LAWYERS' REPORTS, ANNOTATED.

BOOK XI.

ALL CURRENT CASES

OF

GENERAL VALUE AND IMPORTANCE

DECIDED IN

THE UNITED STATES, STATE AND TERRITORIAL COURTS,

WITH FULL ANNOTATION

BY

ROBERT DESTY, EDITOR.

BURDETT A. RICH AND HENRY P. FARNHAM,

REPORTERS,

THE PUBLISHER'S EDITORIAL STAFF, AND THE SEVERAL REPORTERS AND JUDGES OF EACH COURT, ASSISTING IN SELECTION.

(11 L. R. A.)

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LAWYERS' REPORTS,

ANNOTATED.

CONNECTICUT SUPREME COURT OF ERRORS.

Jacob BROSCHART
v.
Henry TUTTLE.

(59 Conn. 1.)

1. **Allegations that defendant's horse was badly broken and more or less unmanageable,** and that as plaintiff and defendant approached each other on the highway "defendant carelessly and negligently drove or permitted his horse to go across the highway and to strike violently against the mare of plaintiff," do not show that the action is founded upon a violation of a statute requiring persons driving on a highway when they meet to turn to the right, and each give half the traveled path.
2. **Where treble damages are allowed,** the proper practice is for the jury to find such damages as they think proper, and then for the court to enhance the amount to meet the statutory requirements.
3. **An unlawful act by a person,** if it directly contributes to a personal injury which he sustains, is a conclusive bar to a recovery for such injury against another person on the ground of negligence.
4. **Driving at an unlawful speed on a street,** if it contributes to an injury received in a collision with another team, is a bar to a recovery for the negligence of the other party.
5. **Whether the rate of speed at which a person was driving was greater** than that permitted by an ordinance, and if so whether the illegal act contributed to a collision with another team, are questions for the jury.
6. **Statements of one party to the other in a conversation about a claim** of the latter against him, that the former is a lawyer and can carry on a suit at one sixth the expense of the other, and that he knows every juryman in the county and that twelve men cannot be got together that will decide against him, may be proved in an action brought upon such claim, as they may, in the absence of explanation, tend in some degree to evince a consciousness of liability upon the claim.

NOTE.—*Collision on highway; rule of the road.*

The law of the road in the United States requires travelers in vehicles when they approach each other upon a highway each to turn to the right if reasonably practicable, and statutes of various States prescribe this rule. Palmer v. Barker, 11 Me. 338; Jaquith v. Richardson, 8 Met. 213; Earing v. Lansingh, 7 Wend. 185; Smith v. Dygert, 12 Barb. 613.

The rule applies to travelers who approach each other in coming from opposite directions. Bolton v. Colder, 1 Watts, 360.

But in Louisiana it is held to apply equally to following travelers who attempt to pass a traveler in advance of them. Avegno v. Hart, 25 La. Ann. 235.

In such case the advance traveler is under no legal obligation to turn to either side to allow the following traveler to get in front of him. Bolton v. Colder, *supra*.

Exceptions to rule.

The exceptions to the rule of the road depend upon the special circumstances of the case, and in respect to which no general rule can be applied. St. John v. Paine, 51 U. S. 10 How. 557, 13 L. ed. 537; New York & L. U. S. Mail S. S. Co. v. Rumball, 62 U. S. 21 How. 372, 16 L. ed. 144; The Cayuga, 81 U. S. 14 Wall. 276, 20 L. ed. 829; The W. H. Clark, 5 Biss. 302; The Grace Girdler, 74 U. S. 7 Wall. 196, 19 L. ed. 113; The Orinoco, Holt, Rule of the Road, 98; The Flora, Id. 114; The Great Eastern, Id. 167; The Graf Van Rechteren, Id. 247; The Emma, Id. 207; The Aura, Id. 255.

The rule of the road does not usually apply to persons on horseback, who must as a rule yield the road to a vehicle, especially a vehicle heavily loaded. Dudley v. Bolles, 24 Wend. 465; Beach v. Parmeter, 23 Pa. 196; Washburn v. Tracy, 2 D. Chip. (Vt.) 128.

Rule not inflexible.

The rules are not inflexible, and a strict observance should be avoided when there is a plain risk in adhering to them. The Pilot, 1 Biss. 166; The Santa Claus, Olc. 428, 1 Blatchf. 370; The Sunnyside, 1 Brown, Adm. 250.

Where a person too rigidly adheres to the rule of going to the right when the injury might have been averted by variance from the rule, he may be charged with fault. Johnson v. Small, 5 B. Mon. 25; Goodhue v. Dix, 2 Gray, 181; Smith v. Gardner, 11 Gray, 418; Brooks v. Hart, 14 N. H. 307; O'Malley v. Dorn, 7 Wis. 236; Allen v. Mackay, 1 Sprague, 219; The Cornelius C. Vanderbilt, Abb. Adm. 361; The Friend, 1 W. Rob. 478; The Commerce, 3 W. Rob. 295.

Violation of rule; penalty.

Where one driving on a country road fails to turn out for another whom he meets, as required by the Rhode Island Statute, and so compels such other to drive upon the side of the road, where he is injured by colliding with a post standing outside of, but near, the traveled part of the road, he may sue the other, who fails to turn out for him in compliance with the Statute. Mahogany v. Ward, 16 R. I. —, Index DD, 153.

The Statute providing a penalty for a person driving upon a roadway and about to meet a passing team, who does not turn to the right of the centre of the road, does not provide *per se* that an offender shall be liable for all damage which may

See also 20 L. R. A. 61; 26 L. R. A. 408, 769.

7. Statements obviously made to discourage the bringing of a suit by predicting the other party's defeat and disadvantage in the way of expenses because the party making them is a lawyer are not privileged on the ground that they are made for the purpose of a compromise.

(April 15, 1890.)

CROSS-APPEALS from a judgment of the Superior Court for New Haven County rendered in an action brought to recover damages for the killing of plaintiff's horse by the alleged negligence of defendant, plaintiff appealing from the refusal to give him treble damages, and defendant appealing because of rulings and instructions which permitted the return of a verdict against him. *Affirmed on plaintiff's appeal. Reversed on defendant's appeal.*

The facts are stated in the opinion.

Messrs. **L. Harrison** and **E. P. Arvine,** for plaintiff:

The court should have granted our motion that damages be trebled. The Statute expressly gives these damages where any person is injured by the neglect of another to turn to the right, when they meet in driving on the highway.

Gen. Stat. § 2690.

It is not necessary to ask for treble damages. The court adjudges them as matter of law.

Hart v. *Brown*, 2 Root, 301; *Lobdell* v. *New Bedford*, 1 Mass. 153; Sedgw. Damages, 571; 2 Wait, Act. and Def. 452.

It is not necessary to give the defendant notice of any matters of law.

Pom. Rem. §§ 529, 530; Bliss, Code Pl. § 181; Sedgw. Stat. and Const. L. §§ 113, 114.

The court did not err in refusing to charge the jury that the plaintiff's violation of the city ordinance would be a conclusive bar to his recovery.

Hartford v. *Talcott*, 48 Conn. 526; *Kirby* v. *Boylston Market Asso.* 14 Gray, 249; *Heeney* v. *Sprague*, 11 R. I. 456; *Moore* v. *Gadsden*, 93 N. Y. 12; *Fuchs* v. *Schmidt*, 8 Daly, 317; *Vandyke* v. *Cincinnati*, 1 Disney, 532.

The weight of authority is decidedly against the conclusive character of a violation of a municipal ordinance on the subject of negligence.

Redf. Neg. § 104; *Frost* v. *Plumb*, 40 Conn. 111; *Steele* v. *Burkhardt*, 104 Mass. 59; *Hanlon* v. *South Boston Horse R. Co.* 129 Mass. 310; *Newcomb* v. *Boston Protective Department*, 6 New Eng. Rep. 282, 146 Mass. 596; *Knupfle* v. *Knickerbocker Ice Co.* 84 N. Y. 488; *Platz* v. *Cohoes*, 89 N. Y. 219; *Hamilton* v. *Goding*, 55 Me. 419; *Heeney* v. *Sprague*, *supra*; *Lester* v. *Howard Bank*, 33 Md. 558; *Niemeyer* v. *Wright*, 75 Va. 239; *Western & A. R. Co.* v. *Jones*, 65 Ga. 631; *Chicago, B. & Q. R. Co.* v. *Sims*, 17 Neb. 691; *Cook* v. *Johnston*, 58 Mich. 437; *Sutton* v. *Wauwatosa*, 29 Wis. 21; *Schmid* v. *Humphrey*, 48 Iowa, 652; *Harris* v. *Runnels*, 53 U. S. 12 How. 79, 13 L. ed. 901; *Union Gold Min. Co.* v. *Rocky Mountain Nat. Bank*, 96 U. S. 640, 24 L. ed. 648; *Wetherell* v. *Jones*, 3 Barn. & Ad. 221.

The declarations of the defendant, objected to by his counsel, were properly admitted by the court. They were in no way connected by the offer of compromise. An admission of a fact is none the less admissible because made in connection with an offer of compromise.

Hartford Bridge Co. v. *Granger*, 4 Conn. 142.

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happen while there, but his liability depends upon the rules of law applicable to cases of negligence. Newman v. Ernst, 31 N. Y. S. R. 1, citing Earing v. Lansingh, 7 Wend. 185; Simmonson v. Stellenmerf, 1 Edm. Sel. Cas. 194; Brooks v. Hart, 14 N. H. 307; Parker v. Adams, 12 Met. 416; Palmer v. Barker, 11 Me. 338.

Care required of traveler.

An instruction that if neither plaintiff nor the driver of the buggy in which he sat was guilty of negligence, but that if the driver of defendant's wagon, which collided with the buggy, was guilty of negligence, the verdict should be for plaintiff, correctly states the law upon the exercise of ordinary care. Christian v. Erwin, 125 Ill. 619.

A traveler upon a highway may presume, in the absence of knowledge of a defect therein, that it is reasonably safe; and if the highway be along a level tract of country, he may ride or drive at a pace such as ordinarily prudent persons would adopt as safe under like circumstances. Wall v. Highland, 72 Wis. 435.

The Act giving the Boston Protective Department the right of way in going to a fire does not relieve it from liability for negligence in injuring one not contributing to the injury. Newcomb v. Boston Protective Department, 6 New Eng. Rep. 282, 146 Mass. 596.

A driver of a fire engine going to a fire, whose duty it is to follow the direction of a hose cart in front of him, and who must avoid all wagons and obstructions, cannot be held to the same degree of care as an ordinary driver; and where he was injured by being thrown off the engine in consequence of the wheel of his cart dropping into a hole over which the hose cart passed, he was held not guilty of contributory negligence. Coots v. Detroit, 5 L. R. A. 315, and *note*, 75 Mich. 623.

Contributory negligence defeats recovery.

The general rule in actions for injuries suffered from a collision on a highway is that plaintiff, to recover, must, himself, be free from fault contributing to produce or occasion the mischief of which he complains. McLane v. Sharpe, 2 Harr. (Del.) 481; Larrabee v. Sewall, 66 Me. 376; Parker v. Adams, 12 Met. 415; Munroe v. Leach, 7 Met. 274; Lane v. Crombie, 12 Pick. 177; Lane v. Bryant, 9 Gray, 245; Fales v. Dearborn, 1 Pick. 345; Mabley v. Kittleberger, 37 Mich. 360; Daniels v. Clegg, 28 Mich. 32; Brooks v. Hart, 14 N. H. 307; Drake v. Mount, 33 N. J. L. 441; Moody v. Osgood, 54 N. Y. 488; Wynn v. Allard, 5 Watts & S. 524; Wood v. Luscomb, 23 Wis. 287; Harpell v. Curtis, 1 E. D. Smith, 78; Knapp v. Salsbury, 2 Campb. 500; Jones v. Boyce, 1 Stark. 402; Pluckwell v. Wilson, 5 Car. & P. 375; Williams v. Holland, 6 Car. & P. 23; Wayde v. Lady Carr, 2 Dowl. & R. 255.

Unskillful or reckless driving is such negligence as will prevent a recovery if it contributes to the injury. Peoria Bridge Asso. v. Loomis, 20 Ill. 235; Pittsburgh Southern R. Co. v. Taylor, 104 Pa. 306; Acker v. Anderson County, 20 S. C. 495; Cassedy v. Stockbridge, 21 Vt. 391; Flower v. Adam, 2 Taunt. 314.

Attempt to pass advance traveler.

A follower attempts to pass another at his peril, and is responsible for all damages caused thereby. Avegno v. Hart, 35 La. Ann. 235.

An attempt of a following traveler to pass an advance traveler, if not made recklessly, is not such contributory negligence as will defeat a recovery for injuries from a defective roadway. Mochler v. Shaftsbury, 46 Vt. 580; Fopper v. Wheatland, 59 Wis. 623.

The rule applies to vessels navigating the ocean.

148; *Fuller* v. *Hampton*, 5 Conn. 416, 426; *Marsh* v. *Gold*, 2 Pick. 285; *Home Ins. Co.* v. *Baltimore Warehouse Co.* 93 U. S. 527, 548, 23 L. ed. 868, 870.

Messrs. **W. C. Case** and **L. N. Blydenburgh**, for defendant:

The court erred in its charge, and in its refusal to charge as requested, with regard to the effect of the plaintiff's violation of the city ordinance upon his right to recover. Contributory negligence shown by fast driving is very different from the willful violation of the law; and while the rate of speed fixed by the ordinance is a proper thing to be taken into consideration in determining whether the driving of the plaintiff was so rapid as to constitute negligence, consideration for that purpose alone does not go far enough; and yet it was for that purpose and in that connection only that the jury were allowed to consider the ordinance. The difference between contributory negligence and violation of law is recognized and approved in *Newcomb* v. *Boston Protective Department*, 6 New Eng. Rep. 282, 146 Mass. 596.

A person who is engaged in the violation of law cannot recover for injuries sustained while violating the law, if that violation directly contributed to those injuries.

Heland v. *Lowell*, 3 Allen, 407; *Hall* v. *Ripley*, 119 Mass. 135; *Tuttle* v. *Lawrence*, 119 Mass. 276; *Smith* v. *Boston & M. R. Co.* 120 Mass. 490; *Lyons* v. *Desotelle*, 124 Mass. 387; *Cratty* v. *Bangor*, 57 Me. 423; *Baker* v. *Portland*, 58 Me. 199; *Norris* v. *Litchfield*, 35 N. H. 271; *Davis* v. *Guarnieri*, 13 West. Rep. 438, 45 Ohio St. 470. See also, as bearing upon this principle, *Finn* v. *Donahue*, 35 Conn. 216; *Funk* v. *Gallivan*, 49 Conn. 128; *Oscanyan* v. *Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539.

The court erred in allowing the evidence of the conversation held between the plaintiff and defendant to go to the jury and to be considered by them.

Stranahan v. *East Haddam*, 11 Conn. 507.

Conversation while engaged in the endeavor to settle difficulties is privileged and not to be used against either party, unless one of the parties admits a fact because it is a fact.

Hartford Bridge Co. v. *Granger*, 4 Conn. 142; *Strong* v. *Stewart*, 9 Heisk. 137; *Wood* v. *Wood*, 3 Ala. 756; *Daniels* v. *Woonsocket*, 11 R. I. 4; *Rideout* v. *Newton*, 17 N. H. 71; *Wisconsin State Bank* v. *Dutton*, 11 Wis. 371; *Champau* v. *Dubois*, 39 Mich. 274; *Dailey* v. *Coons*, 64 Ind. 545.

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

This is an action to recover damages for the loss of a horse, caused by the alleged negligence of the defendant in so driving and managing his horse and sleigh as to come into collision with the plaintiff's horse and sleigh, while the parties were driving in opposite directions along a street in the City of New Haven. The case was tried to the jury and resulted in a verdict of $700 in favor of the plaintiff, and thereupon the plaintiff filed a motion that he be awarded treble damages pursuant to the Statute, which was overruled by the court. Both parties have appealed to this court—the plaintiff on account of the denial of his motion for treble damages, and the defendant on account of alleged errors in the charge to the jury and in the rulings of the court as to the admission of evidence.

So where a vessel unnecessarily attempts to pass another vessel, she does so at her peril, and is liable for the consequential damages. Naugatuck T. Co. v. The Rhode Island, 7 N. Y. Leg. Obs. 38.

Excessive speed on streets.

Where persons enter into a contest of speed with their horses, on the street, driving at a dangerous and unlawful rate of speed, frightening the horses of another and causing them to run away, and injure the latter, a remedy exists in the latter's favor, independent of an ordinance regulating the rate of speed at which persons may drive within the city limits. Middlestadt v. Morrison, 76 Wis. 265, citing Wright v. Malden & M. R. Co. 4 Allen, 283; Hall v. Ripley, 119 Mass. 135; Hanlon v. South Boston Horse R. Co. 129 Mass. 310.

But driving through the streets at a rate of speed forbidden by a municipal ordinance, but not contributing to the injury, will not prevent a recovery against the city for injuries from a defective highway. Baker v. Portland, 58 Me. 199; Heland v. Lowell, 3 Allen, 407; Alger v. Lowell, 3 Allen, 402; Stuart v. Machias Port, 48 Me. 477; Welch v. Wesson, 6 Gray, 505.

Riding a horse at an improper speed along a much-used public street in a populous city, and at the same time looking in another direction from that in which the rider is going, is culpable negligence. Stringer v. Frost, 2 L. R. A. 614, 116 Ind. 477.

Mutual negligence of parties.

The negligence of one party will not excuse the negligence of the other. Chamberlain v. Ward, 62 U. S. 21 How. 549, 16 L. ed. 213; Davies v. Mann, 10 Mees. & W. 546; Colchester v. Brooke, 7 Q. B. 377; Greenland v. Chaplin, 5 Exch. 243.

The negligence of a driver of a carriage in controlling his horses after a collision caused by defendant's negligence, unless he did some act contributing to the running away of his team, or the like, will not relieve defendants from responsibility. Belk v. People, 125 Ill. 584.

Evidence in action.

In cases of injury by collision the plaintiff must prove both care on his part and the want of care on the part of defendant. Carsley v. White, 21 Pick. 254; Lane v. Crombie, 12 Pick. 177; Kennard v. Burton, 25 Me. 39; Rathbun v. Payne, 19 Wend. 399; Butterfield v. Boyd, 4 Blatchf. 356; Vennall v. Garner, 1 Cromp. & M. 21; Vanderplank v. Miller, Mood. & M. 169; Handayside v. Wilson, 3 Car. & P. 528; Sills v. Brown, 9 Car. & P. 601; Butterfield v. Forrester, 11 East, 60; Smith v. Dobson, 3 Man. & G. 59; Marrott v. Stanley, 1 Scott, N. R. 392; Raisin v. Mitchell, 9 Car. & P. 613.

In case of a collision, being on the wrong side of the road at the time is prima facie evidence of negligence. Damon v. Scituate, 119 Mass. 66; Steele v. Burkhardt, 104 Mass. 59; Smith v. Gardner, 11 Gray, 418; Jones v. Andover, 10 Allen, 18; Spofford v. Harlow, 3 Allen, 176; Burdick v. Worrall, 4 Barb. 596.

But it is not as matter of law such a fault as will defeat a recovery if it did not contribute to produce the injury, and plaintiff was free from negligence in other respects. Kennard v. Burton, 25 Me. 39; Parker v. Adams, 12 Met. 415; Simmonson v. Stellenmerf, 1 Edm. Sel. Cas. 194; Clay v. Wood, 5 Esp. 44; Chaplin v. Hawes, 3 Car. & P. 555; Wayde v. Lady Carr, 2 Dowl. & R. 255.

The Statute upon which the plaintiff bases his claim for treble damages provides as follows:

"Sec. 2689. When the drivers of any vehicles for the conveyance of persons shall meet each other in the public highway, each shall turn to the right and slacken his pace, so as to give half the traveled path, if practicable, and a fair and equal opportunity to pass, to the other.

"Sec. 2690. Every driver of any such vehicle who shall, by neglecting to conform to the preceding section, drive against another vehicle and injure its owner, or any person in it, or the property of any person . . . shall pay to the party injured treble damages."

Whether, in order to recover the extraordinary damages given by the Statute, it is necessary to refer to it specifically in the complaint, we will not determine, but it is conceded to be necessary to state such facts in the complaint as will clearly bring the defendant within the provisions of the Statute.

The plaintiff may have an election between his remedy at common law and the one given by statute, but the court has no election and can only render such judgment in damages as the record calls for. In order, therefore, to require the court to threefold the damages it must appear that the verdict was necessarily founded upon a violation of the Statute on the part of the defendant. This does not appear. The complaint does not allege that when the teams of the plaintiff and defendant were about to meet in the public highway the defendant failed to turn to the right and slacken his pace, nor that it was practicable for him to do so; nor that the defendant failed to give the plaintiff a fair and equal opportunity to pass; nor that he drove against the plaintiff's horse or vehicle on account of his failure to do these acts. The fifth and sixth paragraphs of the complaint, which were traversed, set forth the principal actionable facts. The fifth avers "that the defendant's horse was badly broken, untrained, balky and subject to sudden starts of more or less unmanageable action, all of which the defendant well knew before he drove upon said highway that day." It may be that in these facts alone the negligence which occasioned the injury consisted, rather than in the things which the Statute mentions. This is not a matter of mere speculation, for it appears from the finding that "the plaintiff offered evidence to prove, and claimed that he had proved, that the horse of the defendant was a vicious, unmanageable and balky horse, which the defendant well knew, and that it was so improperly hitched to the sleigh as in traveling to strike the runner with one or both of the hind hoofs, thereby causing it to take fright and become difficult to control; that when the defendant first undertook to start from the Boulevard House his horse balked, and balked for a considerable time, and that while so balking the defendant was advised by the hostler of the Boulevard House to go home by way of Shelton Avenue, where there was no crowd and no number of teams passing, and that said hostler offered to take his horse for him out upon said avenue, and that the defendant could and ought to have gone home that way, but that in fact the defendant refused to go that way and persisted in driving up the Boulevard, where there was a large crowd on the sides of the street and many teams passing to and fro, and that when finally the horse of the defendant did start it bucked and jumped and pursued a zigzag course up the avenue and was not controlled by its driver up to the time of the accident."

The sixth paragraph of the complaint avers that "when the plaintiff and defendant were nearly opposite each other, the defendant carelessly and negligently drove, or permitted his horse to go, across the highway, and to strike violently against the mare of the plaintiff." It would seem from this allegation that the defendant had already turned to or was on the opposite side of the highway from the plaintiff, and that it might well have been one of those "sudden starts of more or less unmanageable action," just set forth, that caused the strange movement towards the plaintiff and the consequent collision.

If this were the proper case for the application of the Statute, we see no objection to the mode of proceeding adopted by the plaintiff. Indeed, we think the practice is in such cases for the jury to find such damages as they may think proper, and then the court enhances the amount in its judgment to meet the statutory requirements. *Hart* v. *Brown*, 2 Root, 301; *Brewster* v. *Link*, 28 Mo. 147; *Lobdell* v. *New Bedford*, 1 Mass. 153; *Swift* v. *Applebone*, 23 Mich. 252; *Wynne* v. *Middleton*, 1 Wils. 126.

The defendant's appeal is based upon several assignments of error, but the important one relates to the effect upon the plaintiff's right to recover of his own violation of a city ordinance, which contributed, as the defendant claimed, directly to the injury. The question, and the manner in which it arose, appear from the finding as follows:

In connection with the claim that the place of the accident was within the city limits and was in a public highway of the city, the defendant further claimed that the view of both the plaintiff and defendant was so obstructed as to render it impossible to see the teams as they were approaching each other in time to avoid the collision by the exercise of ordinary care, and that up to the instant of the accident the plaintiff had been and was driving at the speed of at least fifteen miles per hour; and the defendant put in evidence an ordinance of the City of New Haven in force at the time of the accident, to wit: "No owner or person having for the time being the care or use of any horse or other beast of burden, carriage or draft, shall ride, drive or permit the same to go at a faster rate than an ordinary trot, or six miles an hour, in any street in said city." Charter and Ordinances of the City of New Haven, 1883, p. 122, § 58. And he claimed that the law is so that if the jury should find that the plaintiff was not following this ordinance at the time of the accident, such unlawful act, if it directly contributed to the plaintiff's injury, was a conclusive bar to the plaintiff's recovery in this action, and not merely evidence of contributory negligence.

This request was not complied with by the court, but the charge to the jury on this point was as follows: "If you find that the ordinance was in fact violated and that its violation entered into the accident which you are now

considering as a cause or one of its causes, you may take it into consideration as one of the circumstances to be considered by you in passing upon the question of whether the defendant was negligent, and in passing upon the question of whether the plaintiff himself contributed by his own negligence or want of care to the injury. I say it is one of the circumstances which may be taken into consideration by the jury in order to determine whether or not the defendant was negligent, and to determine whether or not the plaintiff contributed by his want of care to his own injury. Even if the plaintiff was violating the ordinance in the way that I have mentioned, in my judgment it does not necessarily show that he was guilty of negligence in such a way as to deprive him of the right to recover. I think it is not conclusive. It is one of the facts which you are to consider, and, after taking all the facts together, if you find that the plaintiff did not contribute to his own damage, he is entitled to recover if he makes out the other parts of the case to your satisfaction, notwithstanding the ordinance."

Then, in another connection, the court, recurring to the same question, told the jury again: "But, gentlemen, driving on the right-hand side or the left-hand side of the centre line is not, in my judgment, a conclusive circumstance either way. I don't think that is conclusive. I think it is one of the facts which enter into the case substantially in the same way as this ordinance enters into it; that is, in an analogous way. Being on the left-hand side of the middle line might be evidence of negligence, or the circumstances might be such that it was not negligence. Driving faster than the ordinance permits might be negligence, or the circumstances might be such that it would not be any negligence at all, or, at least, not such negligence as to prevent a party from recovery; or it might be such negligence as would make a party liable. But it is for you to say, gentlemen; these are the circumstances, all of which go into the case, and upon the summing up of them all you are to say whether the defendant was negligent or not, and also whether the plaintiff was so or not."

And again, as the judge was about to conclude his charge, a juror inquired whether the plaintiff incurred any responsibility in getting up the trot. The court thereupon added: "I think the question of the ordinance is all there is about it. It seems to me that what I have said in respect to the right of way, the common, public highway, is all covered by that. I don't think because a man drives a horse faster than a certain rate he thereby necessarily becomes liable. It is a circumstance from which his negligence or want of care may be proved. In this particular case I do not think he incurred any liability; he might be liable to a fine or something else, but I don't think in this particular case, gentlemen, that of itself makes him liable; it is only one of the circumstances. You should take the whole case together and determine whether he was negligent or whether he was not negligent."

It is manifest from these quotations that the legal proposition contained in the charge as actually given was radically different from that contained in the defendant's request. The latter made an illegal act, if it directly contributed to the injury, a bar to recovery as matter of law; while the former did not recognize the plaintiff's illegal act as necessarily a contributory fault at all. It virtually eliminated the legal element and reduced the matter to a mere question of fact within the exclusive province of the jury, who were to receive the matter as they would any item of evidence. If it did not in their opinion prove negligence in fact, it amounted to nothing. If it did prove negligence, then there was still another question—not whether the illegal act caused the injury, but whether the negligence which they actually found proved from all the evidence (including the illegal act) caused it. We think the charge erroneous and that the request contained a true statement of the law as it has been established by a decided preponderance of judicial authority.

It is true there is a seeming disagreement in the cases which at first impression is quite confusing, yet upon more careful scrutiny it will appear that the difference consists, not in the principle adopted, but mostly, if not entirely, in the mode of its application.

While all, or nearly all, the courts of last resort in the United States that have had the subject under consideration, agree in the legal proposition that any culpable negligence or any illegal act on the part of the plaintiff which essentially contributes to his injury will prevent a recovery, yet there is a marked difference in opinion as to what constitutes a contributory cause of injury. This difference, however, is mostly, if not entirely, confined to cases affected by the plaintiff's violation of the Sunday Law.

For instance, the courts of Massachusetts have held in numerous cases (and several other States have followed the same rule), that a person traveling on Sunday, not from necessity or charity, cannot recover of a town or city for injuries caused by a defective highway or even by the carelessness of another traveler. *Bosworth* v. *Swansey*, 10 Met. 363; *Jones* v. *Andover*, 10 Allen, 18; *Feital* v. *Middlesex R. Co.* 109 Mass. 398; *Smith* v. *Boston & M. R. Co.* 120 Mass. 490; *Oratty* v. *Bangor*, 57 Me. 423.

But in reaching such a result the courts of Massachusetts have uniformly assumed that the plaintiff's unlawful act contributed to his injury; while on the other hand the courts of New York and of some other States following the same rule have reached the opposite result, and have held that the plaintiff in such cases may recover, always giving as among the controlling reasons that the illegal act did not contribute to the injury.

There must of course be a fallacy somewhere in the reasoning that can reach opposite results while proceeding upon the same premises. It seems to us that the fallacy in the reasoning of those who support the Massachusetts rule consists in assuming (unconsciously no doubt) that a mere concurrence of the illegal act with the accident in point of time is to be treated as a concurring cause of the injury, which it is not, but rather a condition or incident merely. In all other cases than these affected by the Sunday Law the courts of Massachusetts have discriminated and applied the principle of contributory fault in strict accordance with the

distinction we have suggested; for instance, in *Welch* v. *Wesson*, 6 Gray, 505, where two persons were racing contrary to law, and one of them negligently injured the other, it was held the injured party could recover, because his own illegal act did not contribute to his injury. So where the plaintiff's team was standing in a street in a manner prohibited by statute, and was carelessly run into by the defendant, a recovery was sustained upon the same ground. *Steele* v. *Burkhardt*, 104 Mass. 59. And in *Gregg* v. *Wyman*, 4 Cush. 322, it was decided there was error in holding a plaintiff's illegal conduct to be an essential element of his case, when in fact it was merely incidental to it.

The fallacy of the reasoning in support of the Massachusetts rule in cases affected by the Sunday Law has, we think, been most ably exposed by the courts of Wisconsin, Maine, Rhode Island, Vermont and New York; while at the same time, as we shall see, they strongly support the proposition of law contained in the defendant's request to charge.

In *Sutton* v. *Wauwatosa*, 29 Wis. 21, the plaintiff was driving his cattle to market on Sunday in violation of the Statute, when they were injured by the breaking down of a defective bridge, which the defendant town was bound to maintain. The defense was the plaintiff's own illegal act. Dixon, *Ch. J.*, in delivering the opinion of the court, said: "To make good the defense it must appear that a relation existed between the act or violation of law on the part of the plaintiff, and the injury or accident of which he complains, and that relation must have been such as to have caused, or helped to cause, the injury or accident, not in any remote or speculative sense, but in the natural and ordinary course of events, as one event is known to precede or follow another." It is then shown that a violation of the Sunday Law is not of itself an act, omission or fault of this kind with reference to a defective bridge, over which a traveler may be passing, unlawfully though it may be, because the violation of such a law has no tendency to cause it. All other conditions remaining the same, the same accident would have happened on any other day, or if the traveler was at the time on an errand of necessity or mercy.

The case of *Baker* v. *Portland*, 58 Me. 199, did not arise under the Sunday Law, but the plaintiff was injured by a defect in the highway while driving at a rate of speed prohibited by the village ordinance, and the judgment in favor of the plaintiff was sustained expressly upon the ground that the jury had found that the fast driving did not contribute to the injury. Barrows, *J.*, in delivering the opinion of the court said: "The defendant has cited a strong line of cases showing that when the plaintiff was violating a city ordinance he could not recover. But in all the latter class of cases it will be seen upon examination that the wrongful act of the plaintiffs either was, or was assumed to be, in some manner or degree contributory to the producing of the injury complained of. . . . Undoubtedly there are many cases where the contemporaneous violation of the law by the plaintiff is so connected with his claim for damages as to preclude his recovery. . . . But the fact that a party plaintiff was at the time of the injury passing another wayfarer on the wrong side of the street, or without giving him half the road, or that he was traveling on runners without bells in contravention of the Statute, or that he was smoking a cigar in the street in violation of a municipal ordinance, while it might subject the offender to a penalty, will not excuse the town for a neglect to make its ways safe and convenient for travelers, if the commission of the plaintiff's offense did not in any degree contribute to produce the injury of which he complains."

In *Baldwin* v. *Barney*, 12 R. I. 392, where it was held that a person illegally traveling on Sunday along a highway could recover against one who recklessly caused a collision and consequent injury to the plaintiff, Durfee, *Ch. J.*, referring to the Massachusetts cases, said: "The logic of these cases is that a person who receives an injury while traveling contributes to that injury by the act of traveling, and that he is therefore bound to show his right to travel in order to show that his own fault did not concur in causing the injury." The chief justice then proceeds to demonstrate the fallacy of this position by many arguments and pertinent illustrations, and shows that in that case the injury must be regarded as a mere incident or concomitant of the traveling and not its effect, and that it would have happened just the same if the plaintiff, instead of being engaged in violating the law, had been going to or from church.

In *Johnson* v. *Irasburgh*, 47 Vt. 28, the court, while holding with the courts of Massachusetts that a person traveling on Sunday in violation of the Statute could not recover of a town for an injury sustained by reason of a defect in the highway, yet places its decision upon a radically different ground, namely, that the town was under no legal duty to furnish a safe highway to travel upon when at that precise time he was forbidden by law to travel over the highway, and owing no duty to him they could not be liable for any neglect. This position was sustained by strong arguments and by the citation of many cases analogous in principle. This may be the true ground and that the Massachusetts cases referred to are right in result and wrong simply in the reasons given in their support; but whether this is so or not we have no occasion now to determine. We refer to the case because the opinion of the court, as given by Ross, *J.*, not only shows that the reasoning that supports the Massachusetts rule in this class of cases is wrong, but establishes the true principle and distinction in regard to illegal acts of a plaintiff that will prevent him from recovering for injuries received. The court says in regard to the case then in hand: "It is difficult to maintain that the traveler's illegal act contributed to the happening of the accident. The insufficiency of the highway remaining the same, and the traveler being at the place of the insufficiency under the same circumstances on any other day of the week, the same accident or injury would have befallen him. A contributory cause is one which under the same circumstances would always be an element aiding in the production of the accident. The fact that the traveler is unlawfully at the place of the accident does not contribute to the overturn of his carriage or the produc-

tion of the accident. The same forces and causes would have overturned the carriage and caused the accident as well on a week day as on the Sabbath; as well when the traveler was lawfully at the place of the accident as when unlawfully there. . . . Neither can the fact that the party receiving the injury was at the time engaged in an unlawful act deprive him of the right of recovery. If the plaintiff at the time of the injury had been profaning the name of the Deity he would have been engaged in an unlawful act."

The case of *Platz* v. *Cohoes*, 89 N. Y. 219, was cited in behalf of the plaintiff as conclusive in his favor provided this court should accept it as containing the true rule of law. We do not so regard it, but consider the case as falling into the same line with the other cases referred to and in perfect harmony with them so far as the point under discussion is concerned. So that its acceptance by us will not require us to sustain the ruling complained of; but on the other hand we think it recognizes and adopts principles that sustain the defendant's position. It was there held, contrary to the Massachusetts rule, that where, through the culpable omission of duty on the part of a city, a street had become so obstructed that a traveler was thereby injured, it was no defense that the accident happened on Sunday and that the plaintiff at the time was traveling contrary to the Sunday Law. The reasoning by which this position was supported was essentially the same as in the other cases we have referred to. As in those cases, so in this, the court makes an exhaustive argument to show that the illegal act of the plaintiff did not contribute to his injury, showing by necessary implication that the court regarded that fact as a controlling one. Danforth, *J.*, in giving the opinion, after citing *Baldwin* v. *Barney*, *supra*, and other similar cases, said: "It may be said that if the plaintiff had obeyed the law and remained at home and not traveled, the accident would not have happened. That is not enough. The same obedience to the laws would have saved the plaintiffs in the cases just cited. It must appear that the disobedience contributed to the accident, or that the Statute created a right in the defendant which it could enforce. But the object of the Statute is the promotion of public order and not the advantage of individuals. The traveler is not declared to be a trespasser upon the streets, nor was the defendant appointed to close it against her. In such an action the fault which prevents a recovery is one which directly contributes to the accident. . . . It may doubtless be said that if the plaintiff had not traveled she would not have been injured; and this will apply to nearly every case of collision or personal injury from the negligence or willful act of another. Had the injured party not been present he would not have been hurt. But the act of travel is not one which usually results in injury. It therefore cannot be regarded as the immediate cause of the accident, and of such only the law takes notice."

But there is still another reason given by the court in support of its conclusion which is particularly relied upon by the plaintiff's counsel as decisive of the present case.

We refer to the point that the Sunday Law exhausts itself in the penalty prescribed, and that to give it further effect by forfeiting the plaintiff's right of action would be in effect adding to that penalty. This reason is given also in the Wisconsin case. We find no fault with it if applied as we think the court intended. It is very important at the outset to look at the principle precisely as stated by the New York court: "The courts may not add to the penalty imposed by that Statute a forfeiture of the right of indemnity for an injury resulting from the defendant's negligence and the violation of the Statute cannot be regarded as the immediate cause of the injury."

The entire force of the principle consists in its connection with the fact last stated, which manifestly is the only foundation that can support it as a rule of law. It is only upon the assumption that the plaintiff's illegal act does not contribute to his injury that you can add to the penalty by denying a right of action for the injury. Surely one must first have a right of action before he can forfeit it. He cannot lose what he never had in fact or in right. Where the plaintiff's illegal act does contribute to his injury he has no right of action whatever, and by so holding nothing is added to the prescribed penalty. It is plain that the New York court never intended to apply the principle to any case except to the one expressly stated, or one like it, that is, where the plaintiff's act had not contributed to his injury. To make any other than such a restricted application of the principle would produce most flagrant injustice and lead to most absurd results. It would enable a party to enforce a contract made upon Sunday or to come into court and demand judgment in his favor in an action founded upon any illegal transaction, provided it was subject to a penalty. Instead, then, of accepting the proposition that denial of recovery to a law breaker in such cases is equivalent to an addition to the penalty prescribed, we prefer, on the other hand, to hold that the allowing of a recovery, where the illegal act was a cause of his injury, would be equivalent to an exemption from the penalty to that extent in favor of one confessedly guilty and the imposition of it upon one confessedly innocent. If we were to look at the consequences to the plaintiff alone it would be true in a sense that his violation of law may reach beyond the penalty prescribed and defeat his right of action, or rather prevent him from having such right. But it is our duty to consider the relation of the illegal act in question to third persons and to the cause which the plaintiff seeks to enforce against others.

It is no more unjust in principle to allow an injured person to recover compensation in damages from an entirely innocent third party, than it is to allow him to recover for a self-inflicted injury. The real principle is the same (although the degree of injustice may not be), whether the plaintiff was the sole author of his injuries or whether his illegal act or fault combined with that of the defendant to produce them, for, in such case, it is impossible to apportion the damages or to determine the relative responsibility of the parties, or whether the plaintiff would have been injured at all except for his own contribution to the result.

The principle that negligence on the part of the plaintiff contributing to his injury will pre-

vent a recovery is universally accepted. There can be no good ground for distinction in this respect between negligence and any illegal act which is a contributing cause of the injury. It may be easier to determine the effect of negligence in a given case than to determine the effect of an illegal act, and owing to the great number of prohibited acts, especially under city ordinances, cases have frequently arisen where courts have determined that certain illegal acts could not be considered contibutory faults, yet the rule applicable to negligence and to illegal acts on the part of the plaintiff is precisely the same. To prevent recovery the negligence in the one case, or the illegal act in the other, must have the relation to the injury of cause to the effect produced.

In every case which we have been able to examine, where it appeared that disobedience to the law directly contributed to the injury, it has been accepted as a perfect defense.

It will be noticed that in some of the cases we have cited the court discussed and decided, as matter of law, the question whether the fault of the plaintiff relied upon in those cases was one which could be considered as contributing at all to the injury. Ordinarily these matters are within the province of the jury. If, however, the fact relied upon as a contributory fault should be manifestly independent of the injury and not standing in the relation to it of cause and effect, the evidence to prove it could properly be ruled out by the court, or where the fact has been allowed to come into the case without objection to the evidence offered to prove it, the court may then determine its legal significance.

In the case at bar there can be no doubt that the rate of speed at which it was claimed the plaintiff was at the time going might have contributed directly to the injury. The court could not properly have ruled out the evidence, but it was the exclusive province of the jury to determine at what speed the plaintiff was going, and whether it was within the prohibitory ordinance, and if so, whether the illegal act contributed to the collision. The court, as we have seen, did not allow the question to go to the jury in this light, but only as mere evidence of negligence; and herein we think the court erred.

The difference between the rule of law as laid down by the court and that contained in the defendant's request to charge is clearly shown in the recent well-considered case of *Newcomb* v. *Boston Protective Department*, 146 Mass. 600, 6 New Eng. Rep. 282. The plaintiff brought his action to recover for injuries received while sitting upon his cab, from the negligent driving of a wagon against it by a servant of the defendant corporation. There was evidence tending to show that at the time of the accident he was violating an ordinance by waiting in a street without placing his vehicle and horse lengthwise with the street, as near as possible to the sidewalk, and that this illegal conduct contributed to the injury. The question for review, as in the case at bar, related to the correctness of the instructions given to the jury by the presiding judge as to the effect of the plaintiff's unlawful act upon his right to recover for the injury received. In discussing the question the court says: "As a general rule, in deciding a question in relation to negligence, each element which enters as a factor into one's act to give it character is to be considered in connection with every other, and the result is reached by considering all together. But, for reasons which will presently appear, illegal conduct of a plaintiff directly contributing to the occurrence on which his action is founded is an exception to this rule. Such illegality may be viewed in either of two aspects. Looking at the transaction to which it pertains as a whole, it may be considered as a circumstance bearing upon the question whether there was actual negligence; or looking at it simply in reference to the violated law, the act may be tried solely by the test of that law. In the latter aspect it wears a hostile garb, and an inquiry is at once suggested whether the plaintiff, as a transgressor of the law, is in a position to obtain relief at the hand of the law. In the first view, the illegal conduct comes within the general rule just stated; in the second it does not. This distinction has not always been observed." The court then refers to decisions in different States, and continuing says: "No case has been brought to our attention, and upon careful investigation we have found none, in which a plaintiff, whose violation of law contributed directly and proximately to cause him an injury has been permitted to recover for it; and the decisions are numerous to the contrary." The court, after citing some of the cases from other jurisdictions arising under the Sunday Law, where a different conclusion was reached from that of their own court, concludes as follows: "But whatever criticisms may have been made upon the decisions or the assumptions in certain cases, that illegal action of a plaintiff contributed to the result or was to be treated as a concurring cause, or upon language in disregard of the distinction between a cause and a condition, there has been none upon the doctrine that when the plaintiff's illegal conduct does directly contribute to his injury it is fatal to his recovery of damages."

The defendant makes the further claim that the court erred in admitting as evidence a certain conversation between the parties. The record presents the question as follows: At a later stage of the case, when the plaintiff had reached the close of his direct testimony, he was recalled and Mr. Zacher put the following question: "At the interview at Cowell's restaurant, did Mr. Tuttle say anything as to whether you could win the suit if you brought one against him, and if so, what did he say?" To this question the defendant objected, the court admitted it and the defendant excepted. The witness answered, "When I got ready to go away and after Mr. Cowell had gone out, Mr. Tuttle said, 'Look here, now, you have three years' time to bring a suit against me; don't be in a hurry; you don't know so much about law as I do; this is a jury trial; we are going to have this before a jury, and I know every juryman in the county, and you can't get twelve men together that will convict me, I am sure; there is always one that will stand out, and I know every one of them; and furthermore, it will cost you $6 to my one to fight the case. I am a lawyer myself and am acquainted with all the lawyers, and where it will cost you a dollar it will cost me twenty-five cents.' I

said, 'I will see about this.' I went up to Judge Harrison and told him all about it." Mr. Case moved to strike out the answer of the witness as irrelevant and improper. The motion was overruled. During the time that the defendant was objecting to this testimony and the plaintiff's counsel was stating what he proposed to prove, all of which took place in the presence of the jury, the defendant made no objection to his so stating, and took no exception whatever. Mr. Henry Cowell testified in substance as follows: "I was at Cowell's restaurant on the occasion mentioned. The interview was in a room up-stairs. Mr. Broschart and Mr. Tuttle talked a good while. It was all friendly. We all three arose to go down stairs; Mr. Broschart and myself were in advance. Mr. Tuttle was back in the room a little, I had got outside the door; Mr. Tuttle says to Mr. Broschart, 'Hold on, young man, I want to speak to you a minute.' Mr. Broschart turned back; I went on down stairs, and heard nothing of what was said."

The authorities seem well agreed that proposals made while a compromise is in treaty between the parties cannot be offered in evidence, but conversations in which an independent fact is disclosed may be admitted to prove it. It is admitted that there had been a conference between the parties in the presence of Cowell for the purpose of compromise, but the treaty had apparently concluded and Cowell had left the room and the plaintiff was in the act of leaving when the conversation in question occurred. It seems to have been prompted by the belief that the plaintiff was unwilling to compromise and inclined to bring a suit. The statements of the defendant were obviously made to discourage the bringing of a suit and probably with a view to bring about another conference in the future. We do not think the statements made by the defendant can be regarded as privileged within even the most liberal interpretation of the rule, but the doubtful point is whether the statements involve an admission of any material fact. Certain it is that there was no express admission, nor is it essential that there should have been, for admissions may be implied from the language or conduct of a party. The evidence relied upon may indeed fall far short of establishing the admission, but if it tends in any degree to this end it should be allowed to go to the jury for their consideration. *Marsh* v. *Gold*, 2 Pick. 285.

In the present case no existing fact bearing upon it is referred to, but the language consists wholly of boastful assertions of what the defendant may be able to accomplish by indirect means in the way of preventing a recovery. Some of the assertions, such for instance as refer to the relative expenses of the parties in the event of litigation, are clearly immaterial considered by themselves, but those assertions which refer, or may be construed to refer, to the defendant's ability, by the use of indirect or improper influences, to divide the jury and so prevent the plaintiff from recovery, may, we think, in the absence of other explanation, tend in some degree to evince a consciousness on the part of the defendant that he was really responsible for the plaintiff's injury. It is not certain of course that this is the true interpretation of the defendant's meaning, but as it seems to us a possible one we think the evidence could be considered and weighed by the jury.

There was error in the judgment complained of upon the defendant's appeal, and a new trial is ordered.

In this opinion the other Judges concurred.

MINNESOTA SUPREME COURT.

Re ESTATE OF Charles A. WASHBURN, Deceased.

William L. PUTNAM, Exr., etc., of Israel Washburn, Jr., Deceased, *Appt.*,
v.
Henry C. PITNEY, Jr., Admr., *c. t. a.* of Charles A. Washburn, Deceased, *Respt.*

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

***1. A foreign will, if executed according to the laws of this State,** may be admitted to probate here, and letters of administration with the will annexed issued, although the testator left only personal property in this State, construing and explaining section 32, chap. 2, of the Probate Code (Laws 1889, chap. 46).

2. A creditor residing in Maine, whose debtor died in New Jersey, the State of his domicil, and where his will has been probated, letters testamentary issued, and the administration of his estate is being had, petitioned a probate court in this State that the will be admitted to probate and letters of administration issued here, alleging that the testator left personal property in this State. There are no creditors, legatees or distributees of the estate residing in this State, and no reason is shown why the petitioner cannot prove and collect his claim in New Jersey, where the principal administration of the estate is being had. *Held*, that the petition was properly denied, as ancillary administration in this State is unnecessary, and to grant it would, under the circumstances, be contrary to the principles of comity between States.

(January 13, 1891.)

APPEAL by petitioner from an order of the District Court for Hennepin County denying his motion for new trial of the questions arising upon appeal from an order of the Probate Court which it had affirmed and which refused to grant ancillary administration upon the estate of Charles A. Washburn, deceased. *Affirmed.*

Charles A. Washburn was a resident of Morris County, New Jersey, where he died about January 15, 1889, leaving a last will and testament of which Henry C. Pitney, Jr., was appointed administrator with the will annexed by the courts of New Jersey.

Before his death Washburn had executed

*Head notes by MITCHELL, J.

and delivered to Israel Washburn, Jr., a resident of Portland, Maine, his promissory note payable in New York. Israel Washburn, Jr., died shortly before June 15, 1883, and William L. Putnam was appointed his executor.

