329.

In Chilfelder v. Levy, 9 Cal. 607, it was said that the only exception to the rule forbidding one court to enjoin the judgment of another would be where a debtor confessed a fraudulent judgment in different courts, and an injunction would be granted to prevent the necessity of the creditors bringing a suit in each different court.

Where a creditor obtained an injunction to set aside a judgment confessed by his debtor on the ground of fraud, and also issued an execution and levied on the property of his debtor, the court required the creditor to make an election to stay his execution during the continuance of the injunction or to dissolve the injunction, and, the creditor refusing to elect, the injunction was dissolved. Livingston v. Kane, 3 Johns. Ch. 224.

II. *For irregularities.*

If the irregularity is so great as to render the judgment void, it seems that an injunction will be granted; but no one except the debtor is entitled to complain if the debt is just, and an injunction will be refused if there is an adequate remedy at law.

So, a judgment by confession upon a forged note and warrant of attorney will be void, and proceedings under an execution sale thereon will be enjoined. Bullen v. Dawson, 139 Ill. 633.

And an order of seizure and sale on a judgment by confession was enjoined where the confession of the judgment, power of attorney, certificate, and affidavit of the justice, taken in another state, were not in compliance with law, and the identity of the notes with this on which judgment was confessed was not shown, and there is a defense to the action. Chambliss v. Atchison, 2 La. Ann. 488.

The execution of a void judgment entered on confession by a married woman where it is not within some of the causes allowing an action against her, will be enjoined. Hoffman v. Shupp, 80 Md. 611.

And under Md. act 1872, chap. 270, providing that a married woman may be sued jointly with her husband on a joint contract, a judgment by confession on a joint power of attorney on a debt that is not joint is void, and proceedings will be enjoined as to the wife. Lowekamp v. Koechling, 64 Md. 95.

An execution will not be enjoined where it issues upon confession in a supersedeas which is not dated as required by Md. Stat. 1825, chap. 223, § 2, providing that the date of confession shall be a part of entry. Dilley v. Shipley, 4 Gill, 48.

Under Tenn. act 1831, chap. 23, providing that judgments confessed or suffered by an administrator within six months after his qualification shall be void, and it shall be his duty to plead Tenn. act 1829, chap. 58, providing that they shall not be liable to answer in that time, a judgment taken within that time in a suit begun before the death of the obligor, where no plea was made in bar, will not be enjoined, as the word "void" is construed to mean that if judgment is taken on confession

Hilbert knew of such representations, and that the plaintiff trusted Hilbert & Johnson, relying on the same; that she conspired with them to keep secret the existence of her said judgment note against them, and that it was understood that, if the said business was not successful, she could, by collusive and fraudulent confession of judgment in her favor, absorb the stock and secure the same, or the avails thereof, to her use, and cheat and defraud the creditors of Hilbert & Johnson. Various other matters were alleged to show that the dealings of Hilbert & Johnson and of Lucy Ellen Hilbert in relation to said stock of goods were fraudulent as against the creditors of Hilbert & Johnson. It was also alleged that both of said judgments were entered by collusion by and between the said Lucy Ellen Hilbert and James J. Hilbert and their said son, G. B. Hilbert,—C. E. Hooker, Esq., acting, in the recovery thereof, for the respective plaintiffs, so that they might secure to themselves the proceeds of said stock on said judgments, to the prejudice of all the other creditors; that the answer of confession in each of said proceedings purported to be signed by J. J. Dick, Esq., as attorney for the defendants, but were not, in fact signed by him or by any person authorized by him, or by the defendants or either of them, and that said judgments were therefore void. The defendants Lucy Ellen Hilbert and James J. Hilbert answered the complaint, putting in issue all the allegations of fraud and collusion in the complaint, and insisting that their judgments were founded upon bona fide debts for moneys advanced, and were not gifts to G. B.

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or default it will be inoperative during that time. Roche v. Washington, 7 Humph. 142.

So, an execution on a judgment by confession which was not entered in the judgment book may be enjoined upon principles of equity, at the suit of the third party prejudiced thereby. Schuster v. Rader, 13 Colo. 329.

But a judgment upon a warrant of attorney to secure a contingent liability is not void or will not be enjoined on the ground that the plaintiff's affidavit annexed to the complaint was defective, where the insufficiency is not clearly shown, and complainant does not show that the judgment is wrong. Reiley v. Johnston, 22 Wis. 279.

And judgments by confession by a corporation will not be enjoined because entered upon defective warrants of attorney, where no valid defense to the same is shown, under Ill. Rev. Stat. 1874, chap. 69, § 7, providing that only so much of a judgment at law shall be enjoined as the complainant shall show himself not equitably bound to pay; and besides there is a remedy in the court at law or by a writ of error. Burch v. West, 134 Ill. 258, affirming, 33 Ill. App. 359.

A judgment by confession, including an attorney's fees under an agreement that is void, will not be enjoined where there is a remedy by motion to set aside or by writ of error. Shelton v. Gill, 11 Ohio, 417.

A receiver of a corporation was refused an injunction against a judgment confessed by the president to a director, although it was claimed that the affidavit was insufficient; that the board of directors directing the same was not duly organized; that a director could not vote in his own favor; that the power to confess judgment was not conferred; that the bonds and warrants were not countersigned as required by the by-laws; and that the same was an unlawful preference,—there being no fraud shown, and the debt being justly due. Besides there is a remedy at law. Stratton v. Allen, 6 N. J. Eq. 229.

And where a judgment was claimed to be irregular an injunction was refused, as there was a remedy in the court in which it was entered. Cammack v. Johnson, 2 N. J. Eq. 163.

An injunction was refused a general creditor against the enforcement of a judgment confessed by his debtor to another on a just debt, although the affidavit required to enter a judgment on a bond and warrant did not set out the consideration. Jackson v. Darcy, 1 N. J. Eq. 194.

And that a magistrate's judgment on confession was rendered without a warrant will not authorize an execution against the same, as there is a remedy by appeal. Brumbaugh v. Schnebly, 2 Md. 320.

A judgment entered on confession will not be held to be fraudulent on the ground that it was entered up in violation of a statute requiring an affidavit that so much was due and justly owing; but as the proof shows that the amount for which the payment was rendered is not all due, the parties holding the same will be required to give bond to refund any part which is not due. Clapp v. Ely, 10 N. J. Eq. 178.

Under Ind. Rev. Stat. 1881, § 1490, providing that judgments by confession may be collaterally impeached by fraud by creditors of the judgment debtor, and such judgment shall be void as to such creditors, unless at the time of the rendition thereof the defendant makes affidavit that he justly owes the debt, the party is not entitled to restrain a sale of his land under a judgment confessed by another for irregularity for want of the statutory affidavit, but may restrain the sale where the judgment has been paid. Chapin v. McLaren, 105 Ind. 563.

The enforcement of a judgment by confession will not be enjoined on the ground that a copy of the petition was not served, under La. Code Pr. arts. 172-179, requiring citations to be served in the French language, as this does not apply to an executory petition. Ailiet v. Henry, 2 La. Ann. 145.

In White v. Crow, 17 Fed. Rep. 98, which was a suit in the Federal court to redeem from a sale in the state court, and to enjoin the execution of a debt on the ground of irregularity in the confession of a judgment, it was held that the Federal court would not enjoin the officer of the state court, and as to the confession of a judgment by a corporation, the court in which the action was pending was the judge of the authority of the person who appeared for the company, whether an attorney at law or an agent, and its judgment as to his authority was conclusive; but, having the parties all before the Federal court, the right was recognized to deal with them directly without reference to the sheriff, and a decree was made authorizing a redemption.

For injunction in aid of attachment, see *note* to People v. VanBuren (N. Y.) 2 L. R. A. 448.

III. *For fraud.*

The debtor is always entitled to an injunction against judgments taken by confession against him, which are obtained by fraud, unless there is an adequate remedy at law; but in actions to enjoin a judgment a valid defense should always be shown before an injunction will be granted.

As, where the debt had previously been paid, and an injunction will be granted by a court of equal jurisdiction of another county having jurisdiction of the person, even though Ohio Rev. Stat. 5354, provides for vacating judgments in the same

Hilbert, and that they were rightfully recovered. The defendant Peters, the sheriff, answered, setting up his proceedings under the executions. It appeared from the findings of the court that H. M. Johnson sold out his interest in the partnership of Hilbert & Johnson to his partner, G. B. Hilbert, August 21, 1893, and that the latter carried on the business until the time the executions were levied, December 30, 1893; that the judgments were founded on bona fide debts actually due for moneys advanced, and which were not gifts to G. B. Hilbert, and all the charges of conspiracy, collusion, and fraud against the creditors of Hilbert & Johnson or of G. B. Hilbert were found to be substantially untrue and without foundation. It was found that the answers to the complaints in the proceedings confessing the judgments, purporting to be signed by J. J. Dick, as attorney for the defendants therein, were not signed in the proper handwriting of said J. J. Dick, but were signed by C. E. Hooker in the absence of said J. J. Dick, for and at the special instance and request of J. J. Dick, he having duly authorized such signing, and also ratified the same. Judgment was rendered dismissing the plaintiff's complaint on the merits, with costs, from which the plaintiff appealed.

Mr. **E. D. Doney** for appellant.

Messrs. **C. E. Hooker** and **J. J. Dick,** for respondents:

Mere irregularity in obtaining a judgment is not good ground for its collateral impeachment.

Adams v. *White*, 23 Fla. 352.

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court that are obtained by fraud, as this is only cumulative. Darst v. Phillips, 41 Ohio St. 514.

And an injunction was granted where the majority of the trustees of a religious society gave a judgment note to persons who had a claim against the society, and also included in such note the amount of certain claims in favor of such parties personally, for the purpose of encumbering the church property and subjecting it to a sale, for this was a fraud; and this was done although the society might have had the judgment vacated on motion. United Brethren Ch. v. Vandusen, 37 Wis. 54.

So, a judgment obtained by an unauthorized appearance of strangers will be enjoined on the ground of fraud whatever may have been the original intention of the party, although courts of law have concurrent jurisdiction: but this will not deprive a court of equity of its jurisdiction. Truett v. Wainwright, 9 Ill. 418.

Or, where a judgment was confessed only as a security for what might thereafter be found due, and the claims were fraudulently enlarged. Keighler v. Savage Mfg. Co. 12 Md. 383, 71 Am. Dec. 600.

And a judgment entered on confession, agreed and intended only as a conditional judgment, where the justice had no power to enter a conditional judgment, was enjoined as void. Gwinn v. Newton, 8 Humph. 710.

Or where the same was excessive, and obtained by fraud and misrepresentation from an ignorant and illiterate party, and a good defense is shown to that action. Shufeldt v. Gandy, 25 Neb. 662.

And fraud in procuring an assignment of a judgment confessed to indemnify the sheriff and a release of errors, so as to prevent prosecution of error, will justify enjoining the judgment. Lyon v. Tallmadge, 14 Johns. 501, reversing Lyon v. Richmond, 2 Johns. Ch. 51.

In Lyon v. Tallmadge, 1 Johns. Ch. 184, a similar bill between the same parties, not charging fraud, was dismissed.

An injunction was granted against suing out execution on a judgment on confession on a bond of £1,200 into which the plaintiff had entered partly in consideration of the defendant returning as so much cash a post obit formerly granted by the plaintiff (an expectant heir) in discharge of a debt of inconsiderable amount, on the understanding that the principal was not to be called for until the death of plaintiff's father. Annesley v. Rookes, 3 Meriv. 226, note.

IV. *Judgments against public policy.*

a. *Usury.*

Injunctions have been granted against judgments entered on confession that are contrary to public policy or statute on account of usury, where the principal and interest are tendered. West v. Beanes, 3 Harr. & J. 568; Fanning v. Dunham, 5 Johns. Ch. 142, 9 Am. Dec. 283.

And an assignee for creditors may obtain an injunction against a judgment by confession entered against his assignor containing usury, even if the defense of usury was not made at law, as equity will relieve on the ground that usurious contracts are contrary to public policy, and Md. act 1845, abrogating the penalty of the act of 1704, still leaves such contracts as to usury void. Thomas v. Watson, Taney, C. C. 297.

But a surety is not entitled to an injunction on the ground of usury against a judgment confessed by him and his principal, where the principal is not made a party defendant in the injunction suit. Boughton v. Allen, 11 Paige, 321.

And in Shelton v. Gill, 11 Ohio, 417, it was held that where the warrant of attorney shows that the judgment confessed is usurious, the remedy by motion to set aside the judgment or by a writ of error will prevent an injunction on the ground of usury.

In Brown v. Swann, 35 U. S. 10 Pet. 497, 9 L. ed. 508, it was held that after a judgment is allowed to be taken without defense against usury the defendant is not entitled to an injunction, and a bill of discovery in usury against a judgment confessed with a saving of the defendant's equity, although Va. Stat. Nov. 23, 1796, § 3, provides for a bill in chancery, and that the lender shall be obliged to accept principal without interest. And although there was annexed to this judgment a reservation in terms for a resort to equity, the court had no authority to make it a part of the record, for the right to resort to equity exists independently of any reservation of the courts of common law, and the defense should have been made before judgment,—reversing Swann v. Brown, 4 Cranch, C. C. 247.

In Wistar v. McManes, 54 Pa. 318-326, 93 Am. Dec. 700, it was held that the denial of a motion to enjoin a judgment on confession and determine usury is not a bar to an equitable action for discovery. But as to *res judicata* this was overruled in Frauenthal's Appeal, *infra*.

In Frauenthal's Appeal, 100 Pa. 290, it was held that the decision on a rule to show cause why an execution should not be stayed, will prevent an injunction on the same grounds, against an execution sale (overruling Wistar v. McManes, *supra*, which was based on Simpson v. Hart, 14 Johns. 63), holding that a decision of a court of law upon a summary application is not such *res judicata* as to preclude chancery from examining the question, stating that no notice was taken in Wistar v. McManes of the fact that in New York, as well as in England, separate courts of chancery then existed,

A judgment rendered without a finding against parties before the court, and respecting a matter within its jurisdiction, is voidable only, and not absolutely void.

Doty v. *Sumner Bros.* 12 Neb. 378.

Where proceedings in attachment are irregular and amendable, but not void, and no objection is made thereto by the defendant, such proceedings cannot be questioned collaterally by third parties.

Connolly v. *Miller* (Neb.) 34 N. W. Rep. 76. See also *Dullard* v. *Phelan*, 83 Iowa, 471.

A decree cannot be attacked collaterally on the ground that it exceeds the relief asked for.

McCrillis v. *Harrison County*, 63 Iowa, 592; *Ketchum* v. *White*, 72 Iowa, 193; *Eureka Iron & S. Works* v. *Bresnahan*, 66 Mich. 489.

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

We think that the findings of the circuit court against the substantive allegations of the plaintiff's complaint, except one, and that the judgments attacked by the plaintiff were founded upon bona fide debts of the defendants G. B. Hilbert and H. M. Johnson and of G. B. Hilbert, were warranted by the evidence. Certainly, there was no preponderance of evidence against its conclusions. The findings of fact must, therefore, be accepted as verities, and it would serve no useful purpose to set forth the substance of the evidence, or enter upon any discussion of it. The only question that remains for consideration is whether the plaintiff was entitled to

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and the equity powers of the common-law courts were confined to narrow limits.

b. *Compounding crimes.*

Injunctions will be granted against the enforcement of judgments confessed that are contrary to public policy, as for compounding a crime.

In Given's Appeal, 121 Pa. 260, it was held that proceedings on a judgment by confession and execution will be enjoined in Pennsylvania where the consideration was stifling a prosecution for forgery, as such agreements subvert public justice. The court followed Wistar v. McManes, *supra*, and referring to Frauenthal's Appeal, 100 Pa. 290, it was said that in that case equity jurisdiction was recognized, but that the injunctions would not be granted when the matter was *res judicata*.

A judgment confessed by a person under a charge of arson in favor of his prosecutor on the representation that it would not be enforced if he suffered corporal punishment in consequence of the prosecution, was enjoined, but as it appeared that the prosecutor was not guilty of misconduct, but acted only on duress, and did nothing wrong except in the single fact of taking judgment from a man in the plaintiff's situation, and as the guilt of the complainant is clear, the judgment should stand a security for the debt, which may be recovered in an action of trespass. Heath v. Cobb, 2 Dev. Eq. 187.

c. *Gambling consideration.*

Where the consideration was a gambling debt an assignee for creditors was entitled to an injunction against the judgment entered on confession against his assignor. Thomas v. Watson, Taney, C. C. 297.

In Wilkerson v. Whitney, 7 Mo. 295, it was held that Mo. Rev. Code 1825, p. 410, providing that judgments given, granted, drawn, or executed contrary to the gambling act might be set aside by a court of equity, applies only to judgment by confession from the terms of it, and Mo. Rev. Code 1835, p. 290, providing that a judgment, when the consideration is a gambling debt, is void, and the defense may be made at law, is construed to mean also judgment by confession, and no other, and a failure to make a defense at law that the consideration of the judgment was a gambling debt will prevent an injunction where the judgment was not by confession.

V. *Judgments against sureties.*

A surety is entitled to an injunction against the enforcement of a judgment entered on confession against him on a proper showing.

As, where the surety was discharged by an extension of time for a consideration paid by the principal to the plaintiff before judgment without the surety's consent. Montague v. Mitchell, 28 Ill. 431.

And the same was held although the warrant of attorney provided that no bill in equity should be filed to interfere in a manner with the operation of the judgment entered by virtue thereof. Kennedy v. Evans, 31 Ill. 258.

But in Gilder v. Merwin, 6 Whart. 522, it was held that a surety cannot obtain an injunction against a judgment confessed, on the ground that since the judgment he has discovered that he was relieved by an extension granted by the principal where he has an adequate remedy in the court at law by application to open the judgment.

For judgments against surety, see also Philadelphia v. Dobson, 10 Pa. Co. Ct. 34, *supra*, I.; Boughton v. Allen, 11 Paige, 321, *supra*, IV.; and Harner v. Price, 17 W. Va. 523, *infra*, IX.

VI. *Judgments against corporations.*

Where a board of directors had authorized the president of the company to confess a judgment for the debt, and it was not shown that the creditor knew that the company was insolvent at the time, and the authority to confess the judgment was legal, a stockholder will not be entitled to an injunction against the judgment. Kilgore v. Nicholson, 26 La. Ann. 633.

In Pennsylvania a corporation may prefer a creditor by confession of judgment, and the same will not be enjoined where confessed by a foreign corporation, although the general law of the state where incorporated prohibits a preference, but it can have no extraterritorial effect. Pairpoint Mfg. Co. v. Philadelphia Optical & Watch Co. 161 Pa. 17; Lowry v. Philadelphia Optical & Watch Co. Id. 123.

And a judgment by confession against a corporation will not be enjoined in a collateral attack on the ground that the officer had no authority to confess judgment, as this is not a sufficient charge of fraud to obtain relief, and there is a remedy in the court at law to vacate the same. Southern Porcelain Mfg. Co. v. Thew, 5 S. C. N. S. 5.

And the execution sale of corporate property upon a judgment bond preferring directors will not be enjoined, where it is not shown that the corporation was insolvent at the time, and fraud is not shown. Neal's Appeal, 129 Pa. 64.

But in Cape Sable Co.'s Case, 3 Bland, Ch. 606, it was held that a judgment confessed by the president of a flourishing corporation where the confession was not under seal, and was irregular, would be enjoined at the instance of the parties representing one third of the stock, where it was claimed that the judgment was through a fraudulent combination to sacrifice the property of the company.

For judgments against corporations, see also Harding v. Fiske, 25 Abb. N. C. 348, *supra*, I.; Stratton v. Allen, 16 N. J. Eq. 229, *supra*, I. and II.; Burch v. West, 134 Ill. 258, *supra*, II.

VII. *Judgments against partners.*

An injunction will be granted against the en-

any relief against the judgments by reason of the fact, found by the circuit court, that the answers of confession upon which these judgments were entered were not signed by the attorney, J. J. Dick, whose name appears thereto, in his own proper handwriting, but that his name was signed thereto by C. E. Hooker, the attorney for the plaintiffs entering the judgments, "in the absence of said J. J. Dick, for and at the special instance and request of J. J. Dick, he having duly authorized such signing, and ratified the same." The statute (Rev. Stat. § 2896) provides that, in the entry of judgments by confession, "the plaintiff shall file with his complaint an answer signed by the defendant, or some attorney in his behalf, confessing the amount claimed in the complaint, or some part thereof." The plaintiff insisted that the judgments were void, though the answers were so signed at Mr. Dick's special instance and request, and such signing had been ratified by him. The method in which the answers of confession were signed was clearly irregular, and one not to be encouraged; but we think it was an irregularity merely. There was in each case a sufficient warrant of attorney, and a release of errors, and the judgments were founded on valid debts. The circuit court would not have been justified in setting them aside on the ground alleged, on motion of the judgment debtors, or on petition of a judgment creditor, unless it were shown that they were unjust or inequitable,

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forcement of a judgment confessed by one partner against the firm without the consent of his copartners, as such confession is beyond the power vested in partners generally. Christy v. Sherman, 10 Iowa, 535. See also Blackwell v. Rankin, 7 N. J. Eq. 153, and Shedd v. Bank of Brattleboro, 32 Vt. 709, *supra*, I.

But in McGee v. Bank of Mt. Pleasant, 7 Ohio, pt. 2, p. 173, it was held that where one partner makes a bond on the warrant of attorney to confess a judgment under seal, and in the name of the firm upon which judgment is taken, without the knowledge of the other partner as to such confession, the remedy by motion to vacate prevents an injunction against the judgment.

And in Cammack v. Johnson, 2 N. J. Eq. 163, a dormant partner was refused an injunction against a judgment confessed by the other partners for a valid debt, where the dormant partner was unknown at the time of the judgment.

For judgments against partners, see also Blackwell v. Rankin, 7 N. J. Eq. 153; Shedd v. Bank of Brattleboro, 32 Vt. 709, and Hier v. Kaufman, 134 Ill. 215, *supra*, I.; Schuster v. Rader, 13 Colo. 329, *supra*, I. and II.

VIII. *Judgments against executors and administrators.*

A judgment confessed by an executor on the consideration to obtain time for the payment of money will not be enjoined on the ground that it was to have been a confession of judgment, to be paid when he should have assets, but which condition was not proved to have been a part of the agreement for such confession. Freelands v. Royall, 2 Hen. & M. 575.

And an injunction will not be granted to an administrator after two judgments *de bonis testatoris* and *de bonis propriis* have been successfully recovered at law, where a judgment was confessed intending to reserve the right of appeal, which was not done, as he did not attend court on account of his wife's illness. Bostwick v. Perkins, 1 Ga. 136.

In Brenner v. Alexander, 16 Or. 349, it was said that an administrator confessing judgment admits that there are assets, and he cannot thereafter have such judgment enjoined on ascertaining subsequently that there is a deficiency; but if he had not confessed judgment it was said that he would not have been estopped.

So, where an administrator *de bonis non* made a defense to a writ of sci. fa., issued to revive a judgment against the former administrator, but voluntarily confessed absolute judgment of fiat, and four years afterwards asked for an injunction on the ground that he was mistaken as to the amount of assets, the injunction was refused on the ground that a court of equity will not relieve for negligence or mistake of law, unless the alleged mistake is conclusive as to the existence of the legal right. Kearney v. Sasser, 37 Md. 264.

For judgments against administrators, see also Roche v. Washington, 7 Humph. 142, *supra*, II.; Gardiner v. Hardey, 12 Gill & J. 365, *infra*, X.

IX. *Statute of limitations.*

And an injunction was granted where a judgment was confessed upon a note which was barred on its face by the statute of limitations.

As where the confession was made by one who was not an attorney of the defendant whose counsel was absent, and the party himself was unable to attend court on account of sickness, and there was a valid defense against the debt, and no steps had been taken to collect the debt for twenty-one years. Cheek v. Taylor, 22 Ga. 127.

So, where a note was made in Wisconsin, and the maker and holder were residents of that state, and in a suit in Illinois a judgment was obtained by confession, as the defense of limitation would have been a good defense in Illinois, it was held in an action in Wisconsin upon a transcript of the Illinois judgment, that as the latter court must have vacated the judgment or granted a perpetual injunction, this last power may be lawfully exercised by the courts of equity where suit was brought for the purpose of enforcing it. Brown v. Parker, 28 Wis. 21.

But the mistake of law of a surety in confessing a judgment for a debt barred by limitation will not entitle him to an injunction against the judgment. Harner v. Price, 17 W. Va. 523.

X. *Consideration not due.*

Injunctions will be granted against judgments entered on confession where there was no consideration, or the debt was not due.

So, a purchaser of land under title bond is entitled to an injunction against the collection of a judgment obtained on a purchase-money note by confession in another county entered without notice, where the vendor has not complied with the terms of his bond, and the vendee has never taken possession. Cooper v. Tyler, 46 Ill. 462, 95 Am. Dec. 442.

And where confession of the judgment was made with a reservation of the right to have the case heard in equity, the same may be enjoined where there is a total failure of consideration. Daveiss v. McKee, 1 Bibb, 331.

So, where a judgment is entered by confession, as a security for an unascertained debt, an injunction will be granted against the enforcement of the same if the proof is clear. Young v. Reynolds, 4 Md. 375.

And where an executrix in good faith confessed a judgment against the estate, the subsequent discovery of a receipt for the debt, of which she had

and nothing was shown against them. *Marshall & Ilsley Bank* v. *Milwaukee Worsted Mills*, 84 Wis. 23, 27; *Horning* v. *E. Griesbach Brew. Co.* 84 Wis. 71; *F. Mayer Boot & S. Co.* v. *Falk*, 89 Wis. 216. Granting that the judgments were void for want of jurisdiction, the result would have been the same. Courts of equity will not enjoin a judgment at law merely for want of jurisdiction in the court in which the judgment is rendered, and where a party can say nothing against the justice of a judgment equity will not interfere, but leave him to contend against it at law as best he can. 2 Story, Eq. Jur. § 898; *Stokes* v. *Knarr*, 11 Wis. 390. Courts of equity interfere in such cases only to prevent injustice, and upon equitable grounds. *Walker* v. *Robbins*, 55 U. S. 14 How. 584, 14 L. ed. 552; *Knox County* v. *Harshman*, 133 U. S. 152, 33 L. ed. 586. It follows that the judgment of the circuit court was rightly given, dismissing the plaintiff's complaint upon the merits.

The judgment of the Circuit Court is affirmed.

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no knowledge at the time of confession, will entitle her to an injunction against the same. Gardiner v. Hardey, 12 Gill & J. 365.

Under Ill. act Feb. 18, 1857, providing that an execution issued upon a judgment obtained by confession, upon a demand not due, may be enjoined until such demand shall have become due, a judgment so obtained should be enjoined, although the debt existed prior to this act, and, as chancery does not act by piecemeal, although one of the notes was due, proceedings on the judgment will be enjoined until the whole becomes due. Wood v. Child, 20 Ill. 209.

XI. *Valid defense must be shown.*

Before an injunction will be granted against judgments entered on confession, a valid defense must be shown. Killgore v. Nicholson, 26 La. Ann. 633; Southern Porcelain Mfg. Co. v. Thew, 5 S. C. N. S. 5; Neal's Appeal, 129 Pa. 64, *supra*, IV.; Robbins v. Mount, 3 Ga. 74, *infra*, XII.; Freelands v. Royall, 2 Hen. & M. 575, *supra*, VIII.; Chambliss v. Atchison, 2 La. Ann. 488; Reiley v. Johnston, 22 Wis. 279, and Burch v. West, 134 Ill. 258, *supra*, II.; Hier v. Kaufman, 134 Ill. 215, *supra*, I.; Stratton v. Allen, 16 N. J. Eq. 229, *supra*, II.

The payment of a mortgage for an unadjusted balance will not authorize an injunction against the enforcement of a judgment by confession for the remainder, entered with the reservation of the right to reduce the amount, where no errors in the amount are shown. Gear v. Parish, 43 U. S. 5 How. 168, 12 L. ed. 100.

And an injunction will not be granted where a judgment is confessed, and there is no fraud or collusion on the part of plaintiff, or some equity shown arising subsequent thereto. Moore v. Barclay, 23 Ala. 739; Ramseur v. Brownell (Ark.) 12 S. W. Rep. 200; Ashton v. Parkinson, 8 Phila. 328.

An injunction will not be granted to stay proceedings on a judgment confessed on the faith of an oral agreement to stay execution, where complainant did not use his remedy at law to have the execution recalled. Moulton v. Knapp, 85 Cal. 385, 88 Cal. 446.

An injunction will not be granted against a judgment by confession, on the ground that a note was given to and held by the judgment creditor which is claimed to be a novation, where such note was delivered prior to the judgment and was tendered back to the debtor. Sallis v. McLearn, 23 La. Ann. 192.

And where a confession of judgment has been entered by mistake, thereby preventing a review, an injunction will not be granted against the same where a valid defense to the action is not shown. Farmers' Bank v. Vanmeter, 4 Rand. (Va.) 553.

The burden of proof is on the party attempting to enjoin a judgment on confession, where it was claimed the warrant of attorney was forged, and, no error in the decision of the court refusing the injunction being shown, the decision will be affirmed. Daly v. Ogden, 28 Ill. App. 312.

Where an injunction was sought on the ground that a confession of judgment was obtained by the promise to give credit for all errors, which was afterwards refused, an injunction will not be granted where such errors are not established. Boone v. Poindexter, 12 Smedes & M. 640.

And a judgment confessed as a compromise will not be enjoined on the ground that complainant claims he was entitled to credits before judgment, where no cause for equitable relief is shown. Morehead v. Do Ford, 6 W. Va. 316.

XII. *Negligence.*

A party guilty of negligence is not entitled to an injunction against a judgment that might have been prevented by the use of diligence. Harner v. Price, 17 W. Va. 523.

And an injunction will not be granted where complainant was negligent, as where a judgment was confessed with an intention to enter an appeal, and one of the defendants was sent, within the proper time, to enter such appeal, but was prevented by the ignorance of the clerk, and the time elapsed so that an appeal could not be taken, if there is no special equity in the defense. Robbins v. Mount, 3 Ga. 74.

XIII. *Remedy at law.*

An injunction will not be granted if there is an adequate remedy at law. Southern Porcelain Mfg. Co. v. Thew, 5 S. C. N. S. 5, *supra*, VI.; McGee v. Bank of Mount Pleasant, 7 Ohio, pt. 2, p. 175, *supra*, VII.; Burch v. West, 134 Ill. 258, *supra*, II.; Shelton v. Gill, 11 Ohio, 417, *supra*, IV.; Brumbaugh v. Schnebly, 2 Md. 330; Cammack v. Johnson, 2 N. J. Eq. 163, *supra*, II.; Stratton v. Allen, 16 N. J. Eq. 229; Artman v. Giles, 155 Pa. 409, *supra*, I.

The remedy at law by motion to set aside an execution that has been levied, or to stay process for a year, will prevent an injunction against proceedings on a judgment obtained on confession on an agreement to stay process for a year, where such agreement was violated by the creditor. Moulton v. Knapp, 85 Cal. 385.

XIV. *Other matters.*

Under Nix. (N. J.) Dig. 97, § 11, providing that no injunction shall issue to set aside proceedings at law in any personal action after judgment on the application of a defendant, unless a deposit be made, or security given, an injunction will not be granted against a judgment entered by confession unless such conditions precedent are complied with. Mariatt v. Perrine, 17 N. J. Eq. 49.

And an injunction will not be granted to maintain, as a set-off, a claim for unliquidated damages, although it was claimed that the plaintiff in the judgment on confession was a nonresident. Smith v. Washington Gaslight Co. 31 Md. 12, 100 Am. Dec. 49.

There are many cases in which judgments by confession are attacked by a motion or suit to set aside, involving similar questions as in this note, but no cases are included except those in which the remedy by injunction is sought. L. T.

KANSAS SUPREME COURT.

Eli D. SMALL *et al.*, *Plffs. in Err.*,
v.
Rebecca SMALL.

(.....Kan.....)

***Subject to certain limitations not applicable to this case, and as against any post mortem claim of his widow, a married man, in Illinois or in Kansas, may** during coverture give away to his children absolutely the bulk of his property, when the known effect of the gift will be to deprive the widow of the fair share of the property which otherwise would have fallen to her.

(November 9, 1895.)