For the purpose of collecting this note out of assets left by Charles A. Washburn in Minnesota, Putnam applied to the Probate Court for Hennepin County for the issuance of ancillary letters of administration upon the property situated within its jurisdiction.

This application was refused, and the District Court having affirmed the decision, petitioner brings the case to this court.

Messrs. **Ferguson & Kneeland** for appellant.

Messrs. **Shaw & Cray** for respondent.

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

The short facts, according to their legal effect, may be stated thus: A creditor, residing in the State of Maine, whose debtor died in the State of New Jersey, the place of his domicil, and where his will has been probated, and letters testamentary issued, and where the administration of his estate is now being had, petitions the Probate Court of Hennepin County in this State that the will be admitted to probate, and letters of administration with will annexed be issued. The petition alleges that the deceased debtor, at the time of his death, left certain personal property in Hennepin County, to wit, certain shares of stock in a corporation organized under title 2, chap. 34, of the General Statutes of this State, whose place of business as well as plant is situated in that county. It is not alleged that there are any creditors of the estate, or any persons interested in it as legatees or distributees, in this State. Neither is any reason given why the creditor has not proceeded to present and collect his claim in New Jersey, where the principal administration is being had, or why he could not do so as conveniently and successfully as in this State. The probate court seems to have denied the prayer of the petition because the copy of the will attached thereto was not properly authenticated; and it was stated upon the argument that the district court affirmed the action of the probate court on the ground that, under section 32, chap. 2, of the Probate Code (chap. 46, Laws 1889), a foreign will, by which, we understand, is meant the will of a nonresident, cannot be admitted to probate here except where the testator left real estate in this State, because in the section referred to the word "personal," which was found in Gen. Stat. 1878, chap. 47, § 18, has been omitted. Even if the Legislature had the power to thus limit the jurisdiction of the probate courts over the estates of deceased persons, it is very evident that the Statute was not so designed. The object of section 32, and the reason why its provisions are limited to cases where the testator left real estate in the State, are very manifest. Not only the administration of real estate, but also its descent, is governed by the laws of the State where it is situated; hence a will not executed according to our laws would, but for this section, be wholly ineffectual to devise real property. Under this Statute, a will executed according to the laws of another State and admitted to probate there, although not executed according to our laws, may be admitted to probate here. In the case of personal property, there is no necessity for any such provision, for the universal rule is that the succession and distribution of personal property, wherever situated, is governed by the law of the domicil of the deceased. Hence, if ancillary administration was had of the personal estate of a nonresident situated within this State, the court, after satisfying the claims of domestic creditors, would either distribute the surplus according to the law of the deceased's domicil or transmit it to the court of the domicil where the principal administration was had. Hence, with reference to foreign wills executed according to the laws of this State, this section is merely cumulative as to the mode of proving it, making the certified copy of it, after probate in another State, sufficient evidence to establish the will. But a will executed according to the laws of this State, whether previously probated in another State or not, and without reference to the domicil of the testator, may be admitted to probate under the provisions of section 4, chap. 1, of the Probate Code, provided the testator left any property in this State which is the subject of administration; and by section 25 and following sections of chapter 2, if the will is not in the possession of the executor or other person asking for its probate, or is lost, or is destroyed or beyond the jurisdiction, it is provided that the will may be established by secondary evidence. And even if the will was incapable of being established at all, there can be no doubt of the power of the probate court, whenever necessary to do so, to issue letters of administration upon the estate of the deceased within this State, although he was domiciled out of it. This power over the estates of deceased persons situate within its jurisdiction is inherent in any State or country on common-law principles, of which the provisions of the Probate Code in that regard are but declaratory. But there is a ground upon which the petition was properly denied. Upon the facts, ancillary administration in this State was neither necessary nor justifiable, and to have granted it would have been in violation of the plainest principles of the law of comity. We have no doubt that a creditor is a party interested in an estate upon whose petition in a proper case letters of administration may be issued. And we may assume, for the purposes of this case, that there may be cases where it would be proper to institute ancillary administration in this State on the petition of a foreign creditor. Nor have we any doubt but that stock in a domestic corporation whose place of business is in this State is assets here for the purpose of founding administration, if the other facts exist authorizing the exercise of jurisdiction over the property for that purpose.

It is a settled principle of universal jurisprudence in all civilized countries that the personal estate of the deceased is to be regarded, for the purposes of succession and distribution, wherever situated, as having no other locality than of his domicil. It would seem to logically follow from this proposition that the executor or administrator of the domicil of the

deceased is invested with the title to all his personal property for the purpose of collecting the effects of the estate, paying the debts and making distribution of the residue according to the law of the place or the directions of the will, as the case may be. It is true that as to personal property situated outside the State of the domicil, this right rests on the law of comity, but it is none the less the law. This rule of comity, however, is rightfully subject to the limitation or qualification that the State where the personal property is situated has the right to assert its jurisdiction over it by ancillary administration whenever necessary to protect its own citizens who are creditors of the estate; in which case, however, after satisfying their demands, it will turn over the surplus to the probate court of the domicil for the final settlement of the estate. It is also true that the universal doctrine of the decisions is that the principal executor or administrator cannot, as such, bring a suit in another State to recover possession of personal property or to collect a chose in action. This limitation or qualification of the general principles in respect to personal property by the comity of nations is said to be founded upon the policy of the State to protect the interests of its home creditors. This seems a very narrow and provincial view to take of the matter. On principle, the correct rule would seem to be to recognize the same right in the executor or administrator of the domicil as in any other owner of personal property to maintain suits for its possession, unless, and until, that right has been superseded by the institution of ancillary administration in the State where the property is situated. But the other rule is now too well settled by the decisions to be changed except by legislative enactment. The modern decisions, however, have so far drifted away from former narrow views as to hold almost universally that, although the executor or administrator of the domicil cannot maintain a suit in another State to recover personal property or collect a debt due the estate, yet he may take possession of such property peaceably without suit, or collect a debt if voluntarily paid; and that, if there is no opposing administration in the State where the property was situated, its courts will recognize his title as rightful and protect it as fully as if he had taken out letters of administration there; also that the voluntary payment of the debt by the debtor under such circumstances would be good, and constitute a defense to a suit by an ancillary administrator subsequently appointed in the domicil of the debtor. It is also now the generally accepted doctrine that, while such executor or administrator cannot sue in another State on a promissory note or other chose in action, yet he may sell or assign it, and his assignee may maintain a suit on it in his own name; the difficulty, it is said, being the disability of the administrator to sue in another State, and not any defect of his title. *Harper* v. *Butler*, 27 U. S. 2 Pet. 239, 7 L. ed. 410; *Wilkins* v. *Ellett*, 76 U. S. 9 Wall. 740, 19 L. ed. 586, 108 U. S. 256, 27 L. ed. 718; *Williams* v. *Storrs*, 6 Johns. Ch. 353–357, 2 N. Y. Ch. L. ed. 148. 149; *Doolittle* v. *Lewis*, 7 Johns. Ch. 45, 2 N. Y. Ch. L. ed. 215; *Vroom* v. *Van Horne*, 10 Paige, 549, 4 N. Y. Ch. L. ed. 1086; *Schultz* v. *Pulver*, 11 Wend. 363; *Parsons* v. *Lyman*, 20 N. Y. 103; *Petersen* v. *Chemical Bank*, 32 N. Y. 21; *Rand* v. *Hubbard*, 4 Met. 252; *Denny* v. *Faulkner*, 22 Kan. 89.

The application of these principles to the present case is this: The executor in New Jersey, so long as there is no opposing administration in this State, may collect dividends on this stock, or sell it and convert it into money for the purpose of paying debts, as fully as could an administrator appointed in this State, except that he could not, without taking out ancillary letters here, bring a suit in our courts to enforce any rights in regard to it,—a thing for which there is, so far as appears, no occasion or necessity. In short, this stock is the subject of administration at the place of the domicil so long as there is no opposing administration in this State. A divided administration is always to be avoided, if possible, as it not only involves greater expense to the estate, but is liable to give one set of creditors an advantage over others, and creates clashing of interests. There being no domestic creditors, and there appearing no reason why the interests of all concerned, including the petitioner, will not be as well or better subserved by allowing the principal executor to continue to manage the entire estate, to allow a foreign creditor to come here and sue out ancillary administration, when he might as well collect his debt in New Jersey, would not only be without precedent, as we apprehend, but so subversive of all rules of comity between States as to be wholly unjustifiable.

Order affirmed.

GEORGIA SUPREME COURT.

RICHMOND & DANVILLE R. CO.,
Plff. in Err.,
v.
ALLISON.

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

1. No fixed rule exists for estimating the damages to be recovered by one who is permanently disabled from laboring, through the negligence of another; the most that can be done is to instruct the jury in general terms to award a fair and reasonable compensation, taking into consideration what the plaintiff's income would probably have been, how long it would have lasted and all the contingencies to which it was liable.

2. In an action by a government em-

NOTE.—*Negligence, rule of damages for personal injuries caused by.*

The general rule in cases of negligence is that only compensatory damages can be given. Juries are not at liberty to go further than compensation, unless the injury was done willfully or was the result of that reckless disregard of the rights of others which is equivalent to it. Lake Shore & M. S.

ployé to recover damages for injuries negligently inflicted upon him by another, which permanently disabled him from performing labor, evidence is inadmissible for the purpose of showing his prospects of promotion in the governmental service for the purpose of increasing the damages, where there was no vacancy to which he could have been promoted at the time of the injury, and there were other persons in the direct line of promotion who were at least as likely to receive promotion as himself, and political considerations were shown to enter somewhat into promotions of that kind.

(November 10, 1890.)

ERROR to the City Court of Atlanta 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.*

After a verdict of $11,250 in plaintiff's favor, defendant moved for a new trial on the following grounds:

(1–4) Verdict contrary to law, etc., such in amount as to show undue prejudice against defendant, and to shock the moral sense, and disproportionate to the injuries inflicted.

(5) Sufficiently appears in the opinion.

(6) Error in charging: "Since the plaintiff would, if he had not been hurt, have received the fruits of his labor year by year as earned, but must now receive the sum awarded, if any, for permanent injuries, in cash, all at once by your verdict, it would be your duty to reduce the sum, when ascertained, to its present cash value."

(7) Error in charging: "The mortality and annuity tables have been introduced in evidence, and the means of ascertaining the conclusions reached, by pursuing their methods, will appear to you upon examination of those tables. These tables may be looked to by you in determining the question of what the future earnings of the plaintiff are worth paid down to him now, in cash, all at once, which have been cut off by his injury, if any have. These tables are not binding upon the jury as such,

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R. Co. v. Rosenzweig, 4 Cent. Rep. 723, 113 Pa. 519; Pennsylvania R. Co. v. Books, 57 Pa. 339; Milwaukee & St. P. R. Co. v. Arms, 91 U. S. 489, 23 L. ed. 374.

Where exemplary damages are not warranted by the gross negligence of the defendant, they must be strictly compensatory; but this may include compensation for pain and suffering, loss of time, expense of medical attendance, and such damages as the plaintiff will probably sustain in the future. Hill v. New Orleans, O. & G. W. R. Co. 11 La. Ann. 222; Pittsburg, A. & M. P. R. Co. v. Donahue, 70 Pa. 119; Choppin v. New Orleans & C. R. Co. 17 La. Ann. 19; Pennsylvania R. Co. v. Books, *supra;* Pennsylvania R. Co. v. Allen, 53 Pa. 276; Brignoli v. Chicago & G. E. R. Co. 4 Daly, 182; Morse v. Auburn & S. R. Co. 10 Barb. 621.

Impotency, although not in terms specified in the declaration as one of the results of injuries received, may be proved and considered in estimating the damages. Denver & R. G. R. Co. v. Harris, 122 U. S. 597, 30 L. ed. 1146.

The measure of damages for negligence is the same against artificial as against natural persons. Pennsylvania, A. & M. P. R. Co. v. Donahue, *supra.*

Exemplary damages.

To justify exemplary damages there must be evidence of gross negligence, amounting to recklessness or indifference to the dangers and consequences to others. Shearm. & Redf. Neg. § 600; Caldwell v. New Jersey S. B. Co. 47 N. Y. 282, affirming 56 Barb. 425; Cleghorn v. New York Cent. & H. R. R. Co. 56 N. Y. 44; Milwaukee & St. P. R. Co. v. Arms, 91 U. S. 489, 23 L. ed. 374; Beale v. Railway Co. 1 Dill. 568; New Orleans, J. & G. N. R. Co. v. Bailey, 40 Miss. 395; New Orleans, J. & G. N. R. Co. v. Statham, 42 Miss. 607; Kennedy v. North Missouri R. Co. 36 Mo. 351; Memphis & C. R. Co. v. Whitfield, 44 Miss. 466; Chicago & R. I. R. Co. v. McKean, 40 Ill. 218; Varillat v. New Orleans & C. R. Co. 10 La. Ann. 88; Kentucky Cent. R. Co. v. Dills, 4 Bush, 593; Hopkins v. Atlantic & St. L. R. Co. 36 N. H. 9; Taylor v. Grand Trunk R. Co. 48 N. H. 305; Alabama G. S. R. Co. v. Arnold, 80 Ala. 600; Lake Shore & M. S. R. Co. v. Rosenzweig, 4 Cent. Rep. 712, 113 Pa. 519.

Exemplary damages should not be awarded for gross negligence of employés, unless it is the result of willful misconduct, or such entire want of care as raises the presumption of a conscious indifference to consequences. Chattanooga, R. & C. R. Co. v. Liddell (Ga.) May 7, 1890.

Punitive damages.

Where the Statute allows punitive damages only where defendant is guilty of "oppression, fraud or malice, actual or presumed," it is error to instruct that if defendant was grossly careless plaintiff may have punitive damages; gross carelessness may not be oppression, fraud or malice. Yerian v. Linkletter, 80 Cal. 135.

Where a corporation in vindication of alleged rights, instead of applying to judicial tribunals, by its controlling officers, has wantonly disturbed the peace of the community and endangered the lives of citizens, it may be liable to punitive damages for personal injuries thereby caused. Denver & R. G. R. Co. v. Harris, 122 U. S. 597, 30 L. ed. 1146.

Where the injury complained of was caused by the willful, wanton or oppressive conduct of the agents of a corporation it is error to refuse to instruct the jury that in such case they cannot give punitive or exemplary damages. Downey v. Chesapeake & O. R. Co. 28 W. Va. 732.

Measure of damages.

The measure of damages for injuries to the person, caused by the negligence of another, is the injury done, even though it might not have resulted but for a peculiar physical condition of the person injured, or may have been aggravated thereby. Lapleine v. Morgan's L. & T. R. & S. S. Co. 1 L. R. A. 378, 40 La. Ann. 661. See Bray v. Latham, 81 Ga. 640; Driess v. Friederick, 73 Tex. 460.

Where there is nothing to show that erysipelas developing in a wound intervened from any want of care or skill on the part of the physician, or from the want of any proper precautions in the treatment of the wound, it must be regarded as directly caused by the same injury which caused the wound, in estimating the amount of damages from the injury. Dickson v. Hollister, 123 Pa. 421.

Plaintiff can recover only what damages he himself sustained; and hence the fact that he has a wife and children is not material. Louisville & N. R. Co. v. Gower, 85 Tex. 465, citing Nashville & C. R. Co. v. Smith, 9 Lea, 470; Chicago, St. L. & N. O. R. Co. v. Pounds, 11 Lea, 129.

But "lack of personal enjoyment," occasioned by personal injuries received through negligence of another, is not a proper element of damages. Columbus v. Strassner (Ind.) June 25, 1890.

The person injured must use reasonable diligence to render the damage as little as practicable, after

but may be used by you as aids or helps to the conclusion sought, and are to be considered by you along with the other evidence bearing upon the same point."

(8) Error in striking B. F. Wyly, Jr., for cause over the objection of defendant, under the following facts: Before the jury was stricken, Mr. Hoke Smith, of counsel for the plaintiff, stated that he had a contingent fee in the result of the litigation and that the juror, B. F. Wyly, Jr., was related to him, and that the wife of the juror was also related to him. Counsel for defendant stated to the court that, if such relationship existed, the defendant would waive it. Discussion then arose over another juror, and, when that was over, Mr. Hoke Smith again stated to the court that on account of Mr. B. F. Wyly, Jr., being his client, and his confidential friend, as well as his relative, to relieve him from any embarrassment which might be caused from trying a case in the result of which Mr. Smith was interested, he would have him stricken for cause, on the sole ground that relationship to counsel having a contingent fee would not disqualify. To this, counsel for defendant objected. The court directed the juror to stand aside for cause, and his place was filled by a talesman. B. F. Wyly, Jr., was one of the jurors regularly drawn for service at that term of the court. Defendant contends that it was error in the court to set aside such juror without some evidence of relationship. Defendant contends further that it was error to set aside the juror for cause, even though related to Mr. Hoke Smith, after defendant had waived the relationship. Defendant further contends that, if related at all to Mr. Hoke Smith, it was so remote as not to be the ground of a challenge for cause.

(9) Sufficiently appears in the opinion.

Messrs. **Jackson & Jackson** for plaintiff in error.

Messrs. **Hoke Smith** and **Burton Smith** for defendant in error.

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discovery of the negligence and its probable consequences. Western U. Teleg. Co. v. Reid, 83 Ga. 401; State v. Fleming, 124 Ind. 97; Marr v. Western U. Teleg. Co. 85 Tenn. 529; Atkins Mfg. Co. v. Rucker, 80 Ga. 291; Mather v. Butler Co. 28 Iowa, 253; State v. Powell, 44 Mo. 436.

The gist of the action for injuries to the person is injury to the person, and prospective damages are considered the immediate and natural consequence. Cook v. Missouri Pac. R. Co. 1 West. Rep. 453, 19 Mo. App. 329.

In estimating the compensatory damages, the injured party is entitled to compensation for all the injuries, past and prospective. Sherwood v. Chicago & W. M. R. Co. (Mich.) Oct. 10, 1890.

All the consequences of the injury may be considered, both past and present. Cleveland, C. C. & I. R. Co. v. Newell, 1 West. Rep. 896, 104 Ind. 264; Townsend v. Paola, 41 Kan. 591.

To entitle plaintiff to recover for future damage, there must be a reasonable certainty as to such future damage; and a mere probability of its occurrence is not sufficient. Missouri Pac. R. Co. v. Mitchell, 75 Tex. 77.

They cannot be based upon speculation or a hypothesis as to what may occur. Gregory v. New York, L. E. & W. R. Co. 55 Hun, 303.

For a personal injury, including deprivation of a member, the law furnishes no measure of damages other than the enlightened conscience of impartial jurors, guided by all the facts and circumstances of the particular case. Western & A. R. Co. v. Young, 81 Ga. 397.

What must be shown.

The continuing effect of the injury up to the trial and its probable effect in the future may be shown. Sheehan v. Edgar, 58 N. Y. 631, and cases cited; Buel v. New York Cent. R. Co. 31 N. Y. 314; Filer v. New York Cent. R. Co. 49 N. Y. 42; Briant v. Trimmer, 47 N. Y. 96.

Elements of damages; pain and suffering.

There is no legal measure of damages for the pain and suffering resulting from a personal injury; and the amount of the damages must be left, to some extent, to the fair discretion and judgment of the jury. Ward v. Blackwood, 48 Ark. 396.

When a serious bodily injury which threatens permanent disability and continues for a long time is proved, the jury are authorized to consider the pain, both of body and mind, in assessing the amount of damages, without direct proof of such suffering. Brown v. Sullivan, 71 Tex. 470.

Damages for personal injury may include damages for bodily pain or suffering, as well as for pecuniary loss sustained, and which may be sustained, by reason of resulting incapacity. Schnieder v. Pennsylvania Co. (Pa.) 2 Cent. Rep. 74.

They may include damages for the bodily pain and mental anguish and all such damage as it appears from the injury will result in future. Ridenhour v. Kansas City Cable R. Co. (Mo.) June 2, 1890. See *note* to Chicago v. McLean (Ill.) 8 L. R. A. 765; Robertson v. Cornelson, 34 Fed. Rep. 716; Townsend v. Paola, 41 Kan. 591; Cook v. Missouri Pac. R. Co. 1 West. Rep. 451, 19 Mo. App. 329.

Among the results of the injury to be considered are pain and suffering, disfigurement and mutilation of the person, and impaired capacity to pursue the ordinary avocations of life at and after attainment of majority. Western & A. R. Co. v. Young, 81 Ga. 397.

Mortification and anguish of mind which a person has suffered and will suffer in the future by reason of the mutilation of his body, and the fact that he may become an object of curiosity or ridicule among his fellows, may be considered in determining the amount of damages for personal injuries. Heddles v. Chicago & N. W. R. Co. (Wis.) June 21, 1890, citing Atlanta & R. A. L. R. Co. v. Wood, 49 Ga. 565; Western & A. R. Co. v. Young, *supra;* Toledo, W. & W. R. Co. v. Baddeley, 54 Ill. 19; McMahon v. Northern C. R. Co. 39 Md. 438; Ballou v. Farnum, 11 Allen, 73; Power v. Harlow, 57 Mich. 107; The Oriflamme, 3 Sawy. 397; Wilson v. Young, 31 Wis. 574; Craker v. Chicago & N. W. R. Co. 36 Wis. 657; Sherwood v. Chicago & W. M. R. Co. (Mich.) Oct. 10, 1890; Larmon v. District of Columbia, 5 Cent. Rep. 447, 5 Mackey, 330.

No recovery can be had for sufferings to occur in the future, unless there is evidence in the case to show that they will be sustained. Mosher v. Russell, 44 Hun, 12.

Value of time lost.

Plaintiff is entitled to recover the value of the time he has lost by reason of the injury. Larmon v. District of Columbia, 5 Cent. Rep. 447, 5 Mackey, 330.

But only nominal damages for loss of time will be awarded if the plaintiff fails to prove its value. Ruger, *Ch. J.*, and Andrews, *J.*, dissent. Staal v. Grand St. & N. R. Co. 9 Cent. Rep. 452, 107 N. Y. 625; Seitz v. Dry Dock E. B. & B. R. Co. (Ct. P.) 32 N. Y. S. R. 56.

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

1. Allison sued the Railroad Company for damages, and obtained a verdict. The Railroad Company moved for a new trial, upon several grounds, which will be found in the official report. The view we take of the case renders it unnecessary to discuss any of these grounds except the fifth and the ninth. The fifth is as follows: "Because the court erred in charging the jury as follows: 'Another item of damages alleged by the plaintiff is for permanent injuries. He says that he has been permanently injured, and, by reason thereof, his capacity to work and earn money by his labor throughout his future life has been practically destroyed. If this be true he would be entitled to further compensation on that account. The burden is on the plaintiff to show the fact that his capacity to labor and earn money has been permanently impaired, and the extent of such impairment, or to furnish data to the jury, from which they may be able to ascertain his financial loss in this respect. In passing upon this question, you would ascertain from the evidence whether the plaintiff's capacity to labor and earn money is, in point of fact, practically destroyed, or in part impaired, by his injuries, and, if so, the extent of such impairment, and whether it will extend to the future, and through the remainder of his life; and, if you so find, you will award him such a sum as you think reasonable and just, in view of the evidence and the extent of such injury, and in view of all the facts and circumstances of this case, as disclosed to you in the evidence. If you believe from the evidence that the plaintiff has not suffered any permanent injury as the result of the injuries mentioned in the evidence, you would not allow him anything in the way of damages for a permanent injury. No fixed rule exists for estimating this sort of damage. The plaintiff's age, his habits, his strength, sex, vocation, the rate of wages earned by him in the past by his labor, his prospects of obtaining steady,

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An instruction to a jury to give, as damages for personal injury, the amount of plaintiff's salary from the accident to the time of trial, and also to give an annuity of the amount damaged, by the year, from the time of the accident, for a period equal to his expectation of life, is erroneous as allowing the earnings lost between the accident and the trial to be twice counted. Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 30 L. ed. 257.

Expenses of nursing and medical attendance.

One injured by negligence is entitled, as part of her damages, to recover whatever was a reasonable and necessary outlay in her attempt to be cured of the injuries resulting from the negligence. Sherwood v. Chicago & W. M. R. Co. (Mich.) Oct. 10, 1890.

Recovery may be had for services necessary to ameliorate the condition of the party injured. Pennsylvania Co. v. Marion, 2 West. Rep. 234, 104 Ind. 239.

In order to recover for medical services, etc., to a person injured, it is not necessary to prove that the bill has actually been paid by the plaintiff. Donnelly v. Hufschmidt, 79 Cal. 74.

Expenses incurred in going to a distant city, pursuant to the advice of a physician, for special treatment of troubles resulting from an injury, are a reasonable and necessary outlay in an attempt to effect a cure, and are recoverable in an action for the negligence occasioning the injury. Sherwood v. Chicago & W. M. R. Co. *supra.*

Plaintiff may prove, by his attending physician, what the services of nurses who attended him were worth, although they were volunteers without charge. Pennsylvania Co. v. Marion, *supra.*

The court instructed the jury that, if they found for plaintiff, they might allow for medicines and medical treatment reasonably and necessarily employed. This was held error because there was no evidence upon which any estimate of such damages could be made. Eckerd v. Chicago & N. W. R. Co. 70 Iowa, 353.

Damages probable in the future.

The damages may include, not only expenses for medical attendance and for pain and suffering, but also for loss of earnings caused by permanent disability; but if a disability previously existed, then only for such additional disability as was the result of the injury. Whelan v. New York, L. E. & W. R. Co. 38 Fed. Rep. 15.

The circumstances, condition in life and the pursuits of the plaintiff may properly be given in evidence on the question of damages; so an inquiry into the probable consequences of the injury, as transitory or permanent, is also proper. Kerr v. Forgue, 54 Ill. 482, 5 Am. Rep. 146; Caldwell v. Murphy, 1 Duer, 233.

Impaired capacity for work or business.

The loss or diminution of capacity to follow one's usual business or employment; the rate of his earnings, and the extent and nature of the business or employment of plaintiff, and his physical capacity to perform his work at the time of injury,—may be shown in fixing the damages. Alabama G. S. R. Co. v. Yarbrough, 83 Ala. 238; Walker v. Erie R. Co. 63 Barb. 260; Grant v. Brooklyn, 41 Barb. 381; Nebraska City v. Campbell, 67 U. S. 2 Black, 590, 17 L. ed. 271.

Where the injury consisted in the breaking of an arm, it is proper to show a former injury to another arm, not as an element of damages in itself, but as a proof of greater incapacity from the injury. Alabama G. S. R. Co. v. Yarbrough, *supra.*

Occupation of plaintiff may be considered.

In estimating such damages the jury should take into consideration the profession or business of the plaintiff, and the effect of the permanent injuries upon his ability to comfortably pursue such profession or business. They are also entitled to consider plaintiff's pain and suffering, mental and physical. Larmon v. District of Columbia, 5 Cent. Rep. 447, 5 Mackey, 330.

Proof that the plaintiff was a physician having an extensive practice, and that at the time of the injury it was a period of much sickness, is admissible on the question of damages, although the facts were not set out in the declaration. Nebraska City v. Campbell, 67 U. S. 2 Black, 590, 17 L. ed. 271.

A jury may consider the occupation of plaintiff, and give him such sum as would fully compensate him for the injuries received. Ohio & M. R. Co. v. Hecht, 115 Ind. 443.

Where there is evidence that plaintiff was unable to attend to her duties for several weeks, during which time she lost her salary, but the amount of her salary is not shown, she is entitled to recover nominal damages only. Baker v. Manhattan R. Co. 118 N. Y. 533; Leeds v. Metropolitan Gas-Light Co. 90 N. Y. 26.

Award of damages within discretion of jury.

In an action for personal injuries, damages are

remunerative employment in the future, prospects of increased earnings in the future by additional experience and skill acquired, if there be evidence on this point, and that evidence, in your opinion, is definite and tangible, these circumstances, in so far as they may be illustrated by the evidence, are all circumstances proper to be taken into account.'"

The plaintiff in error objects to that portion of the charge set out which says: "No fixed rule exists for estimating this sort of damage," and insists that a fixed rule does exist, to wit, that such a sum should be allowed the plaintiff as would make his future income the same as it would have been had he not been injured, taking into consideration the probabilities of disease, decreased capacity to labor and the duration of life. It is insisted that the charge, as given, puts no limit upon the finding of the jury; that, while it calls to their attention elements which they could consider, it does not restrict them by the fixation of a principle which should control their conclusion. This court has considered this question upon different occasions, and in several cases has said that there is no "Procrustean rule," or fixed rule, in cases of this kind. See *Georgia P. R. Co.* v. *Freeman*, 83 Ga. 586; *Central R. Co.* v. *Thompson*, 76 Ga. 785; *Savannah, F. & W. R. Co.* v. *Stewart*, 71 Ga. 428 (1), 446; *Davis* v. *Central R. Co.* 60 Ga. 329 (4).

The last case in which the question was considered was *Georgia P. R. Co.* v. *Freeman*, *supra*, where the exact words complained of were approved by this court. Upon the request of counsel for the plaintiff in error, we allowed him to review that decision. We have carefully considered his argument, and have devoted much time to reading the text-books and reports of cases decided by other courts, to ascertain if we could find any authority or decision holding that there is a fixed rule to be given to the jury, which must control them in estimating the damages to a person who has been permanently injured by the carelessness and negligence of a railroad company, or nat-

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assessable for all the injuries sustained; and the jury cannot be required to itemize and assess a separate amount for each element entering into and making up the gross sum allowed. Ohio & M. R. Co. v. Judy, 120 Ind. 397.

The amount of damages for personal injuries must be left largely to the reasonable discretion of the jury. Waldhier v. Hannibal & St. J. R. Co. 3 West. Rep. 245, 87 Mo. 37.

Where in an action for damages for personal injuries nothing appears to induce the belief that the jury must have acted from prejudice, partiality or other improper motive in the assessment of damages, the verdict will not be disturbed on the ground that such verdict is excessive. Louisville, N. A. & C. R. Co. v. Pedigo, 5 West. Rep. 876, 108 Ind. 481; Baltimore P. & C. R. Co. v. Pixley, 61 Ind. 22.

The determination of the amount of damages to be awarded is within their exclusive province. Ohio & M. R. Co. v. Collarn, 73 Ind. 261.

The appellate court will seldom disturb the award of damages.

In an action for permanent injuries to the person, courts will seldom disturb the award of damages where the evidence tends to support the verdict. 3 Wood, Railway Law, 1227.

A verdict will not be set aside for excessive damages, unless the amount is so disproportionate to the injury as to evince prejudice or passion on the part of the jury. Malone v. Hawley, 46 Cal. 409; Chicago, R. & Q. R. Co. v. Hazzard, 26 Ill. 373; Peoria Bridge Asso. v. Loomis, 20 Ill. 235; Chicago & A. R. Co. v. Flagg, 43 Ill. 364; Chicago & R. I. R. Co. v. McKean, 40 Ill. 218; Pierce v. Millay, 44 Ill. 189; Ohio & M. R. Co. v. Dickerson, 59 Ind. 317; Russ v. Steamboat War Eagle, 14 Iowa, 363; Morris v. Chicago, R. & Q. R. Co. 45 Iowa, 29; Choppin v. New Orleans & C. R. Co. 17 La. Ann. 19; McMahon v. Northern Cent. R. Co. 39 Md. 438; Pittsburg & C. R. Co. v. Andrews, 39 Md. 329; Bannon v. Baltimore & O R. Co. 24 Md. 108; Ballou v. Farnum, 11 Allen, 73; Quigley v. Central Pac. R. Co. 11 Nev. 350; Cohen v. Eureka & P. R. Co. 14 Nev. 376; Holyoke v. Grand Trunk R. Co. 48 N. H. 541; Hopkins v. Atlantic & St. L. R. Co. 36 N. H. 9; Drew v. Sixth Ave. R. Co. 26 N. Y. 49; Ransom v. New York & E. R. Co. 15 N. Y. 415; Smith v. Pittsburg, Ft. W. & C. R. Co. 23 Ohio St. 10.

Examples and instances.

A verdict of $500 will not be considered excessive for injuries which confined a woman to her bed for months, causing great pain extending up to the time of the trial. Atlanta & W. P. R. Co. v. Smith, 81 Ga. 620.

Where the evidence shows that plaintiff's injuries are quite serious, resulting in considerable suffering, expense and loss of time, that his health and ability to earn money are impaired and that the injury may be permanent, $600 damages are not excessive. King v. Oshkosh, 75 Wis. 517.

A verdict of $700 in an action for negligence will not be set aside as excessive where the plaintiff received serious bodily injuries, suffered great pain and gave premature birth to a child with which she was pregnant at the time of the accident. Michigan City v. Ballance, 123 Ind. 334.

A verdict of $700 is not excessive where plaintiff's wrist was broken so that he suffered much pain, was unable to use his arm for six months and is unable to work, and receives no wages, and a physician gives it as his opinion that the injury will be permanent. Sherman v. Nairey, 77 Tex. 291.

Where one receives serious injuries from the fall of an awning extending over a sidewalk, a verdict for between $800 and $900 damages is not excessive. Gainesville v. Caldwell, 81 Ga. 76.

For an injury to the hip and the sciatic nerve, which has caused continuous suffering for more than five years, and which will probably be permanent, a finding of damages in the sum of $1,000 will not be declared excessive. Winkler v. St. Louis, I. M. & S. R. Co. 3 West. Rep. 433, 21 Mo. App. 99.

Where a young girl was thrown down by defendant's dog, which inflicted a wound upon her hip, from which resulted hip disease, and there was some evidence to show that the result was contributed to by hereditary scrofula, a verdict for $1,450, which by the statute is to be doubled, was not excessive. Fitzgerald v. Dobson, 3 New Eng. Rep. 394, 78 Me. 559.

A verdict of $1,500 is not too large a sum allowed to a seaman whose left hip and arm were fractured. The A. Heaton, 43 Fed. Rep. 592.

So, a verdict of $1,500 is not excessive for injury to a pregnant woman, causing a miscarriage. Reading City Pass. R. Co. v. Eckert (Pa.) 2 Cent. Rep. 791.

A verdict of $1,600 for permanent injury to a farmer sixty years of age was not excessive. Duffy v. Chicago & N. W. R. Co. 34 Wis. 188.

A verdict of $2,000 for a broken leg will not be held excessive where permanent recovery is out of the question, and considerable expense, long con-

ural person, but we have been unable to find a decision of any court, or a dictum of any text-writer, holding that there is a fixed rule for measuring the damages in such cases; and, in the nature of things, it is impossible for a court to prescribe any fixed rule, because it is impossible to prove such exact data as would authorize a court to prescribe one. It is impossible for any witness to testify to the exact time that the injured person would have lived, if he had not been injured. It is impossible to say whether the person would have remained in good health during his whole life, or whether he would have lost little or much time by sickness or idleness or the loss of an opportunity to labor. It is impossible to say whether he would have continued to earn the same amount of money during his whole life; whether he would have earned more, and how much more, or less, and how much less; whether he would have remained in the same occupation, or would have abandoned that, and pursued another, more lucrative, or less so. Unless these and other facts which might be enumerated could be shown the jury, we do not see how a fixed rule to measure the damages for a permanent injury could be prescribed to the jury. It may be said, however, that the life tables put in evidence, would show a man's expectancy of life, and that the amount he was earning at the time he was injured would be a sufficient basis upon which to prescribe such a rule; but we do not think that this would in all cases be fair, either to the plaintiff or to the railroad company. If the plaintiff were a young man of character and capacity and industry, and had chosen his occupation, and commenced its pursuit, his yearly income at first might be small, but, in a few years, he might be able to increase it very largely; yet, under the rule contended for, he would be confined during his life to the small income he was making at the commencement. On the other hand, if the plaintiff were an aged or a middle-aged person, making a large yearly income, it would be

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finement and much suffering have resulted. Driess v. Friederick, 73 Tex. 460.

Where a man twenty-three years old was injured so that his thumb on the right hand had to be amputated and the two fingers next to it were permanently injured, a verdict for $2,300, of which $320 was for loss of time, is not excessive. Whalen v. Chicago, R. I. & P. R. Co. 75 Iowa, 563.

A verdict of $2,500 for the breaking of an arm of an old lady sixty years of age, the injury being permanent, was held not excessive. Pittsburgh, C. & St. L. R. Co. v. Sponier, 85 Ind. 165.

A verdict of $2,500 for severe and probably permanent injury to hand and wrist was held not excessive. Maloy v. New York C. R. Co. 53 Barb. 182.

Yet it has been held that a verdict for $800 for the loss of a hand was excessive. Chicago & A. R. Co. v. Wilson, 63 Ill. 167.

A verdict of $2,500, for a sprained ankle, disabling totally two or three weeks, and partially for about the same time in addition, party's salary being $1,080 and his physician's bill $25, was held excessive. Spicer v. Chicago & N. W. R. Co. 29 Wis. 580.

A verdict of $2,500, where it was not probable the injury would be permanent, and the plaintiff not deprived of business capacity to earn money, and not appearing to have suffered any extreme pain, was held excessive. Chicago, R. I. & P. R. Co. v. Payzant, 87 Ill. 125.

Where a man sixty-two years old has three of his ribs broken and is rendered insensible for a time, causing him for a considerable time thereafter great physical and mental sufferings, and it is doubtful that he will ever recover, $3,750 is not an excessive amount of damages. Missouri Pac. R. Co. v. Aiken, 71 Tex. 371.

Four thousand dollars will not be held excessive damages for incurable spinal injuries in addition to temporary hurts which were painful. Missouri Pac. R. Co. v. Shuford, 72 Tex. 165; Reed v. New York Cent. R. Co. 56 Barb. 493.

A verdict of $4,500 was held not excessive for the loss of an arm. Mentz v. Second Ave. R. Co. 2 Robt. 356.

A verdict of $4,500, in view of plaintiff's age and business, the permanent disablement of his right hand and the pain and suffering endured, is not excessive. Schultz v. Chicago, M. & St. P. R. Co. 48 Wis. 375.

A verdict for $4,500 is not excessive for personal injuries to a woman who was the chief support of the family, whereby she has suffered and will suffer much pain, and be permanently crippled so as to impair her capacity to aid in supporting the family. Missouri Pac. R. Co. v. Texas Pac. R. Co. 41 Fed. Rep. 316.

Where one injured was earning $3.50 a day, and his health has become greatly impaired so as to cause him great suffering and render him unable to work, and his condition is growing constantly worse, so that his physician fixes eight years as his limit of life, a verdict for $4,680 damages is not excessive. Hughes v. Orange County Milk Asso. 56 Hun, 396.

Five thousand dollars will not be held excessive damages for a personal injury necessitating the amputation of one arm of a yard foreman of a railroad company. Little Rock & Ft. S. R. Co. v. Cagle (Ark.) June 1, 1890.

Where the right eye of a man thirty-five years old was entirely destroyed, and his other eye thereby affected so that he could do no more than half the work after the injury that he could do before, $5,000 damages will not be held excessive. Johnston v. Missouri Pac. R. Co. 96 Mo. 340.

A verdict of $5,000 to a young unmarried man earning about $25 per month, is not excessive. Bierbauer v. New York Cent. & H. R. R. Co. 77 N. Y. 588.

Where the services of a minor injured by the negligence of a railroad company would be worth $100 per year from his tenth or twelfth year until majority, a verdict in favor of his father for $5,000 was held excessive. Hurt v. St. Louis, I. M. & S. R. Co. 13 West. Rep. 233, 237, 94 Mo. 255, citing Little Rock & Ft. S. R. Co. v. Barker, 33 Ark. 350.

Where no bones were broken, and the injury was muscular only, a verdict for $5,000 was held excessive. Chicago, R. I. & P. R. Co. v. McAra, 52 Ill. 296.

A verdict for $6,000 in favor of a boy who by reason of a personal injury has lost an arm, and had his face disfigured and been otherwise injured, is not excessive. Evans v. American I. & T. Co. 42 Fed. Rep. 519.

Yet a verdict of $5,875 for loss of time, and injury to team of $600, and loss of toes of left foot, was held excessive. Chicago & R. I. R. Co. v. McKean, 40 Ill. 218.

Where a healthy, vigorous man about forty-five years old and accustomed to hard labor was stunned, one eye injured permanently so that he would ultimately lose it and the sight of the other eye might possibly be affected, and three of his vertebræ were out of line, and likely to result in his being a hunchback, and in paralysis, a verdict of $6,500 will not

unfair to the Railroad Company to take that income and his expectancy of life as the sole basis to determine the amount of his recovery; because our experience shows that a man in declining years has not ordinarily the same capacity to labor and earn money as a young man. It is then that sickness, inability and indisposition to labor come upon him more and more each year, as he grows older. These and like facts should then be taken into consideration by the jury in behalf of the Railroad Company. None of these things can be proved with such exactness as would authorize a court to prescribe a fixed rule. As was said by the Supreme Court of the United States in *Vicksburg & M. R. Co.* v. *Putnam*, 118 U. S. 554, 30 L. ed. 258, it has never been held that the rules to be derived from such tables of computations must be the absolute guides of the judgment and the conscience of the jury. On the contrary, in the important and much-considered case of *Phillips* v. *South Western R. Co.*, above cited [L. R. 4 Q. B. Div. 406, 49 L. J. N. S. Q. B. 233; *Phillips* v. *London & S. W. R. Co.* L. R. 5 Q. B. Div. 78, L. R. 5 C. P. Div. 280], the judges strongly approved the usual practice of instructing the jury in general terms to award a fair and reasonable compensation, taking into consideration what the plaintiff's income would probably have been, how long it would have lasted and all the contingencies to which it was liable; and as strongly deprecated undertaking to bind them by precise mathematical rules in deciding a question involving so many contingencies incapable of exact estimate or proof. We therefore think that it is better for both parties to let the jury look at these things, as a whole, in the light of common sense and their own experience, and let them make such a compensation in their verdict as would be reasonable and just to both parties, not giving to the plaintiff a large sum with the purpose of enriching him, but compensating him for the loss of money which he would probably earn had he not been injured, and thereby prevented by the negligence of the defendant. These remarks, of

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be set aside on appeal. Dallas & G. R. Co. v. Able, 72 Tex. 150.

A verdict for $7,000 for injuries to a woman sixty years old, resulting in the shortening of a leg, causing great pain and permanently disabling her to attend to her household duties, is not excessive. Fitch v. Broadway & S. A. R. Co. 32 N. Y. S. R. 376.

A verdict for $7,500 for negligence resulting in the loss by a boy thirteen years old of his right hand is not excessive. Sprague v. Atlee (Iowa) Oct. 9, 1890.

Where both of plaintiff's legs were broken and his ankle badly dislocated, and at the trial, after the lapse of four months, he was compelled to use crutches, a verdict for $7,500 will not be held excessive. Evans v. Delk (Tex.) Oct. 23, 1888.

A verdict of $7,500 will not be held excessive for injuries to a boy thirteen years of age, resulting in permanent impairment of sight, permanent injury to his urinary organs and permanent loss of strength in his hands and arms, and, probably, a permanent affection of his whole nervous system. McDonald v. Union Pac. R. Co. 42 Fed. Rep. 579.

Where plaintiff, a strong, healthy young man aged nineteen, was compelled to lose part of his ankle bone, whereby the joints of his ankle and foot were stiffened, and he was rendered a cripple for life, a verdict of $8,000 was not excessive. Henry v. Sioux City & P. R. Co. 75 Iowa, 84.

Yet a verdict of $8,000 in case of injury to a cooper and teamster was held excessive, and was reduced to $6,000. Murray v. Hudson River R. Co. 47 Barb. 196.

A girl seven years old, who had one leg cut off, her hand crushed and was otherwise injured, was awarded $8,100. Chicago & A. R. Co. v. Murray, 71 Ill. 601.

A verdict of $8,500 will not be set aside as excessive, where the person injured was less than ten years of age, and the nervous connection of his left arm was severed, thereby causing paralysis and permanently disabling him, although he still retained the use of the elbow joints. Ridenhour v. Kansas City Cable R. Co. (Mo.) June 2, 1890.

A lady teacher, whose spine was permanently injured by gross negligence of a carrier, was awarded $8,958 damages. Illinois Cent. R. Co. v. Parks, 88 Ill. 373.

A verdict of $9,000 where plaintiff was disabled for life and endured great bodily suffering is not excessive. Deppe v. Chicago, R. I. & P. R. Co. 38 Iowa, 592.

So, a verdict for $9,000 was held not excessive, for the loss of a leg, under the circumstances of the case. Louisville & N. R. Co. v. Moore, 83 Ky. 675.

A verdict for $10,000 for loss of an arm in a case of gross negligence was held not excessive. Robinson v. Western P. R. Co. 48 Cal. 409.

A verdict for $10,000 for the loss of an arm, by a boy belonging to a laboring family, was sustained. Ketchum v. Texas & P. R. Co. 38 La. Ann. 777.

So, $10,000 was held not excessive where a woman received injuries in a collision by which both legs were broken, the lower part of the leg bone crushed and she was otherwise injured, and suffered intense pain, and more than a year after the accident could not move without pain, and, in the opinion of the surgeon who attended her, was permanently disabled. The Washington v. Cavan ("The Washington and The Gregory") 76 U. S. 9 Wall. 513, 19 L. ed. 787.

Yet a verdict of $10,000 was held excessive in the case of a brakeman, where amputation of his leg below the knee was the result of the injury, but there was no evidence as to what he was earning at the time of the injury. Missouri Pac. R. Co. v. Dwyer, 36 Kan. 58.

A verdict of $11,000 awarded to a laborer thirty-four years of age for an injury necessitating amputation of one leg, superinducing other mental and physical sufferings, was held not excessive. Berg v. Chicago, M. & St. P. R. Co. 50 Wis. 419.

Yet a verdict for $11,000, where there was no gross negligence, being more than twice the amount recoverable in case of death, was held excessive. Collins v. Albany & S. R. Co. 12 Barb. 492, 5 How. Pr. 435.

So a verdict for $11,000, where a young man of thirty years engaged in an employment which had a regular system of promotion received permanent injuries, was held excessive. Belair v. Chicago & N. W. R. Co. 43 Iowa, 662. See Delie v. Chicago & N. W. R. Co. 51 Wis. 400.

A verdict of $12,000 was held not excessive where plaintiff was confined to bed six weeks, suffering great pain, unable to attend to business for several months, and left permanently lame, and obliged to pay $1,200 to $1,500 physician's bill and other expenses. Rockwell v. Third Ave. R. Co. 64 Barb. 438.

A verdict of $12,000 for personal injuries which made a man a cripple for life, and compelled him to suffer great mental and physical pain, will not be held excessive, especially where a former verdict was for about the same amount. Texas M. R. Co. v. Douglass, 73 Tex. 325.

course, apply only to the measure of damages for the permanent injury. It is not contended that any fixed rule can be prescribed as a measure of damages for pain and suffering. We therefore reaffirm the ruling in *Georgia P. R. Co.* v *Freeman, supra.* On this subject, see 2 Thompson, Trials, §§ 2077, 2078; 2 Redf. Railroads, 309 *et seq.*; 2 Wood, Railway Law, § 317; Whittaker, Smith, Neg. 474; Pierce, Railroads, 301; 3 Sutherland, Damages, 283 *et seq.*; 2 Shearm. & Redf. Neg. § 758; Wood's Mayne, Damages, p. 596, § 627; 2 Sedgw. Damages, 547; Pol. Torts, 161, 162; Field, Damages, §§ 614, 615.

2. The ninth ground complains that the court erred in admitting the following evidence, over the objection of counsel for the defendant, to wit: "*Q.* How soon after his injury [referring to Mr. Allison] were there any vacancies to which promotions could have taken place? *A.* Vacancies were shortly afterwards, say certainly in the course of the next three to six months, I think, after Allison was hurt. According to Mr. Allison's standing, and the classification which I give, his prospects for promotion to one of these places was good." The defendant objected to this testimony, and all other evidence of the witness, tending to show prospects of promotion, as being simply the opinion of the witness, and showing a possibility too remote to be the basis of consideration by a jury in finding damages. We think

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But a verdict of $12,000 was held excessive in the case of a man fifty-seven years old in declining health, partially paralyzed, where there was no proof of gross, wanton or willful negligence on the part of defendant. Louisville & N. R. Co. v. Stocker, 86 Tenn. 343.

Fifteen thousand dollars are not excessive for injuries to a physician or surgeon whose expectation of life was twenty-three years, and whose income was from $1,200 to $1,500 per year, and who was almost totally disabled, incurring much expense and suffering great pain, leaving him unable to earn more than $200 or $300 per year. Pence v. Chicago, R. I. & P. R. Co. 79 Iowa, 389.