ERROR to the District Court for Jackson County to review a judgment in favor of plaintiff in an action brought to enforce plaintiff's alleged rights as widow of Daniel Small, deceased, in property which he had conveyed during his lifetime in alleged fraud of her rights. *Reversed.*

Statement by **Martin**, Ch. J.:

On January 27, 1859, at Findlay, Ohio, Daniel Small married Rebecca Cone, the present defendant in error, as Rebecca Small. He was the father of five children by a former marriage, namely, Eli D., Daniel J., John D., William B., and Susan, now Susan McKenney; the oldest, Eli D., being about seventeen, and the youngest, the daughter, about three and one half years of age; and his home was at Wilmington, Will county, Ill. He had accumulated about $30,000, but Rebecca Cone's belongings were of trifling value. She went from Findlay to Wilmington, and took charge of the children, who soon became very much attached to her, and she was devoted to their welfare, and the relations of the entire family were always very harmonious up to the death of Daniel Small, which occurred April 14, 1888. The business of Daniel Small was the loaning of money on his own account. As early as 1869, Daniel Small conceived the idea of giving or leaving the bulk of his fortune to his said five children in equal shares (there being no issue of his second marriage) after providing a sum sufficient for the maintenance of his wife during her widowhood, but nothing in that direction was done until March 19, 1878, when he made an assignment of all the notes, bonds, mortgages, and securities held by him on or against persons or property in Illinois, and amounting to about $100,000, to his brother, Darius Small, of Herkimer county, N. Y., in trust for said five children, the trustee being authorized to collect the notes and securities and reinvest the proceeds in other interest-bearing securities or real estate in or outside of the state, and to divide the same, with the accumulations, at his death in equal shares, among said children. By the terms of this trust assignment Darius Small was authorized to appoint some discreet person, a resident of Will county, as his attorney in fact, to assist in carrying out the trust; and on the same day Darius Small accepted the trust, and also appointed Eli D. Small as such attorney in fact. Daniel Small had all these notes and securities in a safe. He took them out, and handed them to Darius Small, who in turn delivered them to Eli D. Small, and he put them back in the safe in the same condition as before. Darius Small was on a visit to his brother at the time, and in a few days afterwards he returned to New York, and never had anything more to do with the trust, except that on January 22, 1879, he executed a further power of attorney to Eli D. Small, authorizing him to sell and convey any real estate situated in Kansas or elsewhere, the title to which might be vested in him as such trustee. Daniel Small continued managing the investments as before, but Eli D. Small assisted him. Most of the notes secured by mortgages on real estate were taken in the name of Darius Small, trustee, and on payment of the same it was the custom for Eli D. Small to satisfy the mortgages as attorney in fact; but the loans made on personal security were principally in the name of Daniel Small. In 1879, and subsequently, part of what was called the "trust fund" was invested in two ranches (one of them consisting of between 3,000 and 4,000 acres in Jackson and Shawnee counties, Kan.; and another one, of more than 1,000 acres, in Wabaunsee county, Kan.) and in improving the same, and the title to these lands was taken in the name of Darius Small, trustee of Daniel Small, but Darius Small knew nothing of the transaction, and the lands were selected by Daniel Small, Eli D. Small, and the other sons. Part of the fund was also loaned through the American Bank in North Topeka, established by the sons. They, or some of them, resided upon the ranches, and the funds for their improvement were furnished in a large measure through the bank. In July, 1886, Daniel Small executed a quitclaim deed to his four sons and his daughter for said Kansas lands, and shortly afterwards Eli D. Small, as attorney in fact for Darius Small, executed deeds to Daniel Small and John D. Small for the large ranch in Jackson and Shawnee counties, and a deed to William B. Small for the smaller ranch in Wabaunsee county. About the same time, Susan McKenney quitclaimed her interest in the land to her brothers, and John D. Small and Daniel J. Small conveyed a one-third interest in the large ranch to Eli D. Small. The sons executed a promissory note to their sister for $8,740.25, an amount equal to one fifth of the money invested in the lands and the improvements. Rebecca Small did not join in the conveyance with her husband, and she knew nothing about it at the time, but was informed of the transfer to the sons

*Headnote by MARTIN, Ch. J.

NOTE.—In connection with the extensive review of the authorities to be found in the above case, see Walker v. Walker (N. H.) 27 L. R. A. 799, and cases there cited.

See also 44 L. R. A. 430.

some time in the autumn of 1886. She never resided in Kansas, but had been on visits with her husband to the sons, and knew that they occupied the lands. For several years prior to September 12, 1882, Daniel Small had loaned or advanced money in unequal amounts to his sons, and on or about that day he paid them the residue of what would make $20,000 each, and he charged the same on his book as advancements. At the same time he had each of his sons to sign a paper, agreeing that in the final division their sister, Susan, should have an equal one-fifth share with them, including said advancements. Susan was then married to W. J. McKenney of Brooklyn, N. Y., and her father afterwards advanced to her the sum of $15,500, which was principally used in the purchase of a home in Brooklyn. Rebecca Small knew that money was furnished to Susan for the purchase of a home, but she did not know of the advancements to the sons, and was not consulted in reference thereto. About January, 1888, Daniel Small was taken sick, and his son Daniel J. Small went from Kansas to Wilmington, and remained there until October, 1888. Susan McKenney was also there for some weeks before and after her father's death. When Daniel Small realized that he could not live much longer, he told his son Daniel J. to go to Judge Parks, a lawyer at Joliet, who was familiar with his affairs, and to tell him that if the trust arrangement of 1878 was not ironclad he wanted it made so, as he desired to leave $20,000 as a fund for the support of his widow, and that all the rest of his personal property should go in equal shares to his children, including the $20,000, the income only of which should be used for the support of his widow. Judge Parks suggested that he thought this could not be accomplished by will without the consent of Rebecca Small, but that all the notes and securities might be given away absolutely to the children in his lifetime, the remainder of the property to be disposed of by will; and he accordingly drew up two papers, one being in form a will, and the body of the other instrument reading as follows: "Conscious that I am now suffering from a malady likely to prove fatal, and deeming it expedient to make final distribution and disposition of my personal estate (save what I propose to set apart for the benefit of my wife) in my lifetime, I have determined to carry out my long and well-considered purpose by an immediate transfer and delivery of the same, consisting for the most part of securities, to my son Daniel J. Small, who is now with me, in trust, to divide equally amongst my five children, Daniel J., Eli D., John D., William B., and Susan McKenney, share and share alike. In execution whereof, in consideration of love and affection, I do hereby assign, transfer, and set over to said Daniel J. Small, in trust, as aforesaid, all my right, title, and interest in and to the notes, mortgages, and securities mentioned and described in the schedule hereto subjoined; to have and to hold to him and his personal representatives for the purpose above set forth." The will, as drawn, recites that the testator had already, by advancements and recent gifts to his children, disposed of all his personal estate except about $20,000, and that, being desirous of making a reasonable and adequate provision for the support of his wife, Rebecca Small, by whom he had no children, he did give and bequeath to his executor $20,000 as a fund to invest and reinvest in good interest-bearing securities at his discretion, and from the interest received therefrom to pay her the annual sum of $1,200 in such periodical instalments as he might see fit during her natural life, and upon her death to divide said fund among said five children, share and share alike; said provision for the widow to be in lieu and discharge of all her rights of dower, save in his real estate, which, together with his household furniture, and such articles of personal property as he had not in the will or otherwise disposed of, he left to the disposition of the law. Daniel J. Small being named as sole executor and trustee. On these papers being exhibited to Daniel Small, he directed that the will be changed so that the payments to Rebecca Small should continue only while she remained his widow, and in the event of her death or marriage the fund to be divided among the five children. The will was changed according to his desire, and a schedule of the notes, securities, etc., amounting to a little more than $100,000, having been made, was attached to the instrument of gift, and the notes and securities were delivered to Daniel J. Small, he having received written authority from his brothers and his sister to receive in their name and behalf any gift which their father might desire to make. The will and the instrument of gift were executed on March 26, 1888, and Daniel J. Small retained possession of said notes and securities until his father's death and afterwards, as also the $20,000 additional selected for the widow. The will was admitted to probate in Will county, Ill., April 21, 1888. Rebecca Small did not know of said trust arrangement of March 19, 1878, until after this action was commenced, the children having been requested by Daniel Small not to mention it to her, or in her presence. She did not know of the advancements of $20,000 each to the sons for a like reason, and she was kept in entire ignorance of the gift instrument and the will of March 26, 1888, until shortly before the will was probated. She knew that her husband had a large amount of money and property, but she was told by Daniel J. Small and Judge Parks, before the probate of the will, that Daniel Small had given substantially everything away except the $20,000 left for her support by the will. It does not appear that she made any inquiry as to the particular disposition of the property, although she was much dissatisfied with the provision made for her. She obtained a certified copy of the will in October, 1888, and then consulted an attorney as to her rights. On May 9, 1888, she entered into a written agreement with all the children, wherein they agreed that she should have $1,400 a year, payable in monthly instalments, in consideration of concessions made by her in relation to certain real and personal property which, under

the will, would become as intestate property, this being allowable under the laws of Illinois. Daniel J. Small paid and Rebecca Small received the monthly instalments required by said contract from its date until very shortly before this action was commenced, when she, through her attorneys, tendered back to Daniel J. Small the amount received and interest thereon. Under the law of descents in Illinois, where a husband dies intestate, leaving surviving him a widow and children, the widow is entitled to one third of the personal estate as her absolute property. Advancements to children and lineal descendants are considered as part of the estate, so far as it regards the division and distribution thereof among the issue, and is to be taken by the child or descendant towards his share of the estate; but he is not required to refund any part thereof, although it exceeds his share. Any provision made by will for the widow, if not otherwise expressed therein, bars her of dower in the lands of the deceased, unless such provision be renounced within one year, in which case she is entitled to dower in the lands and to one third of the personal estate after the payment of all debts. But Rebecca Small never made any renunciation. On April 2, 1890, Rebecca Small commenced her action against Eli D. Small, John D. Small, William B. Small, Daniel J. Small, and Daniel J. Small as executor of the last will and testament of Daniel Small, deceased, for the cancelation of the several instruments referred to, except the trust agreement of March 19, 1878 (of which she was ignorant), and for an accounting as to all property received by the defendants from Daniel Small or his estate, praying that she be adjudged the owner of an undivided half of all said lands in Kansas, asking also for her share of the rents and profits thereof, and her share of the rents and profits of certain real estate in Illinois, and for decree of partition of the Kansas lands. The case was tried at November term, 1890. The court held that the plaintiff below could not recover any part of the Kansas lands, but that all the transactions were fraudulent as to her, and as to any interest she might have had in the estate of her husband upon his death the latter is to be held as having died intestate, and rendered money judgments against the defendants below aggregating $72,899.73. The defendants below prosecute their petition as plaintiffs in error in this court, and a cross petition in error has also been filed by Rebecca Small.

Messrs. **Waggener, Horton, & Orr,** with *Messrs.* **Douthitt, Jones, & Mason,** for plaintiffs in error:

The provisions of the Illinois statute do not include the heirs or widow of a deceased person claiming rights under the statute of Illinois relating to the descent of property.

Sutherland, Stat. Constr. §§ 268–277; *Re Perry*, Kan. Sup. Ct. (MSS.); *White* v. *Icey*, 84 Ga. 186; *State* v. *McGarry*, 21 Wis. 496.

There was no fraud, in fact or in law, alleged or established upon the trial.

Padfield v. *Padfield*, 78 Ill. 16, 68 Ill. 210 (1875).

Whatever may be the decisions in any other state as to the power of the husband to make such a final disposition of his property as disclosed in this case to his children before his death, those decisions cannot affect the statute as construed by the supreme court of Illinois, or the disposition made by Daniel Small of his personal property before his death, under the laws of Illinois.

Wœrner, Am. Law of Administration, last ed. p. 187, ¶ 91; *Williams* v. *Williams*, 40 Fed. Rep. 521.

If a sale or gift will bind the grantor it will bind his heirs.

Carithers v. *Weaver*, 7 Kan. 110; *Buffington* v. *Grosvenor*, 46 Kan. 730, 13 L. R. A. 282.

The husband may dispose of his personal property by voluntary gift during the coverture without his wife's consent, and freed from every post-mortem claim by her.

Lines v. *Lines*, 142 Pa. 149; *Ellmaker* v. *Ellmaker*, 4 Watts, 91.

As Daniel Small legally disposed of his property, the court, in its findings of fraud, made a wrong application of the law.

Williams v. *Williams*, *supra*; *Decker* v. *Waterman*, 67 Barb. 460; *Lightfoot* v. *Colgin*, 5 Munf. (Va.) 63; *Pringle* v. *Pringle*, 59 Pa. 281; *Dickerson's Appeal*, 115 Pa. 198; *Dunnock* v. *Dunnock*, 3 Md. Ch. 140; *Cameron* v. *Cameron*, 10 Smedes & M. 398, 48 Am. Dec. 759; *Samson* v. *Samson*, 67 Iowa, 253; *Coffin* v. *Coffin*, 23 N. Y. 9, 80 Am. Dec. 235; Thornton, Gifts & Advancements, 189.

A court of equity will not entertain jurisdiction to set aside the probate of a will on the ground of fraud, mistake, or forgery, this being the exclusive jurisdiction of the probate court.

Ellis v. *Davis*, 109 U. S. 485, 27 L. ed. 1006; *Simmons* v. *Saul*, 138 U. S. 439, 34 L. ed. 1054; *Christmas* v. *Russell*, 72 U. S. 5 Wall. 290, 18 L. ed. 475; *Maxwell* v. *Stewart*, 89 U. S. 22 Wall. 77, 22 L. ed. 564; *Ritter* v. *Hoffman*, 35 Kan. 215; *Snow* v. *Mitchell*, 37 Kan. 636; 2 Pom. Eq. Jur. § 913, p. 407; *Tarver* v. *Tarver*, 34 U. S. 9 Pet. 174, 9 L. ed. 91; *Collins* v. *Woods*, 63 Ill. 285; *Post* v. *Mason*, 91 N. Y. 539, 43 Am. Rep. 689; *Johnson* v. *Beazley*, 65 Mo. 250, 27 Am. Rep. 276; *Gaines* v. *Chew*, 43 U. S. 2 How. 619, 11 L. ed. 402; *Vanderpoel* v. *Van Valkenburgh*, 6 N. Y. 190; *Gilman* v. *Gilman*, 52 Me. 165, 83 Am. Dec. 502; 2 Story, Eq. Jur. 1575; 1 Redf. Wills, 373 *et seq.*; 2 Redf. Wills, 47; 3 Redf. Wills, § 2, subd. 1; 1 Wms. Exrs. 549, and notes; 1 Wœrner, Am. Law of Administration, § 145; *Duson* v. *Dupré*, 32 La. Ann. 896; *Powell* v. *Brunswick County Supers.* 150 U. S. 433, 37 L. ed. 1134; *Higgins* v. *Reed*, 48 Kan. 272; *Baker* v. *Baker*, 51 Ohio St. 217; *Re Taylor's Estate* (Pa.) 18 L. R. A. 855, as to gifts of checks; Fiero, Special Actions, chap. 23.

The advancements made by Daniel Small to his children in his lifetime were actually and legally made, and in no event can be brought into hotchpot for the purpose of augmenting the widow's share.

Thornton, Gifts & Advancements, § 605, p. 601; *Richards* v. *Richards*, 11 Humph. 429; Wœrner, Am. Law of Administration, § 554; Wms. Exrs. *1500; *Grattan* v. *Grattan*, 18 Ill. 167, 65 Am. Dec. 726; *Andrews* v. *Hall*, 15 Ala. 85.

The provision of the Kansas statute concerning the real estate of the husband does not apply "when the wife at the time of the conveyance is not, or never has been, a resident of this state."

Buffington v. *Grosvenor*, 46 Kan. 730, 13 L. R. A. 282.

In some of the states dower is allowed to the wife by statute, as construed by the supreme courts thereof, in the personal property of the husband. Not so in Illinois.

Padfield v. *Padfield*, 78 Ill. 16.

The district court of Jackson county, Kansas, had no jurisdiction of the subject-matter of this case; had no jurisdiction to set aside the will of Daniel Small or the probate thereof; and had no jurisdiction to disturb or interfere with the settlement of the estate of Daniel Small, deceased, which is primarily exclusive in the probate court of Will county, Illinois.

Ellis v. *Davis*, 109 U. S. 485, 27 L. ed. 1006; *Simmons* v. *Saul*, 138 U. S. 439, 34 L. ed. 1054; *Kieley* v. *McGlynn*, 88 U. S. 21 Wall. 503, 22 L. ed. 599.

Under the statutes and decisions of Illinois, Daniel Small in his lifetime had the legal and undisputed right to give and dispose of his personal property to his children, free from any claim of his wife. If he had such legal and undisputed right, then no fraud can be predicated upon any act of his during his lifetime, in so giving and disposing of his personal property.

Padfield v. *Padfield*, 68 Ill. 210, 72 Ill. 329, 78 Ill. 16; *Pringle* v. *Pringle*, 59 Pa. 281; *Dickerson's Appeal*, 115 Pa. 198; *Lines* v. *Lines*, 143 Pa. 149; *Holmes* v. *Holmes*, 3 Paige, 363; *Richards* v. *Richards*, 11 Humph. 429; *Buffington* v. *Grosvenor*, 46 Kan. 730, 13 L. R. A. 282; *Butler* v. *Butler*, 21 Kan. 521, 30 Am. Rep. 441; *Green* v. *Green*, 34 Kan. 740, 55 Am. Rep. 256; *Williams* v. *Williams*, 40 Fed. Rep. 521.

Under the 4th subdivision of the statute of Illinois, Mrs. Rebecca Small was not entitled after the death of her husband to any part of his personal estate, not bequeathed to her, unless he died intestate, or unless she renounced her right to take under the will of her husband, which will was duly executed, and, after the death of her husband, was legally probated.

Akin v. *Kellogg*, 119 N. Y. 441; *Cowdrey* v. v. *Hitchcock*, 103 Ill. 262; *Cribben* v. *Cribben*, 136 Ill. 609; *Warren* v. *Warren*, 148 Ill. 641.

The gift and actual delivery of the personal property on the 26th of March, 1888, by Daniel Small to his children, was not a testamentary disposition of his property.

McCarty v. *Kearnan*, 86 Ill. 291; *Carthy* v. *Connolly*, 91 Cal. 15; *Lines* v. *Lines*, 142 Pa. 149.

Messrs. **Valentine, Godard, & Valentine, A. D. Walker,** and **Hayden & Hayden,** for defendant in error:

It is admitted that the estate has been fully and finally settled, except with reference to the plaintiff's claim.

This gave the plaintiff the right to sue the heirs in the manner she did, even if she did not have such right without such final settlement.

Shoemaker v. *Brown*, 10 Kan. 383; *Johnson* v. *Cain*, 15 Kan. 537; *Gafford* v. *Dickinson*, 37 Kan. 287; *McLean* v. *Webster*, 45 Kan. 644; *Re Hyde*, 47 Kan. 277.

While the so-called trust assignment purports upon its face to be founded upon a valuable consideration, yet the undisputed testimony shows that it was in fact executed without any consideration whatever therefor.

A false recital respecting the consideration of a written instrument is, when the bona fides of such instrument is called in question, a badge of fraud.

Bump, Fraud. Conv. 40.

A deed purporting to be founded on a valuable consideration cannot be set up as a gift.

Hildreth v. *Sands*, 2 Johns. Ch. 35; Bump, Fraud. Conv. 579, and cases cited.

The fact that an alleged advancement is secretly made, and all knowledge thereof purposely concealed from the wife, is of itself sufficient to raise a presumption that such advancement was intended as a fraud upon her rights.

Pomeroy v. *Pomeroy*, 54 How. Pr. 228; *Reynolds* v. *Vance*, 1 Heisk. 344; *Cranson* v. *Cranson*, 4 Mich. 230, 66 Am. Dec. 534; *Sanborn* v. *Lang*, 41 Md. 113; *White* v. *Dougherty*, Mart. & Y. 308, 17 Am. Dec. 802.

The fraudulent intent on the part of Daniel Small and the defendants below to defeat the marital rights of Mrs. Small is necessarily presumed from their knowledge that such rights would be defeated by the several gifts of which we complain.

Nichols v. *Nichols*, 61 Vt. 426.

Fraud is not purged by circuity.

Broom, Legal Maxims, *210.

Acts such as were perpetrated in the present case, which violate justice, good morals, public policy, and the spirit, if not the letter, of the laws both in Kansas and Illinois and elsewhere, are certainly fraudulent.

Klemp v. *Winter*, 23 Kan. 699.

The interest which a husband or wife has in the property of the other while both are living is a present and existing one, and one that is substantial in its character, and one that will authorize an action by the one injured or threatened with injury, for the maintenance and protection of his or her rights or interests or the redress of his or her grievances.

Kan. Stat. of Descents & Distributions, §§ 8, 28; Kan. Stat. relating to Wills, § 35; Ill. Stat. Record, pp. 65–67; *Busenbark* v. *Busenbark*, 33 Kan. 572; *Green* v. *Green*, 34 Kan. 740, 55 Am. Rep. 256; *Munger* v. *Baldridge*, 41 Kan. 236; *Buzick* v. *Buzick*, 44 Iowa, 259, 24 Am. Rep. 740; *Kelly* v. *McGrath*, 70 Ala. 75, 45 Am. Rep. 75; *Chandler* v. *Hollingsworth*, 3 Del. Ch. 99; *Kitts* v. *Wilson*, 130 Ind. 492; *Stroup* v. *Stroup* (Ind.) 27 L. R. A. 523; *Clifford* v. *Kampfe*, 84 Hun, 393; *Tyler* v. *Tyler*, 126 Ill. 525; *Scott* v. *Maglaughlin*, 33 Ill. App. 162, affirmed in 133 Ill. 33; *Petty* v. *Petty*, 4 B. Mon. 215, 39 Am. Dec. 501; *Johnson* v. *Johnson* (Ky.) 2 S.W. Rep. 487; *Gregory* v. *Filbeck*, 12 Colo. 379.

There are three things highly favored in law, —life, liberty, and dower.

Co. Litt. 124b; *Kennedy* v. *Nedrow*, 1 U. S. 1 Dall. 415, 1 L. ed. 202; *Osterhout* v. *Osterhout*, 30 Kan. 746; *Kelly* v. *McGrath*, 70 Ala. 75, 45 Am. Rep. 75.

Neither one, from the time of the marriage contract, can transfer any interest in his or

her property in fraud of the marital rights of the other.

Green v. *Green*, 34 Kan. 740, 55 Am. Rep. 256; *Beere* v. *Beere*, 79 Iowa, 555; *Murray* v. *Murray*, 90 Ky. 1, 8 L. R. A. 95; *Chandler* v. *Hollingsworth*, 3 Del. Ch. 99; *Swaine* v. *Perine*, 5 Johns. Ch. 482, 9 Am. Dec. 318; *Brown* v. *Bronson*, 35 Mich. 415; *Jones* v. *Jones*, 64 Wis. 301; *Smith* v. *Smith*, 6 N. J. Eq. 515; *Littleton* v. *Littleton*, 1 Dev. & B. L. 327; *Pomeroy* v. *Pomeroy*, 54 How. Pr. 228; *Petty* v. *Petty*, *supra*; *Achilles* v. *Achilles*, 151 Ill. 136; Wait, Fraud. Conv. § 70.

Wherever a husband fraudulently or in contravention of law or public policy disposes of his property, real or personal, for the purpose of preventing his wife from receiving her fair proportion thereof after his death, as provided by law, the wife or widow may follow the property and recover her share thereof or its value from any person who participated in the fraud or received its benefits, and who is not an innocent holder for value.

Nichols v. *Nichols*, 61 Vt. 426; *Thayer* v. *Thayer*, 14 Vt. 107, 39 Am. Dec. 211; *Jenny* v. *Jenny*, 24 Vt. 324; *Manikee* v. *Beard*, 85 Ky. 20; *Kelly* v. *McGrath*, 70 Ala. 75, 45 Am. Rep. 75; *Re Hummel's Estate*, 161 Pa. 215; *Sanborn* v. *Lang*, 41 Md. 107; *Cranson* v. *Cranson*, 4 Mich. 230, 66 Am. Dec. 534; *Brown* v. *Bronson*, 35 Mich. 415; *Chandler* v. *Hollingsworth*, 3 Del. Ch. 99; *Murray* v. *Murray*, 90 Ky. 1, 8 L. R. A. 95; *Swaine* v. *Perine*, 5 Johns. Ch. 482, 9 Am. Dec. 318; *McClurg* v. *Schwartz*, 87 Pa. 521; *Jiggitts* v. *Jiggitts*, 40 Miss. 718; *Littleton* v. *Littleton*, and *Stroup* v. *Stroup*, *supra*; *Davis* v. *Davis*, 5 Mo. 183; *Tucker* v. *Tucker*, 29 Mo. 350; *McGee* v. *McGee*, 4 Ired. L. 105; *Pomeroy* v. *Pomeroy*, *supra*; *Reynolds* v. *Vance*, 1 Heisk. 344; *Gilson* v. *Hutchinson*, 120 Mass. 27; *Kitts* v. *Wilson*, and *Jones* v. *Jones*, *supra*; *McCammon* v. *Summons*, 2 Disney (Ohio) 596; Wait, Fraud. Conv. § 70; 35 Cent. L. J. 365; *Jones* v. *Brown*, 34 N. H. 439; *Johnson* v. *Johnson* (Ky.) 2 S. W. Rep. 487; 3 Pom. Eq. Jur. § 1063.

Advancements are a part of the estate for the purposes of the subsequent and final division, partition, or distribution of the estate.

Gen. Stat. 1889, ¶¶ 2617, 7244; Ill. Laws, Record, p. 71; *White* v. *White*, 41 Kan. 556; *Chicago Lumber Co.* v. *Tomlinson*, 54 Kan. 770; *Murray* v. *Murray*, 90 Ky. 1, 8 L. R. A. 93; *Littleton* v. *Littleton*, *supra*.

Gifts *inter vivos* in fraud of a wife's rights are void.

Re Hummel's Estate, and *Murray* v. *Murray*, *supra*; *Buzick* v. *Buzick*, 44 Iowa, 259, 24 Am. Rep. 740; *Nichols* v. *Nichols*, *Jenny* v. *Jenny*, *Sanborn* v. *Lang*, *Cranson* v. *Cranson*, *Jiggits* v. *Jiggits*, *Jones* v. *Jones*, and *Reynolds* v. *Vance*, *supra*.

Gifts *causa mortis* are void if made with the intention of defrauding the widow.

Baker v. *Smith* (N. H.) 23 Atl. Rep. 82; *Jones* v. *Brown*, *supra*; *Dunn* v. *German-American Bank*, 109 Mo. 90; *Nichols* v. *Nichols*, *supra*; Kerr, Fraud & Mistake, 217; *Tucker* v. *Tucker*, 29 Mo. 350, 32 Mo. 464.

A gift made under such circumstances, and with such intent and purpose, would, if the element of fraud were eliminated, be treated as a *donatio causa mortis*.

Meach v. *Meach*, 24 Vt. 591; *Grymes* v. *Hone*, 49 N. Y. 17, 10 Am. Rep. 313; *Staniland* v. *Willott*, 3 Macn. & G. 664; *Gardner* v. *Parker*, 3 Madd. 184.

Gifts by will, where they are made with the intention of defrauding the widow, or where they are in contravention of law or public policy, are as void as if made in any other form.

Section 4 of the Illinois statute of frauds applies to fraudulent transfers of property made by a husband with intent to defeat the wife's suit for alimony.

Tyler v. *Tyler*, 126 Ill. 525.

One cannot hold property which he receives as a mere gratuity or as heir if the property was conveyed to him to defeat the wife of the deceased of her right to dower.

Jenny v. *Jenny*, and *Reynolds* v. *Vance*, *supra*; *Killinger* v. *Reidenhauer*, 6 Serg. & R. 531; *Gilson* v. *Hutchinson*, 120 Mass. 27; *Green* v. *Seaver* (Vt.) 10 Atl. Rep. 742; *Osterhout* v. *Osterhout*, 30 Kan. 746; *Buzick* v. *Buzick*, 44 Iowa, 259, 24 Am. Rep. 740; *Munger* v. *Baldridge*, 41 Kan. 243.

While the husband has the unquestionable right to sell and dispose of his personal property as he pleases, when he pleases, to whom he pleases, and without the signature, assent, or even knowledge of his wife, provided it is all done in good faith, yet he has no power to sell or otherwise dispose of his personal property for the purpose of defrauding his wife or of depriving her of her interest therein at the time of his death.

Beere v. *Beere*, 79 Iowa, 555; *Re Hummel's Estate*, 161 Pa. 215; *Baker* v. *Smith* (N. H.) 23 Atl. Rep. 82; *Dunn* v. *German-American Bank*, 109 Mo. 90; *Murray* v. *Murray*, 90 Ky. 1, 8 L. R. A. 93; *Straat* v. *O'Neil*, 84 Mo. 68; *Tyler* v. *Tyler*, 126 Ill. 525; *Manikee* v. *Beard*, 85 Ky. 20; *Littleton* v. *Littleton*, 1 Dev. & B. L. 327; *McCammon* v. *Summons*, 2 Disney (Ohio) 596; *White* v. *Dougherty*, Mart. & Y. 308, 17 Am. Dec. 802; 1 Am. Lead. Cas. Real Prop. 334; *Jiggitts* v. *Jiggitts*, *supra*; *Reynolds* v. *Vance*, 1 Heisk. 334.

Transfers of real estate made directly or indirectly by the husband without the consent of the wife are void as against the wife.

Nichols v. *Nichols*, 61 Vt. 426; *Sanborn* v. *Lang*, 41 Md. 107; *Davis* v. *Davis*, 5 Mo. 183; *Tucker* v. *Tucker*, 29 Mo. 350; *McGee* v. *McGee*, 4 Ired. L. 105; *Kitts* v. *Wilson*, 130 Ind. 492; *Johnson* v. *Johnson* (Ky.) 2 S. W. Rep. 487; *Tobey* v. *Tobey*, 100 Mich. 54; *Scott* v. *Magloughlin*, 33 Ill. App. 162, affirmed in 133 Ill. 23; *Fields* v. *Fields*, 2 Wash. 441; *McClurg* v. *Schwartz*, 87 Pa. 521; *Gilson* v. *Hutchinson*, 120 Mass. 27.

The defendants below as joint tortfeasors and joint recipients of the fruits of the fraud found by the court below are jointly and severally liable to plaintiff below for the whole amount of which she has been wrongfully deprived by means of the fraudulent acts.

Palmer v. *Stevens*, 100 Mass. 461; 1 Foster, Fed. Pr. § 50; *Tucker* v. *Tucker*, 29 Mo. 350.

On petition for rehearing.

The gifts made contemporaneously with the will were made in the anticipation of the donor's speedy demise, and because he could

not lawfully dispose of such property by will, and they should be treated as gifts *causa mortis*.

Meach v. *Meach*, 24 Vt. 591; *Tucker* v. *Tucker*, *supra*; *Grymes* v. *Hone*, 49 N. Y. 17, 10 Am. Rep. 313; *Staniland* v. *Willott*, 3 Macn. & G. 664; *Gardner* v. *Parker*, 3 Madd. 184.

If treated as gifts *causa mortis*, they are not valid as against the claim of the widow.

Hatcher v. *Buford*, 60 Ark. 169, 27 L. R. A. 507; *Tucker* v. *Tucker*, and *Baker* v. *Smith*, *supra*; *Jones* v. *Brown*, 34 N. H. 439; *Dunn* v. *German-American Bank*, 109 Mo. 90.

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

Many questions respecting rights as well as remedies have been presented, and very ably argued orally and in the voluminous briefs of counsel, but we have found it necessary to decide only one of them. The underlying question is whether, under the laws of Illinois or of Kansas, the several gifts and advancements made by Daniel Small to his children are to be treated as fraudulent and void as to his widow. Most of these gifts and advancements were made without the knowledge of Rebecca Small, and Daniel Small appears to have enjoined upon his children that the subject should not be mentioned to her, nor in her presence. Secrecy is often called a badge of fraud, but it is not fraud itself. If a man's disposition of his property is fair and lawful, the concealment of the transaction cannot render it fraudulent. If the rights of the children were dependent only upon the trust agreement of March 19, 1878, it is doubtful if they could stand the test of law and equity, for, notwithstanding the trust appeared upon its face to be a valid disposition of the property and securities therein mentioned, such as would be binding upon Daniel Small, yet the trusteeship of Darius Small seems to have been only nominal, and Daniel Small virtually controlled the property, and did as he pleased respecting it, just as he had done before; his son Eli D. Small, the nominal attorney in fact of the trustee, merely assisting in the transaction of the business of collecting and reinvesting. If Daniel Small had died while the securities were in this condition, and the Kansas lands in the name of Darius Small as trustee, probably it should be said that all belonged in equity to Daniel Small, and formed part of his estate upon his death; but a considerable portion of the so-called "trust fund" was invested in the Kansas lands and improvements thereon, and both Daniel Small and the trustee, through his attorney in fact, conveyed the lands to the sons and the daughter absolutely in 1886. The advancements were made in 1882 and prior thereto, and we suppose they formed part of said trust fund and its accumulations; and nineteen days before the death of Daniel Small he made the final gift, exceeding $100,000. On April 1, 1888, two weeks before his death, Daniel Small had no control, in law or equity, of the money advancements, the Kansas lands, nor the notes, securities, etc., which were the subject of the gift of March 26, 1888. All were valid as to him, and he could not have recovered a dollar thereof from his children. Upon his death they therefore formed no part of his estate, unless, upon some established principle of law or equity, his widow had a right to so consider them. And this brings us to the main question in the case, namely, Under the laws of Illinois and of this state may a married man, during coverture, as against any post mortem claim of the widow, give away to his children the bulk of his property when the known effect of so doing is to diminish the share which she would have been otherwise entitled to upon his death? In this state there are some limitations upon the right of disposition of real property by a husband where the wife is a resident of this state; but section 8 of our act concerning descents and distributions (Gen. Stat. 1889, ¶2599), which allows to the widow one half in value of all the real estate in which the husband at any time during the marriage had a legal or equitable interest, not sold at judicial sale, and not necessary for the payment of debts, and to which the wife has made no conveyance, provides, further, that the wife shall not be entitled to any interest under said section in any lands to which the husband has made a conveyance, when the wife, at the time of the conveyance, is not, and never has been, a resident of this state. And in *Buffington* v. *Grosvenor*, 46 Kan. 730, 13 L. R. A. 282, it was held that this proviso is constitutional. Under this decision Rebecca Small is cut off from any claim of right, title, or interest in the Kansas lands, and the court below was correct in so holding.