So, a verdict of $15,000 was held not excessive where the injury forced plaintiff, a physician, to abandon his practice amounting to $2,500 a year, and the injuries to his person and his nervous system were of a permanent character. Woodbury v. District of Columbia, 3 Cent. Rep. 788, 5 Mackey, 127.

Yet where the evidence showed that a person fifty-three years of age, injured by negligence, was probably crippled for life, owing to injury of her spinal cord, that she suffered intermittently, and was not able to walk before or at the trial, and that she had left her house but once since the accident, being then carried out for fresh air, and suffered so then that she did not go out again, a verdict for $15,000 damages was held excessive, and she was required to remit $5,000. Furnish v. Missouri Pac. R. Co. (Mo.) June 30, 1890, citing Harrold v. New York E. R. Co. 24 Hun, 184; Chicago & E. I. R. Co. v. Holland, 18 Ill. App. 418, affirmed, 122 Ill. 461; Woodbury v. District of Columbia, 3 Cent. Rep. 788, 5 Mackey, 127.

Where a man was disabled for life by an injury, and suffered in the hospital 145 days; and, twenty months after the accident, dead bone was still working out of the wound, which was still open, and his leg was partially stiffened and somewhat shorter than the other,—a verdict for $16,666 was held not excessive. Galveston, H. & S. A. R. Co. v. Porfert, 72 Tex. 344.

Yet a verdict of $4,000 was held flagrantly excessive, where it was shown plaintiff was laid up with a broken leg only for a short time, and the fracture had healed and never would seriously inconvenience him again. South Covington & C. S. R. Co. v. Ware, 84 Ky. 267.

Eighteen thousand five hundred dollars will not be held an excessive sum for personal injuries by which a boy a little over seven years old had both legs so badly crushed that amputation was necessary, where he required a constant attendant, and was left in such a state, both physically and mentally, as to render his life a burden. Heddles v. Chicago & N. W. R. Co. (Wis.) June 21, 1890.

Yet a verdict of $18,000 for loss of legs in case of a brakeman was held excessive. Chicago & N. W. R. Co. v. Jackson, 55 Ill. 492.

A verdict of $20,000 is not excessive where it was shown that the injured person, who, before the accident, was an industrious able-bodied mechanic, is now a wreck both in body and mind, and unfit to labor, with the probability that his sufferings will be permanent. International & G. N. R. Co. v. Brazzil, 78 Tex. 314.

A verdict of $25,000 was held not excessive where plaintiff, thirty years old, and his wife, depended for their support upon his labor, and he was so injured that he could do nothing, and would remain helpless until his death. Alberti v. New York, L. E. & W. R. Co. 43 Hun, 421.

Yet where the most serious injury received from an accident was an inflammation of the hip joint, which caused great pain and exposed the injured person to loss of time, loss of business and large expenses for medical assistance, but left him able to earn his livelihood, and well disposed to enjoy life, needing only proper treatment and prudence for a complete cure, a verdict of $25,000 damages was reduced by the court to $5,000. Peyton v. Texas & P. R. Co. 41 La. Ann. 361.

In a case somewhat under similar circumstances, where the ankle joint of a man fifty-four years old was dislocated, requiring the amputation of his foot and medical attendance for two months, an order for new trial was made, unless a judgment for $10,750 with interest from the time of the verdict should be accepted. Kennon v. Gilmer, 9 Mont. 108.

So a verdict of $25,000 for an injury rendering a person a cripple for life was held excessive. Chicago & N. W. R. Co. v. Fillmore, 57 Ill. 265.

A verdict of $30,000 for injuries resulting in the amputation of both legs of a boy, one at the ankle and the other at the knee, is excessive. Heddles v. Chicago & N. W. R. Co. 74 Wis. 239.

A verdict of $30,000 for a man of about forty years, who, in addition to lesser injuries, suffered from the accidental injury of the spine producing a progressive disease, which would probably eventuate in paralysis and death, was held excessive. Harrold v. New York Elev. R. Co. 24 Hun, 184.

Setting aside for inadequacy.

A verdict of $167 will not be set aside as inadequate on the ground that the jury must have been influenced by a perverted judgment, where the pain and disability suffered since the injury should in part be attributed to previous ill health; which the circumstances tended to show were not so severe as claimed. Robinson v. Waupaca (Wis.) Oct. 14, 1890.

A judgment of $300 damages in an action for personal injury will not be set aside as inadequate unless its injustice is plainly apparent. Wunderlich v. New York, 33 Fed. Rep. 854.

this exception is well taken, and that the court erred in allowing the testimony complained of to go to the jury. The testimony of this witness shows, in substance, that he was the assistant superintendent of the railway mail service of the fourth division; that Allison was a postal clerk under him, and that he had special supervision of Allison's record and work; that the next class above Allison in the line of promotion at the time he was injured was "class 5," and that the salary in that class was $1,300 a year; that Allison was receiving, when injured, $1,150; that Allison's standing in regard to the basis of promotion was "first-class;" that there was no vacancy in the class above Allison at the time he was injured, but two vacancies occurred in the course of from three to six months thereafter; that there were three men of Allison's class, including Allison, and that the other two stood as well as he did, and both were older than Allison. One had been in the service longer and the other a shorter time than Allison. Political considerations enter somewhat into the appointment of clerks. The promoting power is at Washington; the office here is the recommending power. A vacancy in the class above Allison might be filled sometimes from other routes, and men taken from another route, and put in, who occupy, say, a second rank. It is in the power of the department under the rules to do that. There is no certainty at all, when there is a vacancy in a position of chief clerk (the clerk in charge), that one of the lower grade on the same route will go up, no more than in any other business. It is not guaranteed. We think this evidence shows that Allison's promotion was too uncertain, and the possibility of an increase of his salary from $1,150 to $1,500 too remote, to go to the jury, and for them to base a verdict thereon. While it is proper in cases of this kind to prove the age, habits, health, occupation, expectation of life, ability to labor and probable increase or diminution of that ability with lapse of time, the rate of wages, etc., and then leave it to the jury to assess the damages, we think it improper to allow proof of a particular possibility, or even probability, of an increase of wages by appointment to a higher public office, especially where, as in this case, the appointment is somewhat controlled by political reasons. The deputy clerk of this court, for example, is very efficient and faithful, and if there should be a vacancy in the office of clerk of the court, it is not only possible, but very probable, that he would be appointed to fill the vacancy, thereby obtaining a much larger salary than he now receives; but if he should be injured as Allison was, and were to sue the railroad company for damages, we do not think it would be competent for him to prove the possibility, or probability, of his appointment to fill a vacancy in the office of clerk, especially as the *personnel* of the court, upon which such appointment must depend, might change in the mean time. To allow the jury to assess damages in behalf of the plaintiff, on the basis of a large income arising from a public office, which he has never received, and which is merely in expectancy, and might never be received, or, if received at all, might come to him at some remote and uncertain period, would be wrong, and unjust to the defendant. We believe the rule of most of the railroads in this State is to promote their employés. An employé commences at the lowest grade, and, if he is competent, capable and efficient, he is very likely to be promoted upon the happening of a vacancy above him. If one occupying a lower grade of service were injured, would he be allowed to prove, unless he had a contract to that effect, that his prospects of promotion to a higher grade and better salary were good, and would the jury be allowed to base their calculation and estimate of the damages upon a much larger salary, which he had never received, but merely had a prospect of receiving? It will be observed that the testimony in this case shows that there were two others in the same class with Allison, equally competent and efficient as he was, and it is by no means certain that Allison would have been preferred to each of them, in case of vacancy, and promoted above them. So it could not be said that he was in the direct line of promotion. Pierce, Railroads, 303; *Brown* v. *Cummings*, 7 Allen, 509; *Boyce* v. *Bayliffe*, 1 Camp. 58; *Brown* v. *Chicago, R. I. & P. R. Co.* 64 Iowa, 656.

This testimony being illegal, and having been objected to, and it being very probable, from the amount of the verdict, that the jury based their calculation upon the increased salary which Allison would have received if he had been promoted, we think it damaged the defendant, and we grant a new trial upon this ground.

The other grounds of the motion we will not discuss, except to say that, if there are any errors contained therein, the court below will doubtless correct them on the next trial. If the explanations of the mortuary and annuity tables were not put before the jury, this can be done at the next trial, if counsel so desire. The same may be said as to the failure of the court to explain to the jury what was meant by the reduction of the sum, when ascertained, to its present cash value, which is complained of as error in the sixth ground of the motion. If counsel desires more specific instructions at the next trial, he can request the court to give them.

Judgment reversed.

ELLIS, *Plff. in Err.*,
v.
DARDEN.

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

***1. Under the Code of Georgia, the marriage of a woman revokes a will,** previously executed by her, in which no provision is made in contemplation of such an event.

2. Parol evidence is not admissible to show that the will was executed in contemplation of the marriage.

(December 23, 1890.)

ERROR to the Superior Court for Taliaferro County to review a judgment rejecting the

*Head notes by BLECKLEY, *Ch. J.*

alleged will of a deceased married woman. *Affirmed.*

The case sufficiently appears in the opinion.

Messrs. **H. T. Lewis** and **Horace M. Holden** for plaintiff in error.

Messrs. **James Whitehead** and **M. Z. Andrews** for defendant in error.

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

1. In construing the Code, it is necessary to bear in mind section 4, which declares that "the masculine gender shall include the feminine." Nothing can be more manifest than that this rule was intended to apply to the provisions of the Code on the subject of wills. These provisions are very ample and extensive, beginning with the definition of a will, and embracing the persons capable and incapable of making them; modes of execution, revocation and probate; the property subject to disposition; the different classes of devises and legacies; the office and functions of executors, etc. Code, §§ 2394-2482. From the first to the last of these sections, with few, if any, exceptions, the masculine includes the feminine. This is obviously so in the very first of them, which defines a will to be "the legal expression of a man's wishes as to the disposition of his property after his death." It cannot be doubted that in many of the sections the word "testator" includes "testatrix." As to most of the sections in which the word occurs, no other construction is possible. See sections 2398, 2400, 2401, 2407, 2413, 2414, 2418, 2420-2422, 2479, 2480. Section 2477 reads as follows: "In all cases the marriage of the testator or the birth of a child to him, subsequent to the making of a will in which no provision is made in contemplation of such an event, shall be a revocation of the will." We can have no reasonable doubt that the rule that the masculine includes the feminine applies to this section as well as to so many others touching the subject of wills, and consequently that in sense and meaning it has the same scope as if it read thus: "In all cases the marriage of the testator or testatrix, or the birth of a child to him or her, subsequent to the making of a will in which no provision is made in contemplation of such an event, shall be a revocation of the will." This construction only treats the codifiers as governing themselves consistently by their own rule in doing their own work. They undertook to state in a condensed form the law of wills, and they devoted an article, consisting of nine sections, to the subject of revocation. Can it reasonably be supposed that they intended to be silent upon the effect of marriage on the prior will of a woman? And yet they were silent on that topic, unless they dealt with it in the broad, general language which we have quoted from section 2477. It is well known that in hundreds of instances the codifiers did not confine themselves to stating the law as they found it, but that they exercised the function of unifying and harmonizing its various rules and provisions so as to present what they deemed a more consistent and complete system. Their work, as a whole, has been adopted by competent authority, and, except where altered or repealed, is now the law of the land. We have only to accept it as written, and interpret it by a rule found in the instrument itself, to arrive at the conclusion that marriage has, in this State at least, as much effect upon a woman's will as upon a man's. There may be more or less reason why revocation should be the result in the one case than in the other, but certainly there is reason enough in either case. At common law the woman's will was revoked but the man's was not. The Act of 1834 put a man's will, in this respect, upon the footing of a woman's, with an implied saving in favor of wills in which provision was made for the prospective wife. It also made the birth of a child operate as a revocation of any prior will in which the child was not provided for. Then came the Code in 1863, and, after varying the phraseology of the Act of 1834 so as to make it wider and more general, incorporated its principle of revocation into the legal system of wills, with an implied saving in favor of wills in which, not the wife or the child, but the event of marriage or the birth of a child, was provided for. This implied saving might not hold good as to the wills of women because of other provisions of the Code; but that would not hinder the express declaration that marriage, or the birth of a child, subsequent to the making of a will in which no provision is made in contemplation of such an event, shall operate as a revocation of the will, from having its full affirmative effect upon every will of that class, whether the maker were male or female. It may admit of question whether the Code, taken as a whole, intended to save any will whatsoever made by a single woman from revocation by marriage; but this doubt need not affect our construction of section 2477 as to the class of wills which make no provision in contemplation of marriage. Wills of this kind are expressly declared to be revoked by marriage, though wills of a different kind may or may not be so revoked, according to their standing, in the light of other provisions of the Code, and the general scheme of testamentary law. We can be sure, at any rate, that the Code nowhere declares that the will of a woman is not revoked by marriage or by the birth of a child. Thus no contradiction is involved in our construction of section 2477, and any apparent inconsistency with other provisions of the Code which it involves touches a class of wills not now under consideration. Nor did any repeal or modification of the section result from the enlarged testamentary capacity and powers of married women, brought into the law by the Act of 1866 and the Constitution of 1868, as expounded by this court in the case of *Urquhart* v. *Oliver*, 56 Ga. 344. If marriage or the birth of a child would work the revocation of a particular class of wills by express statute when the testamentary powers of a married woman were restricted, we see no reason why such an event should not produce the same effect after those restrictions were removed. Surely, marriage or the birth of a child is as great an event in the life of a woman as of a man, and imports as important a change in the testamentary standpoint. It would seem that the more the testamentary powers of the two sexes are equalized, the more reasonable it would be to apply to both alike the provisions of section 2477 of the Code. It is a mistake to suppose that this pro

vision, as applied to men, has, or ever had, any purpose to coerce them into the performance of any legal duty which they owe to their families. A man may bequeath his entire estate to strangers. Code, § 2399. All legal rights of the wife and family, such as dower and a year's support, are as secure against a will made at one time as at another. The object of the provision is to secure a specific moral influence upon the testamentary act,—the moral influence of having before the mind a contingent event so momentous as marriage or the birth of a child, and so deserving of consideration in framing a testamentary scheme. A public policy which rejects the will of a prospective husband or father because it affords no evidence of the presence of this influence may well reject that of a prospective wife or mother for the same reason. Both are alike free from any legal obligation to provide by will for spouse or child; and both, as a general rule, are equally under the sway of moral motives so to do when these claimants, existing or anticipated, are thought of, and their claims duly considered. There is as much reason in requiring one as the other to furnish evidence in the will itself that the testamentary act was performed with the future event of marriage or birth of a child in actual and present contemplation. Now that women, according to the decision in *Urquhart* v. *Oliver*, *supra*, have substantially the same testamentary freedom as men, the wills of both sexes, whether made before or after marriage, ought to stand on the same footing. It was only on the doctrine of implied repeal of certain statutory restrictions in the Code that this court could arrive at the conclusion announced in *Urquhart* v. *Oliver*. But that conclusion does not require for its completeness or its consistency that section 2477 shall be held not to apply to wills made by women, or that a woman's will should stand on a higher plane than that of a man. On the contrary, the harmony of the whole testamentary system will be better preserved by treating the wills of both sexes alike. When a woman's rights touching the disposition of property are those of a man, her disabilities should also be those of a man.

Basing our decision solely on the statutory system of this State, we rule that the will now before us was revoked by the subsequent marriage of the testatrix, though it occurred on the same day and within a few hours after the will was executed. A copy of the will is not before us, but we take it for granted from the argument and from the recitals in the record that the sole beneficiary under the will was a sister of the testatrix, and that the instrument contained no provision showing that it was made in contemplation of marriage. How the general question has been treated elsewhere under various shades of statutory provisions will appear from the following authorities: *Loomis* v. *Loomis*, 51 Barb. 257; *Brown* v. *Clark*, 77 N. Y. 369; *Fransen's Will*, 26 Pa. 202; *Swan* v. *Hammond*, 138 Mass. 45; *Nutt* v. *Norton*, 142 Mass. 243, 2 New Eng. Rep. 594; *Miller* v. *Phillips*, 9 R. I. 141; *McAnulty* v. *McAnulty*, 120 Ill. 26, 8 West. Rep. 630; *Re Tuller*, 79 Ill. 99; *Noyes* v. *Southworth*, 55 Mich. 173; *Morton* v. *Onion*, 45 Vt. 145; *Re Carey's Estate*, 49 Vt. 236; *Ward's Will*, 70 Wis. 251; *Webb* v. *Jones*, 36 N. J. Eq. 163; *Fellows* v. *Allen*, 60 N. H. 439; *Emery, Appellant* (*Re Hunt's Will*) 81 Me. 275. See also Beach, Wills, § 64; 6 Lawson, Rights, Rem. and Pr. § 3285; *notes* to *Young's App.* 80 Am. Dec. 516, 39 Pa. 115; 1 Jarman, Wills, 5th Am. ed. p. 268 *et seq.*; 3 Jarman, Wills, 5th Am. ed. p. 783, *note 19;* Schouler, Wills, § 424; 3 Washb. Real Prop. 575, * 698; 1 Woerner, Administration, p. 107.

2. The parol evidence offered to show that the will was executed in contemplation of the marriage was properly rejected. In order to save a will from revocation by subsequent marriage, the will itself must contain the requisite evidence that the event was contemplated. At least, such evidence must appear on the face of some document offered for probate as a part of the will. *Deupree* v. *Deupree*, 45 Ga. 415.

Judgment affirmed.

Josie BELDING, *Plff. in Err.*,

v.

C. P. JOHNSON.

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

1. **A saloon keeper is not guilty of negligence** in furnishing liquor to an intoxicated person and in failing to protect one who enters the saloon on business of his own and becomes engaged in an altercation with such intoxicated person from being shot by him so as to render himself liable in damages to the deceased person's widow for his death under a statute allowing recovery for death resulting from criminal or other negligence.

2. **No recovery can be had,** unless authorized by statute, against a saloon keeper who sells liquor to an intoxicated person, for damages resulting from such person's killing another with whom he quarrels while still intoxicated.

3. **The sale of liquor to an intoxicated person is not the legal and natural cause of the death** of a third person, who is killed by the former after a quarrel between them over a previous wager and the custody of the stakes, so as to render the seller liable in damages therefor under statutes which provide that damages are too remote if only the imaginary or possible result of the tortious act or other and contingent circumstances preponderate largely in causing the injurious effect, as well as those traceable to the act, but not its legal and natural consequence.

(November 12, 1890.)

ERROR to the City Court of Atlanta to review a judgment in favor of defendant in an action brought to recover damages for the death of plaintiff's husband, which was alleged to have resulted from the sale by defendant of liquor to an intoxicated person. *Affirmed.*

From the official report it appeared that "Mrs. Belding, as the widow of Neal Belding, sued Johnson and Whitlock, making the following allegations in her declaration: About 9 o'clock on the morning of April 26, 1889, her husband and Whitlock met in the bar-room of Johnson, and drank intoxicating liquors together, and soon became engaged in a dispute, which ended at that meeting in the bet of a watch, which her husband agreed, at the suggestion of Whitlock, should be held by one

See also 43 L. R. A. 143.

Sloan, a clerk in the bar-room. Her husband and Whitlock then left the saloon, but afterwards returned, and her husband said he would withdraw the bet, and demanded his watch; but to this Whitlock objected, and Sloan refused to surrender it without Whitlock's consent. Her husband and Whitlock had angry words about the matter, Whitlock by that time being under the influence of liquor purchased at Johnson's saloon. Whitlock agreed to let her husband have his watch, if he would pay Whitlock's expenses of that day at the saloon, which proposition her husband declined. This was about 11 o'clock in the forenoon. In the afternoon he went to the saloon, and demanded his watch again. Whitlock was then considerably under the influence of liquors, purchased at Johnson's saloon, and that, too, while Whitlock was drunk, and was known to be by Johnson. When her husband demanded his watch in the afternoon, Whitlock refused to allow him to have it, and they then quarreled in the saloon, in the presence of Johnson and his clerks threatening to fight, and Belding made preparations to fight by pulling off his coat and hat, whereupon Whitlock, without cause, shot and killed him. Johnson was the owner and proprietor of the saloon, and invited her husband and all other persons there to drink, promising him and all others that he would maintain order, and protect all persons from violence by any person in his bar-room; but he not only failed to do this, but sold liquor to Whitlock when he was drunk, knowing that Whitlock, when under the influence of liquor, was a violent and dangerous man, and that Whitlock and her husband were angry with each other, and that Whitlock had threatened to whip her husband. Johnson and his servants continued to furnish liquors to Whitlock, when they knew he was drunk, and instead of protecting her husband against Whitlock's violence, stood by and saw him shoot her husband down, without cause, and without attempting to protect him, and without uttering one word of remonstrance. The difficulty could have been averted, and the life of her husband saved, if Johnson had refrained from selling Whitlock liquor, and discharged his duty in keeping order, and protecting her husband from Whitlock's violence. At the time her husband was killed, he was healthy and strong, thirty years old, able to earn by his labor $100 per month, etc., and she has been deprived of his earnings and protection by the wrongful and illegal conduct of defendants. Wherefore she sued, alleging that she had been damaged $20,000."

To this declaration Johnson interposed a general demurrer, which was sustained, and the action dismissed as to him, and plaintiff excepted.

Messrs. **T. P. Westmoreland** and **L. B. Austin, Jr.,** for plaintiff in error.

Messrs. **Arnold & Arnold,** for defendant in error:

Every tort in Georgia is such either by statute or common law. At common law no action lies for loss of a life.

Daly v. *Stoddard*, 66 Ga. 146; *Barrett* v. *Dolan*, 130 Mass. 366; *Davis* v. *Justice*, 31 Ohio St. 359; *Kirchner* v. *Myers*, 35 Ohio St. 85.

The Legislature of Georgia has qualified this rule to the extent of allowing a recovery by the wife and other designated persons for a homicide, when "the death of a human being results from a crime or from criminal or other negligence."

See Act Oct. 27, 1887, p. 44, Ga. Code, § 2971.

The Statute refers to the immediate cause, and no one is responsible for a death when there comes in between his act and the death an independent cause, which immediately produces the death, and without which it would not have resulted.

Daly v. *Stoddard*, *supra*; *Bradbury* v. *Furlong*, 13 R. I. 15, 43 Am. Rep. 1.

In many States there exist what are called "Civil Damage Acts." Under them saloon keepers have been held liable for very remote results of intoxication, which shows that the liability rests on the Statute alone and not on common-law principles.

Schroder v. *Crawford*, 94 Ill. 357; *Dunlap* v. *Wagner*, 85 Ind. 529.

The reason why a statute is necessary to create a liability is that no one is responsible for a remote result of his act, nor when an independent, intervening agency comes in and produces the injury. An intoxicated person does not lose his status as a man; the law does not allow the whiskey to absorb all the responsibility, but considers that there is enough of the man left to render the drunkard's actions accountable. This being his footing, the law looks no further than to him to find the person responsible for the injury.

This case differs from *Scott* v. *Shepherd*, 2 W. Bl. 892 (*Squib Case*), for there the squib continued the motion originally imparted, and the persons touching it before Scott was hit merely diverted it from themselves. There is so little certainty about the effect of intoxication, and so much depends upon the temperament of the person intoxicated, that a saloon keeper cannot anticipate injury to a particular person, and, in the absence of a statute, an injury by the intoxicated person would not be the proximate result of furnishing him whiskey.

Shearm. & Redf. Neg. 1st ed. § 9. See *Milwaukee & St. P. R. Co.* v. *Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Ætna Ins. Co.* v. *Boon*, 95 U. S. 117, 24 L. ed. 395; *Davis* v. *Justice*, 31 Ohio St. 359; *Freeze* v. *Tripp*, 70 Ill. 496; *Meidel* v. *Anthis*, 71 Ill. 242; *Fentz* v. *Meadows*, 72 Ill. 540.

Belding was not in the saloon as a guest, and entitled to no protection as such; the best that can be said is that he was a mere licensee. No positive duty is owed to a licensee, and for omission to keep premises safe there can be no recovery.

Larmore v. *Crown Point Co.* 2 Cent. Rep. 409, 101 N. Y. 391; *Severy* v. *Nickerson*, 120 Mass. 306; *Morgan* v. *Pennsylvania R. Co.* 7 Fed. Rep. 78.

A saloon keeper is not under the same stringent rules of liability as a common carrier or public inn.

See *note* to *Rommel* v. *Schambacher*, 6 Am. St. Rep. 736.

Inn keepers are not liable for trespasses committed on guests.

2 Kent, Com.; *Morse* v. *Slue*, 1 Vent. 190;

Kent v. *Shuckard*, 2 Barn. & Ad. 803; Story, Bailm. § 482.

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

Under the facts alleged in the declaration, which will be found set out in the official report, there was no error in sustaining the demurrer and dismissing the case. Under these facts, we do not think Johnson was liable to the widow of Belding on account of her husband's having been killed by Whitlock in Johnson's bar-room. The declaration alleges that Johnson sold liquor to these parties in the forenoon, and that the quarrel between the latter then originated, in regard to a wager they had made; yet the homicide did not occur until the afternoon, when Belding again entered the bar-room for the purpose of obtaining the watch he had wagered with Whitlock in the forenoon. He did not enter as a customer or guest, but upon his own private business. He then met Whitlock the last time, the quarrel was renewed and he was killed. Our Statute allows a recovery by certain named persons for a homicide, when "the death of a human being results from a crime, or from criminal or other negligence." Acts 1887, p. 45.

It is sought to make Johnson liable in this action, because he furnished liquor to Whitlock when drunk, and failed to protect Belding against Whitlock, both being in his saloon at the time of the homicide, and Johnson himself being present. Under the facts as alleged, we do not think this was such negligence or misconduct on the part of Johnson as would authorize the widow to recover against him, especially as Belding was not even a guest or customer of Johnson at the time.

Our Code (§§ 3072, 3073) declares: "If the damages are only the imaginary or possible result of the tortious act, or other and contingent circumstances preponderate largely in causing the injurious effect, such damages are too remote to be the basis of recovery against the wrong-doer." "Damages which are the legal and natural result of the act done, though contingent to some extent, are not too remote to be recovered. But damages traceable to the act, but not its legal or natural consequence, are too remote and contingent." Under these sections of the Code, we think the damages too remote to be recovered. "Other and contingent circumstances" preponderated largely in causing the homicide, and the damages, though traceable remotely to the act of selling the liquor, are not the "legal and natural consequence" of the act. They do not arise directly from that act, but from the act of shooting, and indirectly from the bet made between Belding and Whitlock, Whitlock's refusal to give up the watch, and Belding's return in the afternoon to recover it, and his preparation for a fight with Whitlock. These indirect elements are more proximate than is that of furnishing the liquor. There are many cases in the reports where recoveries have been had against bar-room keepers for injuries arising from the sale of liquor to persons, but all of them, so far as we have ascertained, except the case of *Rommel* v. *Schambacher*, 120 Pa. 579, 9 Cent. Rep. 742, are founded wholly upon special statutes authorizing recovery for such injuries. In no other State has the right to recover been placed upon common-law principles, and several of the courts, in discussing the question, say that no recovery could be had at common law. As we have no special statute in this State authorizing such recovery, and as the two sections above cited from our Code are declaratory of the common law of this State, and as we think that under these sections the damages claimed are too remote, we affirm the judgment of the court below sustaining the demurrer, and dismissing the case. Even *Rommel* v. *Schambacher*, *supra*, would not be a precedent for recovery in a case of homicide: for, at common law, homicide gave no cause of action. Besides, Pennsylvania had a statute upon which the decision in that case could have been predicated.

Judgment affirmed.

INDIANA SUPREME COURT.

TOWN OF MARION *et al.*, *Appts.*,
v.
Louvina SKILLMAN *et al.*

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

1. Twenty years' use by the public under claim of right, evidenced by the use, will give a right to a road or street of which the owner of the fee cannot devest the public, no matter what may have been his intention in permitting the use.

2. Not merely the strip actually traveled will be presumed, by reason of the public use, to be dedicated for a street where the street is already laid out on each side of the premises,

NOTE.—*Highway; public easement acquired by prescription.*

The use of a way by the public for twenty years gives a prescriptive right of a public as well as a like user does of a private way, and this right when once established continues until it is clearly and unmistakably abandoned. Washb. Easem. 199. See Lewistown v. Proctor, 27 Ill. 417.

Under Rev. Stat. 1881, § 5035, the use of a road as a highway, with or without the consent of the adjoining landowners, will make the road a public highway, which the county commissioners may have recorded as such. Strong v. Makeever, 3 West. Rep. 346, 102 Ind. 578; Willey v. Norfolk S. R. Co. 96 N. C. 408.

A road which has been long used as a public road, and has been recognized as such by the county court, making it a part of a road district and appointing an overseer to work it, is prima facie a statutory highway. Howard v. State, 47 Ark. 431.

Prescription is one of the modes of proving a grant; and twenty years of appropriate user is sufficient to prove the establishment of a public or a private way across a railroad. Gay v. Boston & A. R. Co. 2 New Eng. Rep. 240, 141 Mass. 407.

A belief of the landowner as to the right of the

but it will be presumed that the owner intended to dedicate a strip the full width of the street.

3. **The subsequent erection, by the original owner, of a hotel encroaching upon the line of the street,** the dedication of which had become complete by twenty years' use, will not affect the public right. A dedication once complete cannot be revoked by the mere act of the owner.

4. **Their mere opinion that the public convenience requires it** is sufficient, under Rev. Stat. 1881, § 3359, to sustain the action of the trustees of an incorporated town in determining the grade, material and width of sidewalks.

5. **A change in the width of sidewalks** may be made by the trustees of an incorporated town after they have once established it.

6. **An injunction will not lie, on the ground of irreparable injury,** to prevent removal of part of the sidewalk in front of a hotel by trustees of a town, on proof merely that but five and a half feet of walk will be left at one end of the hotel and seven and one half feet at the other end.

(January 31, 1891.)

APPEAL by defendants from a judgment of the Circuit Court for Grant County enjoining them from removing a portion of the sidewalk in front of plaintiffs' premises. *Reversed.*

The facts are stated in the opinion.

Mr. **Andrew T. Wright** for appellants.

Mr. **John A. Kersey** for appellees.

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

This was a suit for injunction, by appellees against appellants. The court found the facts specially and stated its conclusions of law thereon. Appellants excepted and the only questions necessary to be considered here arise on the assignment of error by appellants that the court erred in its conclusions of law. The facts found by the court are substantially as follows:

Appellees own and are in possession of a tract of land situate within the corporate limits of the Town of Marion, containing $\frac{4}{100}$ acres, on which is situate a valuable hotel building. This land they and their vendors and predecessors in ownership had owned and occupied for more than twenty years when this suit was commenced, and appellees had resided thereon for more than fifteen years prior thereto. No part of this land had ever been platted as an addition to said Town, nor had any part of it ever been condemned, nor formally and by record dedicated as a street or part of said Town. It was, however, surrounded by lands that had been formally platted in lots, streets and alleys. That lying north of and adjoining the land in question is what is known as Clark Wilcutt's Addition to said Town, and that south of and adjoining the said land is what is known as Pilcher's Addition; and a certain street known as Branson Street is laid out and used across both said additions, running north and south forty-nine and one half feet in width, and that a direct extension of said street from one of these additions to the other would pass over and across the east side of appellees' said land. That appellees and their predecessors in the ownership of said land have permitted the pub-

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public to use a strip of land for a highway will not affect the right of the public to acquire title by prescription. State v. Waterman, 79 Iowa, 360.

User of a highway for twenty years vests an indefeasible right in the public. Fort Wayne v. Coombs, 5 West. Rep. 232, 107 Ind. 75; Webster v. Lowell, 2 New Eng. Rep. 675, 142 Mass. 324; Gay v. Boston & A. R. Co. 2 New Eng. Rep. 240, 141 Mass. 407; Gentleman v. Soule, 32 Ill. 278.

An easement in land may be acquired by an uninterrupted and adverse enjoyment for the period of twenty years. McKinzie v. Elliott (Ill.) June 12, 1890.

An uninterrupted use of a street by the public for at least twenty years is necessary to establish a public highway by user. Kennedy v. Cumberland, 7 Cent. Rep. 412, 65 Md. 514.

Presumption of grant arises from user.

To constitute such a user or enjoyment as raises the presumption of a grant requires, in addition to the requisite length of time, that it should have certain qualities and characteristics, such as being adverse, continuous, uninterrupted and by acquiescence of the owner of the inheritance out of or over which the easement is claimed. Washb. Easem. 130.

As the presumption of a grant will arise by an adverse and continuous use of an easement for twenty years, so a disuse occurring afterwards for the same length of time will raise a presumption of a surrender or extinction of the easement in favor of the servient tenement. Willey v. Norfolk & S. R. Co. 96 N. C. 408.

A right to maintain a highway, acquired by prescription, was lost by the actual and exclusive possession of the land in an inclosure for more than ten years prior to the Texas Act of 1887, which prohibits acquiring title in that way to a highway. Ostrom v. San Antonio, 77 Tex. 345.

But it has long been settled that public policy requires that undisturbed enjoyment of an incorporeal right affecting the lands of another for twenty years, the possession being adverse and unrebutted, imposes on the jury the duty to presume a grant. Coolidge v. Learned, 8 Pick. 504; Knight v. Halsey, 2 Bos. & P. 172; 3 Dan. Abr. 55. See Wilson v. Wilson, 4 Dev. L. 154; Ingraham v. Hough, 1 Jones, L. 39.

The public may acquire the right to the use of a road by use and adverse occupancy acquiesced in by the owner of land for ten years. Zimmerman v. Snowden, 4 West. Rep. 406, 88 Mo. 218; State v. Proctor, 7 West. Rep. 135, 90 Mo. 334.

Evidence of user.

Public highways may be shown by evidence of a user, as well as by the record of their laying out. Com. v. Low, 3 Pick. 412.

And parol evidence of its existence and user as an ancient highway is admissible to establish it as such. Green v. Canaan, 29 Conn. 167; Day v. Allender, 22 Md. 526; Folger v. Worth, 19 Pick. 108; Stetson v. Faxon, Id. 153; Williams v. Cummington, 18 Pick. 312; Com. v. Old Colony & F. R. R. Co. 14 Gray, 93; State v. Marble, 4 Ired. L. 318; State v. Hunter, 5 Ired. L. 369; Nash v. Peden, 1 Speers, L. 17.

Use under claim of right.

In the absence of a formal acceptance of a dedication to public use, it should appear that the use by the public was under a claim of right, and not by a temporary license by the owner. Eureka v. Croghan, 81 Cal. 524.

Dedication of land to public use.

A dedication of land to public use need not be

lic and said Town to use a strip of the east side of their said land as a public street and as a continuation of said Branson Street, from a time prior to the erection of said hotel building, and for more than twenty years prior to the commencement of this suit. From the facts found it further appears that Branson Street as dedicated to the public on the plats of Clark Wilcutt's Addition, Pilcher's Addition and the original plat of the Town in connection with the strip used by the public, with appellees' permission, across their said land formed a continuous and straight street extending entirely across said Town, of the uniform width of forty-nine and one half feet, and that until the erection of the hotel building above referred to there was no obstruction on appellees' land to the use by said Town and the public of said Branson Street in its uniform width of forty-nine and one half feet.

When the hotel building was erected is not shown, save that it was since the public commenced the use of appellees' land as a part of said street and prior to March, 1887. When the hotel building was erected it was so placed that at the northeast corner it was six inches and at its southeast corner thirty inches east of the west line of said Branson Street; or, in other words, if Branson Street was extended across said land said building would extend into the street to that distance.

In March, 1887, one of the appellees, with others, petitioned the board of trustees of the Town to cause the sidewalks on said Branson Street, including the part thereof along and on said land, to be graded to the width of eight feet and paved within said eight feet to the width of four feet. The board granted the petition, ordered the improvement made and caused the engineer of the town to set stakes showing the line of the improvement and marking the outer or curb line. The finding is a little obscure as to the location of the curb line, but as we construe it, the curb line was laid to correspond with the curb line on other parts of the same side of Branson Street. The walk was then constructed in accordance with the order of the board of trustees, except that appellees, instead of improving the walk in front of their hotel building so as to conform to the boundaries indicated by the engineer, disregarded the curb line fixed by him and so constructed the walk that at the northeast corner of the building it extended six inches east and outside of the curb line, and at the southeast corner it extended thirty inches outside thereof. In other respects, as to grade, width, material, etc., it conformed to the order made and the stakes set by the engineer. The court finds that this was rendered necessary by reason of the location of the hotel building as above stated, and that in order that the walk might be eight feet wide in front of the hotel building it was necessary either to thus extend the walk outside the curb line or move the building back to that distance. This walk, after its completion, was accepted by the Town.

In April, 1888, appellees, with others, petitioned the board of trustees of the Town to cause Branson Street to be graded and macadamized. The prayer of the petition was granted and the necessary steps were taken

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evidenced by writing, but may be manifested by acts and declarations which, however, must be unmistakable in their purpose and decisive in their character. Baker v. Vanderburg, 99 Mo. 378.

To constitute a valid dedication, there must be actual intention clearly indicated by unequivocal acts or conduct, and there must have been an acceptance by the public of the land dedicated. Shellhouse v. State, 9 West. Rep. 63, 110 Ind. 503.

Dedication may be found from long-continued public use and acquiescence, even where land is unenclosed and uncultivated. Ely v. Parsons, 4 New Eng. Rep. 823, 55 Conn. 83.

When there is an offer to dedicate property to public use, and such offer is followed by adverse use by the public under claim of right, no formal acceptance by corporate officers is required. Price v. Breckenridge, 10 West. Rep. 106, 92 Mo. 378; Cook v. Harris, 61 N. Y. 448; Buchanan v. Curtis, 25 Wis. 99; Kennedy v. Le Van, 23 Minn. 513.

Twenty or thirty years of abandonment to the exclusive use of the public is sufficient, in point of time, to constitute a dedication. Irwin v. Dixion, 50 U. S. 9 How. 10, 13 L. ed. 25.

When the intention of the owner is manifest, dedication is complete without acceptance or user. Point Pleasant Land Co. v. Cranmer, 2 Cent. Rep. 746, 40 N. J. Eq. 81.

Assent of owner to use of land.

To make a highway by dedication, the owner of the land must assent to its appropriation for such use, and it must be so used by the public. Union Co. v. Peckham, 5 New Eng. Rep. 668, 16 R. I. —.

Assent is inferred from acquiescence in public use. *Ibid.*

An intention to dedicate is implied by the opening of a thoroughfare. *Ibid.*

An unequivocal dedication takes place immediately. *Ibid.*

Acceptance necessary.

Acceptance on the part of the city is necessary to constitute land dedicated for a highway a public street. Cohoes v. Morrison, 42 Hun, 216; Bell v. Burlington, 68 Iowa, 296; St. Louis v. St. Louis University, 4 West. Rep. 52, 88 Mo. 155; Rozell v. Andrews, 4 Cent. Rep. 209, 103 N. Y. 150; Hayward v. Manzer, 70 Cal. 476.

Acceptance by a city of a street, after dedication, is necessary in order to establish the right of the public thereto. Waterloo v. Union Mill Co. 72 Iowa, 437.

No formal acceptance by a city as a corporation is necessary to complete the dedication of the streets. See *note* to Meier v. Portland C. R. Co. (Or.) 1 L. R. A. 856.

An incipient dedication of a street to the public does not convey the right of way until it has been accepted. Dorman v. Bates Mfg. Co. 82 Me. 438.

In the absence of a formal acceptance by the public of a dedication, the owner has the right, at any time prior to a public use, to revoke his offer and resume possession and control of the property. Eureka v. Croghan, 81 Cal. 524.

A road becomes established as a public highway by prescription, where the public, with the knowledge of the owner of the soil, has claimed and continuously exercised the right of using it for a public highway for the period of seven years, unless it was so used by leave, favor or mistake; and this, though the public travel may have somewhere slightly deviated from the original track by reason of any obstacle that may have been placed in it. Howard v. State, 47 Ark. 431.

The existence of a railroad upon a road during a portion of the twenty years required by statute to make the road a public highway by user will not

by the board to grade and macadamize the street accordingly. In order to carry out this work according to the plans and specifications adopted by the board the court finds that "it will be necessary to take up and remove a portion of said sidewalk pavement so made by plaintiff, to wit, a strip off of the east side thereof six inches wide at the north end, and regularly increasing in width to thirty inches wide at the south end thereof." The town authorities let the contract for the construction of the street improvement to appellant Philip Matter, and at the time this suit was commenced he was proceeding to construct the same and was about to take up and remove that portion of appellees' sidewalk above described. If taken up and moved, there would remain but five and one half feet in width of sidewalk in front of the south end of said hotel, and seven and one half feet at the north end. The object of this suit was to prevent the removal of that portion of the sidewalk, appellees' claim being that by its removal irreparable injury would be done to their said property. The conclusions of law were in favor of appellees, and it was ordered that a temporary injunction previously granted be made perpetual.

We regret that we are compelled to pass upon the questions presented by this record without the aid of a brief from counsel for appellees. Their contention, however, as we gather it from the record, seems to be that the Town has never acquired the right to treat the strip of land in question as a part of Branson Street; or if their conduct has been such as to amount to a dedication, that the dedication is only of so much of the strip of land as lies outside the line of the hotel building, which line must be treated as the boundary and the sidewalk and curb line be adjusted accordingly; and that the threatened cutting away of a portion of the sidewalk, which they aver will render their property worthless, is an attempt on the part of the Town to so widen Branson Street at that point as to take a part of the land on which the building stands, which has never been dedicated to the public, and thereby deprive them of it without due process of law.

The statement which we have made of the facts as they were found by the court is, we think, accurate and full as to all facts found, which are necessary to a determination of the questions involved.

That property may be dedicated to a public use is a principle too well established to require any citation of authorities, as is also the principle that all that is necessary to constitute such dedication is the assent of the owner of the soil to the public use and the actual enjoyment by the public of the use for such a length of time that the public accommodation and private rights would be materially affected by a denial or interruption of the enjoyment. *State* v. *Hill*, 10 Ind. 219; *Mauck* v. *State*, 66 Ind. 177; *Summers* v. *State*, 51 Ind. 201; *Indianapolis* v. *Kingsbury*, 101 Ind. 200.

There must be in such cases an intent on the part of the owner to dedicate, and the intent to dedicate must clearly appear. Dillon, Mun. Corp. § 627 *et seq.*

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defeat the claim of a highway by user, where the strip occupied by the railroad was open to the public, and travelers could pass over every part of it, except that it was not practical for vehicles to pass over the tracks, the user being otherwise sufficient to constitute the road a highway. Speir v. New Utrecht, 120 N. Y. 420.

Acceptance, how may be shown.

An acceptance may be shown by user by the public, as by travel, or by the acts of public officers in repairing and keeping it up. Lake View v. Le Bahn, 6 West. Rep. 739, 120 Ill. 92; Hayward v. Manzer, 70 Cal. 476; Waterloo v. Union Mill Co. 72 Iowa, 437.

Use by the public for fifty years of a street dedicated to public use by the owner of the land is sufficient evidence of its acceptance by the town. Com. v. Moorehead, 10 Cent. Rep. 611, 118 Pa. 344.

The fact that sidewalks were ordered laid by the village authorities in front of the premises, to be built by the owners, would not be an acceptance. Irving v. Ford, 8 West. Rep. 759, 65 Mich. 241.

Where a principal street of a village, and its sidewalk, had been used for about forty years, and the village had made improvements upon it, the jury are authorized to find that the street and sidewalk were dedicated to public use. Pomfrey v. Saratoga Springs, 7 Cent. Rep. 44, 104 N. Y. 459.

Effect of dedication.

A dedication for a highway confers a mere easement for public use as a highway, and the landowner retains the right to use the land for any lawful purpose compatible with the full enjoyment of the public easement. Ellsworth v. Lord, 40 Minn. 337.

Where the alleys of a city have been dedicated to the public, no further action is required by the city to open them for public use. Osage City v. Larkins, 2 L. R. A. 56, 40 Kan. 206.

Intent of parties, how must be manifested.

The intent of the respective parties to a dedication and acceptance must be followed by appropriate and characteristic acts upon the part of each. The intent of the owner to give must be followed by an abandonment of his exclusive enjoyment, and the intent to accept must be followed by the use and appropriation of the thing dedicated. Flack v. Green Island, 120 N. Y. 107.

When landowners devote a portion of the land for use as a private alley, such alley will not be converted into a public highway simply because the public use it by permission. Shellhouse v. State, 9 West. Rep. 63, 110 Ind. 509.

When the use is interrupted, prescription must begin again. *Ibid.*

A single act of interruption by the owner has more weight upon a question of intention than many acts of enjoyment. *Ibid.*

The mere permitting the public to pass over land, where the owner uses it for his own purposes, does not of itself constitute dedication. *Ibid.*

Dedication once completed is irrevocable.

A dedication of land once made to the public and accepted by it is in its nature irrevocable. Union Co. v. Peckham, 5 New Eng. Rep. 668, 16 R. I——; Dubuque v. Maloney, 9 Iowa, 455; Rowan v. Portland, 8 B. Mon. 232; Beall v. Clore, 6 Bush, 680; Wilder v. St. Paul, 12 Minn. 200; Missouri Institute v. How, 27 Mo. 211: Ragan v. McCoy, 29 Mo. 356; Lee v. Sandy Hill, 40 N. Y. 442; Huber v. Gazley, 18 Ohio, 18; Com. v. Alburger, 1 Whart. 469; Scott v. State, 1 Sneed, 632; State v. Trask, 6 Vt. 355; New

Such intent may be inferred from circumstances. The assent of the owner to the use need not be expressly declared, nor be manifested in any particular manner, but may be implied from the conduct of the owner of the land. Elliott, Roads and Streets, 99.

An implied dedication arises by operation of law from the acts of the owner. *Williams* v. *Wiley*, 16 Ind. 362; *Evansville* v. *Evans*, 37 Ind. 229; *Indianapolis* v. *Kingsbury*, 101 Ind. 200; *Waltman* v. *Rund*, 109 Ind. 366, 7 West. Rep. 533.

It is considered as in the nature of an estoppel *in pais*, and once made it is irrevocable. Elliott, Roads and Streets, 89 *et seq.*; Dillon, Mun. Corp. § 631, and cases cited; *Haynes* v. *Thomas*, 7 Ind. 38.

While the question of dedication from permissive occupation and use depends upon the intention of the owner, yet evidence of such occupation and use is one of the evidences of an intention to dedicate.

No length of time can be fixed as necessary to enable a court or jury to find that there has been in fact a complete common-law dedication. The question as to the intention of the owner of the land to dedicate it is in the majority of cases one of mingled law and fact, although there may be cases where the facts are undisputed and where they admit of but one legal interpretation or can lead to but one conclusion, and in all such cases the question is purely one of law. Elliott, Roads and Streets, 120 *et seq.*; *Kennedy* v. *Cumberland*, 65 Md. 514.

When the use of the easement has continued for more than twenty years, the rule as stated by some of the authorities is, that the intention of the owner to dedicate will be conclusively presumed. We think, however, that the author of Roads and Streets, above cited, states the principle more accurately when he says: "Twenty years' use by the public under claim of right, evidenced by the use, will give a right to the road or street of which the owner of the fee cannot devest the public, no matter what may have been his intention. . . . This result follows, not because an intention to dedicate is conclusively presumed, but because the Statute of Limitations has devested the owner of a right by destroying the remedy." Elliott, Roads and Streets, 125.

As to so much of the land in question as is not covered by the hotel we have no difficulty in holding that the public rights therein are as full and complete as if it had been formally and expressly dedicated by deed or plat. As to that portion covered by the hotel a different question is presented. Upon the facts found we think the permissive use by the public of the strip of land was evidence of an intention of the owners to dedicate to the public a strip thereof corresponding in width to the street already existing in connection therewith immediately north and south of it. The inference of an intention to dedicate would not be simply to dedicate that portion upon which there was actual travel, but would evidence the intention of the owners that Branson Street was to be continued across their land. *Bartlett* v. *Beardmore*, 74 Wis. 485; *Sprague* v. *Wait*, 17 Pick. 309; *Hannum* v. *Belchertown*, 19 Pick. 311;

Orleans v. United States, 35 U. S. 10 Pet. 662, 9 L. ed. 573.

A dedication is beyond recall where it has been formally accepted by the public authorities. Plumb v. Grand Rapids, 81 Mich. 381.

Municipal control over highways.

A municipality has complete control over highways and steeets. Terre Haute & L. R. Co. v. Bissell, 6 West. Rep. 254, 108 Ind. 113.