The advancements of money and the gifts of notes and securities of March 26, 1888, were made in Illinois, and, if lawful there, we should probably so consider them here, even though invalid if made in this state; and this leads us to a consideration of the laws of Illinois applicable to this subject. The controversy constituting the subject-matter of the cases of *Padfield* v. *Padfield* in its several aspects was three times before the supreme court of Illinois, and received very full consideration. 68 Ill. 210, 72 Ill. 322, and 78 Ill. 16. It was finally held in the last suit, which was brought by the widow, that any disposition of personal property and credits by a husband in good faith, where no right or interest is reserved to him, either present or ultimate, though made to defeat the rights of his wife, will be good against her; and that there is nothing in the statute respecting the estates of deceased persons that in the slightest degree prevents the husband from disposing of his personal property free from any claim of his wife, whether by sale, gift to his children, or otherwise, in his lifetime. The court quotes approvingly from a note in Kerr on Fraud and Mistake (page 220) as follows: "There can be no doubt of the power of a husband to dispose absolutely of his property during his life independently of the concurrence, and exonerated from any claim of his wife, provided the transaction is not merely colorable, and be unattended with circumstances indicative of fraud upon the rights of the wife. If the disposition

by the husband be bona fide, and no right is reserved to him, though made to defeat the right of the wife, it will be good against her." And the court refers to *Dunnock* v. *Dunnock*, 3 Md. Ch. 140; *Cameron* v. *Cameron*, 10 Smedes & M. 394, 48 Am. Dec. 759; *Lightfoot* v. *Colgin*, 5 Munf. 42; *Stewart* v. *Stewart*, 5 Conn. 317; and *Holmes* v. *Holmes*, 3 Paige, 363,—as fully supporting the doctrine. The court further says: "Again, the act of 1861, known as the 'Married Woman's Law,' confers upon *femes covert* the power of disposing of their separate property, absolutely and as they may choose, free from the control of their husbands. It was manifestly the intention of the general assembly to confer on married women the same, and no greater, rights, in regard to their property, as were possessed by their husbands. It would be singular, and we cannot suppose that the legislature could have intended to confer other or greater power on the wife than upon the husband. To hold that a *feme covert* has a vested interest in her husband's personal estate, that he is unable to devest in his lifetime, would be disastrous in the extreme to trade and commerce. Owing to commercial necessities, personalty must be left free for exchange, and, to be so, some one must be vested with full power to sell and transfer it free from latent and contingent claims." It is contended by counsel for Rebecca Small that section 4 of the Illinois statute of frauds was amended in 1874, after the rights in the *Padfield Cases* had vested, so that gifts made with intent to defraud "creditors or other persons" (the last three words having been added) were declared void, and that a widow comes within the designation of "other persons," and therefore the doctrine in the last *Padfield Case* is changed by statute; and that this is recognized in *Tyler* v. *Tyler*, 126 Ill. 525. In that case it appears that William A. Tyler, in anticipation of proceedings by his wife against him for separate maintenance, in Broome county, N. Y., went to Conneaut, Ohio, and assigned and delivered to his son, John B. Tyler, a large amount of notes, bonds, and mortgages, and also indirectly transferred to him certain lands. The suit was brought by the wife soon after the transfer. Afterwards William A. Tyler commenced an action in Illinois against his son to compel a reassignment of said notes, bonds, and mortgages and a reconveyance of the lands; but it was held by the supreme court of Illinois that the action could not be maintained, said William A. Tyler having transferred the property with intent to defraud the wife, and to render any judgment for separate maintenance ineffectual, the wife coming within the designation of "other persons" in said section 4 of the statute of frauds as amended. The *Padfield Cases* are not overruled, distinguished, nor otherwise referred to, but the case follows *Draper* v. *Draper*, 68 Ill. 17, where it was held that a conveyance, after bill filed for divorce and alimony, with intent to deprive the wife of alimony, was fraudulent, and should be set aside. The phrase "other persons" probably would not include a widow seeking to enforce her rights under the statute of descents and distributions. When general words follow particular and specific words, the former must be confined to things of the same kind. Sutherland, Stat. Constr. §§ 268, 273, 277; *Guptil* v. *McFee*, 9 Kan. 30, 37; *White* v. *Ivey*, 34 Ga. 186, 199; *State* v. *McGarry*, 21 Wis. 496, 498. The word "creditors" serves to limit and control the generality of the following words "other persons" so as to include only those of like or similar kind and nature to creditors.

There seems to be a distinction between the rights of a widow and those of a wife driven by the aggressions of her husband to a suit for alimony or separate maintenance. In the latter case the wife is seeking to establish an unliquidated claim against her husband for money or property, and her relation to him is that of a quasi creditor. This dissimilarity is pointed out by Agnew, J., in *Bouslough* v. *Bouslough*, 68 Pa. 495, 499, as follows: "So the rule that forbids the wife to avoid the voluntary assignment or gift of her husband must change when her relation to him changes. There is no reason why a wife whose husband has deserted her, and refused to perform the duty of maintenance, or who, by cruel treatment, has compelled her to leave his house and commence proceedings for divorce and maintenance, should not be viewed as a quasi creditor in relation to the alimony which the law awards to her. So long as she is receiving maintenance, and is under his wing as it were, she is bound by his acts as to his personal estate; but when she is compelled to become a suitor for her rights, her relation becomes adverse, and that of a creditor in fact, and she is not to be balked of her dues by his fraud." Recognizing this distinction, it would seem that Rebecca Small, while residing with her husband in the most amicable relations, could not have maintained an action to set aside or annul the advancements and gifts to the children, nor to compel either her husband or the children to account to her for the same; and, as these advancements and gifts were valid as to her and valid as to Daniel Small when made, they formed no part of the estate at his death. But we need not go so far in this case. The reasoning in *Padfield* v. *Padfield*, *supra*, as to the married woman's law in Illinois is of much force here. In some states property acquired during coverture is known as "community property," and partakes to some extent of the nature of partnership property between husband and wife; but our legislation is in the opposite direction, manifesting a purpose to maintain, as far as practicable, the separate rights of husband and wife as well to accumulations during as before the existence of the married relation, and each is entitled to dispose of his or her own goods and chattels, with a slight modification as to mortgaging the same. Some of our former decisions have accorded in spirit with the doctrine established in Illinois. *Butler* v. *Butler*, 21 Kan. 521, 525, 526, 30 Am. Rep. 441; *Munger* v. *Baldridge*, 41 Kan. 241–244. The cases of *Busenbark* v. *Busenbark*, 33 Kan. 572, and *Green* v. *Green*, 34 Kan. 740, 55 Am. Rep. 256, both relate to protection of the husband and wife re-

spectively during coverture from fraudulent alienation of real estate by the other, and are only remotely analogous to the case now under consideration. In *Williams* v. *Williams*, in the circuit court of the United States for the district of Kansas (40 Fed. Rep. 521), Foster, J., delivering the opinion of the court, said: "The main question, in its broadest sense, is simply this: Can a married man give away his property, during coverture, for the purpose of preventing his wife from acquiring an interest therein after his death? The law seems to be that if such gift is bona fide, and accompanied by delivery, the widow cannot reach the property after the donor's death. . . . Neither the wife nor children have any tangible interest in the property of the husband or father during his lifetime, except so far as he is liable for their support, and hence he can sell it or give it away without let or hindrance from them. Of course the sale or gift must be absolute and bona fide, and not colorable only. And if the sale or gift would bind the grantor it would bind his heirs." We are aware that the authorities are not all in harmony upon this subject, but the cases asserting a contrary doctrine are generally under statutes or customs different from those of Illinois and Kansas, and we think the weight of authority in states having statutes upon this subject of the same general nature as our own establishes the doctrine herein announced. We cite some authorities in addition to those hereinbefore given, *viz.*: *Pringle* v. *Pringle*, 59 Pa. 281; *Lines* v. *Lines*, 142 Pa. 149; *Richards* v. *Richards*, 11 Humph. 429; *Sanborn* v. *Goodhue*, 28 N. H. 48, 59 Am. Dec. 398; *Ford* v. *Ford*, 4 Ala. 142, 146; *Smith* v. *Hines*, 10 Fla. 258, 285; Stewart, Husb. & W. § 301; Thornton, Gifts, § 488. We are of opinion that the rights of Rebecca Small are controlled by the will and the contract of May 9, 1888. If there was any real estate or personal property in Illinois or elsewhere not disposed of by the will nor included in the contract, of course she is entitled to her proper share of the same.

The judgment will be reversed, and the case remanded for further proceedings in accordance with this opinion.

All the Justices concur.

Rehearing denied December 21, 1895.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

MISSOURI PACIFIC RAILWAY COMPANY, *Plff. in Err.*,
v.
George MEEH

(69 Fed. Rep. 753.)

1. **Filing a plea to the merits before filing a plea in abatement** to the jurisdiction of the court, upon the ground of citizenship, is not a waiver of the question of jurisdiction under the act of Congress of March 3, 1875, § 5, making it the duty of the Federal circuit courts to dismiss or remand a suit not involving a dispute properly within the jurisdiction.

2. **Two states cannot by joint action create a corporation** which will be regarded as a single corporate entity, and for jurisdictional purposes a citizen of each state which joined in creating it.

3. **The result of creation by one state of a corporation of a given name,** and the declaration of the legislature of an adjoining state that the same legal entity shall be or become a corporation of that state, and be entitled to exercise within its borders all of its corporate functions by the same board of directors, is not to create a single corporation, but two corporations of the same name having a different paternity.

4. **An interstate corporation having but one board of directors,** formed by process of consolidation or otherwise, acts in each of such states as a domestic, and not as a foreign, corporation.

5. **A Federal court has no jurisdiction of an action by a citizen** of the state against a consolidated railway company organized under the statutes of that and adjoining states, for personal injuries inflicted within the state, as such corporation is a domestic corporation for jurisdictional purposes.

(September 2, 1895.)

ERROR to the Circuit Court of the United States for the District of Kansas to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Before Caldwell, Sanborn, and Thayer, Circuit Judges.

Mr. **B. P. Waggener,** for plaintiff in error:

When a consolidated company is formed by union of several corporations chartered by different states, it is a citizen of each of the states which granted the charter to any one of its constituent companies, and when sued in one of those states it cannot claim the right of removal on the ground that it is also a citizen of another state.

Fitzgerald v. *Missouri P. R. Co.* 45 Fed. Rep. 812; *Chicago & N. W. R. Co.* v. *Whitton*, 80 U. S. 13 Wall. 270, 20 L. ed. 571; *Muller* v. *Dows*, 94 U. S. 444, 24 L. ed. 207; *St. Louis, A. & T. H. R. Co.* v. *Indianapolis & St. L. R.*

NOTE.—As to residence or citizenship of corporations for purposes of jurisdiction, see *note* to Stephens v. St. Louis & S. F. R. Co. (C. C. W. D. Ark.) 14 L. R. A. 184.

Later decisions of the Supreme Court of the United States on the subject are found in the L. C. P. Co.'s Digest of the United States Supreme Court Reports, vol. 3, pp. 174, 175.

Co. 9 Biss. 144; *Pennsylvania R. Co.* v. *St. Louis, A. & T. H. R. Co.* 118 U. S. 290, 30 L. ed. 83; *Pacific Railroad* v. *Missouri P. R. Co.* 23 Fed. Rep. 565; *Central Trust Co.* v. *St. Louis, A. & T. R. Co.* 41 Fed. Rep. 551.

It is the duty of a Federal appellate court to take notice, of its own motion, that the record does not show jurisdiction in the court below, and thereupon to remand the cause.

Grand Trunk R. Co. v. *Twitchell*, 59 Fed. Rep. 727; *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379, 28 L. ed. 462; *Grace* v. *American C. Ins. Co.* 109 U. S. 278, 27 L. ed. 932; *Robertson* v. *Cease*, 97 U. S. 646, 24 L. ed. 1057; *Jackson* v. *Ashton*, 33 U. S. 8 Pet. 148, 8 L. ed. 898; *Scott* v. *Sandford*, 60 U. S. 19 How. 393, 15 L. ed. 691; *Piquignot* v. *Pennsylvania R. Co.* 57 U. S. 16 How. 104, 14 L. ed. 863; *Cutler* v. *Rae*, 48 U. S. 7 How. 729, 12 L. ed. 890; *United States* v. *Huckabee*, 83 U. S. 16 Wall. 414, 21 L. ed. 457; *Barney* v. *Baltimore*, 73 U. S. 6 Wall. 280, 18 L. ed. 825; *Thompson* v. *Central Ohio R. Co.* 73 U. S. 6 Wall. 134, 18 L. ed. 765; *Williams* v. *Nottawa*, 104 U. S. 209, 26 L. ed. 719.

Messrs. **Fenlon & Fenlon,** for defendant in error:

A plea in abatement after the defendant has pleaded to the merits is too late.

Cook v. *Burnley*, 78 U. S. 11 Wall. 659, 20 L. ed. 29; *Sheppard* v. *Graves*, 55 U. S. 14 How. 509, 14 L. ed. 519; *D'Wolf* v. *Rabaud*, 26 U. S. 1 Pet. 476, 7 L. ed. 227; *Eddy* v. *Lafayette*, 49 Fed. Rep. 810, 4 U. S. App. 247.

A corporation is the creature of the state bringing it into existence; it cannot migrate nor have a citizenship in two or more states at the same time, for the purpose of avoiding the process of the Federal courts therein, any more than an individual can be a citizen of two or more states at the same time, and for the same reason.

Bank of Augusta v. *Earle*, 38 U. S. 13 Pet. 519, 10 L. ed. 274; *Louisville, C. & C. R. Co.* v. *Letson*, 43 U. S. 2 How. 497, 11 L. ed. 353; *Chicago & N. W. R. Co.* v. *Whitton*, 80 U. S. 13 Wall. 270, 20 L. ed. 571; *Lafayette Ins. Co.* v. *French*, 59 U. S. 18 How. 405, 15 L. ed. 451; *Baltimore & O. R. Co.* v. *Harris*, 79 U. S. 12 Wall. 65, 20 L. ed. 354; *Nashua & L. R. Corp.* v. *Boston & L. R. Corp.* 136 U. S. 363, 34 L. ed. 363; Ang. & A. Priv. Corp. §§ 404, 405.

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

The question for consideration in this case is whether a citizen and resident of the state of Kansas can maintain in the circuit court of the United States for the district of Kansas a suit against a railroad company for personal injuries sustained within the state of Kansas in consequence of the negligent conduct of the said railroad company, it appearing that, when the injuries were so sustained, said railroad company was duly incorporated under the laws of Kansas, and was operating a line of railroad in that state, and that it was also duly incorporated under the laws of the states of Missouri and Nebraska. The question arises in this wise: George Meeh, the defendant in error, sued the Missouri Pacific Railway Company, the plaintiff in error, in the circuit court of the United States for the district of Kansas, alleging that he was a citizen and resident of the state of Kansas, that the defendant company was a citizen and resident of the state of Missouri, and that he (the plaintiff) had sustained certain personal injuries, to his damage in the sum of $10,000, in consequence of the negligent operation by the defendant company of one of its trains near the town of Admire, in Lyon county, Kan. At the return term, on April 7, 1894, the defendant company appeared, and filed an answer to the complaint, which alleged, among other things, that it was a railway corporation "duly chartered, incorporated, and organized under and by virtue of the laws of the states of Kansas, Nebraska, and Missouri, and, as such corporation, operates a line of railway into and through the counties of Lyon and Leavenworth, in the state of Kansas." Later, on June 8, 1894, it filed a plea to the jurisdiction, alleging that the plaintiff was "a resident, citizen, and inhabitant of the state of Kansas, and the said defendant, the Missouri Pacific Railway Company, was a corporation made up by the consolidation of three or more separate and distinct corporations, one incorporated under the laws of the state of Missouri, another under the laws of the state of Kansas, and another under the laws of the state of Nebraska, and that its articles of incorporation have been duly filed with the secretary of state of the state of Kansas, and it was at the date of the institution of this suit, and still is, a corporation incorporated under the laws of each of the states of Missouri, Kansas, and Nebraska, and the requisite diverse citizenship does not exist to give this court jurisdiction, and there is no Federal question involved." No action appears to have been taken on this plea. Later, on June 11, 1894, the defendant company filed an amended answer to the complaint, the second and third paragraphs whereof were as follows:

"Second. For further answer defendant says that this court has no jurisdiction to hear, try, and determine the matters herein; that at the commencement of this action, and prior to the alleged injuries complained of by the plaintiff, the plaintiff was, and ever since has been, a citizen, resident, and inhabitant of the state of Kansas; that at the commencement of this suit the defendant was, and ever since has been, a corporation chartered and incorporated under the laws of each the states of Missouri, Kansas, and Nebraska; that the said Missouri Pacific Railway Company was originally incorporated under the laws of the state of Missouri, but subsequently, and before the institution of this action, the said company, as so incorporated under the laws of Missouri, was duly and legally consolidated under the laws of Kansas with certain railway companies duly and legally incorporated under the laws of the state of Kansas, and subsequently such consolidated company was also consolidated under the laws of Nebraska with certain corporations incorporated under the laws of Nebraska, and such consolidated company then and there took the name of the Missouri Pacific Railway Company, the de-

fendant herein; that the said defendant as consolidated had and has but one board of directors, and operates its system of railroad into and through the states of Missouri, Kansas, and Nebraska; and said defendant at the commencement of this suit was, and ever since has been, a resident citizen and inhabitant of the state of Kansas.

"Third. Defendant further says that this court has no jurisdiction to hear, try, and determine the question in controversy; that the state of Missouri is not included in or a part of the district of Kansas."

The plaintiff demurred to the second and third paragraphs of the amended answer, for the reason that the same were not sufficient in law, and the circuit court sustained the demurrer. Subsequently there was a trial before a jury, and a verdict was returned and a judgment entered in favor of the plaintiff.

Preliminary to a discussion of the main question in the case, noted above, we will notice two points urged by counsel for the defendant in error.

It is insisted that the jurisdictional question was waived, and does not arise upon the present record, because the defendant company filed a plea to the merits before filing a plea in abatement to the jurisdiction of the court. This point is not well taken, and must be overruled. It is true that it was once held that an objection to the jurisdiction of the court upon the ground of citizenship, in actions at law, should be made by a plea in abatement, and that, if a plea to the merits or the general issue was filed, it was a waiver of the plea in abatement, and that a plea of the latter character came too late and was of no avail if filed after or in connection with a plea to the merits. *De Sobry* v. *Nicholson*, 70 U. S. 3 Wall. 420, 18 L. ed. 263; *D' Wolf* v. *Rabaud*, 26 U. S. 1 Pet. 476, 7 L. ed. 227; *Smith* v. *Kernochen*, 48 U. S. 7 How. 198, 216, 12 L. ed. 666, 673; *Sheppard* v. *Graves*, 55 U. S. 14 How. 505, 510, 14 L. ed. 518, 520 *Wickliffe* v. *Owings*, 58 U. S. 17 How. 47, 15 L. ed. 44; *Conard* v. *Atlantic Ins. Co.* 26 U. S. 1 Pet. 386, 450, 7 L. ed. 189, 217. But this rule was abolished by section 5 of the act of March 3, 1875 (18 Stat. at L. p. 472, chap. 137), which makes it the duty of the Federal circuit courts to dismiss a suit at any time, or to remand it to the state court if it was originally removed therefrom, when it appears "to the satisfaction of the court . . . that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined either as plaintiffs or defendants for the purpose of creating a case cognizable" by the Federal courts. By virtue of this statute, the time within which an objection to the jurisdiction may be taken is not limited as heretofore. The right to make such an objection is not waived by filing a plea to the merits, but the objection may be taken at any time after the suit is brought, in any appropriate manner, either by motion or plea; and it is the duty of the Federal courts at all times either to dismiss or to remand a cause for want of jurisdiction apparent on the face of the record. *Nashua & L. R. Corp.* v. *Boston & L. R. Corp.* 136 U. S. 356, 373, 34 L. ed. 363, 367; *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U. S. 379, 28 L. ed. 462; *Barth* v. *Coler*, 9 C. C. A. 81, 19 U. S. App. 646, and 60 Fed. Rep. 466.

It is further insisted in behalf of the defendant in error that, when the demurrer to the second paragraph of the answer was sustained, the answer simply alleged that the Missouri Pacific Railway Company was a corporation duly incorporated under the laws of Kansas "at the commencement of the suit," and that this averment in the answer did not meet the general allegation of the complaint that the defendant company "was a citizen and resident of the state of Missouri." We need not stop to decide whether this view is sound or unsound, because the second paragraph of the answer containing the plea to the jurisdiction was immediately amended by leave of court so as to state that the Missouri Pacific Railway Company was a Kansas corporation, operating a line of road in that state, when the alleged injuries were sustained, as well as when the suit was commenced; and the case went to trial on the amended special plea alleging this fact, which was neither denied by the reply nor the sufficiency thereof challenged by demurrer. The case was obviously tried by the circuit court, and the demurrer to the second and third paragraphs of the answer was obviously sustained, on the ground that the fact that the defendant company had been incorporated in Missouri as well as in Kansas entitled a citizen of Kansas to sue it in the Federal circuit court of that state for an act of negligence there committed. We must accordingly consider and decide whether that view is tenable.

At this day it must be regarded as settled beyond doubt or controversy that two states of this Union cannot by their joint action create a corporation which will be regarded as a single corporate entity, and, for jurisdictional purposes, a citizen of each state which joined in creating it. One state may create a corporation of a given name, and the legislature of an adjoining state may declare that the same legal entity shall be or become a corporation of that state as well, and be entitled to exercise within its borders, by the same board of directors and officers, all of its corporate functions. Nevertheless, the result of such legislation is not to create a single corporation, but two corporations of the same name, having a different paternity. This was decided in *Ohio & M. R. Co.* v. *Wheeler*, 66 U. S. 1 Black, 286, 297, 17 L. ed. 130, 133, where Mr. Chief Justice Taney, speaking for the Supreme Court, said: "It is true that a corporation by the name and style of the plaintiffs appears to have been chartered by the states of Indiana and Ohio, clothed with the same capacities and powers, and intended to accomplish the same objects; and it is spoken of in the laws of the states as one corporate body, exercising the same powers and fulfilling the same duties in both states. Yet it has no legal existence in either state, except by the law of the state, and neither

state could confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised. It may, indeed, be composed of and represent, under the corporate name, the same natural persons. But the legal entity or person, which exists by force of law, can have no existence beyond the limits of the state or sovereignty which brings it into life and endues it with its faculties and powers. The president and directors of the Ohio & Mississippi Railroad Company is, therefore, a distinct and separate corporate body in Indiana from the corporate body of the same name in Ohio, and they cannot be joined in a suit as one and the same plaintiff, nor maintain a suit in that character against a citizen of Ohio or Indiana in a circuit court of the United States."

The doctrine of this case was afterwards reaffirmed in *Chicago & N. W. R. Co.* v. *Whitton*, 80 U. S. 13 Wall. 270, 283, 20 L. ed. 571, 575, where Mr. Justice Field used the following language, speaking of a corporation that had been duly incorporated under the laws of Illinois and Wisconsin: "But it is said—and here the objection to the jurisdiction arises—that the defendant is also a corporation under the laws of Illinois, and therefore is also a citizen of the same state with the plaintiff. The answer to this position is obvious. In Wisconsin the laws of Illinois have no operation. The defendant is a corporation, and as such a citizen, of Wisconsin, by the laws of that state. It is not there a corporation or a citizen of any other state. Being there sued, it can only be brought into court as a citizen of that state, whatever its status or citizenship may be elsewhere. Nor is there anything against this view, but, on the contrary, much to support it, in the case of *Ohio & M. R. Co.* v. *Wheeler* [*supra*]."

These cases have since been referred to, and the doctrine enunciated therein has been approved, in *Muller* v. *Dows*, 94 U. S. 444, 447, 24 L. ed. 207, 208; in *Pennsylvania R. Co.* v. *St. Louis, A & T. H. R. Co.* 118 U. S. 290, 298, 30 L. ed. 83, 88; and in *Nashua & L. R. Corp.* v. *Boston & L. R. Corp.* 136 U. S. 356, 376, 377, 34 L. ed. 363, 368, 369. They have also been cited and followed by the supreme courts of Michigan and Illinois in *Chicago & N. W. R. Co.* v. *Auditor General*, 53 Mich. 91; in *Racine & M. R. Co.* v. *Farmers' Loan & T. Co.* 49 Ill. 331, 348, 95 Am. Dec. 595; and by Judge Caldwell on the circuit in *Fitzgerald* v. *Missouri P. R. Co.* 45 Fed. Rep. 812.

Chief Justice Cooley remarked in *Chicago & N. W. R. Co.* v. *Auditor General*, *supra*, that "it is impossible to conceive of one joint act, performed simultaneously by two sovereign states, which shall bring a single corporation into being, except it be by compact or treaty. There may be separate consent given for the consolidation of corporations separately created; but, when the two unite, they severally bring to the new entity the powers and privileges already possessed, and the consolidated company simply exercises in each jurisdiction the powers the corporation there chartered had possessed, and succeeds there to its privileges."

And in the case of *Quincy Railroad Bridge Co.* v. *Adams County*, 88 Ill. 615, 619, Mr. Justice Breese said, speaking of a corporation that had been incorporated both by the states of Illinois and Missouri: "The states of Illinois and Missouri have no power to unite in passing any legislative act. It is impossible, in the very nature of their organizations, that they can do so. They cannot so fuse themselves into a single sovereignty, and as such create a body politic which shall be a corporation of the two states, without being a corporation of each state or of either state. As argued by appellee, the only possible status of a company acting under charters from two states is, that it is an association incorporated in and by each of the states, and when acting as a corporation in either of the states it acts under the authority of the charter of the state in which it is then acting, and that only, the legislation of the other state having no operation beyond its territorial limits. We do not, and cannot, understand that appellant derives any of its corporate powers from the legislature of the state of Missouri, but wholly and entirely from the general assembly of this state."

Assuming, then, that there are three distinct legal entities known as the Missouri Pacific Railway Company,—one a corporation of Missouri, another a corporation of Kansas, and another a corporation of Nebraska,—we turn to consider whether, on the state of facts disclosed by this record, the circuit court of the United States for the district of Kansas had jurisdiction of the case at bar. We think that this question was practically decided in the cases heretofore cited. Thus, in *Chicago & N. W. R. Co.* v. *Whitton*, 80 U. S. 13 Wall. 270, 283, 20 L. ed. 571, 575, the plaintiff, who was a citizen of Illinois, sued the railway company, which had been incorporated by the states of Wisconsin and Illinois, in the courts of Wisconsin, for a negligent act committed in Wisconsin. Subsequently the plaintiff removed the case to the circuit court of the United States for the district of Wisconsin, and the question arose whether the latter court had jurisdiction. It will be noticed that in the paragraph of the opinion above quoted Mr. Justice Field said: "The defendant is a corporation, and as such a citizen, of Wisconsin, by the laws of that state. It is not there a corporation or a citizen of any other state. Being there sued, it can only be brought into court as a citizen of that state whatever its status or citizenship may be elsewhere."

So, in the case of *Ohio & M. R. Co.* v. *Wheeler*, 66 U. S. 1 Black, 286, 17 L. ed. 130, the plaintiff company described itself as a corporation created and existing under the laws of the states of Indiana and Ohio, having its principal office in Cincinnati, Ohio. It sued Wheeler, describing him as a citizen of Indiana, in the circuit court of the United States for the district of Indiana; but the supreme court held that the action could not be maintained, saying in substance that in the character in which the company had sued, as a corporation of Indiana and Ohio, it could not maintain a suit against

a citizen of Ohio or Indiana in a circuit court of the United States. The decisions in *Nashua & L. R. Corp.* v. *Boston & L. R. Corp.* 136 U. S. 356, 365, 34 L. ed. 363, 364, and in *Muller* v. *Dows*, 94 U. S. 444, 447, 24 L. ed. 207, 208, do not conflict with the prior decisions of the Supreme Court of the United States, for in the former of these cases the New Hampshire corporation, the Nashua Railroad, which had been created a corporation of the state of Massachusetts, sued the Massachusetts corporation in the circuit court of the United States for the district of Massachusetts, to adjust certain differences that had arisen, growing out of a contract in which the two companies had dealt with each other as separate legal entities; and it was held that the suit could be maintained. So, in *Muller* v. *Dows* two citizens of New York and a citizen of Missouri united in bringing a suit against two railroad corporations in the district of Iowa. Both of the defendant corporations were incorporated under the laws of Iowa, but one of them, by consolidation proceedings, had also become a corporation of the state of Missouri. This fact was supposed to destroy the jurisdiction of the court. But the supreme court held otherwise, saying that the consolidated company "in the state of Iowa [where sued] . . . was an Iowa corporation existing under the laws of that state alone." The rule, we think, that may fairly be extracted from these cases, is this: That whenever a corporation of one state, by legislative sanction, becomes also a corporation of another state, either by the process of consolidation or otherwise, whatever acts it subsequently does or performs in the latter state it does and performs as a domestic, and not as a foreign, corporation. It derives all of its powers to act as a corporation in the state of its adoption from local laws. If it is there sued for an act done within the state, it is sued and must answer as a domestic, and not as a foreign, corporation. The same thought was expressed by Mr. Justice Breese in the passage quoted from *Quincy Railroad Bridge Co.* v. *Adams County*, *supra*, when he said: "The only possible status of a company acting under charters from two states is, that it is an association incorporated in and by each of the states; and when acting as a corporation in either of the states, it acts under the authority of the charter of the state in which it is then acting, and that only, the legislation of the other state having no operation beyond its territorial limits."

Nor is there anything new or strange in the view that a foreign corporation, when created a corporation by the laws of some other state, must thereafter act in the latter state and be there dealt with as a domestic corporation. It was long ago said in *Paul* v. *Virginia*, 75 U. S. 8 Wall. 168, 181, 19 L. ed. 357, 360, that a "corporation, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. . . . The recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states, — a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion." Instead of merely licensing a foreign corporation to operate a railroad or to transact any other business within its borders, a state may, for reasons of its own, adopt the foreign corporation by creating it a domestic corporation with the same franchises and powers that it exercises in the state which originally created it, or with powers that are less or more extensive. When a state pursues the latter course, and adopts the foreign corporation as one of its own creation, it follows, we think, that all of its subsequent acts and transactions within the state of its adoption are the acts of a domestic corporation, that the franchises and powers there exercised were conferred by local laws, and that process served upon its officers or agents within the state is served upon the domestic corporation rather than upon the foreign corporation of the same name.

It follows from what has been said that the parties to the suit at bar must be regarded as citizens and residents of the same state. The averments contained in the amended answer are sufficient to show that the Missouri Pacific Railway Company, which figured as the defendant in the circuit court and as the plaintiff in error here, is in reality a domestic corporation of the state of Kansas. The injuries complained of were inflicted upon a citizen of the state of Kansas while the defendant company was operating its road in that state. Under these circumstances, we hold that the circuit court of the United States for the district of Kansas had no jurisdiction of the case, and that, upon the state of facts disclosed by the present record, the suit should have been dismissed.

The judgment of the Circuit Court is accordingly reversed, and the case is remanded to that court for a new trial.

KANSAS SUPREME COURT.

City of ARGENTINE, *Plff. in Err.*,
v.
ATCHISON, TOPEKA, & SANTA FÉ R CO.

(.....Kan.....)

*A city of the second class is vested with power to construct at its own expense, or to require the construction by a railroad company at its expense, of a viaduct or bridge over railroad tracks within the city, where the safety and convenience of the public make it necessary; and, when it is deemed to be just that the cost of such a structure should be divided between the city and the railroad company, the city may contribute or bind itself to pay a share of such cost.

(October 5, 1895.)

ERROR to the District Court for Wyandotte County to review a judgment in favor of plaintiff in an action brought to recover money which defendant had contracted to contribute toward the building of a bridge. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Waters & Waters** for plaintiff in error.

Messrs. **A. A. Hurd** and **Mills, Smith, & Hobbs,** for defendant in error:

The acceptance of the terms of the Ordinance No. 240 by the railroad, and the building of the viaduct, were a dedication of it to the public as a street.

Elliott, Roads & Streets, p. 91; *Griswold* v. *Huffaker*, 47 Kan. 703; *Dubuque* v. *Maloney*, 9 Iowa, 451, 74 Am. Dec. 358; *Cincinnati Trustees* v. *White*, 31 U. S. 6 Pet. 431, 8 L. ed. 452; *Brooks* v. *Topeka*, 34 Kan. 281.

The city had ample power to pass the ordinance and enter into the contract it did for the building of the viaduct.

Elliott, Roads & Streets, p. 28; *State* v. *Gorham*, 37 Me. 461.

It would be contrary to equity and good conscience for the city to repudiate the payment of the amount it agreed to pay, and it is estopped from so doing.

Brown v. *Atchison*, 39 Kan. 37; *Sherman Center Town Co.* v. *Morris*, 43 Kan. 282; *Hutchinson & S. R. Co.* v. *Kingman County Comrs.* 48 Kan. 70; *Stewart* v. *Wyandotte County Comrs.* 45 Kan. 708; *Sleeper* v. *Bullen*, 5 Kan. 300; *East St. Louis* v. *East St. Louis Gaslight & Coke Co.* 98 Ill. 415, 38 Am. Rep. 97; *San Francisco Gas Co.* v. *San Francisco*, 9 Cal. 469; *Hitchcock* v. *Galveston*, 96 U. S. 341, 24 L. ed. 659.