The court of chancery has no jurisdiction to control the discretion of the municipal authorities of the village as to when or where walks shall be laid in the streets of the village. That is a matter of municipal regulation confided by law to the board of trustees of the village. Irving v. Ford, 8 West. Rep. 759, 65 Mich. 241.

Widening streets.

The changing of a narrow alley to a wide street comes within the character of street improvements contemplated by Ind. Rev. Stat. 1881, §§ 3166, 3167, which should be referred to the city commissioners to assess the benefits and damages. Anderson v. Bain, 120 Ind. 254.

A street may be widened by sections. People v. Hyde Park, 6 West. Rep. 315, 117 Ill. 462.

The California Act, providing for the widening of Dupont Street, in San Francisco, and for the levy of an assessment on the property benefited, for the payment of the improvement, is not unconstitutional, either as an attempt to assess for local improvement within the limit of a municipality, or that it denies due process of law. Lent v. Tillson, 72 Cal. 404.

The Constitution is to be read in connection with the city charter; if the Constitution guarantees a hearing, the statute is not invalid because no hearing is provided in it. *Ibid.*

The court is authorized to determine all objections to the commissioners' report, and could by its final order modify the report so as to adjust the final determinations in regard to the assessments to the report as altered. *Ibid.*

Under the laws of New York, Brooklyn is liable to pay for land taken in widening North Second Street, the amount of damages awarded by commissioners appointed under the Act; and it is not essential to such liability that the assessments should have been made upon the lands benefited. McCormick v. Brooklyn, 10 Cent. Rep. 451, 108 N. Y. 49.

Under the Pennsylvania statute Philadelphia could pass an ordinance to increase the width of Chestnut Street, and after confirmation of the new lines no new building could be erected without conforming to the lines established. *Re* Chestnut Street, 11 Cent. Rep. 383, 118 Pa. 593.

The city councils are not obliged to widen the entire street at once by an ordinance giving three months' notice to property owners to recede. *Ibid.*

When a property owner in rebuilding is obliged to recede under the ordinance, the property added to the street is taken for public use and the owner is entitled to compensation therefor. *Ibid.*

Where, the instant the old buildings were torn down, the city took part of the land for public use, it is liable to make compensation to the owner the same as if it had been taken in any other mode. *Ibid.*; Philadelphia v. Linnard, 97 Pa. 242.

Narrowing streets.

Narrowing a street, upon the condition of making such compensation to the respective lotowners abutting thereon as may be assessed in the manner provided by law, is a lawful exercise of the authority vested in town boards. Rensselaer v. Leopold, 3 West. Rep. 874, 106 Ind. 29.

Simmons v. *Cornell*, 1 R. I. 519; *Cleveland* v. *Cleveland*, 12 Wend. 172.

If such use continued long enough before erection of the hotel to make the dedication complete, the fact of the subsequent erection of the hotel would not effect the public right. A dedication once complete cannot be revoked by the mere act of the owner. *Re Comrs. of Public Parks*, 25 N. Y. S. R. 231; Dillon, Mun. Corp. § 631, and cases cited; *Macon* v. *Franklin*, 12 Ga. 239.

In this case, however, there is no finding which shows how long the public use of the land had continued before the erection of the hotel. The finding is that such use commenced before the hotel was built, and had continued more than twenty years when the suit was commenced; but so far as the finding is concerned, the hotel may have been erected within a month or a year after the commencement of such use, and we cannot say that the public had prior thereto acquired any rights therein. So far, then, as the facts are found in this case, we can only say that, except for the strip actually covered by the hotel, the land in question constitutes a part of Branson Street; and that the rights of the public therein are as complete and the power of the board of trustees over the same as ample as if there had been an express statutory dedication of it by the owners.

While in this State by Statute (see Rev. Stat. 1881, § 3367) boards of trustees of incorporated towns are given exclusive power over the streets within the corporate limits of their respective towns, and are invested with large discretionary powers in the exercise of the duties thus imposed, there may arise many cases where it becomes the duty of the courts to interfere by injunction to prevent them exceeding their power or abusing such discretion. *Judge* Dillon says: "Generally speaking, equity will interfere in favor of or against municipal corporations on the same principles by which it is guided in cases between other suitors." Dillon, Mun. Corp. § 908.

While this is true, it was well said by the Supreme Court of New Jersey: "The process of injunction has been called the strong arm of the court, and that to render its operation useful it must be exercised with great discretion and only when necessity requires. Nor am I aware of any class of cases in which it should be applied with greater caution than to the proceedings of municipal corporations in the execution of public improvements." *Cross* v. *Morristown*, 18 N. J. Eq. 305.

We think it should be shown that there has been a clear invasion of the rights of a party to justify the courts in interfering by injunction with the conduct of municipal authorities in making street improvements of the character here in question.

The acts complained of are that in the grading and macadamizing of the street they are proposing to cut away a portion of a sidewalk heretofore constructed by their order. In addition to the general Statute heretofore referred to, which gives the boards of trustees of incorporated towns exclusive power over streets, etc., within the corporate limits of their respective towns, certain special powers are given them in relation to the grading and paving of sidewalks, and the grading, paving, graveling and macadamizing of streets. Section 3359, Rev. Stat. 1881, provides that, "whenever, in the opinion of the board of trustees of any incorporated town in this State, public convenience requires that the sidewalks of any street in such town should be graded or paved or planked, such board of trustees may

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The narrowing of a street being recognized by the Statute as a matter of public benefit, no finding of that fact is necessary where such work is entered upon. *Ibid.*

The service of notice is a jurisdictional fact, which the board of trustees are required to determine. A service upon the sheriff, and a recital showing a determination by the board that such notice is due notice to the county as to county property, renders such determination conclusive upon others duly served with notice. *Ibid.*

Improvement of sidewalks.

Under an authority to improve streets, sidewalks may be improved. Taber v. Grafmiller, 7 West. Rep. 353, 109 Ind. 206.

A sidewalk is part of a street, and a statute referring to streets embraces sidewalks. Dooley v. Sullivan, 11 West. Rep. 818, 112 Ind. 451.

Sidewalks on the two sides of the same portion of a street constitute but one improvement. Hence, an ordinance providing therefor is not void as combining two improvements in one proceeding. Watson v. Chicago, 1 West. Rep. 659, 115 Ill. 78.

The court of quarter-sessions has power to decide any complaint in relation to the laying out and widening of sidewalks, under the Borough Act of 1851; and its final order thereupon is conclusive upon all parties and upon the supreme court. Chartier's App. (Pa.) 6 Cent. Rep. 173.

Public convenience and necessity.

An ordinance stating expressly that "public convenience and necessities of the city" require the laying out of a certain highway sufficiently conforms to the statute and ordinance requiring that it must be found that "common convenience and necessity," or "common convenience and public necessity," require it. Dorman v. Lewiston, 81 Me. 411.

If public necessity and convenience require the alteration in a highway, it is immaterial at whose expense it is made. Pillsbury v. Augusta, 3 New Eng. Rep. 618, 79 Me. 71; Gay v. Bradstreet, 49 Mo. 580; Coombs v. County Commissioners, 68 Me. 484.

A committee appointed by the supreme court is not to determine the legality of the doings of the commissioners, but must simply inquire whether common convenience and necessity require that they be affirmed or reversed, in whole or in part. Bryant v. Penobscot Co. Comrs. 3 New Eng. Rep. 832, 79 Me. 128; Shattuck's App. 76 Me. 167.

Whether the proceedings of the commissioners were legal or not, is a question of law for the court to decide, either upon certiorari, or upon acceptance of the report of the committee, regardless of their views upon the question. Goodwin v. Sagadahoc Co. Comrs. 60 Me. 328.

The committee, as they find "the convenience and necessity" to be, must either affirm or reverse the doings of the commissioners in whole or in part; and that is their whole duty. Brunswick's App. 37 Me. 446; Hodgdon v. Aroostook Co. Comrs. 72 Me. 246; Shattuck's App. 76 Me. 167.

An adjudication that "public convenience and necessities of the city" require the improvement, means that the public convenience and necessity of the citizens require it, and is sufficient. Dorman v. Lewiston, 81 Me. 411.

by an ordinance compel the owners of lots adjoining such street to grade, pave or plank the same." The three sections next succeeding prescribe the manner of doing this. Section 3363 provides that in certain cases, upon petition of two thirds of the resident owners of certain real estate, such board of trustees shall make certain improvements or repairs in streets and sidewalks. Section 3364 provides that in certain cases, upon petition of a majority of the resident owners of certain lots or lands, such boards of trustees may cause the grading, paving, graveling or macadamizing of streets or parts of streets. These Statutes commit to the boards of trustees a wide discretion as to the making of such improvements. In so far as they empower the board to compel the abutters to do the work or pay for the same, under familiar and well-settled principles they will be strictly construed, and they can exercise no power except such as the Statute expressly confers. For example, if the Statute authorizes them to compel the adjacent lotowner to grade and pave or plank a walk, but does not authorize them to thereafter compel him to repair or keep it in repair, the power as against the lotowner is exhausted when they have compelled him to grade and pave or plank, and it will thereafter be the duty of the town to keep it in repair.

As is well said in the work on Roads and Streets, from which we have heretofore quoted: "The right to levy a special assessment is purely statutory and in derogation of common right; whereas, making public improvements demanded by the public good and to be paid for out of the public treasury is the exercise of a corporate function that may well be implied from the general words of the Act of Incorporation." Elliott, Roads and Streets, 343.

Under the Statute above referred to, with reference to sidewalks, nothing is necessary or preliminary to action by the board but their opinion that public convenience requires it. They are unrestricted in determining the grade, the material of which it shall be constructed or its width. While a petition is necessary to authorize them to grade and pave or gravel or macadamize a street, so as to charge the cost of the improvement on the abutter, the board is unrestricted in determining the grade, the width to which it shall be improved, and in otherwise adopting specifications for the work. In this case the board had determined that public convenience required the grading and paving of the walk. They had required that it be graded to the width of eight feet, and that four feet of the walk thus graded should be paved. If they had decided that public convenience only required the grading of four feet instead of eight, there would have been no ground for interference by the courts. That was a matter which the Legislature has left solely to their discretion, and we think that when they have once decided that public convenience requires the grading and paving of eight feet and it has been done accordingly, they are not thereby precluded from afterwards deciding that the walk is wider than the public needs require and causing it to be narrowed to meet their changed views.

In the case at bar, the sidewalk had been graded to the width of eight feet in obedience to the order of the board, and four feet of the graded space had been paved. What part of the graded space was covered by the paving does not appear from the finding. Whether in the outer, the inner or the central part the court does not say. It is, however, not material. The land in question formed a part of Branson Street, and the board of trustees had the same power to determine the width of the sidewalk at that point that they had to determine the width of any other sidewalk on any other street, and in the absence of any finding showing such abuse of the discretion with which the law has clothed them as would work great and irreparable injury to appellees, they should not have been enjoined. If the effect of the work would be to cut off or destroy appellee's right of ingress or egress, they would doubtless be entitled to enjoin the board from doing it, but no such case is presented.

The record presents another question, which is, we think, fatal to appellee's contention. To entitle them to an injunction it was necessary for them to plead and prove facts showing that the injunction was necessary to prevent the infliction of great and irreparable injury. The complaint does contain averments which we think are probably sufficient, but no fact is found by the court covering this averment. The court simply finds that the construction of the work as proposed would involve the taking up and removal of a strip of the sidewalk "six inches wide at the north end and regularly increasing in width to thirty inches wide at the south end thereof," and that "to take up and remove the part of said walk as proposed will leave but five and one half feet of walk in front of the south end of said hotel for a sidewalk, and seven and one half feet at the north end." What effect, if any, this will have upon the hotel is not shown. The walk remaining may be of ample width. The finding indicates nothing to the contrary. Only four feet in width of the walk was paved. The remaining portion was probably left to be sodded for ornament. It may be that the paved portion will all remain, and only the æsthetic sense be offended by the removal of a portion of the ornamental part of the walk. Access to the premises may be rendered easier instead of more difficult. Upon the facts found it certainly cannot be stated as a legal proposition that the walk thus left will not be sufficient, or that the proposed action of the board will work irreparable injury to appellees. The facts found were insufficient to entitle appellees to relief by injunction.

Judgment reversed, with instructions to the court below to restate its conclusions of law in accordance with this opinion and to render judgment accordingly.

Jacob N. HAUCH, *Appt.*,

v.

William I. RIPLEY.

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

The statutory lien of an agister for feed

NOTE.—As to liens on animals for the cost of their keeping, see *note* to Fishell v. Morris (Conn.) 8 L. R. A. 82.

See also 20 L. R. A. 719.

and care of animals is inferior to a prior chattel mortgage of them duly recorded.

(December 16, 1890.)

APPEAL by defendant from a judgment of the General Term of the Superior Court for Marion County affirming a judgment of the Trial Term in favor of plaintiff in an action brought to recover damages for the alleged wrongful conversion of certain horses. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Ayres, Brown & Harvey** for appellant.

Mr. **Harmon J. Everett,** for appellee:

A mortgagor in possession has no power to create by contract a lien that shall have priority to a duly recorded mortgage.

Jones, Chat. Mortg. § 472.

A mechanics' lien would not have precedence over a duly recorded mortgage.

Globe Works v. *Wright*, 106 Mass. 207.

Notice of sale by the agister must be to the owner if known and the sale is void without it.

Jordan v. *Shireman*, 28 Ind. 136.

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

The complaint contains two paragraphs, but, as the judgment rests upon the first, we need not notice the second. The appellee was the plaintiff in the trial court, and alleges that he was the owner, by virtue of a chattel mortgage which was duly recorded, of two sorrel horses, and that the appellant wrongfully took possession of said horses, disposed of them and converted the proceeds thereof to his own use. The case was put at issue and tried, and a judgment rendered for the appellee. The facts presented by the record, so far as we need refer thereto, are as follows: A Mrs. Ainsworth was the owner of the horses, together with some other property. She executed a chattel mortgage on the property to secure a note executed by her to the appellee for the sum of $500. The mortgage was duly recorded, and by its terms the mortgagor was to retain possession of the property until maturity of the note; and in case of default in payment of the debt at maturity the appellee, as such mortgagee, was entitled to the possession of the property. After the execution of the mortgage the husband of the mortgagor contracted with the appellant, an agister, to feed and care for said horses, and placed them in his possession for that purpose. Afterwards, the appellant not having been paid for services and expenses in keeping and caring for said horses, advertised the same for sale at public auction, and became the purchaser for the amount which he claimed to be due to him, and thereafter he sold and disposed of said horses to other parties. There is some question made as to whether or not there was not a redemption from said sale by virtue of an arrangement made between the husband of Mrs. Ainsworth and the appellant; but in view of the conclusion to which we have arrived, whether there was a redemption or not does not become material. The point is also made that, under the evidence and the issues in the case, it became a question of fact for the jury whether or not the horses were not delivered to the appellant to feed and care for, with the knowledge and consent of the appellee; but, as there is an entire failure of evidence as to any such knowledge or consent, no such question is presented for our consideration. The one single question which the record presents is, Who had the superior lien, the mortgagee or the agister? We have the following Statute in regard to the recording of chattel mortgages: Rev. Stat. § 4913: "No assignment of goods by way of mortgage shall be valid against any other person than the parties thereto, where such goods are not delivered to the mortgagee or assignee and retained by him, unless such assignment or mortgage shall be acknowledged as provided in case of deeds of conveyance and recorded in the recorder's office of the county where the mortgagor resides within ten days after the execution thereof." At common law an agister had no lien. *Grinnell* v. *Cook*, 3 Hill, 485, 38 Am. Dec. 663; *Bissell* v. *Pearce*, 28 N. Y. 252, 13 Am. & Eng. Encyclop. Law, 943, and citations in *notes 2* and *3*.

Nearly all of the States have statutes recognizing the right of livery-stable keepers and agisters to a lien on horses and other animals for their keep; and necessarily the extent and character of the lien depends upon the construction to be given to the statute creating it. Our Statute is as follows: Rev. Stat., § 5292: "The keepers of livery stables and all others engaged in feeding horses, cattle and hogs and other live stock shall have a lien upon such property for the feed and care bestowed by them upon the same; and shall have the same rights and remedies as are provided for those persons heretofore having by law such lien in the Act to which this is supplemental." It is not necessary to call attention to the original Act, as it will throw no light upon the question under consideration. The language employed in the Statute is general in its character. It does not seem to have been the intention of the Legislature to do more than to create a lien in favor of the classes of persons named; and, not having expressed any intention of giving to these persons superiority over other lienholders, we think it is but fair to presume that it was the intention of the Legislature to place them on a common plane with other lienholders, the first in the order of time having superiority. As the agister's lien depends alone upon the Statute it can have no greater force than the Statute gives it; and, as the Legislature have, as we have said, manifested no intention of giving to it superiority over other liens, it can have none. And we may say in this connection that we can imagine no good reason why superiority should exist in favor of an agister over other lienholders. The lien of each rests upon a valuable consideration arising out of contract, express or implied, unless it may be the general lien which the law creates when an execution is in the hands of a ministerial officer, the effect of which, as against an agister's lien, we are not now called upon to consider. The appellee loaned his money in good faith, and took a note and a chattel mortgage to secure the same; he, within the time allowed by law, had his mortgage recorded. The appellant, with notice, for he was bound to take notice, of the appellee's mortgage, under a contract with one not the

owner of the property, but at most her agent, furnished his feed and services, which was but money, whereby the mortgagor became indebted to him, and to secure which indebtedness the law created a lien. Not only was the record of the mortgage notice to the appellant of the appellee's lien, but notice, also, if that were important, as to whom the property belonged. Had the appellant had actual notice of the appellee's mortgage, and, in the face of such notice, had he taken the property to keep, what plausibility would there be in his claim to superiority of lien? What equity would there be in such a claim? None whatever. With the record before him, and constructively it was before him, the notice came with the same force to the appellant as if he had had actual notice, and was as effectual to him as an agister as to other classes of junior lienholders, But, if it were necessary, we might add further that one of the conditions in the appellee's mortgage was that the mortgagor should not remove the pledged property from where it was at the time the mortgage was executed, except by the consent of the mortgagee, and of this the appellant had notice. We concede that there is some conflict of authority as to the construction to be placed upon statutes creating liens in favor of agisters as to whether these liens should have superiority over other specific liens senior thereto. The decisions, however, in some of the cases which seem to be adverse to our conclusion were influenced by special circumstances. See *Vose* v. *Whitney*, 7 Mont. 385; *Smith* v. *Stevens*, 36 Minn. 303. The last case turned upon the express language of the Statute of Minnesota, the Statute expressly providing that the keeping at the request of the legal possessor shall be sufficient to create the lien, the court holding that the mortgagee took his mortgage with a full knowledge that under the law the mortgagor might create an agister's lien upon it superior to his mortgage, and hence was bound thereby. See *Hammond* v. *Danielson*, 126 Mass. 294. But the weight of authority, and, as we think, the better reasoned cases, are in accord with the conclusion to which we have arrived. See *McGhee* v. *Edwards*, 87 Tenn. 506; *Jackson* v. *Kasseall*, 30 Hun, 231; *Bissell* v. *Pearce*, *supra*; *Charles* v. *Neigelsen*, 15 Ill. App. 17; *Sargent* v. *Usher*, 55 N. H. 287; *State Bank* v. *Lowe*, 22 Neb. 68; *Easter* v. *Goyne*, 51 Ark. 222; Jones, Liens, §§ 691–693; Jones, Mortg. § 472.

The lien which exists in favor of one making repairs upon a vessel rests upon different principles than does a statutory lien in favor of an agister, and hence we do not think the authorities cited as to the effect of such liens are in point. In *Easter* v. *Goyne*, *supra*, it is said: "The statute under consideration does not evince the intention to give preference to the statutory lien, and, in the absence of a legislative intent to that effect, the courts have not, unless in exceptional instances, permitted the lien created by the statute to become paramount to a prior recorded mortgage. . . . In accordance with this rule it has been decided by this court that a mechanics' lien is subordinate to a prior recorded mortgage." And so it has been held by this court as to a mechanics' lien. *McCrisaken* v. *Osweiler*, 70 Ind. 131; *Close* v. *Hunt*, 8 Blackf. 254; *Troth* v. *Hunt*, Id. 580.

The case of *Case* v. *Allen*, 21 Kan. 217, being, as we think, against the great weight of authority, and in principle against our own cases, cited above, we cannot give to it the weight that it would otherwise be entitled to receive. We find no error in the record.

Judgment affirmed, with costs.

11 L. R. A.

See also 46 L. R. A. 858.

Thomas N. BRYAN *et al.*, Trustees of the South Street Baptist Church, *Appts.*,
v.
Charles C. WATSON.*

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

A subscription to liquidate an indebtedness upon a church is not void because made on Sunday, under a statute making "common labor" on that day illegal, but excepting work of "charity." Such a subscription is not "common labor" although ordinary contracts would be, and it is moreover a work of "charity."

(January 23, 1891.)

APPEAL by plaintiffs from a judgment of the Superior Court for Marion County in favor of defendant in an action brought to recover a subscription for the liquidation of a church debt. *Reversed.*

The facts sufficiently appear in the opinion.

Mr. **Austin F. Denny** for appellants.

Mr. **S. M. Shepard** for appellee.

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

The appellants are the trustees of the South Street Baptist Church in the City of Indianapolis. This action was brought to enforce a subscription made by the appellant for the benefit of said church society. When the appellee made the subscription here in question he was a member of the said society.

The complaint is in two paragraphs, one counting on a verbal, and the other on a written, subscription. The object of the subscription, as alleged in the complaint, was to liquidate an indebtedness of said church contracted in the erection of a building to be used as a place of worship. At the time the appellee made his subscription other persons also made subscriptions, and upon the faith of the subscription made by the appellee paid the amounts subscribed by them. After the cause was put at issue there was a jury trial, and by direction

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NOTE.—*Contract made on Sunday; legality of.*

A contract agreed to and consummated on a week day is not invalidated by the fact that negotiations leading up to its consummation were had on Sunday. McKinnis v. Estes (Iowa) Oct. 20, 1890.

An act done must be itself a charitable act, to constitute it such an act of charity as is exempt from the Lord's Day Act of Massachusetts. Bucher v. Cheshire R. Co. 125 U. S. 555, 31 L. ed. 795. See *notes* to Parsons v. Lindsay (Kan.) 3 L. R. A. 658; Dugan v. State (Ind.) 9 L. R. A. 321; and cases referred to in *note* to Sullivan v. Maine Cent. R. Co. 8 L. R. A. 427, 82 Me. 196.

of the court a verdict returned for the appellee, and upon the verdict he recovered judgment.

Counsel for the appellant rests his case upon two propositions, which relieves us from considering other questions presented by the record. These two propositions are: (1) that a subscription to aid a religious society, made on Sunday, is valid and binding, and (2) if not valid in the beginning, the taint may be wiped out by ratification on a secular day.

The conclusion to which we have arrived as to the first proposition makes it unnecessary that we consider the second. The subscription rests upon a valuable consideration and may be enforced as an executory contract, unless the transaction of which it is the outgrowth is one which § 2000, Rev. Stat. 1881, denounces. *North Western Conference of Universalists* v. *Myers*, 36 Ind. 375; *Higert* v. *Trustees of Indiana University*, 53 Ind. 326; *Petty* v. *Trustees of Asbury University*, 95 Ind. 278.

Section 2000, *supra*, reads thus: "Whoever, being over fourteen years of age, is found on the first day of the week, commonly called Sunday, rioting, hunting, fishing, quarreling, at common labor or engaged in his usual avocation (works of charity and necessity only excepted) shall be fined in any sum not more than $10 nor less than $1."

In our opinion, this Statute does not condemn the transaction here under consideration, and we rest our conclusion upon two grounds:

First. The transaction to which the subscription relates was not in any sense a work of "common labor," within the meaning of the Statute.

Second. What was done was to aid a work of charity. Our conclusion is not in conflict with decided cases which hold that contracts which relate altogether to the every-day affairs of life fall within the inhibition contained in the Statute as being acts of "common labor." The phrase "common labor" cannot be given an exact and accurate definition; this is impossible in the very nature of things. The most that the courts can do is to determine, as cases arise, whether or not the transaction or act involved in a given case falls within the legislative intention as expressed in the Statute. One thing, however, may be safely assumed, and that is that it was not the legislative intention that the phrase "common labor" should be restricted in its meaning to mere manual labor. The execution of ordinary contracts and the transactions to which they relate may well be regarded as acts of "common labor" within the meaning of the Statute. Such transactions belong to the ordinary business affairs of life and no doubt were as much in the legislative mind when the Statute was enacted as the work of the farmer in his field, of the mechanic in his shop or the common laborer upon a public improvement. But cases of the character of the one under consideration belong to a different class altogether. The purpose or end in view is not financial aid or worldly gain, but to advance the cause of Christianity and to elevate the moral standard of the particular community or locality. *Rapp* v. *Reehling*, 124 Ind. 36, 7 L. R. A. 498.

One who engages in a mere business transaction on Sunday, such as the execution of a conveyance to land, or a promissory note or other contract, violates the Statute in question and is guilty of a misdemeanor and subject to a criminal prosecution, the same as if he had engaged in any other act of common labor; but who ever imagined that persons engaged in church collections, either as solicitors or contributors, on Sunday were under the condemnation of the Statute? If, however, the contention of the appellee is to be adopted, then every collection made on the Sabbath day in connection with religious services is an act of common labor and unlawful. And if collections which are paid as the solicitors pass through the congregation do not fall within the Statute, neither do contributions promised to be paid at a future time, because the circumstances and purposes under and for which they are made are in no wise different. The Statute in question must apply as well to cash collections as those made to be paid in the future: for, as we have already intimated, it is a criminal statute, and recognizes no distinction between executed and executory contracts. If the trustees of a religious society were prosecuted for a violation of the Statute in making collections for the benefit of their society on Sunday, it would be no justification that all persons solicited made cash payments. Unless the appellants were liable to a criminal prosecution for what they did in the way of taking a collection at the time the appellee made his subscription, the subscription does not fall within the inhibition of the Statute as an act of common labor, and we do not think they were guilty of any offense for which they were subject to criminal prosecution.

That the subscription was made in aid of a charitable enterprise we think may also be successfully maintained.

The purpose for which it was taken falls within the definition placed upon the word "charity" by courts of last resort in other States, and of very high standing for legal learning. *Doyle* v. *Lynn & B. R. Co.* 118 Mass. 195; *Allen* v. *Duffie*, 43 Mich. 1; *Dale* v. *Knepp*, 98 Pa. 389.

See also the word "charity" and its definitions in Webster, Worcester and the Century Dictionaries.

The conclusion to which we have come overrules *Catlett* v. *Trustees of M. E. Church*, 62 Ind. 365, which properly enough controlled the rulings of the trial court as to the question we have considered. We do not think that case sound on principle and it is against the great weight of authority. See cases cited last above.

For the error indicated this case must be reversed.

Judgment reversed, with costs.

COLORADO SUPREME COURT.

Andrew MELDRUM
v.
Mary MELDRUM, *Appt.*

(....Colo.....)

*1. **Courts have not undertaken to lay down any specific and definite rules** in regard to fraud by which in all cases they will be controlled in giving relief.

2. **Equitable principles** can be applied to every case of fraud as it occurs, however new it may be in its circumstances.

3. **The relationship of husband and wife** is one of special confidence and trust, requiring the utmost good faith and frankness in their dealings with each other; and where either one is false to the other, and fraudulently or through coercion procures an unjust advantage, chancery may relieve against the transaction.

4. **Where the wife, while harboring a determination to abandon her husband** and dissolve the marital relation, fraudulently procures from him valuable property as a home for the family, and afterwards institutes proceedings for a divorce, equity may restore the title to the husband after a decree of divorce has been granted upon his cross-complaint.

5. **The fact that the husband did not, in such cross-complaint, make claim** for the property so conveyed, will not defeat the subsequent action therefor based upon the fraud, the amount involved being beyond the jurisdiction of the court granting the divorce.

6. **The wife alone can maintain** an action for alimony.

*Head notes by HAYT, J.

(October 17, 1890.)

APPEAL by defendant from a judgment of the District Court for Arapahoe County in favor of plaintiff in an action brought to set aside a conveyance of real estate and to recover possession of the same. *Affirmed.*

Statement by **Hayt, J.:**

Appellee, Andrew Meldrum, was married to appellant, Mary, upon the 3d day of December, 1884, in the County of Delta, in this State. At the time of the marriage appellant was possessed of no estate whatever. Appellee, however, was then possessed of both real and personal property, his total resources amounting to about $50,000. A ranch in Delta County, and an interest in the Guston mine, situate in Ouray County, constituted the bulk of his property. Plaintiff and defendant lived together as husband and wife about fifteen months, during which time plaintiff gave to the defendant a large amount of property and money. The larger of these gifts consisted of a ranch in Delta County, valued at $7,500, certain Denver property, which cost about $12,000, and various gifts of money, the last one being $2,000 in cash. In this action appellee, Andrew Mel-

NOTE.—*Relations of confidence and trust between husband and wife.*

Persons about to marry "do not, like buyer and seller, deal at arms' length, but stand in a confidential relation requiring the exercise of the greatest good faith." Stewart, Mar. and Div. 28, citing *Re* Bierer, 92 Pa. 265; Pierce v. Pierce, 71 N. Y. 154; Daubenspeck v. Biggs, 71 Ind. 252; Russell's App. 75 Pa. 269; Pond v. Skeen, 2 Lea, 126.

As between the parties, any concealment by one party as to the value of his or her property will render a marriage contract relating thereto voidable. Frazer v. Boss, 66 Ind. 1; Tarbell v. Tarbell, 10 Allen, 278; Taylor v. Rickman, 1 Busb. Eq. (N. C.) 273; Woodward v. Woodward, 5 Sneed, 49; Stewart, Mar. and Div. 28.

So, where a wife, being deceived as to the value of her rights, relinquished them for a trifle, the deed was held void. Pierce v. Pierce, *supra.*

So where she separated and got an allowance from her husband, intending to live in adultery. Evans v. Edmonds, 13 C. B. 777; Evans v. Carrington, 2 De G. F. & J. 481, 492.

The contract between husband and wife must be free from fraud or duress (Stewart, Mar. and Div. 161, citing Evans v. Carrington and Evans v. Edmonds, *supra;* Robertson v. Robertson, 25 Iowa, 350, 351, 352, 354; Randall v. Randall, 37 Mich. 563, 571; Garver v. Miller, 16 Ohio St. 527, 531; Switzer v. Switzer, 26 Gratt. 574, 582. But see Kendall v. Webster, 1 Hurlst. & C. 440, 448, 450), the character of the relation and the duty of perfect frankness being considered. See *Re* Bierer and Garver v. Miller, *supra.*

Equitable relief from fraud.

Equity alone can give a remedy on a contract made between a husband and wife. Wood v. Chetwood, 12 Cent. Rep. 248, 44 N. J. Eq. 64, citing Woodruff v. Clark, 42 N. J. L. 198; Gould v. Gould, 35 N. J. Eq. 37, 562; Rusling v. Rusling, 47 N. J. L. 1; Bank of Rahway v. Brewster, 7 Cent. Rep. 482, 49 N. J. L. 231.

A strong instinctive passion for property often leads a husband or wife into schemes for the absorption and conversion of the other's possessions; and equity is watchful to defeat all such wrongful appropriations. It requires that the donor's intention to devest himself or herself of the property shall be proven by the donee. Lane v. Lane, 76 Me. 525; Carleton v. Lovejoy, 54 Me. 445; Wing v. Merchant, 57 Me. 383; Jennings v. Davis, 31 Conn. 134; Mews v. Mews, 15 Beav. 529; Lloyd v. Pughe, L. R. 8 Ch. 88; *Re* Breton's Estate, L. R. 17 Ch. Div. 416; 2 Story, Eq. Jur. § 1375.

A wife will not be permitted to retain the title to real estate conveyed to her at her instance by her husband as a provision for her support in case of his death, where, after receiving such conveyance, she, without sufficient cause, abandons him. Dickerson v. Dickerson, 24 Neb. 530.

Relief in equity accorded on equitable principles.

Equitable principles will accord relief from fraud where any confidential relations exist between the parties, and there has been confidence reposed by one party in the other, which confidence was betrayed. Fisher v. Bishop, 10 Cent. Rep. 707, 108 N. Y. 25; Story, Eq. Jur. § 311.

In such case, if no proof is adduced establishing the perfect fairness, adequacy and equity of the transaction between the parties, courts of equity treat the case as one of constructive fraud. Weller v. Weller, 112 N. Y. 655, affirming 44 Hun, 172; Cowee v. Cornell, 75 N. Y. 99.

Equity has jurisdiction of fraud, misrepresentation and concealment; and it does not depend on discovery. Jones v. Bolles, 76 U. S. 9 Wall. 364, 19 L. ed. 734; Mann v. Appel, 31 Fed. Rep. 378.

See also 36 L. R. A. 442.

drum, after a final decree of divorce from appellant, Mary, seeks to recover from her the real property which he had voluntarily conveyed or caused to be conveyed to her as gifts during the existence of the marital relation, and while they were living together as husband and wife. The grounds of the action, as set forth in the complaint, are undue influence, misrepresentation, deceit and fraud on the part of appellant, in procuring such property to be conveyed to her. Appellant in her answer "admits that on or about the 3d day of October, 1885, plaintiff, moved by the solicitations of the said defendant thereunto, and by defendant's professions and protestations of great affection and regard for plaintiff, and in full confidence in the truth of said professions, and upon consideration solely of plaintiff's affection for the said defendant, and of plaintiff's confidence, belief and anticipations that defendant would continue to reside and cohabit with plaintiff during their joint lives, and would bear children to plaintiff, and in all things continue to observe and perform her wifely duties, by deed bearing date the day and year last aforesaid, conveyed to defendant the land situated in Delta County aforesaid, with the appurtenances; that the said land, with the improvements thereon, were and are of the value mentioned in said complaint; and that afterwards, and moved by the same considerations (but denies that the same were false professions of affection and regard), the plaintiff gave to defendant the sum of two thousand dollars in money, and that on or about the 1st day of February, 1886, plaintiff, with other moneys to him belonging, purchased and procured to be conveyed to said defendant certain premises situated in the City of Denver, as described in plaintiff's complaint, and caused the same to be furnished as alleged." And it is further admitted in this answer that "the defendant did urge and solicit plaintiff to donate to her the moneys, goods, lands, furniture, etc., mentioned in the plaintiff's complaint." All the fraudulent conduct charged against appellant is denied. At the trial, the district court made certain findings of fact. By the second of these it is found that, at the time of the marriage, appellant was not in love with appellee, but that she married him for a home. By the fourth that, at the time of the conveyance from the plaintiff to the defendant of the property in Delta County, the determination by defendant to abandon the plaintiff had not been formed, and, while plaintiff at that time was repugnant to her, nevertheless she was willing to continue to live with him as his wife. By the sixth it was determined that, after the said conveyance of the Delta County property, and before the conveyance of the Denver property, in February, 1886, the defendant, moved by her repugnance for the plaintiff, determined to abandon him, and cease her wifely relations to him; and she also determined that, before said abandonment occurred, she would, so far as her opportunities might permit, secure from plaintiff, as gifts, all the property she could obtain from him. By the seventh that she did not, before the conveyance of the Denver property, inform the plaintiff of her secretly formed purpose to abandon him; on the contrary, she permitted him to believe that she loved him;

If there be any one ground upon which a court of equity affords relief with more unvarying uniformity than on any other, it is on allegation of fraud, whether proven or admitted. Atkins v. Dick, 39 U. S. 14 Pet. 114, 10 L. ed. 378.

Fraud is one of the grounds upon which a court of equity will interfere to prevent a wrong, although there may be some legal remedy provided. Catron v. Board of Comrs. (N. M.) Feb. 1889; Hannewinkle v. Georgetown, 82 U. S. 15 Wall. 548, 21 L. ed. 231.

Equitable rights.

The jurisdiction of chancery has been so extended as to grant relief to prevent the deprivation of rights connected with real estate, possibly upon the ground that such injuries are irreparable, and cannot be fully compensated for by damages recoverable in an action at law. Swan v. Burlington, C. R. & N. R. Co. 72 Iowa, 650.

Where no remedy exists elsewhere to enforce a right, this court will furnish such a remedy whenever it is necessary to prevent a total failure of justice. Cobine v. St. John, 12 How. Pr. 339; Wheeler v. Van Kuren, 1 Barb. Ch. 490, 5 N. Y. Ch. L. ed. 463.

Equity will look beyond the writing, and grant relief from the effects of a deed or contract if founded in mistake or fraud. Schwass v. Hershey, 125 Ill. 653.

In such cases resort may be had to parol evidence, but the proof should be clear and satisfactory. 1 Story, Eq. Jur. 153, 157; Gillespie v. Moon, 2 Johns. Ch. 585, 1 N. Y. Ch. L. ed. 500; Hunter v. Bilyeu, 30 Ill. 228; Miner v. Hess, 47 Ill. 170; Allen v. Webb, 64 Ill. 342; Sapp v. Phelps, 92 Ill. 588.

Where the principles of law by which the ordinary courts are guided give a right, but the powers of those courts are not sufficient to afford a complete remedy, or their modes of proceeding are inadequate to the purpose, or where they give no right, but, upon the principles of universal justice, the interference of the judicial power is necessary to prevent a wrong, and the positive law is silent, or to provide for the safety of property in dispute pending a litigation, and preserve it from being dissipated or destroyed, by those to whose care it is by law intrusted, or by persons having immediate but partial interests, chancery jurisdiction obtains. United States v. Parrott, 1 McAll. 296.

That equitable principles govern equitable rights, see *note* to Miller v. Cook (Ill.) 10 L. R. A. 293.

Cancellation of written instrument for fraud.

An instrument will be ordered canceled and delivered up, whether the void character of the instrument appears upon its face or otherwise. Hamilton v. Cummings, 1 Johns. Ch. 517, 1 N. Y. Ch. L. ed. 229; Jones v. Perry, 10 Yerg. 59, 30 Am. Dec. 444; Downing v. Wherrin, 19 N. H. 92, 49 Am. Dec. 146; Field v. Holbrook, 14 How. Pr. 106; Porter v. Jones, 6 Coldw. 318; Anderson v. Talbot, 1 Heisk. 410; Mobile & G. R. Co. v. Peebles, 47 Ala. 329; Almony v. Hicks, 3 Head, 42; Briggs v. French, 1 Sumn. 506.

This doctrine met with much contrariety of opinion, on the question of general jurisdiction, where the instrument is void at law upon its face. Peirsoll v. Elliott, 31 U. S. 6 Pet. 95, 8 L. ed. 332; Briggs v. French, *supra*.

The cases may, perhaps, be reconciled on the general principle that the exercise of the power is to be regulated by a sound discretion, as the circumstances of the individual case may dictate, and the resort to equity to be sustained either because the instrument is liable to abuse from its negotiable nature, or because the defense, not arising on its face, may be difficult or uncertain at law, or from some other circumstance peculiar to the case, and rendering a resort here highly proper, and clear of

See also 25 L. R. A. 514.

and he had a right to believe, judging from her manner and demeanor, that she loved him, and would continue to live with him as became a dutiful and loving wife. By the eighth, that the conveyance of the Denver property was caused to be made and delivered to her by the plaintiff, moved by his love and affection for defendant; that, had he known of her secretly formed intention to abandon him, he would not have caused the conveyance to be made and delivered to her. By the ninth, that shortly after the said last-mentioned conveyance was made, defendant upon a slight provocation, but not at all sufficient, carried her intention of abandonment into execution, and she has not since lived with plaintiff as his wife.

Exhibits B and C, referred to in the opinion, are as follows:

"*Exhibit B.*

"Denver, Colo., March 1st, 1886.

"Andy: I am going to write a letter which may seem very hard-hearted in the writer, but I must tell you my feelings. Andy, you know that I do not love you as I should, and that I do not treat you right, and I know that I never can. Now, don't you think it is best to give me a divorce, as long as I want one? If you promise to give me one, I will not sell anything you have given me. If, on the other side, you do not, I will sell the house and go away. I have thought the matter over carefully, and have come to the conclusion that we had better part. When you answer this letter, tell me that you will give me a divorce, and then I will not sell the house. If you do not give me one, I shall sell the house, as I have a chance, and go away.

"Polly.

"P. S. If you give me a divorce, in three months after, if you care for me, and I care for you, I will marry you again. I do not care for anyone any more than I do for you. The lawyers said that no one need know anything about it unless you wished it."

"*Exhibit C.*

"Denver, Colo., March 1st, '86.

"Andy: I wrote you a letter about three hours ago, but since then my lawyer has called and advised me what to do. He said that the easiest way to do was for you to come here and say, in the presence of Richard, or anyone, that you are going to leave the State for good, and bid me good-by. Now, Andy, that is a very easy way to get a divorce, and will not cost much; but, if you do not do that, he will do another way, which will cost you all the the money you have, and all the money I have, and besides that it will give us both a bad name. Now, I do not want that, but if you do not do what I ask you to do in the commencement of this letter, I shall be compelled to do that; but if you do come, I will not have to sell my house, and I will give you the house and ranch in Delta; and, after we are divorced, if you care for me, and I care for you, we will marry again. Now, Andy, the best thing for you to do is to come to Denver right away, and say those few words. Of course you do not need to leave the State; only tell someone that

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all suspicion of any design to promote expense and litigation. Smith v. Smith, 30 N. J. Eq. 567; Home Ins. Co. v. Stanchfield, 1 Dill. 433; Resch v. Senn, 31 Wis. 141; Connecticut Mut. L. Ins. Co. v. Home Mut. Ins. Co. 17 Blatchf. 145. See, however, Pillow v. Wade, 31 Ark. 683; Stewart's App. 78 Pa. 97, where it is said the best rule is in Martin v. Graves, 5 Allen, 661; Merritt v. Lyon, 16 Wend. 418.

The rule was at last denied and it is now well established that equity will not interpose to decree the cancellation of an instrument the invalidity of which appears upon its face. Venice v. Woodruff, 62 N. Y. 466, 29 How. Pr. 339; Story, Eq. Jur. § 700 *a*.

Some special ground for equitable relief must be shown; the mere fact that the instrument ought not to be enforced is not sufficient, standing alone, to justify a resort to equity. Venice v. Woodruff, *supra;* Grand Chute v. Winegar, 82 U. S. 15 Wall. 374, 21 L. ed. 174; Minturn v. Farmers L. & T. Co. 3 N. Y. 498; Perrine v. Striker, 7 Paige, 598, 4 N. Y. Ch. L. ed. 203; Morse v. Hovey, 9 Paige, 197, 4 N. Y. Ch. L. ed. 665; Field v. Holbrook, 6 Duer, 597; Allerton v. Belden, 49 N. Y. 373; Reed v. Bank of Newburgh, 1 Paige, 215, 3 N. Y. Ch. L. ed. 622.

A deed may be set aside, although the court did not find in terms either false representations, fraudulent concealment or a fraudulent intent on the part of the defendants, or that the deed was without consideration. Weller v. Weller, 112 N. Y. 635, affirming 44 Hun, 172.

Where the presumption was against the transaction, the burden rested on the party claiming under it to show that it was fair, by evidence in addition to that derived from the execution of the instrument conferring the gift. *Ibid.*, following Bergen v. Udall, 31 Barb. 9; Sears v. Shafer, 1 Barb. 408.

Constructive fraud.

Where the donor and donee were so situated toward each other that undue influence might have been exercised, the question is not merely, What was the intention of the donor? but how that intention was produced. Huguenin v. Baseley, 14 Ves. Jr. 273; Gibson v. Jeyes, 6 Ves. Jr. 266.

When the relation between the parties contracting appears to be such as renders it probable that an unfair advantage has been taken by either, the transaction is presumed void. Green v. Roworth, 113 N. Y. 470; *Re* Smith, 95 N. Y. 516; Story, Eq. Jur. § 238.

When the confidential relation of the parties is shown, then there is cast upon the party claiming the benefit or advantage the burden of relieving himself from the suspicion thus engendered, and of showing, either by direct proof or by circumstances, that the transaction was free from fraud or undue influence, and that the other party acted without restraint and under no coercion, or any pressure, direct or indirect, of the party benefited. This rule does not proceed upon a presumption of the invalidity of the particular transaction, without proof. The proof is made in the first instance when the relation and the personal intervention of the party claiming the benefit are shown. *Re* Smith, *supra.*

Concurrent jurisdiction.

The equity jurisdiction will be exercised notwithstanding a court of law has concurrent jurisdiction to declare the instrument void. Maise v. Garner, 1 Mart. & Yerg. 383.

Whether exclusive jurisdiction in equity will be exercised depends upon the question whether the legal remedies open to the party seeking relief are adequate to promote the ends of justice and afford complete relief. Bushnell v. Hartford, 4 Johns. Ch. 301, 1 N. Y. Ch. L. ed. 848; Dale v. Roosevelt, 5 Johns. Ch. 174, 1 N. Y. Ch. L. ed. 1047; Glastonbury v. McDonald, 44 Vt. 453; Bissell v. Beckwith, 33 Conn. 357;

you are. If you come it will not cost more than one hundred dollars ($100), and any other way it will cost all we both have, and I am going to get one if it costs all I have. The lawyer says I can get one a good many ways, but this is the easiest way, and that no one will know anything about it no more than if we were still man and wife. Neither one of us will have to go to court. You have only to say that to Richard, and then go back to Delta. This is very easy, and, as long as I am determined to have one, it is the best to do it in the quietest way, and the cheapest way, also. If you do not come right away, I will enter suit the other way that I told you about.

"Polly.

"[Written on the margin]: Do not say anything about this to pa, or anyone else, and then no one will know anything about it. If you give me a divorce, I will promise you that I will marry no one else unless it is you, if you want me, and that I will not sell the house."

By the decree of the district court the title to the property in Delta County, which was conveyed to appellant during the first year of their married life, and before the determination to abandon her husband was shown to have been formed, was confirmed in her, but the title to the property conveyed to her shortly prior to their separation, and after she had determined to abandon him, was restored to the husband.

Messrs. **Patterson & Thomas** for appellant.

Messrs. **Wells, McNeal & Taylor,** for appellee:

Equity will grant relief against frauds committed by the husband or wife upon the other equally as between other persons.

Stone v. *Wood,* 85 Ill. 604; *Darlington's App.* 86 Pa. 512; *Willetts* v. *Willetts,* 104 Ill. 122; Cooley, Torts, 513; Stewart, Husband and Wife, § 110; Perry, Tr. §§ 210, 170.

The rule which requires plaintiff to litigate all claims which may or ought to be presented at the same time is not applicable to the defendant.

Covington & C. Bridge Co. v. *Sargent,* 27 Ohio St. 233.

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

It standing admitted by the pleadings that appellant did procure a large amount of property from her husband as the result of her solicitation, our review will first be directed to the evidence of her fraud in so doing. It is in testimony that, to at least four people, appellant expressed her intention to get away with appellee's money. The witness William Robinson testified that she told him that she did not want to live where she was; that she was going to marry Meldrum, and get some money out of him. A few months after the marriage, appellant planned a trip to California with her mother, and, just prior to starting, the same witness testified to having overheard a conversation between appellant and her mother in which the mother said: "Polly, you will have to be careful about Andy, how you talk to him, and behave nicely to him, and get that $10,000 out of him,"—to which appellant replied: "O, you leave it to me. I know how to work him. I'll get all I can out of him, you bet." The same witness, further testifying, said: "On another occasion, I met her [appellant] on the street in Delta, and she told me she was going to get $10,000 from Andy, and as soon as she got it she was going to skip."

Sherman v. Fitch, 98 Mass. 59; McHenry v. Hazard, 45 N. Y. 580; 1 Pom. Eq. Jur. 225, 330.

Courts of equity have the right to annul and set aside contracts or instruments obtained by fraud, to correct mistakes made in them and to require their cancellation. United States v. American Bell Teleph. Co. 128 U. S. 315, 32 L. ed. 450.

Jurisdiction; where remedy at law exists.