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

This action was brought by the Atchison, Topeka, & Santa Fé Railroad Company against the city of Argentine to recover $3,000, being a share of the cost of two viaducts constructed in the city of Argentine by the railroad company, and which the city had agreed to pay. It appears that prior to the settlement of Argentine the railroad company had established large yards, with many tracks, at that location, and that afterwards people settled and built homes on both sides of the railroad yards. Two streets were laid out and opened across the yards, which the inhabitants of the city used in going from one side of the yards to the other. When the city reached a population of 5,000, and had within its limits a smelter and a number of elevators, making a great deal of business in the yards, crossing over the same at grade was deemed to be inconvenient and dangerous. An ordinance was then adopted by the city directing the railroad company to construct a viaduct over all the railroad tracks operated by it, at a point near a certain avenue, to be selected by the city council, and which was to be 20 feet wide, and, with the approaches, would be about 1,338 feet long. It was to be constructed according to certain plans and specifications which had been prepared, at an estimated cost of $15,000. A further provision was that the railroad company should also build a foot viaduct over the same tracks at another point; and it was provided that, on the completion of both viaducts in accordance with the plans and specifications, the city of Argentine should pay to the railroad company $3,000 of the cost thereof. It was provided that, on the completion of the viaducts, they should be public highways, to be used by the public instead of the grade crossings, and should be forever maintained and kept in repair by the city, without expense to the railroad company. Other provisions were made with respect to the change of the grade of the streets to correspond with the approaches to the viaducts, as well as for the reconstruction or widening of the same in certain contingencies, and for the laying of water and gas mains under the tracks of the railroad company. It was finally ordained that if, within thirty days after the passage of the ordinance, the railroad company should file in the office of the city clerk a written acceptance of the provisions of the ordinance, it should then become a contract between the city and the railroad company, binding upon both parties. Within the time limited, the terms and conditions of the ordinance were accepted by the railroad company. The city selected the locations for the viaducts, and they were built by the railroad company in compliance with the provisions of the ordinance, and with the plans and specifications which had been prepared, at an actual cost to the railroad company of about $15,700; and, if the usual charges for transportation of material were made, it would add to the amount named from $1,600 to $2,000. The city and its officers knew of the building of the viaducts, and no legal steps were taken to prevent it, and since then the viaducts have been in constant use by the inhabitants and others for teams, vehicles, and pedestrians. At a special election in the city, bonds to pay the $3,000 claim of the railroad

*Headnote by JOHNSTON, J.

NOTE.—For liability for expense of changing street grade to avoid railroad grade crossing, see also Kelley v. Minneapolis (Minn.) 26 L. R. A. 92, and note.

company, and for the construction of certain sewers and the building of a city hall, were voted upon. The bonds have been issued and sold for such purposes. Taxes have been levied in the city to pay these bonds, and the sum of $3,000 is in the hands of the city treasurer, set apart as the viaduct fund, having been derived from the sale of the bonds voted for the purpose of paying the $3,000 claim of the railroad company. The claim was duly presented in writing by the railroad company to the mayor and council, with a full account of the items thereof, duly verified as required by law, but payment was refused by the city, when the present action was brought. The railroad company recovered the full amount claimed, and the city complains and presents the single proposition that it had no power to make the contract which was made with the railroad company.

Argentine is a city of the second class, and, although there is no statute which in express terms provides for the building of viaducts in cities of that class, there appears to be ample authority for such a city to build or require the building of viaducts or bridges over railroad tracks where the convenience and safety of the public make it necessary. In the act governing cities of the second class, authority is given to open and improve streets, avenues, and alleys, and to build bridges, within the city. Gen. Stat. 1889, ¶ 788. It is also provided that the city may provide for the passage of railways through the streets and grounds of the city, regulate depots, depot grounds, the crossing of railway tracks, the running of railway engines, cars, and trains within the limits of the city, and make any other and further provisions to prevent accidents at crossings and on the tracks of railways. Paragraph 821. In addition to these, there are provisions vesting the care, management, and control of the city in the mayor and council, authorizing them to open, widen, extend, or otherwise improve the streets and avenues of the city, and to prevent all encroachments upon them, and granting authority to them to enact all such ordinances as they shall deem expedient for maintaining the good government and welfare of the city, its trade and commerce. Paragraphs 787, 811, 812, 824. Under these general provisions, we think there is ample power in a city of the second class to construct or require the construction of viaducts over railroad tracks. In addition to these, however, there is express authority given for the construction of bridges. In the more enlarged sense of that word, viaducts over railroad tracks are included. Worcester defines the word "bridge:" "A pathway erected over a river, canal, road, etc., in order that a passage may be made from one side to the other." Webster defines it as "a structure, usually of wood, stone, brick, or iron, erected over a river or other watercourse, or over a ravine, railroad, etc., to make a continuous roadway from one bank to the other." The last-named authority defines the word "viaduct" as "a bridge." According to modern usage, the term "bridge" may be appropriately applied to the viaducts which were constructed by the railroad company; and we think it may be fairly said that the term was used in that sense in the statute. Gen. Stat. 1889, ¶ 788; *State* v. *Gorham*, 37 Me. 461.

It is conceded by the city that it had the power to compel the railroad company to build the viaducts wholly at the expense of the company, and that the city can build them at its own expense under the provisions mentioned there can be little doubt. As the city may construct them entirely at its own expense, no reason is seen why it may not contribute a part of the expense of viaducts determined to be necessary. The questions of necessity and expediency of viaducts, the character and cost of those which the safety and convenience of the public may require, and the means of providing them, including what proportion of the expense should be borne by the city and what by the railroad company, are for the determination of the mayor and council, rather than the court. The fact that the city can compel the railroad company to build a viaduct upon certain conditions at its own expense does not prevent the city from sharing the expense under other circumstances where it is deemed to be just that a division of the expense should be made; and that question, like the others which have been mentioned, so far as the municipality is concerned, rests with the legislative authority of the city.

It is contended that the viaduct is not a public highway, but is constructed over the private property of the railroad company, and for this reason, also, the power of the city is questioned. The viaducts were to be constructed at a place to be designated by the city, and to connect with the streets on each side of the tracks and yards. They were supported by posts of iron, resting on foundations of masonry, braced with iron bolts and sway rods, so as to make a safe and substantial structure. It was provided that the viaducts, when constructed, should be and remain public highways, for the use of the public. The railroad company, having accepted the provisions of the ordinance and constructed the viaducts over its yards, has effectually dedicated the land as a public highway, and would be estopped from interfering with the easement so long as it is maintained as a public highway.

Our opinion is that the district court reached a correct conclusion in holding that the city had the power to contract with the railroad company for the construction of the viaducts, and that it is liable for the share of the cost of the same which it agreed to pay. It is unnecessary to determine the validity of the provisions as to future maintenance, and upon that question we express no opinion.

The judgment of the District Court will be affirmed.

All the Justices concur.

NORTH CAROLINA SUPREME COURT.

William F. PICKETT, Admr., etc., of Albert Williams, Deceased,
v.
WILMINGTON & WELDON RAILROAD COMPANY, *Appt.*

(.....N. C.....)

1. **He who has the last clear chance,** notwithstanding the negligence of the adverse party, is considered solely responsible for injuries resulting from his failure to exercise reasonable care.
2. **The failure of an engineer to perform his duty to maintain a reasonably vigilant lookout** along the track in front of the train renders the railroad company liable for killing a human being lying on the track apparently helpless from any cause, when the engineer could have seen him by the exercise of ordinary care.
3. **It is proper to instruct the jury that plaintiff's negligence is immaterial** if they find that the defendant's negligence was the proximate cause of the injury.
4. **The qualification of a witness** to give an opinion is for the court to decide.
5. **An instruction that the measure of damages for the loss of a human life is the net moneyed value of the intestate's life** to those dependent upon him is not sufficient to cure a refusal to instruct that it would be the present value of accumulations arising from his net income based upon his expectancy of life.
6. **A new trial solely for the purpose of inquiring as to the damages** may be granted on a reversal for errors affecting damages only.

(November 19, 1895.)

APPEAL by defendant from a judgment of the Superior Court for Duplin County in favor of plaintiff in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's negligence. *Reversed in part.*

The facts are stated in the opinion.

Messrs. **W. R. Allen** and **H. L. Stevens** for appellant.

Messrs. **A. D. Ward** and **N. J. Rouse** for appellee.

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

The most important question presented by the appeal is whether the court erred in refusing to instruct the jury that if the plaintiff's intestate deliberately laid down upon the track, and either carelessly or intentionally fell asleep there, the defendant was not liable, unless the engineer actually saw that he was lying there in time, by the reasonable use of the appliances at his command, to have stopped the train before it reached him. In the headnote to *Smith* v. *Norfolk & S. R. Co.* 114 N. C. 729, 25 L. R. A. 287, it seems that the intelligent reporter deduced from the opinion of the court the principle that, while the mere going upon the track of a railroad is not contributory negligence, any injury subsequently inflicted by a collision with a passing train is deemed to be due to the carelessness of the person who goes upon it, unless it is shown that he looked and listened for its approach. While such an abstract proposition may be fairly drawn from the reasoning upon which the opinion is founded, the new trial was in fact awarded, because the court below refused to instruct the jury that if the plaintiff's intestate was drunk, though he was lying apparently helpless upon the track, the defendant was not liable, unless its engineer actually saw that he was in danger in time to avert the injury by reasonable care. The learned counsel who argued this case for the defendant, without citing *Smith's Case* in support of his contention, obviously invoked the aid of the principle there decided when he rested his argument upon the proposition that one who carelessly or purposely falls asleep on a railway track is not only negligent in exposing himself upon first going there, but that, though he afterwards becomes utterly unconscious, there is, in contemplation of law, a continuing carelessness on his part up to the moment of a collision, which is, concurrently with the fault of the defendant, a proximate cause of an ensuing injury, or operates to acquit the carrier of what would have been culpable carelessness and a *causa causans* if the injury had been inflicted on a horse, a pig, a cow, or a person rendered insensible in any other manner than by drunkenness or deliberately or carelessly falling asleep. So that we are again called upon to review *Smith's Case*, and to determine whether we will modify the principle there laid down, or extend its operation to other cases coming within the reason upon which it is founded.

The language of Judge Cooley which is cited in *Clark* v. *Wilmington & W. R. Co.* 109 N. C. 449, 14 L. R. A. 749, is that, "if the original wrong only becomes injurious in consequence of intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote." If, in the case at bar, the plaintiff's intestate was in fault in lying down upon the track, and his carelessness culminated in doing so, then it is clear that the engineer was in fault in failing to keep a proper lookout if he could by doing so have seen the deceased in time through the reasonable use of the appliances at his command to have averted the injury, and his carelessness, of course, intervened after that of plaintiff's intestate. If he had looked and stopped the train, the collision would have been prevented, notwithstanding the previous want of care on the part of the boy who was killed.

In *Herring* v. *Wilmington & R. R. Co.* 10 Ired. L. 402, 51 Am. Dec. 395, this court followed what was at the time the generally

NOTE.—As to necessity of lookout on railroad train, see *note* to Smith v. Norfolk & S. R. Co. (N. C.) 25 L. R. A. 287.

See also 40 L. R. A. 172.

accepted doctrine,—that persons who went upon railroad tracks at places other than public crossings were trespassers, to whom the carrier owed no duty of watchfulness, and for whose safety it was in no wise liable, unless its engineer actually saw that there was danger of injury from a collision, and wilfully refused to use means by which he could have averted it. In *Gunter* v. *Wicker*, 85 N. C. 310, this court gave its sanction to the principle first distinctly formulated in *Davies* v. *Mann*, 10 Mees. & W. 545, that "notwithstanding the previous negligence of the plaintiff, if, at the time the injury was done, it might have been avoided by the exercise of reasonable care and prudence on the part of the defendant, an action will lie for damages." This doctrine was subsequently approved in *Saulter* v. *New York & W. S. S. Co.* 88 N. C. 123, 43 Am. Rep. 736; *Turrentine* v. *Richmond & D. R. Co.* 92 N. C. 638; *Meredith* v. *Cranberry Coal & I. Co.* 99 N. C. 576; *Roberts* v. *Richmond & D. R. Co.* 88 N. C. 560; *Farmer* v. *Wilmington & W. R. Co.* Id. 564; *Bullock* v. *Wilmington & W. R. Co.* 105 N. C. 180; *Wilson* v. *Norfolk & S. R. Co.* 90 N. C. 69; *Snowden* v. *Norfolk Southern R. Co.* 95 N. C. 93; *Carlton* v. *Wilmington & W. R. Co.* 104 N. C. 365; *Randall* v. *Richmond & D. R. Co.* 104 N. C. 410. And it was repeatedly declared in those cases that it was negligence on the part of the engineer of a railway company to fail to exercise reasonable care in keeping a lookout, not only for stock and obstructions, but for apparently helpless or infirm human beings on the track, and that the failure to do so, supervening after the negligence of another, where persons or animals were exposed to danger, would be deemed the proximate cause of any resulting injury.

It was after all of these precedents following *Gunter* v. *Wicker*, *supra*, that the court in *Deans* v. *Wilmington & W. R. Co.* 107 N. C. 686, was confronted with the question whether a railway company was liable where, by ordinary care, its engineer could have stopped its train in time to prevent its running over a man lying asleep upon its track, under the doctrine of *Gunter* v. *Wicker*, or whether, the accident having occurred at a place other than a public crossing, the company could be held answerable, under the rule as stated in *Herring* v. *Wilmington & R. R. Co.* only where it was shown that the engineer actually saw the trespasser, and had reasonable ground to comprehend his condition. Upon mature consideration, the court overruled *Herring's Case*, and stated the rule applicable in such cases to be that "if the engineer discover, or by reasonable watchfulness may discover, a person lying upon the track asleep or drunk, or see a human being, who is known by him to be insane, or otherwise insensible to danger, or unable to avoid it, upon the track in his front, it is his duty to resolve all doubts in favor of the preservation of life, and immediately use every available means, short of imperiling the lives of passengers on his train, to stop it." This rule was approved in express terms in *Meredith* v. *Richmond & D. R. Co.* 108 N. C. 618; *Hinkle* v. *Richmond & D. R. Co.* 109 N. C. 472; *Clark* v. *Wilmington & W. R. Co.* 109 N. C. 444, 445, 14 L. R. A. 749; *Norwood* v. *Raleigh & G. R. Co.* 111 N. C. 240; *Caufield* v. *Asheville Street R. Co.* 111 N. C. 600.

In *Smith's Case*, *supra*, the same questions were again presented, and this court was asked to overrule the doctrine of *Deans* v. *Wilmington & W. R. Co.* and reinstate *Herring* v. *Wilmington & R. R. Co.* as authority. The court declined to overrule *Deans's Case* and others which had followed it, but held that in so far as the opinions purported to bring within the protection of the rule a person who is lying upon the track, in an insensible state brought about by drunkenness, they were entitled only to the weight of *dicta*. No member of the court adopted this particular view but the chief justice, who delivered the leading opinion. The other members of the court were either in favor of sustaining without any modification, or of overruling *in toto*, the principle as enunciated in *Deans's Case*. The learned counsel for the defendant now contends that one who deliberately incurs the risk of lying down upon the track is no more entitled to the protection of the law than a drunken person, and that, where he is killed, his personal representative cannot invoke the benefit of a rule which subserves the purpose of shielding even brutes from the same unnecessary peril. At common law, in England, the owner of cattle was required to keep them in or restrain them from trespassing on the lands of others. 2 Shearm. & Redf. Neg. §§ 418, 626, 627. But in this country the rule has been either modified by statute or in a much larger number of states entirely disregarded, because the reason upon which it was founded, under different conditions, had ceased to operate. 2 Shearm. & Redf. Neg. §§ 419-422. The principle deduced from *Davies* v. *Mann*, as is said by discriminating law writers, is that "the party who has the last clear opportunity of avoiding the accident, notwithstanding the negligence of his opponent, is considered solely responsible for it." 1 Shearm. & Redf. Neg. p. 165. This rule has now been adopted in almost all of the southern and western states, but has been construed in some of them and by a number of text-writers as applying to injuries done by moving trains only, where the engineer actually sees an animal or a person. But this court, soon after adopting the rule laid down in *Davies* v. *Mann* (in *Gunter* v. *Wicker*, *supra*), construed it in its application to animals in *Wilson* v. *Norfolk & S. R. Co.* 90 N. C. 69 (followed by *Snowden's*, *Carlton's*, *Bullock's*, and *Randall's Cases*, *supra*), to mean that an engineer was not only negligent in failing to avert an injury to animals actually seen, but those which might by proper vigilance have been seen by him, in time by the use of the appliances at his command, and without peril to the safety of persons on the train, to avert the accident.

It is settled irrevocably in North Carolina that a railway company is answerable in damages for an injury to any valuable domestic animal due to the failure of the engineer to exercise reasonable care in observing the track

in his front, and to passengers on a train when caused by a want of similar vigilance on the part of the same servant in keeping an outlook for obstructions. The question presented in this case, therefore, as in *Smith's Case*, is whether, by any sort of legal fiction, we can hold a servant faultless for failure to see one who has voluntarily fallen upon the track, and yielded to the influence of sleep, or who, overcome with drunkenness, lies prostrate in the way of a train when either or both are sandwiched between obstructions; also, animals, children, or persons unconscious from sickness, or known by the engineer to be deaf, whom the law declares it is his duty to see, if it is possible for him, by the exercise of ordinary care, to do so. The opinion of the court in *Smith's Case* not only concedes, but adduces much authority to sustain, the correctness of the ruling in *Deans* v. *Wilmington & W. R. Co.* and the later opinions approving it, as therein interpreted, but proceeds upon the idea that, in so far as any previous opinion had stated that a railway company owed the duty of watchfulness to drunken persons lying on its track, or became liable for failure to discharge it, unless actually seen by the engineer, they were *dicta* only. It was true, however, as to *Deans's* and *Clark's Cases*, that there was some evidence tending to show that, in the one instance, the person who fell asleep on the track was drunk, and, in the other, that the man killed was intoxicated when he went upon the trestle.