Where the remedy at law is plain, complete and adequate equity will not assume jurisdiction. Keigwin v. Drainage Comrs. of Hamilton, 2 West. Rep. 910, 115 Ill. 347; Balfe v. Lammers, 7 West. Rep. 548, 109 Ind. 347; Brown v. Abbott (N. J.) 1 Cent. Rep. 672; Moores v. Townshend, 3 Cent. Rep. 441, 102 N. Y. 387; Gore v. Kramer, 4 West. Rep. 146, 117 Ill. 176; Buzard v. Houston, 119 U. S. 347, 30 L. ed. 451; Pierpont v. Fowle, 2 Woodb. & M. 29; Shepard v. Sanford, 3 Barb. Ch. 127, 5 N. Y. Ch. L. ed. 844; Oakville Co. v. Double Pointed Tack Co. 7 Cent. Rep. 720, 105 N. Y. 658; Quinn's App. (Pa.) 10 Cent. Rep. 350; Travis v. Lowry (Pa.) 7 Cent. Rep. 553; Newman v. Westcott, 29 Fed. Rep. 49; Genet v. Howland, 45 Barb. 568, 30 How. Pr. 368; Morse v. Elmendorf, 11 Paige, 277, 5 N. Y. Ch. L. ed. 135; Bradley v. Bosley, 1 Barb. Ch. 125, 5 N. Y. Ch. L. ed. 324.

The remedy at law must be plain and adequate. Denny v. Denny, 12 West. Rep. 202, 113 Ind. 22; McMillen v. Mason, 71 Wis. 405; Watson v. Sutherland, 72 U. S. 5 Wall. 74, 18 L. ed. 580; Bishop v. Moorman, 98 Ind. 1.

Jurisdiction depends not so much on the absence of a common-law remedy as upon its inadequacy (Harper's App. 1 Cent. Rep. 585, 109 Pa. 9), unless for the purpose of preventing serious and irreparable injury. Thomas v. Musical Mut. Prot. Union, 8 L. R. A. 175, and *note,* 121 N. Y. 45; McHenry v. Jewett, 90 N. Y. 58; People v. Canal Board, 55 N. Y. 394.

But the mere allegation that irreparable damage will ensue is not sufficient, unless facts are stated which will satisfy the court that the apprehension is well founded. Blaine v. Brady, 1 Cent. Rep. 489, 64 Md. 373, citing Amelung v. Seekamp, 9 Gill & J. 468.

The adequate remedy at law, which is the test of the equitable jurisdiction of the courts of the United States, is that which existed when the Judiciary Act of 1789 was adopted, unless subsequently changed by Congress. McConihay v. Wright, 121 U. S. 201, 30 L. ed. 932.

The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy in equity. Kilbourn v. Sunderland, 130 U. S. 505, 32 L. ed. 1005.

In order to defeat and oust equity jurisdiction, where "special circumstances" and other grounds for its interposition exist, the remedy at law must be in all respects as satisfactory and as ample as the relief furnished by a court of equity. Mann v. Appel, 31 Fed. Rep. 378, citing 1 Pom. Eq. Jur. 297; Boyce v. Grundy, 28 U. S. 3 Pet. 210, 7 L. ed. 655.

Jurisdiction in a case of fraud and of trust being ancient and original in equity, it is not ousted by the mere fact that a court of law can afford an apparently adequate relief. Bank of Commerce v. Chambers, 96 Mo. 452.

A doubtful or partial remedy at law does not exclude the injured party from relief in equity.

Both Frank and Sarah Hepworth testify to appellant's repeated declarations, made just prior to her marriage with appellee, of her love for one Charlie Mitchell, a notorious character, but of her determination to marry Meldrum, for whom she had no affection, in order to get away with his money.

The witness Miss Nettie Goldsmith testifies that in the latter part of October, or the 1st of November, appellant paid her a visit at her home in Leadville, and that while there she talked quite freely in reference to her hatred of her husband, and her love for Mitchell; that she was going to leave appellee and not live with him any more. Witness also testifies to a conversation between appellant and her mother, in which Mrs. Meldrum said: "Mamma, I can't stand it to live with him [appellee]. I can't wait until February." And her mother said: "Try to love him, and wait until the 1st of February, and then he will get his money. Then you can go to Europe or New York, and you can stay away a year, and send him a divorce, and have a good cry, and that will be the last of it." The witness, further testifying, details a conversation that she swears she had with appellant a little later in the year at Delta: "I was coming back from town one day, and met Polly. She said she was going to leave Andy, and not going to stay with him any more. Said she was going to Mrs. Haas' house, and going to Leadville next day. I talked to her awhile, but she would not come back. I went back home. Polly came back that night, and she and Andy made up again. He was going up to the mine the next day, and we walked out to the bars with him. Polly took hold of my arm. She said: 'He has gone up to the mine, and after he gets the money I wish to God he would fall down and break his neck.' She says: 'Nettie, I just hate him. I just shiver when he touches me. If he would bring his money home, honest to God I'd rob him and skip.'"

In February, A. D. 1886, appellee sold his interest in the Guston mine. Soon after this the parties came to Denver, appellant's mother, Mrs. Bond, accompanying her daughter to this city. It was at this time that the home in Denver was purchased. The contract of purchase was made on the 13th day of February, but the deed was not delivered until a few days later. In this deed, Mrs. Meldrum was made the grantee. In reference to this, appellee testifies that "she wanted to get it in her name, and she asked me if I would not deed it to her. I says: 'You have got one place now, you better let me have this one;' and she said she would give me back the place in Delta, and she wanted this one, and I joked with her, and she thought I was not going to give it to her, and she started to cry about it in the room. Her mother was present, and her mother says, says she: 'What are you crying about, Polly?' 'Well, Andy don't want to deed me that house,' she says, and her mother says: 'Well, he don't say he won't deed it to you;' yet she cried about it, and wept so hard over it, I said, 'All right, I will give it to you;' and I went up to Mr. Berkey's, and told him to make out the deed in her name." Mrs. Meldrum's version of the transaction is as follows: "We thought we would like to live in Denver; such a beautiful place; and he asked me how I would like it, and I told him I would like it very much. He wanted to know if he should try and buy a home, or should he buy a home would I like it, should I be contented; and I told him 'Yes.'

Neese v. Ætna Ins. Co. 32 W. Va. 283, citing Spotswood v. Higgenbotham, 6 Munf. 313; Swann v. Summers, 19 W. Va. 115.

The jurisdiction in equity attaches, unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy in equity. Kilbourn v. Sunderland, 130 U. S. 505, 32 L. ed. 1005.

The remedy at law must be as complete and beneficial as the latter. Hodges v. Kowing, 7 L. R. A. 87, and *note*, 58 Conn. 12.

Equity can enforce a legal right only when it can give more complete and effectual relief in kind or in degree on the equity side than on the law side of the court. Buzard v. Houston, 119 U. S. 347, 30 L. ed. 451.

The fact that there is a remedy at law is not alone sufficient to oust the jurisdiction of equity, but there must also be a remedy which is adequate and reasonably convenient. McMullin's App. 131 Pa. 370.

A bill may be sustained solely upon the ground that it is the most convenient remedy. Brush Electric Co's App. 6 Cent. Rep. 134, 114 Pa. 574, citing Kirkpatrick v. M'Donald, 11 Pa. 387.

Equity jurisdiction does not depend upon a want of common-law remedy; the exercise of chancery powers must often depend upon the sound discretion of the court. Brush Electric Co's App. *supra*, citing Bierbower's App. 107 Pa. 14.

A suit in equity by a woman to set aside a deed made by her former husband pending a divorce suit in which a decree was made giving her the land will not be defeated on the ground that she has a complete remedy at law. Powell v. Campbell, 2 L. R. A. 615, and *note*, 20 Nev. 232.

Equity may grant relief even if there be an adequate remedy at law, if the defendant does not plead remedy at law. Blair v. Chicago & A. R. Co. 5 West. Rep. 449, 89 Mo. 334, citing Underhill v. Van-Cortlandt, 2 Johns. Ch. 369, 1 N. Y. Ch. L. ed. 411; Livingston v. Livingston, 4 Johns. Ch. 290, 1 N. Y. Ch. L. ed. 385; Burroughs v. McNeill, 2 Dev. & B. Eq. 300; Stockley v. Rowley, 2 Head, 493.

But not unless jurisdiction appears in the bill. Pavonia Land Asso. v. Feenfer (N. J.) 5 Cent. Rep. 640.

When a common-law remedy is inadequate to do complete justice between the parties, the exercise of equity may be invoked. Brush Electric Co's App. 6 Cent. Rep. 134, 114 Pa. 574.

Where no legal remedy is provided for a civil wrong, equity will take jurisdiction. Britton v. Royal Arcanum Supreme Council, 46 N. J. Eq. 102.

When the principles of law by which the ordinary courts are guided give rights, but the powers of those courts are not sufficient to afford a complete remedy, or their modes of proceeding are inadequate, it is generally admitted that a court of equity may act. Whitlock v. Duffield, 2 Edw. Ch. 366, 6 N. Y. Ch. L. ed. 432; Wallace v. Harris, 32 Mich. 392; Thayer v. Lane, Harr. Ch. (Mich.) 247; Wheeler v. Clinton Canal Bank, Id. 449; American Ins. Co. v. Fisk, 1 Paige, 90, 2 N. Y. Ch. L. ed. 572; Quick v. Stuyvesant, 2 Paige, 84, 2 N. Y. Ch. L. ed. 823; Mallory v. Vanderheyden, 3 Barb. Ch. 9, 5 N. Y. Ch. L. ed. 795; Pratt v. Northam, 5 Mason, 95; Pierpont v. Fowle, 2 Woodb. & M. 23; Weymouth v. Boyer, 1 Ves. Jr. 416; Baxter v. Knollys, 1 Ves. Sr. 494; Truman v. Lore, 14 Ohio St. 144; Clary v. Clary, 2 Ired. L. 85; Hartshorn v. Day, 60 U. S. 19 How. 223, 15 L. ed. 612; Story Eq. Jur. § 650.

We went around and looked at several nice places, and then we decided on this one up here that we have now on Grand Avenue, and he asked me how I would like it for that $10,000 that he promised me if he should put the money into the home, and give it to me in my name. Would it make any difference to me? Would I rather have the money. I told him it made no difference; so he bought the home. I didn't know the deeds were put in my name till after he came back. He came home, and called me to one side, and I went to the window, and he said: 'Polly, I have bought the house, and I have had the deeds put in your name,' and he said, 'and recorded. Now they are in the recorder's office.'"

In another part of her testimony, Mrs. Meldrum admits that, in all their conversations in reference to the purchase of a home, a home for the family was meant. About the time they became settled in the house, and the day after the carpets were laid, and the last of the furniture put in place, appellant, making a pretext of some slight disagreement with appellee about the use of a horse and buggy which he had purchased for her recreation and amusement, drove appellee out of the house, and notified him of her intention to apply for a divorce. After this episode, appellee, at the request of appellant and her mother, departed for Delta. The testimony leaves no doubt that at this time appellee still clung to the hope that his wife would not attempt to carry out her foolish threat of obtaining a divorce, but in this he was soon undeceived by receiving the two communications from his wife, marked "Exhibits B and C." By those letters it appears that, despite all her efforts upon the witness stand to show a valid excuse for applying for a divorce, there did not exist in fact the remotest legal cause in her behalf for a dissolution of the marital vows. One cannot read the evidence without being impressed with the conviction that appellant had long before determined to force a separation from her husband, first receiving from him the largest portion of his estate that he could, by threats, entreaty and dissimulation, be induced to make over to her. And, in carrying out such determination, she seems to have secured the assistance of a lawyer who had as little regard for the principles that should actuate members of the profession as the conduct of Mrs. Meldrum shows she entertained for her marital vows. It is a matter of justice to state that none of the attorneys of record in this suit were at that time employed by Mrs. Meldrum. The plot outlined in the letters of March 1 was promptly followed up by the appellant commencing proceedings in the county court for a divorce. In this action she caused a summons to be issued for her husband; and, to procure an order for service upon him by publication, she falsely swore that he had departed from the State with no intention of returning. Appellee, finding that it was useless to hope for a reconciliation with his wife, filed an answer denying the charges contained in appellant's petition, and a cross-complaint, upon which judgment was afterwards entered in his favor, dissolving the bonds of matrimony with appellant.

We cannot review all the testimony set out in the 346 pages of the printed abstract in this case, but have endeavored to quote sufficient therefrom to demonstrate that the findings of the trial court find ample support in the evidence. There can be no doubt, in view of the evidence, that the court was justified in concluding that the conveyance of this property was procured by appellant suppressing from appellee her aversion and determination to abandon him, while simulating an affection that did not exist. Appellant admits upon the stand that the property was conveyed to her as a home for the family. That it was a fraud to procure the conveyance, under the circumstances, at a time when she had determined that she would not live with him, cannot be doubted. Whether it is such a fraud as courts of equity can lay hold of, and relieve the injured party from its result, is a more difficult question. The case is an novel one, but we think it can be determined upon well-settled principles of law. That no parallel case can be found need not necessarily be taken as conclusive against the decree of the trial court.

Courts have never yet undertaken to lay down any specific and definite rules in regard to fraud, by which, in all cases, they will be controlled in giving relief. As said by *Lord* Hardwicke: "Fraud is infinite, and, were courts of equity once to lay down rules, how far they would go, and no further, in extending the relief against it, or to define strictly the species of evidence of it, the jurisdiction would be cramped and perpetually eluded by new schemes which the fertility of man's invention would contrive." Parkes, Hist. Ch. 508.

In commenting upon this language of *Lord* Hardwicke, Mr. Perry, in his excellent work upon Trusts, says, at page 197: "Although courts of equity have not made general definitions stating what is fraud and what is not, they have not hesitated to lay down broad and comprehensive principles of remedial justice, and to apply these principles in favor of innocent parties suffering from the fraud of others. These principles, though firm and inflexible, are yet so plastic that they can be applied to every case of fraud as it occurs, however new it may be in its circumstances. In investigating allegations of fraud, courts of equity disregard mere technicalities and artificial rules, and look only at the general characteristics of the case, and go at once to its essential morality and merit."

The dominant influence which a woman may acquire over a man, even before marriage, is well illustrated in the case of *Rockafellow* v. *Newcomb*, 57 Ill. 186. Rockafellow, while engaged to Miss Newcomb, conveyed to her real estate valued at about $5,000, and she conveyed to him property worth $700. The transaction, was, however, found not to be an exchange of property, though she claimed that it was. Upon Miss Newcomb's refusal to marry him, Rockafellow brought suit to compel a reconveyance of the property. The supreme court, reversing the judgment of the court below, decided that the contract for marriage was the real consideration for the conveyance, and that such a contract was valid and binding in law. In setting aside the conveyance, the court said: "The party failing to comply has no right, either in morals or law, to property thus acquired. The contract was sacred, hav-

ing the sanction of both divine and human law. The party in default should not be allowed to reap benefits from its violation. This would disregard the long settled principles of equity jurisprudence." It being urged upon the petition for a rehearing that the contract to marry was not the consideration for the deed, the court held that, if this were true, it would not change the result; that the relation between the parties was of the most confidential character, and that the woman took advantage of her power, and exercised an undue influence in procuring the execution of the deed; that, even if there was an exchange of property, the appellant might repudiate the same, because of the influence exercised by Miss Newcomb to her great advantage, and to his great disadvantage. The court based the relief in such cases upon the general principle "which applies to all the variety of relations in which dominion may be exercised by one person over another." This principle has been applied in many cases in rescuing unfortunate wives from the result of conveyances to their husbands, induced by the latter's fraud, and we see no reason, under our Statute emancipating married women from the disabilities of coverture, for not applying it to conveyances to the wife procured by her fraud. The relationship of husband and wife is one of special confidence and trust, requiring the utmost good faith and frankness in their dealings with each other. "Where either one is false to the other, and fraudulently or through coercion procures an unjust advantage, chancery will relieve against the transaction." Schouler, Husb. and W. § 403.

In *Stone* v. *Wood*, 85 Ill. 603, it was held, at the suit of the husband, that a deed, procured by the fraud of the wife to be made to a third party for her benefit, would be set aside in equity. And the court said: "Where either husband or wife becomes untrue to the other, and by fraud obtains an unjust advantage over the other, a court of equity will as readily afford relief as it will between other persons not occupying that relation."

In *Haydock* v. *Haydock*, 34 N. J. Eq. 570, gifts made by the husband, while sick, to the wife, were set aside at the suit of the executor of the husband's estate after his death, because of the undue influence exercised by the latter over the former in procuring the same, the court, in the course of the opinion, using this language: "The presumption against the validity of the gift is not limited to those instances where the relation of parent and child, guardian and ward or husband and wife exists, but in every instance where the relation between donor and donee is one in which the latter has acquired a dominant position. The parent by age may come under the sway of his children. *Highberger* v. *Stiffler*, 21 Md. 338. And so, as in the present case, the husband may become the dependent of the wife, and their natural position become reversed."

Mr. Kerr, in his work on Fraud and Mistake, at page 183, says: "The principle on which a court of equity acts in relieving against transactions on the ground of inequality of footing between the parties is not confined to cases where a fiduciary relation can be shown to exist, but extends to all the varieties of relations in which dominion may be exercised by one man over another, and applies to every case where influence is acquired and abused, or where confidence is reposed and betrayed."

The evidence leaves no doubt of the fraud practiced by Mrs. Meldrum upon her husband. After she had determined to abandon him and procure a divorce, with her mind fully bent upon carrying out such purpose, concealing from him her real intention, he was induced by false professions of love and affection to cause the conveyance of the Denver property to be made to her as a home for the family. Appellant's original purpose is made plain by her subsequent conduct. As soon as the deed was recorded, she threw off the mask, ordered her husband out of the newly purchased home, and proceeded to break up the family. That appellee acted foolishly will not be denied. He, with his strong passion and ardent love, was not able to cope with her. She, with her deceit and false professions of affection, held complete mastery over him, which she did not fail to exercise to her great benefit, and his great disadvantage. He swears that, had he known of her dislike and determination to abandon him, he would not have consented to the title being placed in her name. She was false to her marital vows, and by fraud procured an unjust advantage of her husband. From such a fraud courts of equity will grant relief, either by setting aside the conveyance or by converting the offending party into a trustee of the property for the benefit of the party defrauded. There is nothing in our Statute of Frauds to prevent this. In fact, the Statute expressly provides that trusts may either arise or be extinguished by implication or operation of law. Gen. Stat. § 1516; Browne, Stat. Fr. 3d ed. § 84; Perry, Tr. chap. 6; *Bohm* v. *Bohm*, 9 Colo. 100; *Sears* v. *Hicklin*, 13 Colo. 143; *Von Trotha* v. *Bamberger*, 15 Colo. —.

And appellee is not precluded by the divorce proceedings in the county court from maintaining this action. There is no question of alimony here. The wife alone can maintain such an action. Under no principle of pleading could the husband, under the circumstances, be required to set up in his cross-complaint in divorce proceedings instituted by his wife the facts here relied upon as constituting his cause of action. The value of the property alone would have precluded the county court from entertaining jurisdiction in the premises. It is contended that appellee is bound under the principle of ratification. There is no finding by the court below upon this question, and if we go to the evidence we find nothing to indicate that appellee, with a full knowledge of all the facts, intended to ratify and confirm the transfer, or that he did anything at any time, with or without such knowledge, to confirm the same. The evidence relied upon to show ratification shows simply that after she had announced her determination to procure a divorce, or when she was complaining of having no ready money to live upon, the husband, still clinging to the hope of a reconciliation, and, in pursuance of his usual liberal policy manifested towards his wife, gave her the further sum of $2,000 in cash.

Finding no error in the decree of the court below, *the judgment will be affirmed.*

MICHIGAN SUPREME COURT.

Charles E. BELKNAP, *Appt.*,
v.
Frank W. BALL.

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

1. **The question whether or not a candidate for office would be disqualified** for holding it if facts published of him were true does not furnish the test for determining whether or not the publication was libelous.
2. **Privilege is not a defense** in an action for libel for the publication of language falsely and maliciously stated as that of the plaintiff.
3. **To publish of a candidate for Congress a false and malicious article representing him as saying:** "I don't propose to go into debate on the tariff differences on wool, quinine and all the things, because I ain't built that way," printing the words in a coarse and blotted imitation of his hand-writing, with misspelled words and an imitation of his genuine signature at the end, is libelous and not privileged.
4. **A demurrer to a declaration which sets out ambiguous language as libelous,** explaining its meaning by *innuendo* and alleging malice, admits both the meaning supplied by the *innuendo* and the malice charged.

(December 24, 1890.)

ERROR to the Circuit Court for Kent County to review a judgment sustaining a demurrer to the complaint in an action brought to recover damages for the publication of an alleged libel. *Reversed.*

The facts are stated in the opinion.

Messrs. **Taggart, Wolcott & Ganson** and **Butterfield & Keeney,** for appellant:

Criticisms on the acts or conduct of a candidate for an office in the gift of the people must be bona fide.

Bronson v. *Bruce,* 59 Mich. 471; *Sweeney* v. *Baker,* 13 W. Va. 133; *Rearick* v. *Wilcox,* 81 Ill. 77.

The private character of a person who is a candidate for office cannot be destroyed by the publication of a libelous article in the newspapers.

Rearick v. *Wilcox, supra.*

Willful and malicious falsehood is never privileged.

Crane v. *Waters,* 10 Fed. Rep. 619; *Lewis* v. *Fox,* 5 Johns. 1; *Root* v. *King,* 7 Cow. 613; *Thorn* v. *Blanchard* 5 Johns. 508; *King* v. *Root,* 4 Wend. 114, 139; *Eviston* v. *Cramer,* 47 Wis. 659; Cooley, Torts, pp. 217, 218; *White* v. *Nicholls,* 44 U. S. 3 How. 266, 11 L. ed. 591; *Com.* v. *Clap,* 4 Mass. 169.

The publication in question is in no sense criticism or discussion. It does not on its face claim or purport to be. It claims to be a statement of facts. It is a fabrication, a falsehood, a lie; and whatever it may lack in legal form, in the court of ordinary morality it is difficult to distinguish it from forgery.

Cottrill v. *Cramer,* 43 Wis. 242; *Popham* v. *Pickburn,* 7 Hurlst. & N. 896.

There is a large class of facts which neither the public nor any other person has any interest in or right to know and the publication of which would be a libel although they are true.

Whittemore v. *Weiss,* 33 Mich. 353.

A falsehood in its proper sense, a malicious intentional misstatement with knowledge of its falsity on the part of him who makes it, as set up in plaintiff's declaration, never has been, never ought to be, protected.

Spiering v. *Andræ,* 45 Wis. 333; *Eviston* v. *Cramer, supra*; *Foster* v. *Scripps,* 39 Mich. 379, 380; *Bailey* v. *Kalamazoo Pub. Co.* 40 Mich. 257; *Wheaton* v. *Beecher,* 66 Mich. 310.

Imputations of ignorance as affecting the capacity for performing the duties of an office are actionable.

Gauvrear v. *Superior Pub. Co.* 62 Wis. 410; *Gove* v. *Blethen,* 21 Minn. 82; *Robbins* v. *Treadway,* 2 J. J. Marsh. 540.

Messrs. **Blair, Kingsley & Kleinhans,** for appellee:

Men seeking public station may lawfully be criticised.

To be criticism the statements must be based upon some act, and not entirely trumped up without a foundation.

Miner v. *Detroit P. & T. Co.,* 49 Mich. 358, illustrates the latitude of criticism of a public officer of this State. There a judge's act was called an "inexcusable outrage," "a contemptible and cowardly act," and one that would invite the public to ask why he oppressed the weak and permitted the strong to go "unwhipped of justice." The court held that in the absence of malice it was deemed privileged.

See also *Sill Case,* 60 Mich. 175.

Charges of crime against public men, though made in good faith and in the honest belief of their truth, are without privilege.

Bronson Case, 59 Mich. 467.

So also is the imputation of base and corrupt motives as influencing official conduct.

Negley v. *Farrow,* 60 Md. 158.

On the other hand a false charge made in a letter read at a public meeting against a judge who was a candidate for re-election of having by a charge to a jury in a certain case made possible a "sewer steal of $200,000," if made in good faith, is privileged.

Briggs v. *Garrett,* 2 Cent. Rep. 364, 111 Pa. 404.

It is not libel to impute, generally, insincerity to a member of Parliament, that he is as wavering as the winds, with inclinations not to carry out the principles of his party.

Onflow v. *Horne,* 3 Wilson, 177.

It was held to be an absolute privilege to call a member of the Legislature "a corrupt old Tory."

Hogg v. *Dorrah,* 2 Port. (Ala.) 212.

Where neither crime nor any moral obliquity or turpitude is charged against a candidate or a public man, but where the charges relate solely to the talents, the mental or physical qualifications of a candidate for the office he seeks, there is an absolute privilege, with the limitation that such statements should not be protected when they go to the extent of making charges, which, if true, would be a legal bar or actual disqualification of the person from filling the office.

See also 20 L. R. A. 533; 21 L. R. A. 493; 47 L. R. A. 223, 859.

Gove v. *Blethen*, 21 Minn. 80; *Robbins* v. *Treadway*, 2 J. J. Marsh. 540; *Bill* v. *Field*, 1 Sid. 67; *Luke* v. *King*, 1 Lev. 240; *How* v. *Prinn*, 2 Salk. 695; *King* v. *Farre*, 1 Keb. 629.

In *Mayrant* v. *Richardson*, 1 Nott & McC. L. 347, the rule is laid down that words imputing lack of mental ability to a candidate are not actionable.

See also Cooley, Torts, p. 218, *note 1*; *Sweeney* v. *Baker*, 13 W. Va. 158; *Walker* v. *Tribune Co.* 29 Fed. Rep. 827; *Bronson* v. *Bruce*, 59 Mich. 472.

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

This is an action on the case for libel. Plaintiff was a candidate for election to the office of representative in Congress. The first count in the declaration, after the usual allegations as to the character of plaintiff and his reputation among his neighbors, alleges that the defendant falsely, wickedly and maliciously did compose, print and publish, and cause to be composed, printed and published in the Daily Democrat, a daily newspaper having a large circulation in the district from which plaintiff was a candidate, and in other parts of the State, and also in the Weekly Democrat, the following words: "I don't propose to go into debate on the tariff differences on wool, quinine and all the things, because I ain't built that way. Charles E. Belknap." That said words were printed and published in a coarse and blotted imitation of the handwriting of the plaintiff, with certain of said words wrongly spelled, and with an imitation of the genuine signature of the plaintiff below the words, thereby meaning that the plaintiff had written said words. And that they were written in the uncouth, blotted and illy-spelled form represented in the publication, and that they were a *fac simile* of the words written and signed by the plaintiff. The second count alleges that at a public meeting held in the City of Grand Rapids plaintiff made a speech. The defamatory matter complained of is that the defendant published in said paper a report of this speech, in which he said: "Mr. Belknap spoke first. He assured his neighbors that he was not there as a candidate begging for votes; that he would refrain from discussing the tariff on wool, quinine, etc., because, as he said, he wasn't built that way." The *innuendo* is that defendant meant by this language that plaintiff was too ignorant and imbecile to discuss said question, or to express in a decent way his intention not to discuss it. The defendant demurred, and as causes of demurrer says: "(1) That the declaration does not allege that in said publication there was anything touching or affecting the moral character or integrity of the plaintiff, but that said publications are complained of only in that they are calculated to convey the impression that plaintiff was a stupid, ignorant and illiterate man, and too ignorant to discuss the tariff question. (2) That no reflection or suspicion is alleged in the declaration to have been caused by the defendant upon the moral character, integrity, probity and uprightness of the plaintiff. (3) That defendant was justified in publishing the articles complained of, because the plaintiff was a candidate for public office, and, in the absence of anything touching the moral character, integrity, probity and uprightness of the plaintiff, the matter stated in the declaration, and the *innuendoes* there drawn, do not set forth the cause of action." The demurrer was sustained by the court below. The demurrer admits the truth of all material facts alleged in the declaration and which are well pleaded. It is proper to consider, first, what these admitted facts are. They are: *first*, that the defendant published the statement; *second*, that it was false and malicious, and done with the intention of injuring the plaintiff; *third*, that defendant published the statement set forth in the first count in such a manner as to naturally induce the belief on the part of the reader that plaintiff actually wrote and subscribed the letter therein contained, and that in the second count the plaintiff actually used the words therein ascribed to him, and that that they were published with the malicious intent to injure, and to induce the belief among the people that plaintiff was too ignorant to discuss the question of the tariff. The gist of the argument on the part of the defendant is that no moral obliquity, unsoundness of mind, impairment of natural faculties, mental or physical, is charged against the plaintiff; that neither his moral, social or religious education is attacked, but only his political and academical education; that nothing was published which, if entirely true or false and believed, would prevent honest members of his own party from voting for him, nor constitute a reason or bar to his holding the office if elected; that the alleged defamatory matter was within the domain of justifiable criticism, and is privileged, and therefore actionable malice will not be inferred, nor can it be predicated in law upon such criticisms or allegations.

I am not prepared to yield assent to the statement that all honest members of either political party would vote for a confessed ignoramus to represent them in Congress. The statement bears its own refutation on its face, for it is apparent that these publications are made for the express purpose of preventing presumably honest members of the candidate's own political party, as well as others, from voting for him. Counsel omit in their statement one very important element, viz., intelligence. They would hardly be willing to assert that all honest, intelligent men would vote for a candidate of their party for an important office who has confessed such ignorance as to show unfitness, although ignorance be no legal disqualification. If defendant's contention be correct, then one may publish of a candidate that he cannot read or write, or that he has confessed that he cannot. No one would seriously contend that such a publication would not be injurious and libelous, and that it would not deprive the candidate of many votes. To hold otherwise would be an insult to the intelligence of our people. Yet no moral turpitude or crime or legal disqualification is charged, and therefore no libel is uttered. But why stop there if disqualification is to be made the test? Conviction of crime is not by the Constitution of the United States made a disqualification for the office of member of Congress. The only constitutional requirements are that the member shall be twenty-five years old, seven years a citizen and an inhabitant of the State where he is chosen.

Aside from these the House of Representatives is the judge of the qualifications of its members. There are many crimes for the conviction of which that body would not consider a member elect disqualified; yet to publish of him, when a candidate, that he is guilty of such crime is admitted to be libelous if not true. Public journals are in the performance of a high duty when they truthfully place such charge before the public. To illustrate, that one has been a gambler does not disqualify him for the office. He may have reformed and become an exemplary citizen; but the fact that he has been a gambler is proper to be placed before the people. The electors are the ones to determine whether they wish such a man to represent them in Congress. Their verdict in his favor would undoubtedly be held conclusive of his right to the office. Disqualification to hold the office cannot therefore be made the test to determine the libelous character of the publication.

Criticism is a discussion, or, as applicable in libel cases, a censure, of the conduct or character or utterances of the person criticised. When one becomes a candidate for public office he thereby deliberately places these before the public for their discussion and consideration. They may be criticised according to the taste of the writer or speaker, and the law will protect them in so doing, provided that in their statements of or reference to the facts upon which their criticisms are based they observe an honest regard for the truth. In such a discussion the law gives a wide liberty. Within this limit public journals, speakers upon the hustings and private individuals may express opinions, and indulge in criticisms upon the character or habits or mental and moral qualifications of official candidates. Cooley, Torts, 217. This is the freedom of the press guaranteed by the Constitution, a freedom necessary for the protection of the liberties and the proper enlightenment of the people. When the facts are truthfully written or spoken of a candidate's character and conduct they then become known to the reader and hearer, as well as to the writer and speaker. Both go before the people together, and they can seldom be misled, and the candidate cannot be injured within the meaning of the law. The same reasoning and rule apply to the utterances of a candidate when they are truthfully stated. But a statement that he gave utterance, either in writing or in speech, to certain language, is neither criticism nor expression of opinion. It is a statement of fact, for the truth of which the publisher is responsible. When language is truthfully stated the criticism thereon, if unjust, will fall harmless, for the former furnishes a ready antidote for the intended poison.

Readers can determine whether the writer has by the publication libeled himself or the candidate. When the language is falsely and maliciously stated privilege ceases to constitute a defense.

The case of *Walker* v. *Tribune Co.*, 29 Fed. Rep. 827, is a good illustration of this principle. Walker had published a pamphlet, and the defendant in its newspaper spoke of it as "plainly the effusions of a crank." It was held that the word "crank" is not in itself actionable, that it has no necessary defamatory meaning, and if it is used in a defamatory sense such sense must be given by an appropriate *innuendo*. As a criticism, although it underrated the author's talents, it was not libelous. *Bronson* v. *Bruce*, 59 Mich. 471; *McAllister* v. *Detroit Free Press Co.* 76 Mich. 356; *Bailey* v. *Kalamazoo Pub. Co.* 40 Mich. 257; *Wheaton* v. *Beecher*, 66 Mich. 310.

The character and reputation of the candidate for public office should be protected from malicious attack by the same rule as are those of private individuals. Greater latitude is allowed, undoubtedly, in the one case than in the other. Beyond this the same rule applies to both. The correct and reasonable rule is stated in *Crane* v. *Waters*, 10 Fed. Rep. 619, as follows: "The modern doctrine appears to be that the public has a right to discuss in good faith the public conduct and qualifications of a public man with more freedom than they can take with a private matter. In such discussions they are not held to prove the exact truth of their statements, provided they are not actuated by express malice, and there is reasonable ground for their statements or inferences, all of which is for the jury." In *Wheaton* v. *Beecher*, 66 Mich. 310, *Mr. Justice* Sherwood, in delivering the opinion of the court, says: "There is no doubt that when a man in this country becomes a candidate for office his character for honesty and integrity and his qualifications and fitness for the position are before the people, and are thereby made proper subjects for comment, and the publications of truth in regard to the candidate are not libelous; and it is equally true that the publication of falsehood against such candidate is wrong, and deserves to be punished." Justice certainly demands that in these discussions one should not transcend the bounds of truth, for, in addition to the commission of a private wrong, great public injury might result. *Foster* v. *Scripps*, 39 Mich. 379.

In my judgment a more potent reason exists for the observance of truth in such case than in publications respecting private matters.

Publications of falsehoods are never privileged. No public interest can be subserved by their publication and circulation. If statements, though false, are published in good faith, and with an honest belief of their truth, the damages may be reduced to a minimum. No other rule will properly protect the freedom of the press and the rights of individuals. In the language of one of the authorities: "The only safe rule to adopt in such cases is to permit editors to publish what they please in relation to character and qualifications of candidates for office, but holding them responsible for the truth of what they publish." There may be difficulty in distinguishing between justifiable criticism and actionable misrepresentation, but this does not affect the rule. In such cases the jury must determine the question under the proper instructions. None of the cases cited by counsel for defendant, or in the opinion of the learned circuit judge, are at all similar in their facts to those of the case at bar. In none of them did the publication charge the plaintiff with having written or spoken certain language which in fact he did not use. These cases generally go no further than to hold that matters of opinion are not

libelous. In my judgment, until courts are prepared to hold that ignorance constitutes no unfitness for office, they must hold the publication set forth in the first count as libelous. If such a letter were written by the plaintiff, it would show him to be ignorant, illiterate and incapable to intelligently perform his duties as a member of Congress. The character of the language set forth in the second count depends upon the meaning of the words "I ain't built that way." The *innuendo* says that defendant meant that plaintiff was too ignorant and imbecile to discuss the question, or to express in a decent way his intention not to discuss it. The province of the *innuendo* is to explain and give meaning to ambiguous language. If extrinsic evidence is required to ascertain its meaning the jury must determine that question. *Bourreseau v. Detroit Evening Journal Co.* 63 Mich. 425.

The meaning of these words as used in the context is certainly not clear. The demurrer for the purposes of this case admits both the meaning supplied by the *innuendo* and the malice charged. When all the facts are placed before the court and jury upon the trial, the question whether or not the publication was libelous will be presented for their determination. The declaration makes out a case proper to be submitted upon the facts which may be shown by the evidence.

The judgment must be reversed, with costs of both courts, and the case remanded for further proceedings.

The other Justices concurred.

CALIFORNIA SUPREME COURT.

PEOPLE OF the State of CALIFORNIA, *Respt.*,
v.
Llewellyn A. POWELL, *Appt.*

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

1. The right of trial by jury at common law includes the right of a prisoner to have the jury obtained from the vicinage or county where the crime is supposed to have been committed.

2. The provision of the Constitution that "the right of trial by jury shall be secured to all and remain inviolate" confers upon a prisoner the common-law right to have the jury selected from the county where the offense was supposed to have been committed, and the Penal Code, § 1033, providing for a change of venue without defendant's consent on application of the district attorney, if no jury can be obtained in the county where the action is pending, is therefore unconstitutional.

3. An application by the district attorney for change of venue because a fair and impartial jury cannot be obtained, without showing that no jury can be obtained, does not make a case for change, under Penal Code, § 1033, although the application would be sufficient if made by the defendant.

4. Evidence that it was not the habit of the deceased to go armed is not admissible on a trial for homicide because of proof that defendant believed him to have been armed at the time he shot him, where there was no evidence of the bad character of the deceased to be rebutted, but merely testimony that deceased had said he had had quarrels with several persons named.

5. Evidence of a conversation between a witness and a third person is not admissible against a party who was not present at the time, or in any way connected with it.

6. Evidence admitted upon assurance of counsel that it will be brought home to the other party should, if this is not done, be struck out on motion.

7. A threat of defendant to "get even" with a person whom he supposed to be the author of a libelous article, but whom he afterwards found out was not, cannot be proved against him on a trial for killing another person, his ill feeling towards whom grew out of the same publication.

8. Where self defense is relied on in justification of a homicide, and the evidence shows that defendant was attacked by deceased, and that, in the encounter which followed, the killing was done, evidence that defendant had been warned that deceased was a dangerous character of whom it was best to beware is admissible to show that defendant acted with reasonable caution and in the honest belief that he was in imminent danger of death or great bodily harm. But that defendant was simply warned to look out for deceased cannot be shown.

9. Articles appearing in a paper after the first trial of a person indicted for killing the former proprietor are not admissible on another trial for such homicide, although the ill feeling grew out of an alleged libel published in such paper.

10. The entire argument on the part of the prosecution may be made by private counsel employed to assist the district attorney, with the consent and acquiescence of such district attorney and the trial court.

11. An instruction that, a homicide having been established by the State, unless the testimony of the State proves that the offense was excusable or justifiable, the burden of proof is on the defendant to show that the crime was only manslaughter or was justifiable, is erroneous because improperly casting the burden on the defendant.

(*Thornton, J., dissents from proposition 11.*)

NOTE.—*Criminal practice, change of venue.*

The only ground for the removal of the place of trial of a criminal action under the California Penal Code is that a fair and impartial jury cannot be obtained in the county. Bias or prejudice of the presiding judge is no legal ground. Desty, Cal. Penal Code, § 1033; People v. Shuler, 28 Cal. 495; People v. Williams, 24 Cal. 31; People v. Mahoney, 18 Cal. 185; McCauley v. Weller, 12 Cal. 523; People v. Graham, 21 Cal. 261; People v. McGarvey, 56 Cal. 327. And see State v. King, 20 Fla. 19.

Change of venue in criminal trial. See *note* to O'Brien v. State (Ind.) 9 L. R. A. 323.

Application for, where a contempt of court. See *note* to Mullin v. People (Colo.) 9 L. R. A. 566.

Right of trial by jury. See *notes* to Gore v. State (Ark.) 5 L. R. A. 832; Grand Rapids & I. R. Co. v. Sparrow (Mich.) 1 L. R. A. 480.

Defendant cannot waive right in capital cases. *Note* to King v. State (Tenn.) 3 L. R. A. 210.

(January 4, 1891.)

APPEAL by defendant from a judgment of the Superior Court for the City and County of San Francisco, and denying his motion for new trial in an action in which he was convicted and sentenced for manslaughter. *Reversed.*

The facts sufficiently appear in the opinion.

Messrs. **George C. Ross, George A. Knight** and **Charles J. Heggerty,** for appellant:

The right of trial by jury shall be secured to all and remain inviolate.

Const. art. 1, § 7.

That language was used with reference to the right as it exists at common law.

Koppikus v. *State Capitol Comrs.* 16 Cal. 254; *Cassidy* v. *Sullivan,* 64 Cal. 266.

By the common law the jury must be returned in all cases, for the general issue, from the same county wherein the fact was committed.

2 Hawk. P. C. p. 559; 2 Hale, P. C. p. 264; 4 Bl. Com. p. 350; Proffatt, Jury Trial, § 80; 1 Bishop, Crim. Proc. § 65; *Coon* v. *State,* 12 Sm. & M. 246; *People* v. *Honeyman,* 3 Denio, 121; *State* v. *Nixon,* 18 Vt. 70; *Com.* v. *Call,* 21 Pick. 509; Cooley, Const. Lim. pp. 33, 392, 393; 1 Elliott, Debates, 44; 2 Story, Const. §§ 1769, 1779, 1781, 1791.

The defendant in a criminal action is entitled to a trial in the county where the offense is committed, and a statute authorizing a change of venue on the motion of the district attorney is invalid.

Wheeler v. *State,* 24 Wis. 52; *Osborn* v. *State,* 24 Ark. 629; *State* v. *Howard,* 31 Vt. 414; *Ex parte Rivers,* 40 Ala. 712; *Kirk* v. *State,* 1 Coldw. 344; *State* v. *Denton,* 6 Coldw. 539; *Swart* v. *Kimball,* 43 Mich. 443; *State* v. *Knapp,* 40 Kan. 148, and cases cited.

Messrs. **George A. Johnson,** *Atty-Gen.,* **James D. Page.** *Dist-Atty. for City and County of San Francisco,* **George H. Buck,** *Dist-Atty. for San Mateo County,* **Eugene N. Deuprey, Samuel M. Shortridge** and **E. F. Fitzpatrick,** for respondent:

If the framers of the Constitution had intended there should be a limitation as to the place of trial, such limitation would have been clearly and unequivocally expressed.

Cox v. *State,* 8 Tex. App. 285; *Bohannon* v. *State,* 14 Tex. App. 300; *Cotton* v. *State,* 32 Tex. 636.

Formerly it was the rule to get jurors from the vicinage, who knew the parties and the transactions. Now the very opposite is the rule.

Horbach v. *State,* 43 Tex. 251; *People* v. *Baker,* 3 Park. Crim. Cas. 187; *People* v. *Vermilyea,* 7 Cow. 141; *People* v. *Webb,* 1 Hill, 179; *People* v. *Long Island R. Co.* 4 Park. Crim. Cas. 602.

The State has a right to obtain a change of venue.

Penal Code, § 1033; *Cox* v. *State, Bohannon* v. *State* and *Cotton* v. *State, supra; McMillan* v. *State,* 11 Cent. Rep. 139, 68 Md. 307.

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

The appellant was charged by information, in the County of San Mateo, with the crime of murder, alleged to have been committed in that county. He was twice tried in said county, and the jury failed to agree upon a verdict at each trial. Without any effort made to procure a third jury, the district attorney moved the court under section 1033 of the Penal Code for a change of venue to another county. The material part of the application was as follows: "Said district attorney, on behalf of the People of the State of California, hereby makes application to said court for a change of venue from said County of San Mateo, to some convenient county, of the above case of the *People of the State of California* v. *Llewellyn A. Powell,* on the ground and for the reason that a fair and impartial jury cannot be obtained for the trial of said case in said County of San Mateo, the same being the county where said action is now pending; and hereby states the following facts and causes for making said application, viz.: That the above-named defendant is charged, by information, filed in said Superior Court of said County of San Mateo, with the crime of murder, alleged to have been committed in the month of November, 1887, in killing in said county, at said time, one Ralph S. Smith; that said defendant has had two trials in said superior court, on said charge; that the first trial was had in April, 1888, and the second trial in August, 1888; that at said first trial, there were summoned from all parts of said county, to appear before said court, to serve as jurors in said case, seventy-two citizens, and, of said number, sixty-seven were examined before a jury could be obtained in said case; that at said second trial, there were summoned from all parts of said county, to appear before said court, to serve as jurors in said case, 184 citizens, and of said number 173 were examined before a jury could be obtained to try said case; that said county is small in size and population, and a large number of its citizens, whose names appear upon its assessment roll, are Italians and Portugese, and are disqualified from serving as jurors, in consequence of not understanding the English language; that also a large number of those citizens, whose names appear upon the assessment roll of said county, live in the City and County of San Francisco, and are therefore not liable to jury duty in said County of San Mateo; that said case was so horrible in its nature that it attracted the attention of the people of, and has been fully discussed in all parts of, said County of San Mateo; that said case has also been discussed, more or less, by the citizens summoned to appear to serve as jurors, as aforesaid; that there are two local weekly newspapers in said county, having a general circulation therein, and the newspapers of the City and County of San Francisco also have a wide-spread circulation throughout said County of San Mateo, and, by and through the columns of the newspapers aforesaid, the facts of said case, and the trials thereof, have been fully discussed before the citizens of said County of San Mateo. For the reasons herein set forth said district attorney says that a fair and impartial jury cannot be obtained to try said case in said County of San Mateo, and said district attorney therefore prays that said court make an order transferring said action of

the *People of the State of California* v. *Llewellyn A. Powell*, now pending in said court, as aforesaid, to some convenient county free from like objections." This application was supported by the following affidavit of the district attorney: "George H. Buck, being duly sworn, says that he is the district attorney of said County of San Mateo, and is the same person who made and signed the foregoing application; that as such district attorney he makes said application; that he has read said application, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and as to those matters he believes it to be true."

In addition to this affidavit there were written others by citizens of said county, in which each of the affiants, after alleging his residence in the county, and acquaintance with the people thereof, alleged that he knew the contents of the affidavit of the district attorney, and that "said affidavit is well founded and true." The assessor of the county also made affidavit that he had examined the last assessment of the county, and that there were about 600 persons among those whose names appeared on the assessment roll who had the necessary qualifications and were competent to serve as jurors of said county. The sheriff of the county also made the following affidavit in support of the application: "W. H. Kinne, being duly sworn, says that he is now, and has been for more than two years past, the sheriff of said county, and that at the two trials of the above case in said county he summoned most of the jury in both of said trials of said case; that in doing so he was obliged to and did go to and visit all parts of said county; that he was a candidate for re-election at the last election, in the fall of 1888, for the office of sheriff of said county, and during the campaign he visited all portions of said county many times; that he also saw many people of and from all parts of said county, at the county-seat, to wit, at Redwood City, during the past year; that he has had an opportunity to and has discussed the merits of the case of the *People of the State of California* v. *Llewellyn A. Powell*, now pending in said superior court, and that he understands the feeling of the people in regard to said case, and has often heard them express their opinion about said case; that from such expression of the people so interviewed, he says that a fair and impartial jury cannot be obtained to try said case in said county."

The defendant objected to the granting of the change of venue, and in opposition to the application therefor filed the affidavit of one of his attorneys, and seventeen other citizens of the county, to the effect that they were residents of the county, and knew many of the other residents thereof, and that in their opinion a fair and impartial jury could be obtained in said county to try the defendant. The application was granted, and the venue changed to the City and County of San Francisco. When the case reached that county, the defendant objected to being tried therein, on the grounds, in substance, that the offense was charged to have been committed in the County of San Mateo; that the superior court of that county alone had jurisdiction to try the defendant; and that the court of the City and County of San Francisco had no jurisdiction in the matter; and moved that the case be remanded to the County of San Mateo for trial. The objection and motion were overruled, the defendant put upon his trial, convicted of manslaughter, and sentenced to the state-prison for the term of ten years. He moved for a new trial, which was denied, and now appeals to this court. The change of venue was granted under section 1033 of the Penal Code, as amended, which provides: "A criminal action may be removed from the court in which it is pending. . . . *Second.* On the application of the district attorney, on the ground that from any cause no jury can be obtained for the trial of the defendant, in the county where the action is pending."

The appellant contends, first, that this section of the Code, so far as it authorizes a change of venue on the application of the district attorney without the consent of the defendant, is in conflict with section 7 of the Bill of Rights contained in the Constitution of this State, which provides: "The right of trial by jury shall be secured to all and remain inviolate." The precise point urged upon us is that the effect of this clause in the Bill of Rights is to preserve and continue in force the right of trial by jury as it existed at common law, and that the common-law right was to a trial by a jury selected from the vicinage or county. This calls upon us to determine: *first*, what the common-law right of trial by jury was; and, *second*, whether or not the right is the same under our Constitution.

We think the common-law right of trial by jury is clearly and definitely stated by Mr. Blackstone in his Commentaries (book 4, p. 350) as follows: "When, therefore, a prisoner on his arraignment has pleaded not guilty, and for his trial hath put himself upon the country, which country the jury are, the sheriff of the county must return a panel of jurors, *liberos et legales homines, de vicineto;* that is, freeholders, without just exception, and of the *visne* or neighborhood; which is interpreted to be of the county where the fact is committed." And Mr. Cooley, in his work on Constitutional Limitations, 5th ed. p. 392, says: "The jury must also be summoned from the vicinage where the crime is supposed to have been committed." Again, in Story on the Constitution: "By the common law, the trial of all crimes is required to be in the county where they are committed. Nay, it originally carried its jealousy still further, and required that the jury itself should come from the vicinage of the place where the crime was alleged to have been committed." Story, Const. §§ 1769, 1779, 1781, 1791. See also *Swart* v. *Kimball*, 43 Mich. 448.

There can be no doubt that such was the common-law right of trial by jury. We are led to inquire, therefore, whether the same right is given or preserved by our Constitution, and, if so, whether the section of the Penal Code under consideration is in conflict with this constitutional right. Our Constitution does not define the right of trial by jury. It was a right then existing, the extent, scope and limitations of which were well understood, and the Constitution simply provides that such right shall be secured and remain inviolate. If the

right at common law was as above stated, there can be no question but that an Act of Legislature, authorizing the trial of a defendant out of the county where the offense is charged to have been committed, is an abridgement of the right, and for that reason void. Such statutes have been almost uniformly condemned as unconstitutional in other States. *Kirk* v. *State*, 1 Coldw. 344; *Wheeler* v. *State*, 24 Wis. 52; *Osborn* v. *State*, 24 Ark. 629; *State* v. *Howard*, 31 Vt. 414; *Ex parte Rivers*, 40 Ala. 712; *State* v. *Knapp*, 40 Kan. 148.

It is contended by the respondent that, in the States in which these cases were decided, the Constitution provided in express terms that one charged with crime should be entitled to a trial by a jury selected from the county or district where the offense is charged to have been committed, and therefore the Statutes referred to were in direct conflict with the express requirements of the Constitution, while in this State the Constitution contains no such requirement. As to most of the States, the fact contended for is true, but not as to all of them. But can this make any difference? Does not our Constitution confer upon a defendant charged with crime precisely the same right, although not expressed in terms? We have seen that this was the well-understood common-law right. This court has said that it is this same right that is held inviolate by our Constitution.

In *Koppikus* v. *State Capitol Comrs.*, 16 Cal. 254, in discussing the effect of this constitutional provision, this court said: "The provision of the Constitution that 'the right of trial by jury shall be secured to all and remain inviolate forever,' applies only to civil and criminal cases in which an issue of fact is joined. The language was used with reference to the right as it exists at common law. It is true that the civil law was in force in this State at the time of the adoption of the Constitution, but its framers were, with few exceptions, from States where common law prevails, and where the language used has a well-defined meaning. The people who, by their votes, adopted the Constitution, at least a vast majority of them, were also from countries where the common law is in force, and they looked upon the right secured as the right there known and there held inviolate. It is in this common-law sense that the language has always been regarded by the courts of this State. It is a right 'secured to all,' and 'inviolate forever,' in cases in which it is exercised in the administration of justice according to the course of the common law, as that law is understood in the several States of the Union." See also *Cassidy* v. *Sullivan*, 64 Cal. 266.

It is true, the question before the court, in the cases cited, was as to the class of cases triable by jury; but the language used would have been just as appropriate and applicable if the question now before us had been under consideration.

Mr. Cooley, in his work on Constitutional Limitations, in discussing the effect of such a constitutional provision as ours, says: "Accusations of criminal conduct are tried at the common law, by jury; and wherever the right to this trial is guaranteed by the Constitution, without qualification and restriction, it must be understood as retained in all those cases which were triable by jury at common law, and with all the common-law incidents to a jury trial, so far, at least, as they can be regarded as tending to the protection of the accused. . . . Many of the incidents of a common-law trial by jury are essential elements of the right. The jury must be indifferent between the prisoner and the Commonwealth; and to secure impartiality challenges are allowed, not only for cause, but also peremptory, without assigning cause. The jury must also be summoned from the vicinage where the crime is supposed to have been committed; and the accused will thus have the benefit, on his trial, of his own good character and standing with his neighbors, if these he has preserved; and also of such knowledge as the jury may possess of the witness who may give evidence against him. He will also be able, with more certainty, to secure the attendance of his own witnesses." Cooley, Const. Lim. 5th ed. 390–393.

This same doctrine, and the reasons for upholding it, are more fully stated by the same learned author and judge in the case of *Swart* v. *Kimball*, 43 Mich. 448, in which it is said: "The Constitution of the State provides that 'the right of trial by jury shall remain, but shall be deemed to be waived in all civil cases, unless demanded by one of the parties in such manner as shall be prescribed by law.' Article 6, § 27. The right is to remain. What right? Plainly the right as it existed before,—the right to a trial by jury as it had become known to the previous jurisprudence of the State. *Underwood* v. *People*, 32 Mich. 1. The right is not described here; it is not said what shall be its incidents; it is mentioned as something well known and understood, under a particular name; and by implication, at least, even a waiver of its advantages is forbidden. If the accused himself cannot waive them, plainly the Legislature cannot take them away. The next section of the Constitution repeats the guaranty of this method of trial 'in every criminal prosecution,' and nothing is better settled on the authorities than that the Legislature cannot take away a single one of its substantial and beneficial incidents (*Opinions of Justices*, 41 N. H. 550; *Ward* v. *People*, 30 Mich. 116); and even the accused cannot waive any one of the essentials. *Work* v. *State*, 2 Ohio St. 296; *Cancemi* v. *People*, 18 N. Y. 128; *Hill* v. *People*, 16 Mich. 351; *Allen* v. *State*, 54 Ind. 461. Now that in jury trial it is implied that the trial shall be by a jury of the vicinage is familiar law. Blackstone says that the jurors must be 'of the *visne* or neighborhood, which is interpreted to be of the county where the fact is committed.' 4 Com. 350. This is an old rule of the common law (2 Hawk. P. C. chap. 40; 2 Hale, P. C. 264); and the rule was so strict and imperative that if an offense was committed partly in one county and partly in another, the offender was not punishable at all (2 Hawk. P. C. chap. 25; 1 Chitty, Cr. L. 177). This over-nicety was long since dispensed with, but the old rule has in the main been preserved in its integrity to this day. It is true that Parliament, as the supreme power of the realm, made some exceptions, which are enumerated by Mr. Chitty in his treatise on Criminal Law [vol. 1, p. 179], the chief of these being cases of supposed trea-

son or misprision of treason examined before the privy council, and which under the Statute of Hen. VIII. might be tried in any county, and offenses of the like character committed out of the realm, and which by a statute of the same arbitrary reign were authorized to be tried in any county in England. But it is well known that the existence of such statutes with the threat to enforce them was one of the grievances which led to the separation of the American colonies from the British empire. If they were forbidden by the unwritten constitution of England, they are certainly unauthorized by the written Constitutions of the American States, in which the utmost pains have been taken to preserve all the securities of individual liberty. It has been doubted in some States whether it was competent even to permit a change of venue on the application of the State, to escape local passion, prejudice and interest (*Kirk* v. *State*, 1 Coldw. 344; *Osborn* v. *State*, 24 Ark. 629; *Wheeler* v. *State*, 24 Wis. 52); but this may be pressing the principle too far (*State* v. *Robinson*, 14 Minn. 447 (Gil. 333); *Gut* v. *Minnesota*, 76 U. S. 9 Wall. 35, 19 L. ed. 573); but no one doubts that the right to a trial by a jury of the vicinage is as complete and certain as it ever was, and that in America it is indefeasible (1 Bishop, Cr. L. 2d ed. § 552; Wharton, Cr. L. § 277; *Paul* v. *Detroit*, 32 Mich. 108; *Ward* v. *People*, 30 Mich. 116)."

This case was decided under a constitutional provision the same, in effect, as our own, and is directly in point.

It may be added that the effect of holding this Statute to be unconstitutional will be to render it necessary, in a case where no jury can be obtained in the county, that a defendant be discharged or held in confinement for an indefinite time until such changes take place in the county that a jury can be had; but we cannot take away from the defendant a right conferred upon him by the Constitution on the mere ground that such a result may follow in rare cases. The right is one which has always been regarded as of great importance, and has been preserved and continued in force by the Constitution of the United States, and perhaps by the Constitutions of every State in the Union. If it be allowed that the Legislature can break in upon this right and take it away or abridge it on the ground and for the reason stated in the Statute under consideration, it must be admitted that it may do so for other reasons, and thus the right guaranteed by the Constitution will be subject to modification at the will of the Legislature, and this cannot be conceded. We are convinced that the section of the Penal Code, so far as it authorizes a change of venue on the application of the district attorney, without the consent of the defendant, is unconstitutional and void; that the change of venue in this case was improperly granted, and that the court below had no jurisdiction to try the cause. But if it were conceded that the Statute is valid, the result of this appeal must be the same. The application for the change of venue, and the affidavit in support of it, were entirely insufficient to bring this case within the Statute, or to authorize a change of the place of trial. The application was not made on the ground that no jury could be obtained in the county, but because a fair and impartial jury could not be obtained. As to what will constitute a fair and impartial jury, there may be many different opinions. The statement that such a jury could not be obtained was the statement of a mere conclusion, and the facts did not show that no jury could be obtained. There are two modes provided by which a defendant, or the people, may avoid a trial by partial or unfair jurors, viz., challenges for cause, which exclude all persons from the jury who are legally incompetent to serve as such, and peremptory challenges, by which a party may relieve himself of jurors whom he believes will not be fair and impartial jurors. This last kind of challenge is limited, and it may happen when a party's right of peremptory challenge is exhausted there may remain on the jury persons who are not, in his estimation, or in fact, fair and impartial, but who are competent jurors. The application and the proof to support it do not show that a jury of such persons as these might not have been obtained. It is perfectly clear that the intention of the Legislature was to make a distinction between the grounds upon which the people and the defendant should be entitled to a change of venue. The defendant has only to show that a fair and impartial trial cannot be had in the county. Penal Code, § 1033. The application before us would have been sufficient under the clause, but it is not sufficient under the clause relating to the right of the district attorney to a change of venue, which provides that the change may be had where no jury can be obtained, which is quite a different thing, as we have attempted to show. A juror is not necessarily incompetent because he is not impartial. He may favor one party or the other, and yet, if he has not formed or expressed an opinion as to the merits of the cause, he cannot be challenged for cause. For this reason, proof that a fair and impartial jury cannot be obtained is not equivalent to proof that no jury can be obtained. A statute of this kind, if valid, should be strictly construed, and, if it could be enforced at all, in our judgment, the change should not be granted until all legal means to procure a jury had been exhausted, and no jury could be obtained. It should not be allowed to rest upon the mere opinion of persons, however numerous, that a jury could not be procured. The conclusion we have reached on this point is decisive of this appeal, but there are other questions presented which may arise on another trial, and we feel it our duty to decide.

The prosecution was allowed, over the objection of the defendant, to prove in rebuttal that the deceased was not in the habit of carrying arms; that on various occasions he had so stated; and, that on the morning of the shooting, he had refused to go armed when it was suggested that he had better do so. We have looked in the transcript in vain for any evidence on the part of the defendant which could justify or call for any such evidence in rebuttal. There was evidence tending to show that the defendant believed the deceased to have been armed at the time he shot him. This rendered it competent for the prosecution to prove that as a matter of fact he was not armed at that time, but it did not justify the proof as to his general habit with respect to the carrying

of weapons, or his declarations with reference to the matter, not made in the presence of the defendant, and not shown to have been communicated to him prior to the shooting. There was no evidence on the part of the defendant going to show that the character of the deceased for peace and quietness was bad; therefore, the evidence cannot be justified on the ground that it tended to show his good character in these respects. Evidence to sustain his character could not be heard unless it was attacked (*People* v. *Anderson*, 39 Cal. 704), and, if it could, it would not have been competent to prove it by evidence that he was not in the habit of carrying arms or that he had refused to do so. On cross-examination of one or more of the witnesses for the prosecution, the defendant asked whether the deceased had not had quarrels with several persons named; and it was admitted that the deceased had so stated. There was no objection to this evidence by the prosecution. It was clearly incompetent, and, if it had been objected to, would no doubt have been excluded. It is claimed that this evidence on the part of the defense rendered the above-mentioned proof competent. We do not think so. In the first place, the evidence on the part of the defense was incompetent, as we have said; but, if it were not, we do not see how the evidence offered in rebuttal that the deceased was not in the habit of going armed tended to rebut the proof that he had stated to someone that he had quarreled with certain persons. There was also evidence admitted in behalf of the prosecution of conversations between the witness Mrs. Willis and third parties, not in the presence of the defendant, and with which he was in no way connected. This evidence should have been excluded. It was admitted by the court below, upon the assurance of counsel for the prosecution, that it would be brought home to the defendant, which was not done. The same may be said of the testimony of the witness Glennon, of a conversation between Mrs. Willis and himself. The prosecution having failed to connect the defendant with the subject matter of the conversation, the defendant moved to strike out the evidence. The motion was denied. This was error. The evidence should have been stricken out. The same witness, Glennon, was also allowed to testify to a conversation with the defendant. The ill-feeling which resulted in the death of Mr. Smith, at the hands of the defendant, grew out of an article published in a newspaper, of which the deceased was proprietor. The conversation testified to by Glennon was with reference to this article, and tended to show that the defendant believed the witness was the author of the article, and abused him, and threatened to get even with him; that in the same connection he made abusive remarks about one Mrs. Willis; and that subsequently, during the same day, he returned and stated to Glennon that he had learned that he was not the author of the article, and apologized for the language he had used. This evidence was well calculated to prejudice the jury against the defendant, and was immaterial and incompetent. If it had been shown to have been communicated to the deceased, it might have tended in some small degree to excuse his conduct towards the defendant, at the time of the shooting, but it was not shown that it was communicated to him. It could hardly be claimed that the threat of the defendant to "get even" with Glennon was evidence tending to prove that he killed the deceased, or the motive of the killing. And if this was not so that part of the conversation relating to Mrs. Willis, and which the defendant moved specially to strike out, was clearly incompetent.

It is contended by the appellant that the court below excluded evidence offered by him to the effect that he was told before the shooting that the deceased was a dangerous character, and that he had better beware of him, and that this was error. The defendant claimed and introduced evidence tending to show that in firing the shot which caused the death of the deceased he acted in self-defense. In connection with the evidence as to what occurred at the time of the shooting, it would no doubt have been competent for the defendant to show that before the shooting he was informed that the deceased was a dangerous man. *State* v. *Lull*, 48 Vt. 586.

Where a defendant claims to act in self-defense, any evidence tending to show that he acted as a reasonably prudent man would have acted under the circumstances is competent. *People* v. *Iams*, 57 Cal. 119, 130; *People* v. *Westlake*, 62 Cal. 307.

In this case the evidence tended to show that the defendant was attacked by the deceased, and, in the encounter that followed, wounded him. In judging whether the defendant acted with reasonable prudence and caution, and in the honest belief that he was in imminent danger of death, or great bodily injury, it was proper that the jury should know, if such were the fact, that he had been informed beforehand that the man who attacked him was a dangerous character, and so believed at the time, as such information and belief might reasonably influence the conduct of a prudent man under such circumstances. Such evidence does not rest upon the necessity of showing that the communication was brought home to the deceased, as counsel for respondent contend. The sole object of it is to show the state of mind of the defendant at the time of the shooting, and for this purpose it was proper and should have been admitted.

There may be some doubt whether the questions put to the witness were such in form as to raise the point, but the question has been presented on its merits here. The form of the questions is not objected to in the court below, nor is it here. In the effort to prove a certain state of facts, either the question put to the witness should disclose clearly what it is supposed to prove, or a proposition to prove certain facts should be submitted to the court below, and refused, in order to present the question in this court. Neither was done here, and we are led to believe, by certain questions put to the defendant, on the same subject, that the communication made to the defendant was not of the kind claimed by the appellant. It certainly was not competent to show that the defendant was warned to "look out" for the deceased, or the like. This would be quite a different thing from proving that the deceased was a dangerous man, and one who might be expected to go to extreme measures if he should

attack the defendant. For these reasons, if no other error appeared in the record, the cause would not be reversed on this ground.

The rulings of the court in excluding certain questions asked the witness Mrs. Smith, widow of the deceased, on cross-examination, with reference to certain articles appearing in the paper formerly owned by her husband, after the first trial of this case, and excluding said articles when offered in evidence, were not erroneous. There was no error in allowing private counsel, employed to assist the district attorney in the prosecution of the case, to open and close the argument in the case. The court below must be left to determine upon the propriety of allowing such a course to be taken, and, so long as private counsel conduct the prosecution properly, we see no reason for holding that the entire argument may not be made by them with the consent and acquiescence of the district attorney and the trial court. The court below gave the following instruction, which is complained of by the appellant: "In this case the homicide, having been established by the State, unless the testimony of the State proves that the offense was excusable or justifiable, the burden of the proof is upon the defendant to show by a preponderance of evidence that the crime was only manslaughter, or was justifiable." This instruction was erroneous, because the homicide being established by the State, it cast upon the defendant the burden of proving by a preponderance of the evidence that the killing was justifiable, or only manslaughter. *People* v. *Bushton*, 80 Cal. 160; *People* v. *Elliott*, 80 Cal. 296; *People* v. *Lanagan*, 81 Cal. 142.

Judgment and order reversed, and cause remanded with instruction to the court below to remand the cause to the Superior Court of the County of San Mateo for further proceedings.

We concur: **Sharpstein**, *J.*; **McFarland**, *J.*

DeHaven, *J.*:

I concur in the judgment. The second subdivision of section 1033 of the Penal Code is clearly unconstitutional. There was also error in the giving of the instruction referred to in the opinion of *Mr. Justice* Works. Upon the other points therein discussed, I express no opinion.

Thornton, *J.*:

I concur in the above, except as to the instruction described in it. I am of opinion that the instruction is sound law, and that there was no error in giving it.

Petition for rehearing denied.

ARKANSAS SUPREME COURT.

H. C. DANIELS, *Appt.*,
v.
J. K. BRODIE.

(.....Ark.....)

1. A person's causing belief on the part of prospective customers of another, that the former is a partner in the latter's rival firm, is a breach of his contract not to engage in business for a certain time as a partner in such firm.

2. Damages for breach of a contract binding a person not to engage in business as a member of a rival firm, where the breach consists only in causing the erroneous belief that he was a member of that firm, can include only the loss to the other party occasioned by that belief, and not any loss caused by the competing business independent of the belief.

3. A person cannot ratify that part of a contract made for him by an unauthorized agent which makes for his interest, and renounce that which makes against it.

4. Keeping part of the goods left for a person with an unauthorized agent, who assumed to accept them in discharge of a contract obligation, which the other party had the option to discharge either in goods or in money, ratifies the act of the agent in accepting the goods, and prevents any rejection of other portions of the goods.

5. The pleadings will be treated on appeal as the parties elected to treat them in the court below.

(February 14, 1891.)

NOTE.—As to ratification of agent's act, see *note* to Wheeler v. McGuire (Ala.) 2 L. R. A. 808.

APPEAL by plaintiff from a judgment of the Circuit Court for Jefferson County in favor of defendant in an action brought to recover damages for the alleged breach of a contract not to engage in business. *Reversed.*

Brodie sold Daniels his stock of merchandise in Redfield, Arkansas, and leased him the store in which the stock was and the fixtures thereto pertaining for the term of two years, and agreed that he would not in any manner engage in the mercantile business in Jefferson County during the term of two years or the continuation of the lease.

In consideration of the sale Daniels agreed to pay Brodie $4,000 two years from the date of the contract, in goods of the same class and quality and at the same prices as were set out in the inventory taken for the purposes of the sale, or at his option $3,000 cash in full satisfaction of the amount.

This action was brought to recover damages for Brodie's alleged breach of his agreement not to engage in business by going into the mercantile business as a partner in the firm of Sallee & Co.

Brodie denied having engaged in business and set up as a counterclaim Daniels' failure to return the goods at the end of two years as agreed.

Upon the question of the failure to return the goods it appeared that Brodie employed a Mr. Davis to take an inventory of the goods tendered, and that goods were delivered to and accepted by Davis. Brodie claimed that Davis had no authority to accept goods.

Plaintiff asked the court to instruct the jury, *inter alia*, as follows:

"3. The jury are instructed, as a matter of law, that if a person adopts a transaction done in his behalf, by an agent, who had no authority to do it, he must adopt it in its entirety; he cannot adopt it in part and repudiate it in part. And if the jury believe, from the evidence, that Davis accepted for Brodie the goods offered him by Daniels, in February, 1889, and that when Brodie returned he accepted and received a part of the goods so taken by Davis, then this was a ratification of the act of Davis, in accepting all the goods delivered to him by Daniels, and Brodie is bound thereby."

The court refused to give this instruction and the jury returned a verdict in favor of defendant for $782.91.

Plaintiff moved for a new trial, which motion was overruled and he brought the case to this court.

Further facts appear in the opinion.

Messrs. **N. T. White, S. M. Taylor** and **J. W. Crawford,** for appellant:

The principal is not permitted to ratify a part of the agent's acts and repudiate the rest.

Bishop, Cont. Enlarged ed. § 1110; *Eberts* v. *Selover*, 44 Mich. 519; *Tasker* v. *Kenton Ins. Co.* 59 N. H. 438; *Joslin* v. *Miller*, 14 Neb. 91; *Crawford* v. *Barkley*, 18 Ala. 270; *Hodnett* v. *Tatum*, 9 Ga. 70; *Crane* v. *Hunter*, 28 N. Y. 389.

If a person adopts a contract made on his behalf by an agent who had no authority to make it, he must adopt it in its entirety; he cannot adopt it in part and repudiate it in part.

Sackett, Instructions, § 10, p. 65; *Southern Exp. Co.* v. *Palmer*, 48 Ga. 85; *Widner* v. *Lane*, 14 Mich. 124; *Henderson* v. *Cummings*, 44 Ill. 325; *Krider* v. *Trustee of Western College*, 31 Iowa, 547; *Menkens* v. *Watson*, 27 Mo. 163; *Saveland* v. *Green*, 40 Wis. 431; *Tasker* v. *Kenton Ins. Co.* 59 N. H. 438; *Strasser* v. *Conklin*, 54 Wis. 102; *Gilliat* v. *Roberts*, 19 L. J. N. S. Exch. 410.

Messrs. **M. L. Bell, J. M. Taylor** and **J. G. Taylor,** for appellee:

The agent's doing more than he is authorized will not vitiate what is properly done, if the two are separable.

Bishop, Cont. § 1095.

Such profits as were sought to be recovered by appellant "are profits or gains derivable from a contract which are uniformly rejected as too contingent and speculative in their nature, and too dependent upon the fluctuations of markets and the chance of business to enter into a safe or reasonable estimate of damage. Thus, any supposed successful operation the party might have made, if he had not been prevented from realizing the proceeds of the contract at the time stipulated, is a consideration not to be taken into the estimate.

Masterton v. *Brooklyn*, 7 Hill, 62; Wood's Mayne, Damages, § 56; Sedgw. Damages, p. 72; *Western Gravel Road* v. *Cox*, 39 Ind. 260; *Low* v. *Archer*, 12 N. Y. 277.

Brodie's stating that he was a partner of a person doing business was no violation of a contract which bound him not to engage in the mercantile business during the period of the contract.

See Bishop, Cont. § 520.

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

The grounds urged for a reversal arise out of the court's refusal to charge the jury as requested by the plaintiff.

The charge given, as well as the prayers refused, relates to two different matters,—the claims of the plaintiff and the counterclaim of the defendant.

Without reciting in detail the rejected prayers, it is sufficient to announce our views on the questions involved.

The defendant obligated himself not in any manner to engage in mercantile business in Jefferson County for two years. If he engaged in such business during the term specified, either as a sole trader or as a partner in the firm of Sallee & Co., he is liable to plaintiff in damages for the injury the latter sustained by reason of that business. If, in fact, he did not engage in such business, but did cause it to be believed among the prospective customers of plaintiff that he was a partner in that firm, this would be a breach of the contract, fairly and properly interpreted. The breach in either case would be the same, but the extent of the injury would be different. If the defendant was the sole or a joint proprietor in such business, he would be liable to the extent of the loss occasioned to the plaintiff by that business; but if he was not such proprietor, and only caused it to be believed that he was, the plaintiff's damage would cover only the loss to him occasioned by that belief, and would not include any loss caused by the competing business, independent of that belief.

But in our opinion there was no evidence to sustain a verdict for plaintiff in the latter state of case. The plaintiff testified that he had been damaged by the competing business of Sallee & Co., but that he knew of no loss he had sustained by reason of the fact that the defendant was understood to be a partner in that firm.

The jury found, upon proper instructions in that regard, that the defendant had not really engaged in business, and, as the evidence discloses no damage to plaintiff growing out of the understanding that he was a partner in the firm of Sallee & Co., there can be no reversal on account of the rejected prayers relating to the plaintiff's claim.

Upon the issue raised by the counterclaim, the court should have given the third instruction asked by the plaintiff. One in whose name an act is done by an unauthorized agent may renounce it if he so elect. But he cannot ratify that part which makes for his interest and renounce that which makes against it. If the defendant authorized Davis only to take an invoice of goods, he was not bound by Davis' receipt of goods in satisfaction of the plaintiff's contract; but if Davis received them for him without authority, the defendant was bound to ratify or renounce the entire act. He could not take that part of the goods that he wanted, and decline that part that he did not want. The appellee concedes that such is the general rule, but contends that it does not apply in this case for the reason, as he assigns, that the defendant was bound by his contract to accept the goods which he took from Davis, and that his acceptance of them should be referred to

this obligation. This reasoning proceeds upon a false premise. The defendant was not bound to accept goods unless a stock of the value of $4,000 and of a particular kind was offered to him. He had no right under the contract to demand merchandise. The plaintiff had the option to discharge his obligation either by delivering a stock of goods of the stated kind and value, or by paying the stated sum of money. When he offered the stock, he was entitled to demand that it be received if it met the requirement as to kind and value; if it did not meet that requirement, he had a right to keep all the goods and pay the sum stipulated in lieu thereof. It might be highly prejudicial to him to permit the defendant to call the stock offered and retain such of it as he desired and return such as was undesirable. When he kept a part of the goods left for him with Davis, he deprived the plaintiff of the option to discharge his obligation either in money or in goods, and did what he was neither obliged nor authorized by his contract to do. Such retention can be referred to no right except that to ratify the act of Davis.

As to the matters involved in the counterclaim the plaintiff was prejudiced by the court's refusal to give the third of his prayers; but he admits and testified that he owed the defendant on the settlement, February 19, 1889, a balance of $177, and if the rejected prayer had been given the defendant would have recovered that with interest. If he will remit the amount of his recovery in excess of that, the court's error will be cured.

We have treated the reply to the counterclaim as filed, for two adequate reasons: in the first place it is certified to us as a part of the record and its unchallenged presence among the papers in the cause is evidence of its filing although it lacks the usual indorsement by the clerk; in the next place the parties treated the allegations of the counterclaim as at issue in the trial below, and we will treat the pleadings here as they elected to treat them there.

For the error indicated, the judgment will be reversed. If the defendant shall, within fifteen days, remit all of his judgment in excess of $177 and interest thereon from February 19, 1889, at the rate of 6 per cent, a judgment for that amount will be affirmed, otherwise the cause will be remanded for a new trial.

WISCONSIN SUPREME COURT.

John MATHERS, *Appt.*,
v.
UNION MUTUAL ACCIDENT ASSOCIATION, *Respt.*

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

An oral contract for immediate insurance is within the powers of an insurance agent under Rev. Stat., § 1977, which gives all insurance agents general powers, notwithstanding a stipulation in the application, which the insured signed without knowing its contents, that the insurer should not be liable until the application and premium were received by its secretary.

(February 3, 1891.)

APPEAL by plaintiff from a judgment of the County Court for Fond du Lac County in favor of defendant in an action brought to recover the amount alleged to be due under a policy of accident insurance. *Reversed.*

The facts are stated in the opinion.

Messrs. **Duffy & McCrary** for appellant.

Messrs. **Winkler, Flanders, Smith, Bottum & Vilas,** with *Messrs.* **Knowles & Phelps,** for respondent:

The receipt of the membership fee by the agent was not a receipt "by the secretary and general manager in Chicago;" neither could the agent approve the application; such assumption is expressly negatived by the provision that the fee and application must be received in Chicago. Full effect has always been given to these stipulations in the application.

Kohen v. *Mutual Reserve Fund L. Asso.* 28 Fed. Rep. 705; *Misselhorn* v. *Mutual Reserve Fund L. Asso.* 30 Fed. Rep. 545; *Ormond* v. *Fidelity L. Asso.* 96 N. C. 158.

It would be an extreme case which would justify the court in reforming or defeating a written instrument for a mistake therein, upon the uncorroborated testimony of a party to it, although such testimony were uncontradicted.

Harter v. *Christoph*, 32 Wis. 245; *Meiswinkel* v. *St. Paul F. & M. Ins. Co.* 6 L. R. A. 200, 75 Wis. 147; *McClellan* v. *Sanford*, 26 Wis. 595, 607, 608; *Kent* v. *Lasley*, 24 Wis. 654. See *Howland* v. *Blake*, 97 U. S. 624, 24 L. ed 1027.

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

This action was tried by the court without a jury, and the findings and judgment are against the plaintiff. The facts are briefly and substantially as follows: One E. L. Maloney, Esq., had been in the insurance business about nineteen years, and had been the agent of the defendant Association at the City of Fond du Lac, in this State, about three years. The plaintiff called upon him at his office at about 1 o'clock P. M., on the 12th day of January, 1889, and stated to him that he had bought certain sheds which he wished to take down, and there was considerable snow and ice on them, and he had to take them down right away, and so he thought he would take a little insurance. The agent said he would insure him at any time. The plaintiff asked him: "Can you insure me now? When does the insurance begin? From what time?" The agent replied: "Right now. From this hour. From the time you pay your money in. You get a receipt from me, and this receipt will call for a policy." The usual premium was $5, but the agent told the plaintiff that he would let him become a member for $2, and the plaintiff then paid the agent the $2, and took a receipt for it. That was a compromise figure,—an understanding between the agent and the plaintiff. The mon-

See also 17 L. R. A. 586.

ey was sent to the Association at Chicago. The agent held in his hand a printed blank application, and he read to the plaintiff all the questions, and he answered them, and the agent wrote in the answers, and then had the plaintiff sign the paper without further reading, and without the plaintiff reading it. The plaintiff thought the paper contained a receipt for the money, and he signed it. At the bottom of the paper there was a printed stipulation in which there was the following agreement: "And I agree that the Association shall not be liable for any bodily injury or death happening prior to the receipt and acceptance of this application and the member's fee by the secretary and general manager in Chicago." The plaintiff did not know that there was any such agreement in the paper. This application bore date the 12th day of January, 1889. The plaintiff then went to work upon sheds twelve feet high, and fell therefrom and was injured, about 5 o'clock in the afternoon on the same day. The next day he notified the agent of his accident, and the agent notified the company, and furnished the plaintiff with a blank claim for damages, which the plaintiff spoiled, and the agent furnished him with another, and filled it out for him as it should be, on his answering the proper questions, and forwarded it to the company, and the plaintiff paid him for his work in doing so. The above facts are established by the uncontradicted testimony. The application and fee of $2 were received by the company at Chicago on the 14th day of January next ensuing, and in about two weeks thereafter the plaintiff received a regular policy of the Company, bearing the last-mentioned date, and on the 22d day of March thereafter he received a written notice from the secretary of the company that his claim had been rejected because his application was not received and the policy issued until January 14. The proofs of the injury or the premium have never been returned to the plaintiff. The prayer of the complaint was amended by asking that the date of the policy be reformed to correspond with that of the verbal contract for insurance.

The mingled findings of fact and conclusions of law are, substantially, that the plaintiff made an application on the 12th day of January, which showed that he would not become a member until his application and fee were received by the secretary and general manager in Chicago, and that they were not so received until the 14th day of January, 1889, and that the plaintiff was injured on the 12th day of January, 1889, and that his membership in the company did not commence until the 14th day of January, and that when he was injured he was not a member of the company. The above uncontradicted testimony and the facts established thereby, in the light of a great many decisions of this court, would seem to constitute a binding contract of the Association for a present insurance.

The general and almost unlimited powers of all insurance agents doing business in this State are sufficiently expressed in the Statute. Rev. Stat. § 1977. "Whoever solicits insurance on behalf of any insurance corporation, or transmits an application for insurance or a policy of insurance to or from any such corporation, or who makes any contract of insurance, or collects or receives any premium for insurance, or in any manner aids or assists in doing either, or in transacting any business for any insurance corporation, or advertises to do any such thing, shall be held an agent of such corporation to all intents and purposes, and the word 'agent,' whenever used in this chapter, shall be construed to include all such persons." The meaning of this language could not be made clearer by construction or comment. All insurance companies understand that all of their agents doing business in this State are general agents, however restricted their powers may be by the rules of the companies or by the stipulations or conditions of their policies, or of the applications for insurance. The only act of the agent here, that the company disclaims and repudiates, is contracting for a present insurance. This does not involve so extensive a power as has been often decided by this court to be possessed by all insurance agents in this State. In the last case decided by this court, of *Zell* v. *Herman Farmers Mut. Ins. Co.*, 75 Wis. 521, it is held that where such an agent received the premium for a new policy, and told the applicant that he was insured for another year from the termination of his first policy, and the company or the agent retained the premium until after a loss had occurred, the company was bound by the contract. There was a stipulation in the former policy that the company should not be liable for contracts made by agents before they have been approved and certified to in writing by the secretary, but this did not prevent the agent making the contract and binding the company. This case is closely in point as to the time fixed by the agent when the insurance should commence. In the present case the plaintiff did not know of the stipulation, in the application, that the company should not be liable until the receipt of the application and fee by the secretary or general manager. In the following cases the general powers of insurance agents to do almost anything that the company could do by virtue of the above Statute are defined in application to various acts, contracts and waivers of conditions made by them. *Schomer* v. *Hekla F. Ins. Co.* 50 Wis. 575, 582, 583; *Knox* v. *Lycoming F. Ins. Co.* 50 Wis. 671; *Alkan* v. *New Hampshire Ins. Co.* 53 Wis. 136; *Body* v. *Hartford F. Ins. Co.* 63 Wis. 157; *Hankins* v. *Rockford Ins. Co.* 70 Wis. 1; *Renier* v. *Dwelling-House Ins. Co.* 74 Wis. 89.

The company was informed of the injury of the plaintiff before issuing the formal policy dated the 14th instead of the 12th day of January, and knew that the application was made and the premium paid on the 12th, and it was at least thoughtful and prudent to fix the date of the policy after that of the injury. It seems to be the general custom or usage of insurance companies to date the policy the day the application is made and the premium paid, and it is certainly a very proper one. If the company may fix the date of the policy two days after the application is made, so as to avoid an intervening accident, it can do so ten days after, if the agent delays sending in the application. The applicant has paid his money, and supposes, and has the right to suppose, that he is insured.

The case of *Ellis* v. *Albany City F. Ins. Co.*,

50 N. Y. 402, is very much in point. In the opinion of *Judge* Grover it is said: "The usage of making agreements for insurance and paying the premiums providing for the issuing of policies thereafter, to be dated at and in force from the time of making the agreement, is so general that judicial notice must be taken of it." *Post* v. *Ætna F. Ins. Co.* 43 Barb. 361; *Sanborn* v. *Fireman's Ins. Co.* 16 Gray, 448; *Jones* v. *Provincial Ins. Co.* 16 U. C. Q. B. 477; Bliss, Life Ins. § 180,—are to the same effect.

In *Jones* v. *Provincial Ins. Co.*, *supra*, it is held that the Statute of Limitations begins to run from the date of the oral agreement to insure. These authorities are based upon the fact that the agent has all the powers of a general agent to bind the company. The above Statute makes all agents soliciting insurance, receiving premiums or transmitting applications, general agents to the fullest extent, so that the above authorities are in point. But this very question was decided by this court in the late case of *Campbell* v. *Philadelphia Am. F. Ins. Co.*, 73 Wis. 100. The oral agreement of the agent was for six months' insurance, and no premium was paid. It was held to cover any loss occurring within the six months. The questions here have been so often decided by the court that it is not worth while to cite authorities elsewhere. Many of them are cited in appellant's brief. The court omits to find the most important fact in the case, and that is the agreement itself. That the oral agreement was made as above stated is undisputed. The testimony of the plaintiff was corroborated by the circumstances, and the agent himself does not dispute it in any material point. The court erred in all of its conclusions of law.

The judgment of the County Court is reversed, and the cause remanded, with direction to render judgment in favor of the plaintiff for the loss proved.

PENNSYLVANIA SUPREME COURT.

Re John LAWRENCE'S ESTATE.

APPEAL OF Samuel APPLETON *et al.*

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

1. The rule of law in regard to perpetuities, that a condition precedent to which an interest is subject must be one to be fulfilled within twenty-one years after some life in being at the creation of the interest, applies to interests in realty or personalty, whether legal or equitable, but not to an interest which is vested.

2. The rule that no interest subject to a condition precedent is good unless the condition must be fulfilled within twenty-one years after some life in being at the creation of the interest, applies as well to a power to appoint

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NOTE.—*Will; rule against perpetuities.*

Future estates limited upon the life estate, which are not sure to take effect within twenty-one years and the usual fraction after the termination of the life estate, are void in their creation. Coggins' App. 124 Pa. 10.

So where, after termination of the life estate to testator's children, a bequest to the grandchildren who arrive at the age of twenty-five years is contingent as to any grandchild arriving at that age; and a grandchild born after testator's death, even if just prior to the death of the parent, being included in its terms,—it is in violation of the rule against perpetuities, as the estate might not vest within twenty-one years and a fraction after the death of the life tenant. *Ibid.*

In Tennessee a devise by which property is tied up and made inalienable beyond the period within a life or lives in being and twenty-one years, with a fraction of a year added for the term of gestation in cases of posthumous birth, is void as creating a perpetuity. Davis v. Williams, 85 Tenn. 646, citing Booker v. Booker, 5 Humph. 508; Franklin v. Armsfield, 2 Sneed, 305; White v. Hale, 2 Coldw. 77.

A devise to trustees to pay income to testator's daughters, and, on the death of the survivor, the principal to grandchildren, or the issue of grandchildren, in fee, is void as a perpetuity. Andrews v. Rice, 2 New Eng. Rep. 124, 53 Conn. 566.

Where the language of a will is plain and unambiguous, it cannot be wrested from its natural import in order to avoid the effect of the rule against perpetuities. Cottman v. Grace, 3 L. R. A. 145, 112 N. Y. 299; Mifflin's App. 1 L. R. A. 453, and *note*, 121 Pa. 205.

Where the vesting of the estate depends on a contingency.

To come within the rule of the common law against perpetuities, the estate, legal or equitable, granted or devised, must be one which, according to the terms of the grant or devise, is to vest upon the happening of a contingency which may by possibility not take place within a life or lives in being (treating a child in its mother's womb as in being) and twenty-one years afterwards. McArthur v. Scott, 113 U. S. 340, 28 L. ed. 1015; Barnitz v. Casey, 11 U. S. 7 Cranch, 456, 3 L. ed. 403.

Limitations which would have been void under the old law because they would have been treated as possibilities upon possibilities are void under the rule against perpetuities. *Re* Frost, L. R. 43 Ch. Div. 246.

The old rule still exists; it has not been abrogated by the more modern rule against all perpetuities, which prohibits property being tied up for a longer period than a life or lives in being and twenty-one years afterwards, with the addition of the period of an actually existing gestation, the two rules being in fact independent and co-existing. Whitby v. Mitchell, L. R. 44 Ch. Div. 85. See Hills v. Barnard (Mass.) 9 L. R. A. 211, and *note*.

What not within the rule against perpetuities.

A limitation for the life of an unborn person, with a limitation after his death to his unborn children to take as purchasers, is void as "a possibility upon a possibility." Whitby v. Mitchell, L. R. 44 Ch. Div. 85.

Executory devises limited upon a definite failure of heirs, *i. e.*, within the term of a life or lives in being and twenty-one years and a fraction afterwards, are valid. Gambrill v. Forest Grove Lodge, 3 Cent. Rep. 888, 66 Md. 17, citing Dallam v. Dallam, 7 Harr. & J. 220; Newton v. Griffith, 1 Harr. & G. 127.

Devise to testator's grandchildren, on condition of their reaching the age of majority, but in default thereof, the property to pass to others, is valid. Succession of Strauss, 38 La. Ann. 55.

A restrictive covenant or contract, not being a

11 L. R. A.

See also 24 L. R. A. 123.

by will as to the appointment; and a power which can be exercised at a time beyond the limits of the rule is invalid.

3. A power given to a living person to appoint by will the persons who shall take the fee of certain property cannot be impeached as violating the rule against perpetuities even though within its terms an appointment may be made which will violate such rule.

4. A power of appointment to be exercised by will only is a special power, and the question whether or not the estate created by the appointment is too remote, under the rule against perpetuities, must be determined with reference to the time of the creation of the power, and not to that of its execution.

5. Where a power of appointment is exercised by creating a valid, particular estate, and limiting a remainder thereon which is void for remoteness, the invalidity of the remainder will not invalidate the whole appointment, but it will be upheld as to the particular estate.

6. If the donee of a special power of appointment by will, in the exercise thereof, creates a remainder which is to take effect at the death of certain persons living at the donee's death, to whom is given the particular estate, the remainder will become vested at the death of the donee, *i. e.*, ready to take effect whenever and however the particular estate determines; and it will be valid notwithstanding the fact that the termination of the particular estate may fall beyond a life or lives in being at the death of the donor of the power.

7. Where a will gives a woman a power to appoint by her will the persons who shall take the fee to certain property the power may lawfully be exercised by devising the property in trust to collect the income and pay certain annuities during the lives of the donee's children and the survivor of them, and then to transfer the property to a certain religious association, since all the interests will vest at the death of the donee, and it is immaterial that the association may not receive possession of the property during a life in being at the death of the creator of the power.

8. A power permitting one to grant and convey real estate in fee, in such parts or shares as the appointee shall by her will direct, will authorize her to create trust estates for life with remainder over.

(October 6, 1890.)

APPEAL of Samuel Appleton, Mary E. Pomerene, John L. Kite, Sarah R. Lightfoot and Henry Pomerene, surviving trustee under the will of John Lawrence, deceased, from a decree of the Orphans' Court of Philadelphia County, appointing a trustee under the will of John Lawrence, deceased, and under the will of Ann Appleton, deceased, and directing the acting trustee to assign and transfer all property in his hands as trustee. *Affirmed.*

The facts are stated in the opinion.

Mr. **John G. Johnson,** with *Mr.* **William A. Manderson,** for appellants:

This case is ruled by—

Smith's App. 88 Pa. 491.

Mr. **E. Spencer Miller,** for Ann E. A. Griffin, petitioner, and the Union Trust Company, appellees:

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limitation of property, is not obnoxious to the rule against perpetuities. Mackenzie v. Childers, L. R. 43 Ch. Div. 265.

A clause in a will directing that none of the legacies, bequests, devises, etc., shall be executed or take effect until a building then in course of construction should be completed and paid for out of the estate, does not violate the rule as to perpetuities. It only declares—what the law requires—that the testator's debts should be first paid. Jones v. Habersham, 107 U. S. 174, 27 L. ed. 401.

A direction by will to convert testator's real and personal estate, except his library, into money, for the purposes of the will,—namely, the payment of debts, the investment of a fund for the payment of annuities and a residuary gift,—operates as an equitable conversion of the real estate into personalty at the time of testator's death. Cottman v. Grace, 3 L. R. A. 145, 112 N. Y. 299.

Rule does not apply to charities.

The rule against perpetuities does not apply to charities. Inglis v. Sailors Snug Harbor, 28 U. S. 3 Pet. 99, 7 L. ed. 617; McDonough v. Murdock, 56 U. S. 15 How. 367, 14 L. ed. 732; Ould v. Washington Hospital, 95 U. S. 303, 24 L. ed. 450.

The gift of a fund to be kept in permanence, and the income thereof to be received and expended by a public corporation, representing public interests, does not violate the rule against perpetuities. Penny v. Croul, 5 L. R. A. 858, and *note*, 76 Mich. 471.

In a will devising funds for establishing colleges, a direction that the real estate should not be alienated does not make a perpetuity forbidden by law, but one allowed in the case of charitable trusts. Perin v. Carey, 65 U. S. 24 How. 465, 16 L. ed. 701; Jones v. Habersham, 107 U. S. 174, 27 L. ed. 401.

Unlawful suspension of power of alienation.

A trust estate limited to a term unauthorized cannot be sustained. Bean v. Bowen, 47 How. Pr. 327.

If the provisions of the trust unduly suspend the power of alienation, it is void, but attempted trusts in testamentary provisions for widows and children may be effectual as powers in trust. Kane v. Gott, 24 Wend. 641; Hone v. Van Schaick, 20 Wend. 564; Moore v. Moore, 47 Barb. 257; Burke v. Valentine, 52 Barb. 412; Killam v. Allen, 52 Barb. 605; Leggett v. Perkins, 2 N. Y. 297; Amory v. Lord, 9 N. Y. 403; Savage v. Burnham, 17 N. Y. 561; Beekman v. Bonsor, 23 N. Y. 298; Downing v. Marshall, 23 N. Y. 366; Gilman v. Reddington, 24 N. Y. 9; Cutter v. Hardy, 48 Cal. 568; *Re* Estate of Delaney, 49 Cal. 76; Toms v. Williams, 41 Mich. 552; Newark M. E. Church v. Clark, 41 Mich. 730; Smith v. Ford, 48 Wis. 115; White v. Fitzgerald, 19 Wis. 480; Goodrich v. Milwaukee, 24 Wis. 422; 2 Pom. Eq. Jur. 566.

A bequest in trust to the mayor of a city and the presidents of two incorporated societies and their successors, to hold in trust forever, constitutes an unlawful suspension of alienation of the estate, and is void. Cottman v. Grace, 3 L. R. A. 145, and *note*, 112 N. Y. 299.

A period measured by years, and not by lives in being, during which there will be no persons in existence by whom an absolute estate in possession can be conveyed, brings an estate within the rule against the unlawful suspension of alienation. Cruikshank v. Home for the Friendless, 4 L. R. A. 140, and *note*, 113 N. Y. 337; Bascom v. Albertson, 34 N. Y. 584; Leonard v. Burr, 18 N. Y. 107; Dodge v. Pond, 23 N. Y. 69; Beekman v. Bensor, 23 N. Y. 306; Rose v. Rose, 4 Abb. App. Dec. 108.

So where the delay was contingent upon the uncertain action of the State, in granting a special

The mere absence of an express permission to declare trusts does not exclude that authority. Farwell, Powers, 255; Sugden, Powers, 411; *Boyle's Estate*, 5 W. N. C. 363; *Willis* v. *Kymer*, L. R. 7 Ch. Div. 181; *Alexander* v. *Alexander*, 2 Ves. Sr. 642.

The appointment by Mrs. Appleton does not break the rule against perpetuities, whether the decision in *Smith's Appeal* be right or wrong.

Gray, Perpetuities, §§ 239, 389, 523, *et seq.*; *Hillyard* v. *Miller*, 10 Pa. 334; *Mifflin's App.* 1 L. R. A. 453, 121 Pa. 205.

Mr. **J. Howard Gendell,** for the New York Baptist Union, appellee:

A power to appoint in fee, but with no prohibition against giving a less estate, authorizes any legal limitations within the scope of the power which may be carved out of the fee.

1 Sugden, Powers, *496; Farwell, Powers, 255; Chance, Powers, 1217; *Lancaster* v. *Dolan*, 1 Rawle, 231; *Keefer* v. *Schwartz*, 47 Pa. 503; *Wickersham* v. *Sarage*, 58 Pa. 365; *Horwitz* v. *Norris*, 49 Pa. 213; *Fidelity Co's App.* 4 W. N. C. 265.

Appointments in trust have been sustained, even under a restricted power, in—

Boyle's Estate, 5 W. N. C. 363; *Pepper's App.* 12 Cent. Rep. 463, 120 Pa. 239; *Crompe* v. *Barrow*, 4 Ves. Jr. 681; *Alexander* v. *Alexander*, 2 Ves. Sr. 642; *Trollope* v. *Linton*, 1 Sim. & Stu. 477; *Willis* v. *Kymer*, L. R. 7 Ch. Div. 181; *Friend* v. *Oliver*, 27 Ala. 532.

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

John Lawrence died domiciled in the City of Philadelphia, in the month of March, 1847. By his last will and testament he devised all his real and personal estate to certain persons therein named, in trust, to pay over the net income, during her lifetime, to his daughter, Ann Appleton; to assign the real estate, upon her decease, in fee to the appointees of her last will; or, failing such appointment, to pay over the same to and amongst her then living children, and the issue of children then deceased.