To illustrate the operation of the conflicting rules as they now stand, suppose that the engineer is approaching a straight cut, through which he can see for one fourth of a mile, or for a sufficient distance to stop his train without breach of his duty to those on it before reaching the cut, and that at the entrance nearest him a sleeping child, 10 feet further a cow, and 10 feet further still a large bowlder with a drunken man, or one who has deliberately laid down, resting, asleep, and unconscious, upon it, are ranged successively. Suppose, then, that the engineer carelessly fails to look out and see the sleeping child, the cow, or the bowlder, and, by successive collisions, kills the child, the cow, and the man on the bowlder, and the train is wrecked by striking the bowlder, so that a number of passengers are likewise killed. The result would present a legal paradox under the law as it now stands. The servant who represents the company would render it liable for his omission of the duty of keeping a lookout, for which the company could be mulcted in damages by the personal representatives of the child and of the passengers and by the owner of the cow, and yet, though the engineer could not discharge the duty, which never ceased, of watching for the bowlder without seeing the drunkard or the sleeping man, the failure to see either is, in contemplation of law, no culpable breach of duty. The learned counsel for the defendant has given, it seems to us, quite as cogent reasons for holding that a railroad company is absolved from duty to one who wilfully or carelessly exposes himself to peril by sleeping upon a track as to one who falls down in a state of utter unconsciousness, superinduced by drinking, and cited equally as strong and numerous authorities in support of his contention. But the reasons and the authority relied upon emanate generally from courts which hold that both persons and animals upon a track are trespassers, and entitled to consideration only where actually seen in time to save them. It is not strange that courts, where it is held that railway companies owe no duty to any one who goes on their track and is not seen, should have sought support for their position where a drunken man happened to be the victim of carelessness, in the theory that he was deemed to be still concurring up to the time of the accident, and was less deserving of consideration than a sober trespasser. But it must not be forgotten that in the last analysis, notwithstanding the additional reason assigned, the drunkard in the states holding to the principle that we have repudiated, is excluded from the right to recover because he is a trespasser, just as his sober neighbor would be barred of the right if he were injured by his side, and, when actually seen, the same duty of protection arises as to both.

The admitted test rule to which we have adverted, that he who has the last clear chance notwithstanding the negligence of the adverse party, is considered solely responsible, must be applied in contemplation of the law which prescribes and fixes their relative duties. The law, as settled by two lines of authorities here, imposes upon the engineer of a moving train the duty of reasonable care in observing the track; and if, by reason of his omission to look out for cows, horses, and hogs, he fails to see a drunken man or a reckless boy asleep on the track, it cannot be denied that he is guilty of a dereliction of duty. If he is guilty of a breach of duty, we cannot controvert the propositions which necessarily follow from the admission that but for such omission, or if he had taken advantage of the last clear opportunity to perform a duty imposed by law, the train would have been stopped and a life saved. It cannot be denied that in a number of the states which have adopted the doctrine of *Davies* v. *Mann*, it has also been held that both man and beast were trespassers when they went upon a railway track, and, except at public crossings or in towns, it was not the duty of the engineer to exercise care in looking to his front with a view to the protection of either. Where the law does not impose the duty of watchfulness, it follows that the failure to watch is not an omission of duty intervening between the negligence of the plaintiff in exposing himself and the accident, unless he be actually seen in time to avert it. The negligence of the corporation grows out of omission of a legal duty, and there can be no omission where there is no duty prescribed. But, when this court declared it the duty of an engineer to exercise reasonable care in looking out for animals on the track, it became equally a duty as to all those classes of persons who, if actually seen by him, would be entitled to demand that he use all the means at his com-

mand to avert injury to them. Where the rule prevails that no liability attaches for a failure of the engineer to keep a lookout except in towns and at crossings, the same test is applied by the courts. So soon as the duty arises, the failure to perform it, if intervening after the negligence of a person in exposing himself to peril, is held to be the last clear opportunity to discharge it, and therefore the proximate cause of the injury, if it could have been averted by the use of the means at his command after the law required him to have seen it. As we hold that the duty on the part of the engineer of watchfulness to protect life is an ever present one, attending him everywhere, and extending to the people in the remote country as well as in the towns, it necessarily follows that the opportunities that grow out of duty performed are coextensive with the duty prescribed, and may arise wherever it exists. We are of opinion that when, by the exercise of ordinary care, an engineer can see that a human being is lying apparently helpless, from any cause, on the track in front of his engine, in time to stop the train by the use of the appliances at his command, and without peril to the safety of persons on the train, the company is liable for any injury resulting from his failure to perform his duty. If it is the settled law of North Carolina (as we have shown) that it is the duty of an engineer on a moving train to maintain a reasonably vigilant outlook along the track in his front, then the failure to do so is an omission of a legal duty. If, by the performance of that duty, an accident might have been averted, notwithstanding the previous negligence of another, then, under the doctrine of *Davies* v. *Mann* and *Gunter* v. *Wicker*, the breach of duty was the proximate cause of any injury growing out of such accident; and, where it is a proximate cause, the company is liable to respond in damages. Having adopted the principle that one whose duty it is to see does see, we must follow it to its logical results. The court committed no error of which the defendant could justly complain in stating the general rule which we have been discussing.

Considered in connection with other portions of the charge, the statement of the distances, as proved by defendant's witnesses, was but a fair submission of the view argued by defendant's counsel, and affords no ground for exception. Under the general principle laid down in *Emery* v. *Raleigh & G. R. Co.* 102 N. C. 236, and the numerous cases which have followed it, it was within the sound discretion of the court to frame the issues, and the defendant must show that the exercise of that discretion operated to his injury, if he would assign it as error. But in *Scott* v. *Wilmington & W. R. Co.* 96 N. C. 428, and *Denmark* v. *Atlantic & N. C. R. Co.* 107 N. C. 185, and other cases, it has been declared that the judge was clothed with discretion to submit one, two, or three issues, where the controversy hinges upon a controverted allegation of negligence, as he might think best, provided he should give appropriate instructions. Where the first issue (here the second) raises not only the question whether the defendant was negligent, but also whether it was the proximate cause, the judge is at liberty to tell the jury if they should find that the defendant was negligent, and its negligence was the proximate cause of the injury, it was immaterial to determine whether or not the plaintiff had been previously negligent.

The question propounded to the witness Wilson was intended to elicit an opinion, which it was the province of the court to decide that he had not qualified himself to give. *State* v. *Hinson*, 103 N. C. 374.

The court below was requested, however, in substance, to instruct the jury that the measure of damage for the loss of a human life was the present value of the net income which would be ascertained by deducting the cost of living and expenditures from the gross income, and that the jury could not allow more than the present value of accumulations arising from such net income, based upon the expectancy of life. The court, in lieu of the instruction asked, told the jury that the measure of damage was the reasonable expectation of pecuniary benefit from the continued life of the deceased to those who would have been dependent on him had he continued to live out his natural life; that the expectation of one seventeen years old would be forty-four and two-tenths years, and the damage would be the net moneyed value of intestate's life to those dependent upon him had he continued to live out his appointed time. Though the court stated the abstract proposition, as we find it formulated in the books, in the first clause of that portion of the charge relating to damages, we think that the substitution of the subsequent portion of it for the more specific instruction to which the defendant was entitled, and for which he asked, was erroneous. The instruction given, viewed without reference to the prayer of the defendant, was objectionable, in that it left the question of the date which should be the basis of the final calculation, to say the least, uncertain, if his language was not susceptible of the construction that the net income would be estimated as of the period when those dependent on him would have realized the benefits of his labor had he not come to an untimely end.

We are of opinion, therefore, that, following as a precedent *Tillett* v. *Lynchburg & D. R. Co.* 115 N. C. 662, a new trial should be granted for the error complained of, only as to the issue to which the erroneous instruction related. The jury found the fact upon full instruction as to the law in connection with other issues, which left the defendant no just reason to complain. But another opportunity must be given to assess the damage in the light of a more explicit statement of the law applicable. A new trial is granted, therefore, solely for the purpose of inquiring as to damages. The case will be remanded to the end that the jury may ascertain what is the present value of intestate's life.

Partial new trial.

COMMERCIAL & FARMERS' BANK
v.
W. H. WORTH, State Treasurer, *Appt.*

(.....N. C.....)

1. **A committee appointed by the general assembly to make an examination** and find the facts from the evidence, with authority to make the report after adjournment of the assembly, cannot draw per diem or mileage after such adjournment, unless the resolution appointing it provides therefor.

2. **A resolution by the general assembly providing that a committee created thereby shall find the facts** from the evidence in an examination to be made by it, set out the evidence in full, and report such facts to the general assembly "if it is possible to do so before its adjournment, and if not then said report shall be made to the supreme court," confers on such committee no power to act after adjournment of the general assembly except to make the report.

3. **A state treasurer properly refuses to pay a warrant** drawn on him by the auditor for an illegal claim under Code, § 3356, subsec. 3, requiring him to pay "all warrants legally drawn on him by the auditor."

(October 29, 1895.)

APPEAL by defendant from a judgment of the Superior Court for Wake County in favor of plaintiff in a mandamus proceeding to compel defendant to pay an order for money, directed to him by the state auditor. *Reversed.*

The case is stated in the opinion.

Mr. **W. A. Guthrie** for appellant.

Messrs. **T. R. Purnell** and **J. N. Holding** for appellee.

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

It is not controverted that the legislature may create a special commission, as, for instance, to examine the treasury accounts, and require that it shall consist of members to be designated from its own body, and fix its compensation. Code, §§ 3360, 3361. Such special commissioners are not disqualified to hold other offices, as members of the general assembly, for instance, being expressly excepted by art. 14, § 7, of the Constitution. Nor can it be denied that the legislature has power to authorize a committee of their body to sit during vacation, and fix its compensation. The question before us does not turn upon the power of the legislature, which is undeniable, but upon the construction of their action. The uniform action of Congress and the legislature, so far as our researches extend, has been to expressly authorize such committee to "sit in vacation." Inasmuch as the existence of all committees, in the absence of legislation, necessarily determines upon the adjournment of the body to which they belong, certainly there must be an explicit enactment that the sessions of the committee can be held after such adjournment, or, at least, a clear, unmistakable implication to that effect from the words used in the act or resolution creating the committee. We do not find such to be the case here. The resolution (Laws 1895, p. 502) simply provides that the committee "shall find the facts from the evidence, and report said facts, and also set out the evidence in full in said report, and make their report to the general assembly if it is possible to do so before its adjournment." So far there is nothing to distinguish this committee from any other, or to prolong its existence beyond the adjournment of the body to which it belonged. Then follow the only words which can be construed to give such power: "And, if not, then said report shall be made to the supreme court." This confers no power on the committee to do any act after the general assembly should adjourn, except to make their report if it should not be ready. There is no explicit provision or clear implication that the committee should take any other action. Had the legislature so desired, it would, according to precedent, have provided that the committee could sit in vacation, as they plainly provided that they could report in vacation, if necessary, which necessity seemed to be considered doubtful. When a committee is empowered to sit in vacation, the resolution must provide the compensation, and for the expenses of the same; otherwise, there is no authority of law for their payment. Certainly, the members cannot draw per diem as members of the legislature; for, by the Constitution (art. 2, § 28), the per diem is allowed only during the session of the general assembly, and is limited to sixty days, which the members of this committee had already drawn, as well as their mileage allowed them in such capacity. We must look to the resolution itself for any authority for payment of either compensation or expenses. That provides only for "the necessary expenses of the said committee while actually engaged in said investigation." Since, as stated above, the meaning of the resolution was that the investigation should be made during the session, merely leaving the report to be filed (if it should be necessary) after adjournment, the necessary expenses would seem to be those of making the investigation; *i. e.* summoning and expense of witnesses, stationery, etc. But it is not required here to say what would be embraced in necessary expenses, for this warrant on its face is for "per diem and mileage." The per diem is compensation which is not provided for by the resolution, and the mileage is not necessary for members who are simply to remain over a short while to file a belated report, since they drew mileage as members to return home. Whether the reasonable board bills of the committee while detained in making up the report would not be included in "necessary expenses" is not before us, but probably that would be conceded. It was urged on one side that, this resolution being passed so short a time before adjournment, the legislature must have intended the committee to sit during vacation; and, on the other side, that, the resolution having been introduced long before,

NOTE.—The rarity of decisions upon the rights and powers of legislative committees makes the above decision somewhat noteworthy. See also the case of Purnell v. Worth, *post*, 262.

As to contempt of such committee, see *Re* Gunn (Kan.) 19 L. R. A. 519.

its passage at this late hour indicated an intention that the committee should get rid of the matter by simply reporting that it could not investigate for lack of time. There is nothing in the resolution to show how long or how short the investigation would be. We are authorized to make no surmises. The legislature had power to authorize the committee to sit in vacation and to allow compensation to the members of it. They chose not to do so. They only authorized such continuance for the purpose of filing the report and necessary expenses. The failure to authorize per diem or some compensation is additional evidence that the committee was expected to finish its labors (except, possibly, as to filing the report) while the assembly were still in session.

It was strenuously, and it would seem seriously, argued before us that, the auditor having given his warrant, the treasurer had no choice but to pay it. The auditor gives no bond, and if the treasurer must pay any and every warrant that is presented to him, the state treasury is at the mercy of the judgment of that officer, who might mistake or misconceive (as in this instance) the meaning of an act. The laws of this state do not bear that construction. The auditor examines the items and amounts, and passes upon them, and can require the claimant to be sworn and examined as to the correctness of the account. Code, § 3350, subsec. 17. If he finds the amount correct, and, further, that payment is provided for by law (Id. § 3350, subsec. 9), he is required to draw his warrant on the treasurer for payment thereof, but he is also required to put in the face of each warrant drawn by him the act authorizing such payment. This is to give notice to the treasurer that he may act understandingly, for he is not required to pay any and every warrant which the auditor may sign, but only "to pay all warrants legally drawn on the treasurer by the auditor." Id. § 3356, subsec. 3. Should the treasurer have reasonable doubts, he should consult the attorney general, or, if he think proper, refuse payment, as in this case, and let the matter be determined by the courts. Our government is one of checks and balances. It is not intended that payments out of the public funds should be made on the judgment of the public treasurer alone or the auditor alone. The auditor examines as to the amounts and the performance of the work. It would seem that as to the facts his finding is conclusive (Id. § 3350, subsec. 5); certainly it is sufficient protection, in the absence of any collusion or notice of fraud, to the treasurer. But the auditor goes further. He examines as to whether the payment of the claim is authorized or provided for by law. If he so finds, his conclusion as to the law is not binding on, nor is it a protection to, the treasurer. The auditor is required to set out the act providing for payment in the face of the warrant (Id. § 3350, subsec. 9); and, on the application of such statute, the treasurer must also pass before payment; and he has authority to take the opinion of the attorney general (Id. § 3363, subsec. 4), or he can act without it at his own risk, either in paying or refusing payment of a warrant which, in his judgment, is not authorized by any statute. It is thus that the lawmaking power hedges about the safekeeping of the public funds. The treasurer's bond (Id. § 3357) is a safeguard, not only against his misuse or misappropriation of the funds committed to him, but against his payment of illegal claims; for the bond provides for the "faithful execution of the duties of his office," and one of those duties is to pay out no money except on warrant drawn by the auditor, and to pay all legal warrants drawn by him. Illegal warrants, not authorized by law, the treasurer pays at his peril. The duty of the special commissioners appointed under section 3361 of the Code is not limited merely to examining whether all warrants are signed by the auditor,—a very simple matter,—but they are required by that section to examine also to see whether such payments were authorized by law as well as by the auditor. In directing the mandamus to issue, *there was error.*

30 L. R. A.

See also 30 L. R. A. 261.

T. R. PURNELL, *Appt.*,
v.
W. H. WORTH, State Treasurer.

(.....N. C.....)

A committee appointed by the legislature to make an examination, and find the facts from the evidence, and report the facts and the evidence in full, is not entitled to an attorney as a necessary expense.

(October 29, 1895.)

APPEAL by defendant from a judgment of the Superior Court for Wake County refusing a mandamus to compel defendant to pay an order which had been directed to him by the state auditor. *Affirmed.*

The facts sufficiently appear in the opinion.

Messrs. **Thomas R. Purnell** and **J. N. Holding,** for appellant:

The auditor is the only officer invested with discretion to examine and liquidate claims against the state.

Boner v. *Adams*, 65 N. C. 639; *Belmont* v. *Reilly*, 71 N. C. 260; *Burton* v. *Furman*, 115 N. C. 171.

The treasurer has no discretionary power but must pay all warrants legally drawn.

Code, § 3351, subsec. 7; *Burton* v. *Furman*, *supra*.

The supreme court cannot "audit and liquidate" a claim against the state but only give a recommendatory judgment.

Const. art. 4, § 9; *Baltzer* v. *State*, 104 N. C. 265; *Bain* v. *State*, 86 N. C. 49; *Clodfelter* v. *State*, 86 N. C. 51.

Special members of the general assembly have been appointed at every session giving the provisions a legislative construction which must be respected.

Opinion of the Judges, 114 N. C. 925.

The general assembly is presumed to have acted properly.

Lawson, Presumptive Ev. 58; *Carr* v. *Coke* 116 N. C. 223, 28 L. R. A. 737.