The trustees named in the will were removed by the Orphans' Court of Philadelphia County during the lifetime of Ann Appleton, and George W. Appleton and Henry Pomerene were duly appointed trustees in their place. All the property, except certain real estate in Philadelphia, was lost by the *devastavit* of the original trustees, the remaining property being known as No. 43 South Second Street, No. 221 Arch Street, and Nos. 1127 and 1129 Pine Street.

Ann Appleton, the donee of the power, died in March, 1883, domiciled in the State of New Jersey, leaving to survive her certain children, all of whom, it is conceded, were born during the lifetime of John Lawrence. By her last will and testament in writing, which was afterwards duly probated, she devised to George W. Appleton, and in event of his renunciation or decease, to the Philadelphia Trust, etc., Company, certain property of her own in Haddonfield, New Jersey, and also all that remained of the property over which she held the power of appointment, under the will of John Lawrence, specifically referring there-

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charter, which might not take place at all, or might leave a period of ten years during which the power of alienation would be suspended. Cruikshank v. Home for the Friendless, *supra*. See People v. Simonson, 55 Hun, 605.

To be valid, the suspension of the power of alienation must necessarily terminate, under any and all circumstances, within the period prescribed by the Statute. Ford v. Ford, 70 Wis. 19, citing Schettler v. Smith, 41 N. Y. 328; Knox v. Jones, 47 N. Y. 397.

Where, under a will, a widow took a present life estate in homestead land; the executors as trustees took a future estate in the same land for the benefit of a son of testator, upon certain contingencies, all of which failing, Hamilton College should take, the son dying before coming into possession of the whole estate—it was such a suspension of the power of alienation as is contrary to the Statute and is absolutely void; and the homestead was held to have descended to the son. Ford v. Ford, 70 Wis. 19.

Powers of alienation an incident of life estate.

A donor creating a life estate cannot take away its incidents, among which are the powers of alienation. Pickens v. Dorris, 2 West. Rep. 420, 20 Mo. App. 1.

A provision of a will that the trustees shall hold one half of the share of each son in trust during his life without power on the part of the *cestui que trust* to alienate it or charge it with his debts, is contrary to the statutes and void. Woolley v. Preston, 82 Ky. 415. Consult also Lampert v. Haydel, 3 West. Rep. 172, 20 Mo. App. 616.

Where an estate in fee is created in clear and decisive terms, a restriction upon the right of alienation is of no effect. Allen v. Craft, 7 West. Rep. 512, 109 Ind. 476, citing M'Williams v. Nisby, 2 Serg. & R. 513; Moore v. Shultz, 13 Pa. 101; De Peyster v. Michael, 6 N. Y. 467; Mandlebaum v. McDonell, 29 Mich. 78; 4 Kent, Com. 5.

Suspension of absolute ownership, when too remote.

Where the suspension of absolute ownership will or may exceed a longer period than two lives in being at the death of the testator, such limitation is too remote and renders the disposition void. Ward v. Ward, 7 Cent. Rep. 67, 105 N. Y. 68, citing Knox v. Jones, 47 N. Y. 389; Colton v. Fox, 67 N. Y. 348; Smith v. Edwards, 88 N. Y. 92; Bailey v. Bailey, 97 N. Y. 460.

The fact that a limitation over upon death of the first taker without issue was to a living person by name does not itself indicate that a definite failure of issue must have been intended, instead of an indefinite failure of issue, which would be too remote to sustain an executory devise. Hackney v. Tracy (Pa.) 26 W. N. C. 464; Taylor v. Taylor, 63 Pa. 481; Middleswarth v. Blackmore, 74 Pa. 414; Comegys v. Jones, 3 Cent. Rep. 736, 65 Md. 317.

A gift of the interest of one third of testator's estate to his daughter for life, and after her death to her child or children, so long as they severally live, and at their death the principal to go to the next of kin of a deceased child in such share and manner as if such child was the absolute owner and should die intestate,—is valid as to the daughter's interest, and as to that of her children afterwards born, if any; but the gift to her grandchildren was void as being too remote, as the vesting might not take place within the life of any person or persons in being and twenty-one years after. Stout v. Stout, 44 N. J. Eq. 479.

A devise in trust for a daughter during her life, and after her death to the use of any husband she may marry, during his life, and after the death of both to the children of the daughter, with gift over, in default of such children, to other persons,

to, in trust, to care for the same and collect the income thereof during the joint lives of her children, all of whom, as we have said, were living at the death of John Lawrence; to pay out of such income and the proceeds of sale of the Haddonfield property, if sold under the authority given, certain annuities mentioned, during that period, and, after the expiration of said joint lives to transfer the *corpus* of the property to the New York Baptist Union for Ministerial Education, which is the corporate name of what is known as the Rochester Theological Seminary.

George W. Appleton died December 1, 1886, and the Philadelphia Trust, etc., Company having renounced the trust, the office of trustee under the appointment in the will of Ann Appleton became vacant; whereupon Ann Eliza A. Griffin, one of the annuitants for life, presented her petition for the appointment of a successor to the trust created by the donee of the power. The appellants resisted this application, alleging that the execution of the power by Ann Appleton was invalid, and that Mrs. Griffin had, therefore, no standing in court to ask for the appointment of a trustee, the estate having passed to those entitled in remainder, under the will of John Lawrence, deceased, as if Ann Appleton had died intestate. Their contention is, first, that the appointment violates the rule against perpetuities, and is therefore wholly void; and second, that whilst the donee of the power, by its terms, could make a direct, immediate and absolute appointment of the fee, she was not authorized to declare uses and trusts as contained in her will.

The rule, as stated in Gray on Perpetuities, is as follows: "No interest, subject to a condition precedent, is good, unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest." This rule is in force in all of the States where the principles of the common law prevail, excepting as it may have been modified by statute. In Pennsylvania it is unaffected by statute, only as it is modified by the Acts of April 18, 1853, section 9, and April 26, 1855, section 12, which were suggested by the Thelussen Act, and operate only in restraint of accumulations. It seems to be conceded, and rightly too, we think, that although Ann Appleton was domiciled at her death in New Jersey, the validity of the appointment, if there should be any conflict, is to be determined by the laws of Pennsylvania, which is the *lex rei sitæ;* any inquiry as to the law of New Jersey is therefore rendered unnecessary. The rule, as stated, applies to interests in realty or personalty, whether legal or equitable, but has no application to an interest which is vested, for a vested interest by its very nature cannot be subject to a condition precedent.

So, also, where a power of appointment is given, either by deed or will, the rule applies as well to the power as to the appointment. If a power can be exercised at a time beyond the limits of the rule it is bad. As in the case at bar, however, the power must be exercised, if at all, in the lifetime of Ann Appleton, a life in being at the time of its creation, it cannot be impeached upon that ground; and although the power, to be exercised by will only, is in the most general terms, it is not rendered bad by the fact that within its terms an appointment might possibly have been made which would be too remote. Gray, Perpetuities, 510.

The direct and specific object of the power, according to its terms is not to create a perpetuity; and as the exercise of it is necessarily according to a certain discretion or latitude of choice in the donee, the security which the law provides against the violation of the law of remoteness is in the failure of any disposition which results from the abuse of that discretion. Lewis, Perpetuities, 487.

The question, therefore, is upon the validity of the appointment which was in fact made.

As a general rule, whether an appointment made in execution of a power is too remote depends upon its distance from the creation of

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is void for remoteness as to the limitations subsequent to the life estate of the daughter and husband, as she might marry after testator's death a person not born in his lifetime, and thus there would be a limitation to her for life, remainder to an unborn person for life, with contingent remainder to children living at the death of that unborn person. *Re* Frost, L. R. 43 Ch. Div. 246.

There is no objection, on the ground of remoteness, to a gift to unborn children for life, and then to a certain person, provided the vesting of the estate in the latter is not postponed too long. Seaver v. Fitzgerald, 2 New Eng. Rep. 511, 141 Mass. 401; Brown v. Brown, 86 Tenn. 277, citing Loring v. Blake, 98 Mass. 253; Evans v. Walker, L. R. 3 Ch. Div. 211; *Re* Roberts, L. R. 19 Ch. Div. 520; Lewis, Perpetuities, 417, 511.

A devise of property "in trust to my grandchildren by my sons J. L. and W. now born, or hereafter born, to be divided equally between them, my sons acting as trustees, each for his own family . . . and dividing out to each child, as he or she may come of age or marry, his due share of said estate, provided always that the right of survivorship shall be to the rest of each family of children in case any child of either family shall die under age unmarried and without children,"—is not void for remoteness. Woodruff v. Pleasants, 81 Va. 37.

Upon the testator's death the property vests in the grandchildren then living, subject to open and let in afterborn children; and upon the death of any grandchild under twenty-one years of age unmarried and without children, his or her share goes to his or her brothers and sisters. *Ibid.*

Unlawful suspension of power of sale.

In order to render the instrument invalid under our Statute the power of alienation must be suspended, and the time it is so suspended must be for over two lives in being at the creation of the estate, or at least so that it may be so suspended. It is a question of power; if the trustees have the power to sell, the instrument is valid; but if the power of sale is absolutely suspended for the prohibited period, it is void. Thatcher v. St. Andrew's Church, 37 Mich. 271; Belmont v. O'Brien, 12 N. Y. 394; Hawley v. James, 16 Wend. 153; Hunter v. Hunter, 17 Barb. 90; Nelson v. Callow, 15 Sim. 353; Cresson v. Ferree, 70 Pa. 446; Mason v. Mason, 2 Sandf. Ch. 432, 7 N. Y. Ch. L. ed. 652.

Where testator's wife is the trustee, as well as beneficiary, her life is to be taken into the account to exhaust the limit which the law has assigned to the suspense of the power of alienation. McSorley v. Wilson, 4 Sandf. Ch. 524, 7 N. Y. Ch. L. ed. 1195.

Where the residuary trust estate is to continue

the power, and not from its execution. Gray, Perpetuities, 514; Lewis, Perpetuities, 484.

The exception is when the power is general to the donee to appoint, to whomsoever he may choose, either by deed or will; in such case the donee has absolute control, as if he had the fee, since he can appoint as well to himself as to any other person; he is practically the owner. In such case the degree of remoteness is measured from the time of the exercise of the power, and not from the time of its creation. *Bray* v. *Bree*, 2 Clark & F. 453; Sugden, Powers, 394–683; Lewis, Perpetuities, 483; Gray, Perpetuities, 477–524; *Mifflin's App.* 121 Pa. 205, 1 L. R. A. 453.

But it will be seen that the power given to Ann Appleton is a power to be exercised by will only; her authority is not commensurate with the entire ownership; she could not appoint to herself, nor to any other person to take in her lifetime. She had not the absolute control, and although the decisions are somewhat conflicting, and the question not free from doubt, the better opinion seems to be, that the power must be regarded as special, and therefore the remoteness of the estate created by the appointment must be measured from the time of the creation of the power, which was at the death of John Lawrence. See *Powell's Trusts*, 39 L. J. Eq. 188; Gray, Perpetuities, 526, and cases there cited.

No estate or interest can be limited under a particular power, which would have been too remote if limited in the deed or will creating the power. Lewis, Perpetuities, 488.

But assuming that the remoteness of the appointment depends upon its distance from the creation of the power, it is plain that the several bequests and annuities made in the last will and testament of Ann Appleton, deceased, were to persons named and in being, for distinct and separable sums of money by way of bequest or annuity, out of the proceeds of her own and the income of the original trust estate.

The manifest purpose of the trust was to preserve the estate for the legatees and annuitants, for the life of her children and the survivor of them. At the death of the last child her surviving, their object would be fully attained; the annuities, whether to children, grandchildren or to others, were then to terminate, and the entire trust estate then remaining was to be conveyed to the New York Baptist Union, etc., in fee, to be applied as by the will is directed. We have, then, a devise to the trustees, in trust for the annuitants for the life of the children of the donee and the survivor of them, with a remainder over in fee to the Baptist Union. Ann Appleton, as the donee of the power, had the right by her will to appoint whom she chose; she certainly had a right to appoint to her children for life, or to trustees for their use for life, whether they were born before or after the decease of John Lawrence, and that although the estate in remainder might be too remote, for the annuitants would take at her decease. "Where, under a power, interests are given by way of particular estate and remainder (including analogous gifts of personal estate), and the particular estate is limited to a valid object of the power, but the remainder is too remote, the appointment will not be wholly void, but only the gift in remainder. In such case the interests, in respect of which there is an excess of the power, being distinct and separable from the valid portion of the appointment, there is no reason for involving the primary limitation in the remoteness of the remainder." Lewis, Perpetuities, 496, citing *Adams* v. *Adams*, Cowp. 651; *Bristow* v. *Warde*, 2 Ves. Jr. 336; *Routledge* v. *Dorril*, Id. 357; *Brudenell* v. *Elwes*, 1 East, 442, 7 Ves. Jr. 382; *Butcher* v. *Butcher*, 9 Ves. Jr. 382; Gray, Perpetuities, 232, 239, 242, citing *Read* v. *Gooding*, 21 Beav. 478, 4 De G. M. & G. 510, and other cases. See also *Davenport* v. *Harris*, 3 Grant, Cas. 168.

In this respect we think the ruling in *Smith's App.*, 88 Pa. 492, was wrong; for although

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entire and undiminished, without regard to the dropping of the lives of his children, until one of his sons shall attain the age of thirty years, the trust is void. Field v. Field, 4 Sandf. Ch. 550, 7 N. Y. Ch. L. ed. 1204.

A will dividing testator's estate to his wife in trust for the support of herself and children "until our youngest child now living shall have arrived at the age of twenty-one years, or would arrive at that age if living;" the estate then to be divided according to law; and appointing his wife sole executrix, with power of sale,—is invalid as being against the Statute prohibiting perpetuities. Haynes v. Sherman, 117 N. Y. 433.

Postponement of power of appointment.

Under a will creating a trust to pay rents to testatrix's sister for life and to their children for their lives, with power to the survivor of such sisters or children to appoint, the power of appointment is void for remoteness, as the children might not all be in being at the death of the testatrix, and the power, therefore, is not given to a person who must necessarily be ascertained within a life in being and twenty-one years. *Re* Hargreaves (C. A.) L. R. 43 Ch. Div. 401.

Where certain appointments by the devisee of the life estate under power given by will were void under the rule as to perpetuities, other appointments which did not offend that rule were not affected where they were made to beneficiaries as individuals. Albert v. Albert, 10 Cent. Rep. 567, 68 Md. 352.

Suspension of ownership of personal property.

A limitation of property in a will, which suspends the absolute ownership beyond the time allowed by statute, if separable from the principal disposition of the property, may be cut off. Henderson v. Henderson, 113 N. Y. 1.

A gift to the children of a woman who is given a life interest, provided she does not survive her husband and leaves any children surviving, which has been made contingent on the fact of such children's reaching the age of twenty-one years, otherwise the property to go to certain other persons,—is void as unlawfully suspending the ownership. Greenland v. Waddell, 116 N. Y. 234, citing Patterson v. Ellis, 11 Wend. 259; Manice v. Manice, 43 N. Y. 303; Warner v. Durant, 76 N. Y. 133; Delaney v. McCormack, 88 N. Y. 174, 183; Batsford v. Kebbell, 3 Ves. Jr. 363.

A bequest to the town in its corporate capacity, to be forever invested by the town board or officers of said town having charge of the financial matters of said town, was void as creating an unlawful suspension of the absolute ownership of personal property. Iseman v. Myres, 26 Hun, 657.

Ryan's daughter, Mrs. Smith, might have had children born after his decease, her children, whether born before or after Ryan's death, would have taken at her death, and the life estates were therefore good; whereas it was held that her appointment was wholly bad. This statement of the law would seem to be decisive of the case at bar, for the proceeding is not by the party entitled in remainder for a conveyance, but by one of the annuitants, for the appointment of a trustee for the purposes of the trust subsisting under the will of Ann Appleton, for the benefit of the annuitants during the life of her children.

But the estate of the Baptist Union also vested at the death of Ann Appleton. The beneficiaries under her will are described by name; to each is given a separate and distinct sum by way of legacy, or annuity, to each one *eo nomine;* and, as we have said, their rights vested at their mother's death. The remainder was ready at any time after the death of Ann Appleton to come into the possession of the Baptist Union whenever and however the life estate might determine; it was subject to no condition precedent save the determination of the preceding estate; the contingency was not annexed to the gift, or to the person entitled, but to the time of enjoyment merely, and according to all the cases the remainder must be treated not as a contingent, but as a vested, estate. If this be so the rule against remoteness is satisfied, for not only the particular estate, but the remainder supported by it, took effect within lives in being, at the creation of the power. "The particular feature," says Mr. Lewis in his treatise on Perpetuities, "in limitations of future interests, with which the rule against perpetuities is connected, is the time of their vesting, or, in other words, of their becoming interests transmissible to the representative of the grantee, devisee or legatee, and disposable by him. When they are so limited as necessarily to allow this quality, within the legal period of remoteness, they are free from objection in reference to the perpetuity rule." Upon this question we may also refer to *Mifflin's App.*, 121 Pa. 205, 1 L. R. A. 453. "If a remainder is vested, that is, if it is ready to take effect whenever and however the particular estate determines, it is immaterial that the particular estate is determinable by a contingency which may fall beyond a life or lives in being." Gray, Perpetuities, 209.

Perpetuities are grants of property wherein the vesting of an estate is unlawfully postponed. *Philadelphia* v. *Girard*, 45 Pa. 26; *Barclay* v. *Lewis*, 67 Pa. 316.

The main question decided in *Smith's Appeal* is therefore not involved in this case. The accuracy of that decision has been somewhat doubted by the learned judge who wrote it (*Coggin's App.* 124 Pa. 10), but the subject can only be further considered when a proper case is presented.

Nor do we think the appointment is invalid, because in the exercise of the power the donee, without special direction of John Lawrence, the testator, to that effect, in appointing the fee declared certain uses and trusts for life, with remainder over. The power conferred upon Mrs. Appleton by her father's will was "to grant and convey the real estate in fee," "in such parts or shares," as she by her last will should direct. The power is wholly unrestricted; the entire discretion is committed to the donee of the power, to grant the fee in such form, and to such persons, as she chose.

In the exercise of that power she did appoint the fee, and we think she was authorized, observing the rule against remoteness, to declare such uses and trusts for life as would best carry out her wishes with respect to the ultimate disposal of the property. No authorities have been cited to any different effect. On the contrary, appointments in trust, even under restricted powers, would seem to have been sustained, and as illustrations of this we have been referred to *Alexander* v. *Alexander*, 2 Ves. Sr. 642; *Trollope* v. *Linton*, 1 Sim. & Stu. 477; *Crompe* v. *Barrow*, 4 Ves. Jr. 681; *Willis* v. *Kymer*, L. R. 7 Ch. Div. 181; 2 Sugden, Powers, 273, 274.

The decree of the Orphans' Court is affirmed, and the appeal dismissed at the cost of the appellants.

MISSOURI SUPREME COURT.

Sophia F. DAVIS, *Appt.*,
v.
Lucy J. GREEN *et al.*, *Respts.*

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

1. Upon full payment of the amount bid for lands at a partition sale, the parties to the partition proceedings stand seised of an estate of inheritance to the use of the purchaser of which his wife is dowable under Revision 1879, § 2186, although his interest therein is sold on execution before he receives his deed and he never goes into possession of the property.

2. The existence of a judgment against a man when he pays his bid on lands sold for partition and the levy of an execution thereunder upon his interest in the lands will not have the effect by relation or otherwise to transfer his title under the deed which he subsequently receives to the execution purchaser so as to cut off his wife's dower rights, since the Statute provides that no judgment against the husband shall prejudice such rights and the execution sale could affect only the interest the husband possessed when it was made, and not the seisin subsequently acquired under his deed.

3. The proceedings in a suit between purchasers of land under rival executions brought to determine which has the better claim thereto, to which neither the execution debtor nor his wife are made parties, are not admissible against the wife in a suit to establish her claim to dower in the property.

4. Declarations of one for whose debt land has been sold under execution as to his title thereto, made after all his interest therein, either legal or equitable, had ceased and when he had no possession, either actual or con-

structive, are not admissible against his wife in a suit to establish her claim to dower in the property.

5. Parol testimony of declarations made by a deceased person as to his title to lands is not, if unsupported by other circumstances, sufficient to contradict a judicial record and sheriff's deed which purport to convey the absolute title to him, especially after the lapse of nearly twenty years from the alleged time of their utterance.

(December 15, 1890.)

APPEAL by plaintiff from a judgment of the Circuit Court for Audrain County in favor of defendants in a proceeding for the admeasurement of dower. *Reversed.*

The facts are stated in the opinion.

Mr. **W. W. Fry,** for appellant:

The right of the husband during coverture to make corporeal seisin is sufficient to entitle the widow to dower without actual seizure.

Gentry v. *Woodson*, 10 Mo. 224; *Warren* v. *Williams*, 25 Mo. App. 22; Mo. Rev. Stat. §§ 2186, 2207.

Williams' answer in the Crump case and the testimony of witness Duncan was hearsay and incompetent and erroneously admitted.

Greenl. Ev. § 90.

The sheriff's deed to Davis during coverture gave plaintiff dower in the land, and no declaration or act of Davis could devest her of it or impair her title.

Hambright v. *Brockman*, 59 Mo. 52; *Grady* v. *McCorkle*, 57 Mo. 172; *Williams* v. *Courtney*, 77 Mo. 587.

Declarations of a party, not in possession, touching the title to property, are valueless and inadmissible.

Gorden v. *Ritenour*, 87 Mo. 59; *Weinrich* v. *Porter*, 47 Mo. 293; *Albert* v. *Besel*, 8 West. Rep. 305, 88 Mo. 154.

The widow is entitled to dower in the lands which her husband held under an inchoate title, although he may have conveyed it prior to the confirmation.

Thomas v. *Hesse*, 34 Mo. 13; *Duke* v. *Brandt*, 51 Mo. 221; Perry, Tr. § 125.

The relation of trustee and *cestui que trust* to create a resulting trust must result from the facts as they exist at the time of the purchase and cannot be created by subsequent occurrences.

Kelly v. *Johnson*, 28 Mo. 249; Perry, Tr. § 133.

If Williams had a vendor's lien he did not enforce it by sale and it did not affect plaintiff's dower.

Duke v. *Brandt* and *Thomas* v. *Hesse*, *supra*; Perry, Tr. § 125.

Resulting trusts must not be declared upon doubtful evidence or on a preponderance of evidence. There should be no room for a reasonable doubt.

Allen v. *Logan*, 96 Mo. 601; *Adams* v. *Burns*, 96 Mo. 363; *Johnson* v. *Quarles*, 46 Mo. 424.

Testimony of verbal admissions of deceased parties is entitled to small weight to establish such trusts.

Ringo v. *Richardson*, 53 Mo. 285.

Testimony of loose declarations of the husband will not be sufficient.

Woodford v. *Stephens*, 51 Mo. 443.

Messrs. **Duncan & Jesse** for respondents.

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

The plaintiff, who is the widow of Silas W. Davis, deceased, brought this action, in 1887, to have dower admeasured and set off to her in the lands described in the petition, being N. E. ¼ of S. W. ¼ of section 12, township 50, range 9 W. On April 26, 1860, Silas Davis, then being the husband of plaintiff, purchased the land in dispute with others, at a partition sale, in a suit by the heirs of William Sims, entitled "*Evans et al.* v. *Sims et al.*," for the sum of $800, one fifth cash, and balance in one and two years, with interest at 10 per cent from date of sale. The sheriff's report of sale, showing collection of purchase money and interest, was filed April 29, 1863, the sheriff's deed was executed and delivered to said Davis May 2, 1863, and was put on record May 19, 1863. Said Davis died in July, 1886, without ever being, at any time, in the actual possession of the land, or any part thereof. April 29, 1862, judgment was recovered in the Circuit Court of Audrain County against said Silas Davis and C. C. Ricketts, in favor of one Hubble. Execution issued thereon in January, 1863, and levied on the land March 6, 1863, and at a sale of the land had under said execution, May 1, 1863, Henry Williams became the purchaser, and obtained a sheriff's deed therefor, dated May 4, 1863. Williams took possession (date of possession not given), under his said purchase, and defendants claim under him by a regular chain of title.

Mr. Duncan, attorney for defendants herein, was called as a witness for defendants, and stated that, as attorney for one Crump, he recovered a judgment against said Davis in 1867, and had the land sold under execution to Crump, and that, afterwards, in 1868 or 1869, he instituted a suit in ejectment for said Crump against one Hutchens, who was, at that time, in possession of this land, and that said Henry Williams was, upon his own motion, made a party defendant in the Crump suit, and that, in 1869, said defendants, Hutchens and Williams, filed their joint answer therein. Here the witness was asked what, if any, conversation he had with S. W. Davis, about whose money paid for this land in dispute, in the purchase of the same at the Sims partition sale in 1859. To this question, and the evidence called for, plaintiff objected, and to all evidence in regard to the Crump case, and to testimony of witnesses, as to any conversation with Davis in 1868, as called for, because plaintiff was not bound by any statement of Davis therein; that neither plaintiff nor her husband were parties to said suit, and plaintiff was not bound by said suit, or any statement of Davis in regard to it; that the oral testimony offered was not admissible against the record in the partition suit and the sheriff's deed to Davis, especially after the lapse of nearly twenty years; that the evidence called for was hearsay, incompetent, irrelevant and immaterial. The court overruled plaintiff's objection, and admitted the evidence, and plaintiff excepted. The witness Duncan, continuing, said: "After the answer was filed I called on S. W. Davis to know about it, as I expected to use him as a witness in the Crump case. This was in 1868. I read the answer to Davis, and he said the facts re-

cited in it were true." Witness was asked what, if anything, Davis said as to the purchase of the land at the partition sale, and for whose benefit the purchase was made, who paid the purchase money and all Davis said. Plaintiff objected on the ground that the declaration and admission of the husband were not binding on her, and incompetent. The objections were overruled, and plaintiff excepted. Said witness then continued his testimony, as follows: "Davis told me that when the lands were sold in April, 1860, in the partition suit, he, Davis, and Henry Williams were, by agreement, to buy the lands jointly, and that he attended the sale, and bid in the land for $800, one fifth cash, and the remainder in one and two years. He and Williams each paid one half of the cash payment, and gave their joint notes for the deferred payments, and the sheriff made him, Davis, a deed to the lands, May 2, 1863; that he was unable to meet his part of the deferred payments, and Williams paid off the notes in July, 1863." On cross-examination, witness said: "I am attorney for the defendants in this case. I cannot give the exact language used in the conversation between Davis and myself, it has been so long ago. In fact, I had forgotten all about it, until, as attorney for defendants, in investigating this case, I found the papers. I run across this answer, in the Crump case, and, after reading that, I recollected of having this conversation with Davis. I do not remember when that conversation was. Davis died in 1886."

Defendant then offered to read in evidence the answer of Williams in the Crump ejectment suit, to which the plaintiff objected on the ground that it was irrelevant, incompetent and immaterial, and that neither Davis nor plaintiff were parties to this suit, or bound by it. The objections were overruled, and plaintiff excepted. The answer read was filed July, 1868, entitled "*James Crump, Plaintiff*, v. *Warner Hutchens and Henry Williams, Defendants.*" The answer is, first, a general denial, then a specific answer, to the effect that, in 1860, said land was to be sold in the partition case of *Evans et al.* v. *Martin J. Adams et al.*; that Henry Williams agreed with S. W. Davis that Davis should attend said sale, to bid in the land offered for sale, "for the joint use and benefit of themselves, and as joint owners;" that Davis attended said sale, and purchased said lands for $800, for the use and benefit of said Williams and Davis; that the terms of said sale were one fifth cash, which was paid at the time, one half by Davis, the other half by Williams, and the balance to be paid in one and two years, with interest; that Davis and Williams gave their joint notes for the deferred payments; that, in July, 1863, Williams paid said deferred payments; that, in 1863, the sheriff, under the partition sale, executed and delivered a deed for said lands to Davis as the highest and best bidder, of which Crump had notice. There is evidence in the present case to show that the various grantees, under Williams, took possession, and that Williams, and those holding under him, including defendants, have been in possession since. This being the substance of the evidence, so far as material, the court refused the single instruction asked in plaintiff's behalf, and which we deem it unnecessary to set out, as the one instruction given in the cause at the defendant's instance shows the theory upon which the court tried and determined the controversy. The instruction so given, and under which the finding was had, is as follows: "If the court sitting as a jury believe from the evidence in the case that, at the sale by the sheriff in partition, S. W. Davis bought the land in controversy, with other lands, for himself and Henry Williams, and each paid one half of the cash payment, namely, $80, and gave their joint notes for the balance of the purchase price, payable in one and two years thereafter, and that Williams paid said notes himself, and Davis paid no part thereof, then the deed from the sheriff to Williams, read in evidence, transferred to Williams all the right in equity Davis had in the land by virtue of his purchase from the sheriff, and if said Davis never afterwards refunded to Williams his part of the money so paid, and was not in possession of the lands at his death, the plaintiff's inchoate right of dower was defeated, and the finding must be for the defendant." The foregoing instruction was given upon the theory that the admissions and declarations of Davis in connection with the answer in the Crump suit, as testified to by the witness Duncan, were sufficient, competent and admissible in evidence. If, however, it should be held that they were not, the instruction would then be manifestly inapplicable to the case made by the remaining facts in evidence, and for that reason, if no other, erroneous, and needs no further notice at present. The questions arising upon the facts of this record may, for convenience, be classified as follows: *First.* Those arising upon the theory that the admissions and declarations of Davis, the husband, were incompetent, inadmissible and insufficient, as against his widow. *Second.* The competency, sufficiency and admissibility of these admissions and declarations, as well as said answer, in the Crump case; and, if held incompetent, inadmissible and insufficient, no further inquiry need be made as to their possible effect.

The first classification involves a consideration of the operation and effect of various sections of the Statute hereinafter mentioned, as well as the proper construction of the sheriff's deed in partition to Davis, with its recitals in connection with the sheriff's report of the sale, and the collection of the purchase money, and its recitals; and also a like consideration and construction of the sheriff's deed to Williams, under execution, upon the Hubble judgment against said Davis and Ricketts, with its recitals, and the effect thereof. It will be found upon examination that, during the progress of the several transactions involved herein, a number of conflicting liens and equities sprang up, and fastened themselves upon the property in question, that tends somewhat to complicate the matter, and renders its proper solution seemingly difficult; but, upon a careful examination, they will be found to disappear. Revision 1879, § 2186, provides that "every widow shall be endowed of the third part of all the lands whereof her husband, or any other person to his use, was seised of an estate of inheritance, at any time during the marriage, to which she shall not have relinquished her right of

dower, in the manner prescribed by law, to hold and enjoy during her natural life." Id., § 2730, enacts that "judgments and decrees rendered by any court of record shall be a lien on the real estate of the person against whom they are rendered situate in the county for which the court is held." Id., § 2731, declares that "the lien of a judgment or decree shall extend as well to the real estate acquired after the rendition thereof as to that which was owned when the judgment or decree was rendered." Id., § 2197, provides that "no Act, deed or conveyance, executed or performed by the husband, without the assent of the wife, evidenced by her acknowledgment thereof, in the manner required by law to pass the estate of married women, and no judgment or decree confessed by, or recovered against, him, and no laches, default, covin or crime of the husband, shall prejudice the right and interest of the wife provided in the foregoing sections of this chapter." The sheriff's deed in partition to Davis bears date May 2, 1863, and recites the payment of the purchase money by Davis, but does not specify the date of the payment. In the absence of anything to the contrary, it will be presumed the payment was made the day the deed was executed. In this case, however, the record shows, by the sheriff's report of sales and collections of the purchase money filed April 29, 1863, that it was paid at least that early if not before,—four days before the date of sheriff's deed in partition, to Davis; and two days before the date of the sheriff's sale to Williams, under execution, upon the Hubble judgment, against Davis and Ricketts; and six days before the date of Williams' deed for the sale so made. Upon this state of facts, the law is well settled that "instantly," upon the full payment of the purchase money, Davis' equity to call for and demand a deed was "full and complete," and that thereupon the parties to the partition proceeding "became and were seised of the legal title" in trust for Davis, and so remained until the execution of the sheriff's deed in partition to Davis, on May 2d following. If that be so, it follows that, during this interval, the parties to the partition proceedings "stood seised of an estate of inheritance to the use of Davis," within the meaning of section 2186, *supra; Worsham* v. *Callison*, 49 Mo. 206; 1 Washb., Real Prop., 5th ed. p. 233, § 13 *et seq.*, and authorities cited, and 1 Washb., Real Prop., 3d ed. 209. Indeed, defendants' counsel, in his brief and argument herein, expressly states and recognizes that as unquestioned law, by the use of the following question, and answer thereto: "Was anyone seised to the use of Davis, during his marriage to plaintiff? His purchase at partition sale was equivalent to a purchase from the owners, and, upon full payment of the price bid, he would have been entitled to a deed, and the heirs would have been seised to his use, though the deed would have been made by the sheriff." The fact that the sheriff, thereafter, on May 2, executed to Davis a formal deed, transferring the legal title and seisin, in no wise militates against the position heretofore taken, as to force and effect, of Davis' "full and complete equity," incident to his payment of all the purchase money. Indeed, defendants' counsel, in his argument, admits that "it is true, when dower once attaches, the husband cannot, by any act or admission, defeat it." It is also true, as expressly declared by statute, that no judgment recovered against the husband shall prejudice the right and interest of the wife. Rev. 1879, § 2197. See also *Williams* v. *Courtney*, 77 Mo. 588; *Grady* v. *McCorkle*, 57 Mo. 172.

But it is insisted for defendants that, under the facts of this case, the sheriff's deed to Davis did not have the effect of vesting in him the legal seisin, which otherwise it would have had. The claim is that the lien of the Hubble judgment, of April, 1862, sprang up and fastened itself upon the land in question at the same instant, and by one and the same act, that made Davis' equity therein "full and complete;" and that this equity of Davis, by operation of the execution sale to Williams, under the Hubble judgment, on May 1, was transferred to and vested in Williams; and that Davis, having thus parted with all beneficial interest in the land, at the date of his partition deed, the legal seisin thereby transferred did not vest in him, but, "under the doctrine of relation," passed to and vested in Williams, who then held all the equity Davis ever had. But it must be remembered that this "doctrine of relation" is a mere fiction of law, which is never allowed to operate so as to cut out the intervening rights of strangers. *Shumate* v. *Reavis*, 49 Mo. 333; *Strain* v. *Murphy*, Id. 337, 341.

Ordinarily, execution sales of real estate affect only such interest as the judgment debtor had therein at the date of the sale, and not such as he may acquire thereafter. Ordinarily, also, the title of the purchaser to the interest bought does not pass to, or vest in, the purchaser, until the execution of the sheriff's deed therefor. In the case at bar, although the execution sale to Williams took place May 1, the sheriff's deed therefor was not made until May 4. Under the facts, while it may be conceded that the sheriff's deed to Williams would pass the husband's equity, as against him, his heirs and assigns, yet, under the Statute, as well as the "doctrine of relation," it would not prejudice the wife's right of dower. And, for a greater reason, the wife's dower right in the husband's legal seisin would not be prejudiced by Williams' execution purchase, since, at the date thereof, the husband had no legal seisin, having, as we have seen, acquired it subsequent to the sale. The further claim in defendants' behalf is that "the equity" of Williams, the "judgment purchaser," is equal in point of time to that of Davis, the "partition purchaser;" yet it does not follow that it is equal to the widow's dower, in the "favor and protection" of the Statute (§ 2197, *supra*), since it expressly provides that "no judgment or decree confessed by or recovered against him, and no laches, default, covin or crime of the husband, shall prejudice the right and interest of the wife provided in the foregoing sections of this chapter." *Grady* v. *McCorkle*, 57 Mo. 172.

In this connection, we may here add that it is not true, as stated in the argument of defendants' counsel, that "the widow's title is no better than an heir's." The law nowhere awards to the heir's title the same measure of protection as is accorded to the wife's right in the section of the Statute last quoted, against the

husband's acts, and those of judgment creditors. While, in a certain sense, she takes under the husband, in a larger sense she holds under the Statute that exempts her rights from the prejudicial acts of the husband, and the judicial proceedings of creditors and others. In this case, whether the wife is to be regarded as endowable by reason of the equitable or legal seisin of her husband, in either event, she is equally within the protection and exemption accorded her by the sections of the Dower Act above set out.

The "second" branch of the case, also, is not without its complications. On examination, however, it will be seen that they are complications in which the plaintiff has no interest, and by which she is not affected. They were, as we shall see, incident to a suit to which neither she nor her husband was a party, and in which the struggle was wholly between third parties, as to which had acquired, by execution purchase, the right of Davis to the property in question, of which, it was conceded, he had been deprived by operation of an execution or judicial sale. It was therefore immaterial to plaintiff, as well as her husband, which of the contestants to that struggle was right, and it made no difference to either which of the two might win. In the outset of this branch of the case, we may remark that defendants' counsel, in his abstract and brief, admits that, "except the admissions of S. W. Davis proved, there was no evidence that the land was held by Davis for himself and Williams, nor that Williams paid the notes given for the purchase price, except what may be inferred from the fact that Davis had unsatisfied judgments standing against him." And he might have added that, except for the Crump suit, the answer of Williams therein and the testimony of the witness (Duncan) concerning the same, above referred to, there was no evidence that there were any unsatisfied judgments standing against him. The amount of the Hubble judgment, under which Williams, and those holding under him, claim, was, as the record shows, only $10 for debt, and —— dollars for damages; and the record further shows that, at the execution sale, the land brought $24,—more than enough to satisfy the same. Defendants' counsel also admits that plaintiff's husband never was, at any time, in the actual possession of the land in question, and that Williams took possession under his purchase, and that the defendants claim under him. The Crump suit, and the answer of Williams, defendant therein, as well as the alleged admission and declarations of Davis in reference thereto, as testified to by the witness Duncan, are clearly *"res inter alios acta."* Neither the plaintiff nor her husband were parties thereto; nor are they bound thereby. The husband (Davis), at most, was but a prospective or contemplated witness therein; but it does not appear that he was ever examined as such, or even that the case ever came to a trial. 2 Bouvier, L. Dict. 579.

At the date of the alleged admissions and declarations of Davis, he had, long prior thereto, parted with whatever constructive seisin or possession, legal or equitable, he ever had to the land, by operation of the execution sale and deed to Williams under the Hubble judgment. They were therefore admissions and declarations of a party having no interest whatever, either legal or equitable, in the subject matter, nor any possession thereof, actual or constructive, at the time they were made and uttered, and clearly mere hearsay, incompetent and inadmissible. *Steward* v. *Thomas*, 35 Mo. 202; *Weinrich* v. *Porter*, 47 Mo. 293.

In the case of *Van Duyne* v. *Thayre*, 14 Wend. 233, cited by defendants, the party making the admissions was in the possession and occupation of the premises at the time. Besides that, they were admissions and declarations of a party long since dead, testified to by a witness after the lapse of nearly twenty years, who himself, on cross-examination, says: "I am attorney for the defendant in this cause. I cannot give the exact language used in the conversation between Davis and myself, it has been so long ago. In fact, I had forgotten all about it until, as attorney for defendant, in investigating this case, I found the papers. I run across this answer in the Crump case, and, after reading that, I recollected of having this conversation with Davis. I do not remember when that conversation was. Davis died in 1886,"—and as such, conceding them to be competent, were of themselves, when standing alone and unsupported by other circumstances, as they are, insufficient to break down and overthrow the force and effect of the record in the partition suit, and the sheriff's deed to Davis, especially after the lapse of nearly twenty years.

In the case of *Ringo* v. *Richardson*, 53 Mo. 385, this court, speaking through Sherwood, *J.*, announced the doctrine that "testimony as to verbal admissions of persons since dead is to be received with great allowance, and whenever it is attempted to prove resulting trusts by virtue of such admissions, the testimony must be clear, strong and unequivocal, and leave no room for doubt, in the mind of the chancellor, as to the existence of such a trust. And the admissions should be supported by other circumstances, also going to show the existence of the trust."

In the case at bar there are no such supporting circumstances going, also, to show the existence of the alleged trust.

In the case of *Johnson* v. *Quarles*, 46 Mo. 423, Bliss delivering the opinion, a similar doctrine is announced; and, proceeding further, it is, in effect, held that "evidence of declarations in the nature of admissions by a deceased person, although competent, never amounts to direct proof of the facts claimed to have been admitted by those declarations, and it has sometimes been doubted whether they ought to be received at all, when introduced for the purpose of devesting a title created by a deed. However, if properly sustained by other circumstances, . . . such declarations would warrant courts in sustaining the claim." In this case, however, there are no other circumstances properly sustaining such declarations. In view of the facts of this case, and the authorities and adjudications cited referred to, we are of opinion, and so hold, that the admission of said admissions and declarations in evidence was error.

There is one matter not noticed in this opinion, for the reason that it was not noticed in

the brief of either counsel in this court, nor is it mentioned or passed upon in the court below. The sheriff's deed to Williams, as copied in this record, does not embrace the tract of land in controversy in this case; but, instead thereof, contains the "N. E., S. E. sec. 12, tp. 50, R. 9." The tract in controversy is "the north-east one-fourth of the south-west quarter of section 12, township fifty (50), range nine (9) west, containing forty acres." This discrepancy most likely is a clerical error in copying the sheriff's deed to Williams, under execution sale upon the Hubble judgment. If, however, the error is in the deed itself, it is quite another matter, and the defense would then have no standing in court, and it would then remain for defendants to consider and determine what course to pursue. We only mention the matter now, that, when the case goes back for retrial, as it must under our ruling, the parties may look into the matter, and see how it is, and determine what course to pursue.

For the errors hereinbefore mentioned, *the judgment of the trial court is reversed*, and the cause remanded for further proceeding in conformity hereto; and it is accordingly so ordered, with the concurrence of all the judges (Barclay, *J.*, specially, as stated in *Davis* v. *Evans*, decided at this term).

MICHIGAN SUPREME COURT.

Charles CORBETT
v.
Louis B. LITTLEFIELD, *Appt.*

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

The lien of a chattel mortgage, duly recorded in the State where the mortgagor resides, is not superior, in another State, into which the property was carried and in which the mortgage is not filed, to subsequent attachments in the latter State.

(December 24, 1890.)

ERROR to the Circuit Court for Wayne County to review a judgment in favor of plaintiff in an action brought to recover possession of horses claimed under a chattel mortgage. *Reversed.*

The facts are stated in the opinion.

Messrs. **Sloman, Berry & Duffie,** for appellant:

The mortgage was void as to Mayne's creditors, not having been filed in Michigan where the horses were.

How. Ann. Stat. § 6193; *Buhl Iron Works* v. *Teuton*, 67 Mich. 628; *Montgomery* v. *Wight*, 8 Mich. 143; *Boydson* v. *Goodrich*, 49 Mich. 67.

All doubts between the creditor and mortgagee are to be solved against the mortgagee, because he, having the power to protect himself fully and prevent others from being deceived, has not done so.

Stanton First Nat. Bank v. *Summers*, 75 Mich. 111.

Mr. **George W. Radford** for appellee.

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

This is an action of replevin to recover possession of two horses known as "Tommy Linn" and "Dan D." The action is brought against the defendant, sheriff of Wayne County, and who held them under three writs of attachment issued against the goods and chattels of Clifton E. Mayne. The cause was tried in the Wayne Circuit Court before a jury, where the plaintiff had verdict and judgment for six cents' damages, he having taken the property under the writ. The plaintiff on the trial below claimed to be entitled to the possession of the property by virtue of a chattel mortgage given by Clifton E. Mayne, the defendant in the attachments. The mortgage was given on the 15th day of July, 1887, to George E. Baker, and assigned by Baker to the plaintiff on May 2, 1888. At the time the mortgage was given, Mayne, the mortgagor, resided at the City of Omaha, Douglas County, Neb., Baker the mortgagee residing at the same place. The mortgage covered other property besides these two horses, and the property is described in the mortgage as being situate on the ranch of Mayne at Platte Valley stock ranch, in township 16 N., range 9 E., of Douglas County, Neb. The mortgage was duly filed in the office of the county clerk of Douglas County, Neb., on October 1, 1887. The Statute of Nebraska authorizing the filing in the county clerk's office was offered in evidence, and is as follows: "Sec. 14. Chattel Mortgages. Every mortgage or conveyance intended to operate as a mortgage of goods and chattels hereafter made, which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagors in good faith, unless the mortgage, or a true copy thereof, shall be filed in the office of the county clerk of the county where the mortgagor executing the same resides, or in case he is a nonresident of the State then in the office of the clerk of the county where the property mortgaged may be at the time of executing said mortgage; and such clerk shall indorse on such instrument or copy the time of receiving the same, and shall keep the same in his office for the inspection of all persons; and such mortgage or instrument may be so filed, although not acknowledged, and shall be valid as if the same were fully spread at large upon the records of the county." At the time the mortgage was assigned by Baker to Corbett, the two horses in question, and also a horse known as "Dr. West" were out of the State, in the possession of a man by name of Nebro, who had them in the trotting circuits for Mayne in the different States. They have never been returned to Nebraska, and were on the trotting circuits in Michigan at the time they were attached for the debts of Mayne. On June 12, 1888, it is claimed, Mayne sold the horses to one John

Riley, and gave Riley a bill of sale, subject to the chattel mortgage then held by Corbett; and Riley made an agreement, it is claimed, with Corbett to release the chattel mortgages on the horses by the payment of $1,000; and it was claimed on the trial that Riley had possession of the horses at the time they were attached. It also appears that on May 1, 1888, an agreement was entered into between Corbett and Mayne by which Mayne acknowledged the validity of the claims for which the mortgage was given, and authorized Corbett to purchase them. On the part of the defendants it was contended (1) that the mortgage was fraudulent in fact; (2) that, even if not fraudulent in fact, it was void as to those attaching creditors of Mayne, for the reason that it was not filed in Detroit or in Michigan; (3) that the bill of sale to Riley was nothing more than a mortgage, and a fraudulent one at that. These were the issues which were presented to the court and jury.

On the trial below, many of the questions raised were questions of fact, which, under the charge of the court, were fairly submitted to the jury for determination. Sixteen requests were presented by defendant's counsel to the court to give in charge to the jury, the most of which relate to the necessity of the refiling of the mortgage in this State. Some of those were covered by the general charge of the court, and others were not given and were refused.

The important question in the case arises under the defendant's second point that the mortgage was not filed in this State, and many of the requests to charge were aimed at this point. The court in its charge to the jury, giving construction to the Nebraska Statute relative to chattel mortgages, directed the jury that they must hold the chattel mortgage as fraudulent and void, as the property remained in the possession of the mortgagor, unless the plaintiff had shown by a preponderance of evidence that it was an honest security, and not taken for the purpose to hinder, delay and defraud the creditors of Mayne; but if they found that the agreement of May 1, 1888, between Corbett and Mayne, by which Corbett was induced to purchase the mortgage was executed in good faith, for the purpose of procuring Corbett to purchase the mortgage, then, though the mortgage was fraudulent in its inception as between Baker and Mayne, the mortgage as to Corbett would be valid if Corbett, relying upon the representations made in the agreement, and acting in good faith, purchased it. The court further in its charge, speaking of the Michigan Statute relative to the filing of chattel mortgages, directed the jury that, though they found the mortgage valid in the hands of Corbett, yet if he permitted the property to be brought into this State, it then became subject to the levy of the attachment in the hands of the sheriff, and the chattel mortgage would be no protection to the plaintiff, as the mortgage was not filed within this State, but that, if the property was brought out of the State of Nebraska, and into the State of Michigan, without the knowledge or consent of Corbett (and as soon as he found that it had been brought out of that State and into this, he took steps to reclaim it), then his rights as mortgagee would be preserved. Upon the question of the rights of Mr. Riley under the bill of sale, the court directed the jury that if the bill of sale was made in good faith, and not with intent to hinder, delay or defraud creditors, and that, acting under the conveyance, Riley took possession of the horses in this State, that would end the case, though the chattel mortgages were fraudulent and void as between Corbett and Mayne, as they could not be attached for the debts of Mayne, though the sheriff would then be entitled to nominal damages. Substantially these are the material parts of the charge. The jury, by their verdict, have found that the property was brought out of the State of Nebraska and into this State without the knowledge or consent of Corbett. The question is therefore presented whether this chattel mortgage can be held to protect the plaintiff's rights in the property, even though not filed within this State, by reason of the bringing of the property out of Nebraska and into this State without the knowledge or consent of the mortgagee. Our Statute (How. Stat. § 6193), like the Nebraska Statute, provides that such conveyances shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless filed. Where there has been no delivery of the property to the mortgagee, and that followed by an actual and continued change of possession of the thing mortgaged, the filing, to be effective, must be in the town clerk's office, or city clerk of the city, or recorder of the city having no officer known as 'city clerk,' where the mortgagor resides, except when the mortgagor is a nonresident of the State, in which case the mortgage is to be filed in the clerk's office where the property is. The relation between the mortgagor and mortgagee is that of debtor on one side and creditor on the other, secured by a lien upon the property of the debtor

The title to the property can only be devested by foreclosure or some act equivalent thereto. It may be true that this mortgage lien was valid in Nebraska, and might have been enforced there as against creditors or even purchasers in good faith. It is the duty of the court to extend the principles of comity to our sister States, and to recognize generally the existence of liens under foreign statutes. But we are asked to give this mortgage priority of lien over the attachment levies. The recognition of the existence and validity of such liens by the foreign State is not to be confounded, however, with the giving them a superiority or priority over all other liens and rights justly acquired in this State merely because the former liens in the State where they first attached have there, by force of their Statute, a superiority or priority. This distinction was pointed out by *Chief Justice* Marshall, in delivering the opinion of the court in *Harrison* v. *Sterry*, 9 U. S. 5 Cranch, 289, 3 L. ed. 104. He there said: "The law of the place where a contract is made is, generally speaking, the law of the contract; *i. e.*, it is the law by which the contract is expounded. But the right of priority forms no part of the contract. It is extrinsic, and rather a personal privilege, dependent upon the place where the property lies and where the court sits which is to decide the cause."

There is no provision of our Statute by which

this mortgage at the time of its execution could have been filed in this State, and the Nebraska Statute did not authorize it, and, even if it had, it would not have had any force beyond the sovereignty enacting it. The mortgagor then resided in Nebraska, and the property was situate there. It would be unreasonable to require a citizen of Michigan to take notice of the files and entries in Nebraska. These notices have no extraterritorial force. *Montgomery* v. *Wight*, 8 Mich. 143. The mortgage having been properly filed under the Statutes of Nebraska, the lien thereby created would undoubtedly have been held by the courts of that State as prior to any lien which creditors might acquire if the mortgage was not fraudulent in fact, though the mortgagor retained possession of the property mortgaged. But, by the terms of the mortgage, the mortgagee had a right at any time to take possession without notice, and Corbett, by the assignment, acquired all the rights which Baker had. Instead of taking possession, he permitted the property to remain in the possession and under the control of the mortgagor, thereby clothing him with all the *indicia* of ownership. This ownership, however, was subject to the lien of the mortgage so long as the property was kept in Nebraska, as the filing of the mortgage there was notice of the lien. But, when the property is moved into a foreign State, the filing in Nebraska cannot be said to be notice to creditors of the mortgagor in such foreign State of the lien of the mortgage, as that Statute has no extraterritorial force. The court was in error in holding that, the property being brought out of Nebraska and into this State without the knowledge and consent of Mr. Corbett, such fact would give the mortgage lien priority over the attaching creditors. That question arose in *Boydson* v. *Goodrich*, 49 Mich. 66, and was expressly ruled the other way. In that case the plaintiff resided in Indiana. Warren, the mortgagor, also resided there, and the mortgage was given there. Without the knowledge or consent of the plaintiff, Warren, the mortgagor, brought the property into this State and sold it. In an action of replevin against the purchaser, it was said by this court: "Counsel for the plaintiff agrees that the rules of state comity are against the defendant, and give the foreign transaction preference. But the law seems to be settled otherwise in *Montgomery* v. *Wight*, 8 Mich. 143." It was further said: "The plaintiff allowed the mortgagor to retain possession, and to appear to the world as well authorized to convey an unincumbered title, and no means of information were provided in this State to impeach this appearance." In the present case it appears from the very terms of the mortgage that Mr. Corbett had it in his power to protect himself by taking possession of the mortgaged property. This he failed to do, but permitted the property to remain in the possession of the mortgagor, relying upon the filing of his mortgage as notice, under the Nebraska Statute, sufficient to protect his lien. It can have no such effect here as against the creditors of the mortgagor, and the court should have so instructed the jury. We find no error in the other portions of the charge. We need not discuss the other questions raised.

The judgment must be reversed, with costs.

The other Justices concurred.

NEW YORK COURT OF APPEALS (2d Div.).

Lena MENTZ, *Respt.*,
v.
Nathan J. NEWWITTER, *Appt.*

(.....N. Y.....)

1. The memorandum of a contract for the sale of land must show without the aid of parol proof the essentials of the agreement, including the subject matter of the sale, the terms and the names or a description of the parties.

2. An auctioneer's memorandum of the sale of lands, which fails to state the name of the vendor or give any description by which he or she can be identified, is fatally defective.

NOTE.—*Specific performance; essentials of memorandum of agreement.*

To obtain a specific performance in equity, the note in writing of the agreement must be sufficient to maintain an action at law. Barry v. Coombe, 26 U. S. 1 Pet. 640, 7 L. ed. 295.

An agreement cannot be specifically performed by order of court unless it clearly appear what the contract is. May v. Cavender, 29 S. C. 598; 2 Story, Eq. Jur. § 764.

A contract, to be specifically enforced, must be made out fully in writing and must be clear. Repetti v. Maisak, 12 Cent. Rep. 411, 6 Mackey, 366.

It must not only be signed by the party to be charged, but must contain substantially the terms of the contract (Pipkin v. James, 1 Humph. 327, 34 Am. Dec. 654; Atwood v. Cobb, 16 Pick. 227, 26 Am. Dec. 657; Kingsbury v. Burnside, 58 Ill. 335), without necessity to resort to parol proof. Tallman v. Franklin, 3 Duer, 403.

A signature by initials to a contract or a memorandum is sufficient. Palmer v. Stephens, 1 Denio, 471; State v. Bell, 65 N. C. 313; Chichester v. Cobb, 14 L. T. N. S. 433.

Terms and price.

The memorandum must contain the terms of the contract with reasonable certainty to admit parol evidence. Tallman v. Franklin, 14 N. Y. 589; Parkhurst v. Van Cortlandt, 1 Johns. Ch. 273, 1 N. Y. Ch. L. ed. 138.

An agreement must contain the exact terms of the contract and a description of the property. Holthouse v. Rynd (Pa.) 11 Cent. Rep. 157; Hagan v. Domestic Sewing Mach. Co. 9 Hun, 76; Abeel v. Radcliff, 13 Johns. 300.

Its terms should be so precise as that neither party can reasonably misunderstand them. Colson v. Thompson, 15 U. S. 2 Wheat. 336, 4 L. ed. 253.

If the price be agreed on it must be stated. Ide v. Stanton, 15 Vt. 691; Smith v. Arnold, 5 Mason, 414; Elmore v. Kingscote, 5 Barn. & C. 583; Hoadley v. M'Laine, 10 Bing. 482; Acebal v. Levy, Id. 376; Buck

See also 11 L. R. A. 143; 32 L. R. A. 127.

(December 2, 1890.)

APPEAL by defendant from a judgment of the General Term of the Court of Common Pleas for the City and County of New York, affirming a judgment entered upon the report of a referee in favor of plaintiff in an action brought to recover damages for an alleged breach of a contract to purchase land.

Reversed.

Statement by **Brown, J.**

Appeal from a judgment of the General Term of the Court of Common Pleas of the City and County of New York which affirmed a judgment entered upon the report of a referee. This action was brought to recover from the defendant the difference between the sum bid for certain real estate at an auction sale thereof and the sum for which said real estate was resold upon the refusal of the defendant to complete his purchase. The referee found the following facts: On April 28, 1886, the plaintiff was the owner of premises known as "No 311 East 104th Street," in the City of New York, and authorized and empowered Richard V. Harnett & Co., auctioneers, to sell the same at public auction, at the Real Estate Exchange in said city, and on the date aforesaid said Harnett & Co. did offer said premises for sale, and they were struck off and sold to the defendant at his bid of $11,800. Said Harnett & Co. thereupon made and signed a memorandum of said sale. Defendant failed to pay 10 per cent of the purchase money, and to sign a memorandum of the purchase so made. Prior to May 26, 1886, a notice was served upon defendant that said premises would be resold on his account, on the date aforesaid, at the real estate auction rooms, and that the plaintiff would hold him for any deficiency arising between the price bid by said defendant and the price the same would bring at such resale. At such resale the premises were sold for $10,200. And, as a conclusion of law, the referee found that the plaintiff was entitled to judgment for $1,600 with interest and auction fees. The only evidence of a written contract between the parties for the sale of the land was a memorandum in the auctioneer's book of sales, as follows:

Bill of Sale.

Wed. 28 April, '86.

311 E 104	Terms Sale
11,000	7,000
250	at 5 per cent
500	2d M. Richard V. Harnett.
11,750	3,000
11,800	at 6 per cent
J. N. Newwitter.	Can be paid
4 Pine St.	

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v. Pickwell, 27 Vt. 167; Adams v. McMillan, 7 Port. (Ala.) 73; Soles v. Hickman, 20 Pa. 180; Waul v. Kirkman, 27 Miss. 823; Kay v. Curd, 6 B. Mon. 103; Story, Sales, § 222.

Terms of credit, if agreed on, and time of performance, if settled, should be stated in memorandum. Davis v. Shields, 26 Wend. 341; Salmon Falls Mfg. Co. v. Goddard, 55 U. S. 14 How. 446, 14 L. ed. 493; O'Donnell v. Leeman, 43 Me. 158.

A memorandum which names no price or terms is too imperfect to be treated as a valid contract. Holmes v. Evans, 48 Miss. 251; Zeringue v. Texas & P. R. Co. 34 Fed. Rep. 239.

But the omission of the particular mode, or even the price itself, does not necessarily invalidate the contract. Hawkins v. Chace, 19 Pick. 502; Valpy v. Gibson, 4 C. B. 837; Hoadley v. M'Laine and Acebal v. Levy, *supra*.

Merger of memorandum.

The law assumes that down to the moment of executing the instrument there is room for a change of intentions, so as to merge all previous negotiations in the contract. Burnham v. Wilbur, 7 Bosw. 190; Wells v. Jackson Iron Mfg. Co. 47 N. H. 253; Nutting v. Herbert, 35 N. H. 121; Cook v. Combs, 39 N. H. 597; Galpin v. Atwater, 29 Conn. 97; Clark v. Wethey, 19 Wend. 323.

When the terms are free from ambiguity everything *dehors* the writing is excluded, and all matters of negotiation are merged in the instrument. Clark v. N. Y. Life Ins. & T. Co. 7 Lans. 326; Dean v. Mason, 4 Conn. 428.

Description of subject matter.

The memorandum should describe the subject matter with reasonable certainty, either expressly or by reference. Nichols v. Johnson, 10 Conn. 192; Kay v. Curd, 6 B. Mon. 100; O'Donnell v. Leeman, 43 Me. 158; Hawkins v. Chace, 19 Pick. 502; Morton v. Dean, 13 Met. 385; Waterman v. Meigs, 4 Cush. 497; DeBeil v. Thompson, 3 Beav. 469; Chitty, Cont. 70, 71, 412; Story, Sales, § 257.

Description of land.

Where the contract is vague or uncertain, or the description of the land is indefinite and the ownership of the vendor is not stated, a bill for specific performance thereof is properly dismissed on the hearing. Hamilton v. Harvey, 10 West. Rep. 924, 121 Ill. 469; Colson v. Thompson, 15 U. S. 2 Wheat. 336, 4 L. ed. 253; King v. Thompson, 34 U. S. 9 Pet. 204, 9 L. ed. 102. See Ross v. Allen (Kan.) 10 L. R. A. 835; Lewis v. Wood (Mass.) *post*, 142; McGovern v. Hern (Mass.) 10 L. R. A. 815, and see *note* to New York & R. Cement Co. v. Coplay Cement Co. (Pa.) 10 L. R. A. 833.

Consideration.

It is sufficient if it can be collected from the memorandum that there was a consideration, and what it was. Bainbridge v. Wade, 16 Q. B. 89; Steele v. Hoe, 14 Q. B. 431; Kennaway v. Treleavan, 5 Mees. & W. 498; Lysaght v. Walker, 5 Bligh, N. S. 1; Rogers v. Kneeland, 10 Wend. 218, 13 Wend. 114; Laing v. Lee, 20 N. J. L. 337.

In Virginia, under its Statute, the consideration need not be stated in writing. Violett v. Patton, 9 U. S. 5 Cranch, 142, 3 L. ed. 61; Taylor v. Ross, 3 Yerg. 330; Gilman v. Kibler, 5 Humph. 19; Wren v. Pearce, 4 Smedes & M. 91.

The words "value received" are sufficient to express a consideration. Watson v. McLaren, 19 Wend. 557; Douglass v. Howland, 24 Wend. 35; Day v. Elmore, 4 Wis. 190; Edelen v. Gough, 5 Gill, 103.

The memorandum should set forth the promise and the consideration, either by its own contents or by reference to something extrinsic, and should show who is the buyer and who the seller. Wheeler v. Collier, Mood. & M. 123; Salmon F. Mfg. Co. v. Goddard, 55 U. S. 14 How. 446, 14 L. ed. 493; Sears v. Brink, 3 Johns. 210; Bailey v. Ogden, Id. 399; Osborn v. Phelps, 19 Conn. 73; Rogers v. Kneeland, 13 Wend. 114; Peltier v. Collins, 3 Wend. 459; Sherburne v. Shaw, 1 N. H. 157; Webster v. Ela, 5 N. H. 540; Sanborn v. Sanborn, 7 Gray, 142; Barry v. Law, 1 Cranch, C. C. 77.

In New York, South Carolina, New Hampshire and in other States the English doctrine, that the consideration must be in the writing, obtains. Sears v. Brink, 3 Johns. 210; Leonard v. Vredenburg, 8 Johns. 29; Stephens v. Winn, 2 Nott & McC. 372 (*n*); Neelson v. Sanborne, 2 N. H. 414; Hender-

This memorandum was signed by Harnett on the margin of the book, at the close of the sale. The book also contained a printed slip or advertisement of the sale, but such slip did not name or describe the owner, or make mention of any such person.

Mr. **John J. Linson,** with *Messrs.* **Cantor & Seldner,** for appellant:

The memorandum of sale was not a sufficient compliance with the provisions of the Statute of Frauds.

2 Kent, Com. 511; Browne, Stat. Fr. § 371; Reed, Stat. Fr. § 321; Bingham, Executory Cont. 391; *Kenworthy* v. *Schofield,* 2 Barn. & C. 945; *Wain* v. *Warlters,* 5 East, 10; *Stone* v. *Browning,* 68 N. Y. 604; *Drake* v. *Seaman,* 97 N. Y. 230; *Newberry* v. *Wall,* 65 N. Y. 484; *Routledge* v. *Worthington Co.* 119 N. Y. 592; *Parkhurst* v. *Van Cortlandt,* 14 Johns. 15.

It is insufficient in that it does not contain the name of the vendor.

Potter v. *Duffield,* 9 Moak, Eng. Rep. 664; *Williams* v. *Lake,* 2 El. & El. 349; *Williams* v. *Byrnes,* 9 Jur. N. S. 363; *Grafton* v. *Cummings,* 99 U. S. 100, 25 L. ed. 606; *Sherburne* v. *Shaw,* 1 N. H. 157; *Nichols* v. *Johnson,* 10 Conn. 192; *Knox* v. *King,* 36 Ala. 367; *Gill* v. *Bicknell,* 2 Cush. 355; *Champion* v. *Plummer,* 1 Bos. & P. 252.

It is insufficient because it is too indefinite and uncertain.

Wright v. *Weeks,* 25 N. Y. 153; *Bailey* v. *Ogden,* 3 Johns. 399; *First Bapt. Church Trustees* v. *Bigelow,* 16 Wend. 28; *Sheid* v. *Stamps,* 2 Sneed, 172; *McConnell* v. *Brillhart,* 17 Ill. 354; *Smith* v. *Jones,* 7 Leigh, 165.

Mr. **Michael H. Cardozo,** with *Messrs.* **Julius J. & A. Lyons,** for respondent:

The memorandum made by the auctioneer in his sales-book was sufficient to satisfy the provisions of the Statute of Frauds.

Harnett, the auctioneer, had authority to sign for the vendor, Mrs. Mentz. His signing his own name on the auction sales-book without the designation "auctioneer" or "agent" was sufficient.

Tallman v. *Franklin,* 14 N. Y. 584; *Salmon Falls Mfg. Co.* v. *Goddard,* 55 U. S. 14 How. 446, 14 L. ed. 493.

The contract is sufficient to satisfy the terms of the Statute.

Doughty v. *Manhattan Brass Co.* 2 Cent. Rep. 397, 101 N. Y. 644; *Foot* v. *Webb,* 59 Barb. 38; *Argus Co.* v. *Albany,* 55 N. Y. 495; *Raubitschek* v. *Blank,* 80 N. Y. 478; *Hagan* v.

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son v. Johnson, 6 Ga. 390; Edelen v. Gough, 5 Gill, 103; Elliott v. Giese, 7 Harr. & J. 457; Bennett v. Pratt, 4 Denio, 275; Hutton v. Padgett, 26 Md. 228.

In Massachusetts, New Jersey, Maine and some other States the consideration need not be stated. Packard v. Richardson, 17 Mass. 122; Buckley v. Beardslee, 5 N. J. L. 570; Levy v. Merrill, 4 Me. 180; Sage v. Wilcox, 6 Conn. 81; Miller v. Irvine, 1 Dev. & B. L. 103; Tufts v. Tufts, 3 Woodb. & M. 456; Reed v. Evans, 17 Ohio, 128; Gillighan v. Boardman, 29 Me. 79; Adkins v. Watson, 12 Tex. 199; Hargraves v. Cooke, 15 Ga. 321.

Contract by agent.

An agent authorized to sell either real or personal estate may enter into a contract, within the terms of his authority, which will bind his principal. Haydock v. Stow, 40 N. Y. 368.

His signature to the contract may be in his own name, no principal's name or fact of agency appearing in the memorandum, and parol proof will be admitted to show the agency and hold the principal. Neaves v. North State Min. Co. 90 N. C. 412, 47 Am. Rep. 532; Johnson v. Dodge, 17 Ill. 433; Curtis v. Blair, 26 Miss. 309; Champlin v. Parish, 11 Paige, 405, 5 N. Y. Ch. L. ed. 178.

All that the Statute of Frauds requires is, that a contract of sale of lands shall be in writing, and that such writing express the consideration and be subscribed by the party by whom the sale is to be made, or by his agent lawfully authorized. The evidence of the authority may be by parol. Neither a written authority nor an authority under seal is required. Henry v. Root, 33 N. Y. 550; Worrall v. Munn, 5 N. Y. 243, 55 Am. Dec. 337; Morgan v. Bergen, 3 Neb. 213; Doty v. Wilder, 15 Ill. 407, 60 Am. Dec. 759; Newton v. Bronson, 13 N. Y. 593; Brown v. Eaton, 21 Minn. 411; Champlin v. Parish, 11 Paige, 411, 5 N. Y. Ch. L. ed. 1159; Merritt v. Clason, 12 Johns. 102; Hawkins v. Chace, 19 Pick. 502; Yerby v. Grigsby, 9 Leigh, 387; Johnson v. Magruder, 15 Mo. 365; Favill v. Roberts, 3 Lans. 25.

His authority will be inferred where the principal adopts the act of the agent. Pringle v. Spaulding, 53 Barb. 21; More v. Smedburgh, 8 Paige, 606, 4 N. Y. Ch. L. ed. 553.

Auctioneer's memorandum.

An auctioneer's memorandum or entry, in his sales-book, if in any case sufficient to take the case out of the Statute of Frauds, is not so if it does not sufficiently describe the lands and the terms of sale. Williams v. Threlkeld, 2 Cranch, C. C. 307.

Proof necessary.

Specific performance should never be granted unless the terms of the agreement sought to be enforced are clearly proved, or, where it is left in doubt, whether the party against whom the relief is asked in fact made such an agreement. Hennessey v. Woolworth, 128 U. S. 438, 32 L. ed. 500, citing Colson v. Thompson, 15 U. S. 2 Wheat. 336, 341, 4 L. ed. 253, 255; Carr v. Duval, 39 U. S. 14 Pet. 77, 81, 10 L. ed. 361, 363; Huddleston v. Briscoe, 11 Ves. Jr. 583, 591; Lanz v. McLaughlin, 14 Minn. 73; Waters v. Howard, 1 Md. Ch. 112, 116.

The contract must be established by competent and satisfactory proof, which must be clear and definite. Lobdell v. Lobdell, 36 N. Y. 332; Phillips v. Thompson, 1 Johns. Ch. 131, 1 N. Y. Ch. L. ed. 87.

A contract will not be specifically enforced where the evidence leaves its terms in uncertainty, or it is reasonably doubtful whether it was finally closed. Potter v. Hollister, 45 N. J. Eq. 508.

Or where such an agreement is a mere negotiation, chancery will not decree a specific performance. Carr v. Duval, 39 U. S. 14 Pet. 77, 10 L. ed. 361, citing Huddleston v. Briscoe, *supra.*

If the evidence to establish it be insufficient, a court of equity will not enforce it, but will leave the party to his legal remedy. Colson v. Thompson, 15 U. S. 2 Wheat. 336, 4 L. ed. 253; King v. Thompson, 34 U. S. 9 Pet. 204, 9 L. ed. 102.

Parol evidence not admissible.

Parol evidence is not admissible, as the contract cannot rest partly in writing and partly in parol (Frink v. Green, 5 Barb. 456; Stevens v. Cooper, 1 Johns. Ch. 429, 1 N. Y. Ch. L. ed. 198; Watt v. Wisconsin Cranberry Co. 63 Iowa, 730; Sharpe v. Rogers, 12 Minn. 185); it will be received only for the purpose of interpretation or explanation where technical terms are employed, or to identify papers. Johnson v. Buck, 35 N. J. L. 344.

Domestic Sewing Mach. Co. 9 Hun, 75; *Smith* v. *Jones*, 7 Leigh, 165; *Pinckney* v. *Hagadorn*, 1 Duer, 89. See *Tallman* v. *Franklin*, *supra*; *Hicks* v. *Whitmore*, 12 Wend. 548; *Bostwick* v. *Beach*, 5 Cent. Rep. 388, 103 N. Y. 414.

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

The exceptions to the referee's finding that the premises in question were sold by Harnett & Co., the auctioneers, to the defendant, and that said auctioneers thereupon made and signed a memorandum of sale, present the question of the sufficiency of the memorandum recorded in the auctioneer's book. It is upon that memorandum that the judgment is founded, and it is upon that that the respondent relies as a compliance with the Statute of Frauds. The Statute is as follows: "Every contract . . . for the sale of any lands . . . shall be void unless the contract, or some note or memorandum thereof, . . . be in writing and be subscribed by the party by whom the sale is to be made." "Every instrument required to be signed by any party under the last preceding section may be subscribed by the agent of such party lawfully authorized." The writing of the auctioneer's name upon the margin of the book may be regarded as a sufficient subscription of the contract by the vendor in this instance, and, for the purpose of disposing of this appeal, we may assume that the instrument created a valid and binding contract if it be such a note or memorandum thereof as the Statute requires; and the precise question we are to determine is whether a memorandum which does not name or describe the vendor fulfills the requirements of the law. A note or memorandum in writing of the contract is necessary to give validity not only to agreements for the sale of land, but also to agreements not to be performed within a year; to answer for others' debts, and for the sales of goods and chattels and things in action, for the price of $50 or more. In considering, therefore, the question, What is a sufficient "note or memorandum," within the meaning of the Statute?—cases decided under any of these several provisions of the Statute may be examined as authorities.

Many English cases in regard to sales of goods and chattels are collected in Benjamin on Sales (Bennett's ed. §§ 234–238), and that learned author states the general rule deduced from them to be as follows: "It is indispensable that the written memorandum should show not only who is the person to be charged, but also who is the party in whose favor he is charged. The name of the party to be charged is required by the Statute to be signed, so that there can be no question of the necessity of his name in the writing. But the authorities have equally established that the name, or a sufficient description, of the other party, is indispensable, because without it no contract is shown inasmuch as a stipulation or promise by A does not bind him save to the person to whom the promise is made; and, until that person's name is shown, it is impossible to say the writing contains a memorandum of the bargain." The leading English case on the subject is *Champion* v. *Plummer*, 1 Bos. & P. N. R. 252, where Champion, by his agent, wrote down in a memorandum book the terms of a verbal sale to him by the defendant, and defendant signed the writing. The words were "Bought of W. Plummer," etc., with no name of the person who bought. *Sir* James Mansfield, *Ch. J.*, said: "How can that be said to be a contract or memorandum of a contract which does not state who are the contracting parties? By the note it does not appear to whom the goods were sold. It would prove a sale to any other person as well as to the plaintiff." Among other cases may be cited *Williams* v. *Lake*, 2 El. & El. 349; *Williams* v. *Byrnes*, 9 Jur. N. S. 363; *Potter* v. *Duffield*, 9 Moak, Eng. Rep. 664.

Potter v. *Duffield* was a case of a sale of real estate at auction. The name of the vendor was not disclosed. The plaintiff's agent signed a memorandum of the contract, and the auctioneer signed for the vendor as follows: "Confirmed on behalf of the vendor, Beadles, per N. J., Aug. 20, 1869." This was held by the master of the rolls (*Sir* George Jessel) not a sufficient memorandum under the Statute, for the reason that the vendor was neither named nor described.

The American cases are to the same effect. *Coddington* v. *Goddard*, 16 Gray, 436–442; *Sanborn* v. *Flagler*, 9 Allen, 474–476; *Waterman* v. *Meigs*, 4 Cush. 497; *Nichols* v. *Johnson*, 10 Conn. 192; *Sherburne* v. *Shaw*, 1 N. H. 157; *Brown* v. *Whipple*, 58 N. H. 229; *Webster* v. *Ela*, 5 N. H. 540; *Lincoln* v. *Erie Preserving Co.* 132 Mass. 129; *Grafton* v. *Cummings*, 99 U. S. 100, 25 L. ed. 363; *Knox* v. *King*, 36 Ala. 367.

The question was fully examined by the Supreme Court of the United States in *Grafton* v. *Cummings*, *supra*. That case arose in the State of New Hampshire, where the Statute provides that no action can be maintained on a contract for the sale of land unless the agreement is signed by the party to be charged, or by some person by him authorized. The contract was signed by Grafton, the purchaser, and it was assumed by the court that it was also signed by the auctioneer, and the precise question presented was stated to be whether the contract was void because the vendor was not named in it. It was held that it was void. The same doctrine is stated in Browne, Stat. Frauds, §§ 371–375; Smith, Cont. pp. 134, 135; 3 Parsons, Cont. p. 13, *note v.*

In this State *Chancellor* Kent in *Bailey* v. *Ogden*, 3 Johns. 399, stated the general rule to be that "the form of the memorandum cannot be material, but it must state the contract with reasonable certainty, so that the substance of it can be made to appear and be understood from the writing itself without having recourse to parol proof." Again, the same learned judge in *Clason* v. *Bailey*, 14 Johns. 484, said: "Forms are not regarded, and the Statute is satisfied if the terms of the contract are in writing and the names of the contracting parties appear." *First Baptist Church Trustees* v. *Bigelow*, 16 Wend. 28, was a case of a sale of a church pew. The same rule was again stated, and the memorandum was held insufficient, because it stated no parties or terms of payment. *Calkins* v. *Falk*, 39 Barb. 620, was a case of a sale of hops. The written memorandum was held defective, and the rule stated

that the terms of the contract and the names of the contracting parties must appear in the instrument. This case was affirmed in this court. 41 N. Y. 619, 1 Abb. App. Dec. 291. The opinion of the court appears in the latter volume, where it is held that the names of the contracting parties must appear in the memorandum required by the Statute.

In nearly all the cases in this State *Champion* v. *Plummer, supra*, was cited with approval, and the whole current of authority in this State is that the memorandum must contain substantially the whole agreement and all its material terms and conditions, so that one reading it can understand from it what the agreement is. *Wright* v. *Weeks*, 25 N. Y. 159; *Drake* v. *Seaman*, 97 N. Y. 230.

No case holding a different rule is cited by the general term, and none by the counsel for the respondent, except *Salmon Falls Mfg. Co.* v. *Goddard*, 55 U. S. 14 How. 447, 14 L. ed. 493. There was a strong dissent in that case, and it was said in *Grafton* v. *Cummings* that it was to be doubted whether the opinion of the majority was sound law. It is clearly in conflict with the general current of authority, and may well be disregarded in view of the later decision of the same court.

Tested by the rule established by the adjudged cases, the memorandum in this case was insufficient to answer the requirements of the Statute. It must be such that when it is produced in evidence it will inform the court or jury of the essential facts set forth in the pleading, and which go to make a valid contract. Such essentials must appear, without the aid of parol proof, either from the memorandum itself or from a reference therein to some other writing or thing; and such essentials, to make a complete agreement, must consist of the subject matter of the sale, the terms and the names or a description of the parties. The memorandum in suit failed to state the name of the vendor, or to give any description by which he or she could be identified, and this omission was fatal. In the potent language of the Statute, the contract was void.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

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

NEW JERSEY SUPREME COURT.

MULHEARN
v.
PRESS PUBLISHING CO.

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

***The vice-president of a foreign corporation, who comes into this State to give testimony** before a commissioner of our supreme court, which testimony is to be used on a motion to set aside the service of a summons issued in an action against such corporation, made in this State upon a person supposed to be an agent of such corporation, is privileged from the service of a summons in another action against said corporation while he is so in attendance as a witness, and a service made upon said vice-president under these circumstances will be set aside.

(December 27, 1890.)

ACTION to recover damages for the alleged publication of a libel. On motion to set aside service of summons. *Motion granted.*

Defendant is a corporation organized under the laws of New York, and does business in New York City. It publishes a newspaper called the New York World. Summons was originally served in this State upon certain news dealers who sold the New York World. A rule was granted requiring plaintiff to show cause why this service should not be set aside. Testimony was taken by defendant before a supreme court commissioner to be used upon the argument of that rule. One of the witnesses who appeared before the commissioner and gave his testimony was William L. Davis, defendant's vice-president, who resided in the City of New York. While thus in attendance as a witness he was served with a summons in this case.

Defendant now moves to set aside that service.

Argued before Reed and Garrison, *JJ.*

Mr. **Chauncy H. Beasley,** for defendant, in support of the motion.

Mr. **J. A. Beecher,** for plaintiff, *contra.*

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

The rule in this State is that a person who attends a trial voluntarily or under process as a witness, or as a party, is privileged from arrest on civil process, and from the service of a summons. *Halsey* v. *Stewart*, 4 N. J. L. 367; *Dungan* v. *Miller*, 37 N. J. L. 182; *Massey* v. *Colville*, 45 N. J. L. 119.

The only grounds suggested for withdrawing the present service from the dominion of this rule are: *first*, that the testimony was not taken in a trial, but upon a side motion in the cause; and, *second*, that the service was not upon the witness in his individual character, but as the representative of a corporation. The reason which underlies the privilege of witnesses is that no one may be deterred from attending the place of trial and delivering his testimony by reason of a liability to be sued in a foreign or distant jurisdiction. The reason for immunity from service is that parties may not lose the testimony of witnesses who might be deterred from attending the place of trial on account of the hazard of such a service and its consequences. The immunity extends to every person who in good faith attends as a witness any place where testimony is to be taken according to the practice of the courts to be used in establishing the rights of a party in any judicial proceeding. In *Dungan* v. *Miller*, *supra*, the party appeared to give testimony before a master in chancery. In *Spence* v. *Stuart*, 3 East, 89, the witness was voluntarily

*Head notes by REED, J.

See also 20 L. R. A. 45; 21 L. R. A. 319; 38 L. R. A. 663.

attending an arbitration. So it applies to a party attending at judges' chambers, or before a master or an examiner of the high court, or at the registrar's office on passing the minutes of a decree, or before the under-sheriff on the execution of a writ of inquiry, as also to witnesses attending the central criminal court, the court of bankruptcy, courts-martial, whether military, marine or naval, the houses of parliament or committees of either house. Taylor, Ev. § 1334.

The witness upon whom service was made in the present case was in attendance, according to the rules of practice of the supreme court commissioner, upon a rule taken in a cause brought in that court. The attendance of witnesses was essential to establish the contention of the defendants that the court had no jurisdiction over them. If we should deny to their witnesses produced upon this rule the privilege so generally conferred, we would fly in the face of the reason upon which the privilege is based, for the rule in which this testimony was to be used lay at the threshold of defendant's defense. It is clear that the occasion was one when the attendance of a person as a witness clothed him with immunity from the service of civil process. Nor do I think that the fact that the witness upon whom the service was made was not himself the defendant in the action in which the process was issued, but was an officer of the corporation defendant, deprives him of the privilege of immunity of service. Corporations, while distinct entities, act, and are acted upon, only through their officers or other agents. Any service of process, in its character personal, must be upon an officer or agent. When a person happens to be an agent or officer, a service upon whom is a service upon a corporation in a foreign jurisdiction, service upon him in his representative character is quite as likely to be as inimical to the rule of privilege as if the service was made in an action brought against the officer personally. The interest of the officer in the corporation which he represents would naturally deter him from a course of conduct which would operate to the prejudice of his corporation. The repugnance of an officer to having his corporation drawn into litigation in a foreign jurisdiction would be quite as likely to keep him at home as if it was merely the danger of service in a personal action. The test is, as already observed, whether the liability to service is calculated to deprive parties of the testimony of witnesses living away from the place of trial. There is no reason, therefore, for the non-applicability of the rule that service of civil process upon a witness while going to, attending and returning from a trial will be set aside. It may be remarked that the fact that the actions in which the party was a witness and in which he was served were against the same defendants can make no difference in the application of the rule. The defendants were entitled to the testimony of the officer in the first action. To obtain that evidence they were not compelled to submit to service here. The rule which protects parties from service in another when attending the trial of one suit, covers this feature of the present case.

The service is set aside.

ARKANSAS SUPREME COURT.

WESTERN UNION TELEGRAPH CO.,
Appt.,
v.
Jesse DAUGHERTY.

(....Ark.....)

(February 14, 1891.)

1. The rule that a telegraph company cannot stipulate against its own negligence will not prevent a stipulation requiring a claim to be presented within a certain time.

2. Sixty days is not an unreasonable time within which to require a claim to be presented against a telegraph company when the contract so provides.

3. A stipulation that a telegraph company will not be liable for damages unless a claim is presented within sixty days applies to a failure to deliver caused by negligence.

APPEAL by defendant from a judgment of the Circuit Court for Jackson County in favor of plaintiff in an action brought to recover damages for defendant's failure to deliver a telegraph message within a reasonable time. *Reversed.*

The facts sufficiently appear in the opinion.

Messrs. **U. M. Rose** and **G. B. Rose,** for appellant:

The power of all corporations and individuals engaged in a quasi-public occupation to make reasonable stipulations limiting their liability is one which has been repeatedly recognized.

Taylor v. *Little Rock, M. R. & T. R. Co.* 39 Ark. 148; *Little Rock, M. R. & T. R. Co.* v. *Harper,* 44 Ark. 208; *St. Louis, I. M. & S. R.*

NOTE.—*Telegraph messages; stipulation for sixty days' notice in contracts.*

A stipulation in a telegraphic blank, that the company will not be liable for damages where the claim is not presented in writing within sixty days after sending the message, is reasonable and obligatory. Hill v. Western U. Teleg. Co. (Ga.) May 7, 1890.

The sender of a message who writes and signs a blank is chargeable with knowledge of and assent to such conditions. *Ibid.*

The stipulation does not, however, exempt the company from the statutory penalty for negligent delay in the transmission or delivery of a telegram. "Damages" means compensation for an injury; but the penalty is inflicted by law to quicken the diligence of the company, and the plaintiff is entitled to it whether damaged or not. Western U. Teleg. Co. v. Cobbs, 47 Ark. 344.

See *note* to Western U. Teleg. Co. v. Short (Ark.) 9 L. R. A. 744.

11 L. R. A.

See also 11 L. R. A. 664.

Co. v. *Lesser*, 46 Ark. 236; *Little Rock, M. R. & T. R. Co.* v. *Talbot*, 47 Ark. 97; *St. Louis, I. M. & S. R. Co.* v. *Weakly*, 50 Ark. 397.

An agreement that an action for a debt or damages claimed upon a special contract shall be brought within a definite period, which is shorter than the period of statutory limitation, is valid.

Greenhood, Pub. Pol. p. 505; *North Western Ins. Co.* v. *Phœnix Oil & C. Co.* 31 Pa. 448; *Lewis* v. *Great Western R. Co.* 5 Hurlst. & N. 867; *Southern Exp. Co.* v. *Caldwell*, 88 U. S. 21 Wall. 264, 22 L. ed. 556; *United States Exp. Co.* v. *Harris*, 51 Ind. 127; *Southern Exp. Co.* v. *Hunnicutt*, 54 Miss. 566; *Dawson* v. *St. Louis, K. C. & N. R. Co.* 76 Mo. 514; *Wolf* v. *Western U. Teleg. Co.* 62 Pa. 87; *Young* v. *Western U. Teleg. Co.* 2 Jones & S. 390, 65 N. Y. 163; *Western U. Teleg. Co.* v. *Jones*, 95 Ind. 228; *Western U. Teleg. Co.* v. *Cobbs*, 47 Ark. 344; *Cole* v. *Western U. Teleg. Co.* 33 Minn. 227; *Heimann* v. *Western U. Teleg. Co.* 57 Wis. 562; *Massengale* v. *Western U. Teleg. Co.* 17 Mo. App. 257; *Western U. Teleg. Co.* v. *Rains*, 63 Tex. 27; *Western U. Teleg. Co.* v. *Dunfield*, 11 Colo. 335; Gray, Teleg. § 34, p. 62.

Mr. **Jesse Daugherty**, appellee, *in propria persona:*

When it is proved that the agent of a telegraph company received a message and failed to deliver it, and there is no proof to account for or excuse the negligence, it may be assumed to have been intentional on the part of the agent or a gross disregard of duty.

Little Rock & Ft. S. Teleg. Co. v. *Davis*, 41 Ark. 79.

The stipulation upon a telegraph blank, requiring the sender to present his claim in writing within sixty days, especially in a case of this kind, where there has been an entire neglect of duty, and no attempt to deliver the telegram, would be unreasonable and void, as against public policy.

Johnston v. *Western U. Teleg. Co.* 33 Fed. Rep. 362; *Smith* v. *Western U. Teleg. Co.* 83 Ky. 104; *Western U. Teleg. Co.* v. *Crall*, 38 Kan. 679; *Western U. Teleg. Co.* v. *Longwill* (N. M.) March 21, 1889; *Ayer* v. *Western U. Teleg. Co.* 4 New Eng. Rep. 784, 79 Me. 493; *Pearsall* v. *Western U. Teleg. Co.* 44 Hun, 532.

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

This is an appeal from a judgment for $50 against the appellant in favor of appellee, to compensate him for damages sustained by the failure of appellant's servants to deliver a telegram sent by appellee from Newport to Clarendon, Ark.

There was printed upon the face of the blank form upon which the telegram was written these words: "The Company will not be liable for damages in any case where the claim is not presented in writing within sixty days after sending the message."

The circuit court made the following declaration of law in the case: "3d. The condition in reference to delay in presenting claim has no application to a failure to deliver caused by the negligence of defendant's agents."

The only controversy in the case is over the correctness of this instruction, and the solution of this depends upon the reasonableness and validity of the above stipulation on the blank of the Telegraph Company, upon which the message was written by appellee's agent, and sent over appellant's telegraph line.

It has been several times held by this court that a common carrier may limit its liability by contract, though it cannot stipulate against its own negligence or the negligence of its servants.

The question is not one of power or right to make regulations, but of reasonableness of the regulations.

The stipulation that the Company would not be liable, where the claim is not presented within sixty days, was an agreement of the plaintiff with the Telegraph Company, and was not in violation of any statute, and if reasonable, and not against public policy, was binding upon him. We know of no principle of the common law that would prohibit it.

It was not a contract to cover the negligence of the Telegraph Company. It was a stipulation against the delay and neglect of the plaintiff in presenting his claim, and it does not appear unreasonable.

By means of the character of the business and the great number of messages sent over the lines of a telegraph company, and the importance of early information of claims, to enable the company to keep an account of its transactions, and the impossibility of recalling them all and accounting for them from memory, after the lapse of a considerable period of time, it does not appear that a stipulation that a claim for damages should be presented, in writing, within sixty days from the time the message is sent, is unreasonable. *Wolf* v. *Western U. Teleg. Co.* 62 Pa. 87; *Young* v. *Western U. Teleg. Co.* 65 N. Y. 163; *Cole* v. *Western U. Teleg. Co.* 33 Minn. 227; *Heimann* v. *Western U. Teleg. Co.* 57 Wis. 562.

Such a condition is not only not a stipulation against the negligence of the company, but it implies that a liability may be incurred for negligence, and it requires that one who seeks to recover damages for such negligence shall present his claim in writing within sixty days or be held to have waived it. *Convention vincit legem. Massengale* v. *Western U. Teleg. Co.* 17 Mo. App. 257.

"When a definite term is fixed, the question of its reasonableness is to be determined by the court." *Ibid.*

In the above case thirty days was held to be a reasonable time, and twenty days has been held sufficient.

We know of no public policy that would be violated by conceding to a competent person the right to make a reasonable contract, and it is not unlawful for such a person to limit himself to less time than would be allowed by the Statute of Limitations, within which to assert his claim for damages, for violation of a contract. Such an one may renounce a privilege allowed him by law and such renunciation will bind him. It is said that "Statutes of Limitation prohibit, not the limitation of actions, but the indefinite postponement of them." Greenhood, Pub. Pol. p. 505; *North Western Ins. Co.* v. *Phœnix Oil & C. Co.* 31 Pa. 448; *Wolf* v. *Western U. Teleg. Co. supra; Western U. Teleg. Co.* v. *Rains*, 63 Tex. 27. See Gray, Teleg. p. 62.

The authorities are almost uniform in maintaining the reasonableness and validity of such a stipulation.

The third declaration of law, made by the circuit court, was erroneous for the reasons above indicated; wherefore, *the judgment is reversed and the cause is remanded for a new trial.*

NEBRASKA SUPREME COURT.

STATE OF NEBRASKA, *Plff. in Err.*,
v.
Samuel CHICHESTER.

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

***Held that illegal voting at a village election is not punishable** under the provisions of sections 181 and 182 of the Criminal Code.

(February 3, 1891.)

ERROR to the District Court for Gage County to review a ruling sustaining a demurrer to an information charging defendant with illegal voting. *Affirmed.*

The facts are stated in the opinion.

Mr. **Hugh J. Dobbs,** for plaintiff in error:

Penal Statutes, like all others, are to be fairly construed with reference to the legislative intent as expressed in the enactment.

Sedgw. Stat. and Const. L. pp. 282, 358; *Rex* v. *Hodnett*, 1 T. R. 96; *The Industry*, 1 Gall. 114; *United States* v. *Athens Armory*, 35 Ga. 344; *Com.* v. *Martin*, 17 Mass. 359; *United States* v. *Winn*, 3 Sumn. 209; *Com.* v. *Loring*, 8 Pick. 370; *Com.* v. *Dana*, 2 Met. 329. See also *People* v. *Warner*, 4 Barb. 314; *Com.* v. *Cone*, 2 Mass. 132; *Cummings* v. *Com.* 2 Va. Cas. 128; *People* v. *Flanders*, 18 Johns. 164; *Quarles* v. *State*, 5 Humph. 561; *Gicens* v. *Rogers*, 11 Ala. 545; *Com.* v. *King*, 1 Whart. 448; *Olive* v. *State*, 11 Neb. 13.

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

A village is not designated by the word "precinct," for in this State precincts are just what, and no more than, the word, as ordinarily understood, imports. They are mere territorial divisions or districts created for certain political and administrative purposes, and without the semblance of corporate character.

State v. *Dodge County Comrs.* 10 Neb. 20.

There is no ambiguity in this Statute, but there is a clear omission to create the offense charged in the information. If there be any doubt whether the Statute embraces the offense, that doubt is to be resolved in favor of the accused.

United States v. *Morris*, 39 U. S. 14 Pet. 464, 10 L. ed. 543; *United States* v. *Wiltberger*, 18 U. S. 5 Wheat. 76, 5 L. ed. 37; *United States* v. *Sheldon*, 15 U. S. 2 Wheat. 119, 4 L. ed. 199. And see also *Ferrett* v. *Atwill*, 1 Blatchf. 151-156; Sedgw. Stat. and Const. L. 324-334; 1 Bishop, Cr. L. §§ 134-145; *United States* v. *Clayton*, 2 Dill. 224.

A departure from the language of an unambiguous statute is not justified by any rule of construction, and is an exercise of legislative authority.

Newell Universal Mill Co. v. *Muxlow*, 115 N. N. Y. 170; *Nettles* v. *State*, 49 Ala. 35.

*Head note by NORVAL, J.

11 L. R. A.

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

An information was filed in the District Court of Gage County charging the defendant with unlawfully voting at an election held in the Village of Filley, in said county, on the 1st day of April, 1890. The information charges "that Samuel Chichester, late of the county aforesaid, on the 1st day of April, 1890, in the County of Gage and State of Nebraska aforesaid, then and there being, and not having actually resided, in the Village of Filley, in said County of Gage and State of Nebraska, the same being an incorporated village under the laws of the State of Nebraska, for three months next preceding the annual election held in said village, on said day did unlawfully, willfully and purposely vote in said village at said election on the day aforesaid, such election being then and there duly authorized by the laws of this State." A general demurrer to the information was sustained, and the State excepted to the ruling of the court. The county attorney brings the case to this court for review under section 515 of the Criminal Code.

The question presented for decision is whether illegal voting at village elections is punishable under the provisions of section 182 of the Criminal Code. Section 61, art. 1, chap. 14, Comp. Stat., prescribes the qualifications of those entitled to vote at elections held in villages and cities of the second class. It is required that the person be a qualified elector of the State, and a resident of the city or village for three months preceding any election therein. Section 182 of the Criminal Code, under which the prosecution was brought, provides that "any person who shall vote in any precinct or in any ward of a city in this State in which he has not actually resided ten days, or such length of time as required by law, next preceding the election, or into which he shall have come for temporary purposes merely, shall be fined in any sum not exceeding $500, nor less than $50, and imprisoned in the jail of the proper county not more than six months." The language used in express terms defines the offense of illegal voting in a precinct and city, and prescribes the punishment therefor. Village elections are not specifically mentioned in the section; and unless the word "precinct," used therein, includes and embraces the word "village," it is obvious that the Legislature has failed to impose a penalty for illegal voting at village elections. The section, being a penal one, must be strictly construed. The intention of the law-maker in enacting it must be determined by giving the words their ordinary and popular signification. The words "village" and "precincts" are unlike in their meaning. A village is a municipal corporation created for the purpose of local government, and may

sue and be sued; a precinct is a political subdivision of a county, possessing no corporate powers. We conclude, therefore, that the word "precinct," as used in the section, does not include a village.

It is claimed by the learned county attorney that, when sections 181 and 182 are construed together, "they cover every species of illegal voting at any election authorized under the laws of this State." Section 181 provides that "the provisions of this chapter shall apply to all elections authorized by the laws of this State." It may be observed that chapter 19 of the Criminal Code, which contains this section, embraces several sections, each relating to offenses against the Election Laws. The sole purpose of the Legislature in enacting section 181 was to make the provisions of the chapter apply to all kinds of elections, special as well as general, held in any of the political subdivisions enumerated in the chapter, for any purpose authorized by law; but it was not intended to extend its provisions to elections held in any political subdivision of a county not therein enumerated. There is no law or statute in this State making illegal voting at village elections a crime. The need of such a law must be conceded, but it cannot be supplied by judicial interpretation. That would be legislation, which is placed upon another department.

The exceptions taken to the sustaining of the demurrer to the information must be overruled. Judgment accordingly.

The other Judges concur.

NORTH CAROLINA SUPREME COURT.

STATE OF NORTH CAROLINA, *Appt.*,
v.
N. B. LEWIS.

(.....N. C.....)

1. **So long as a judge assumes to act in that capacity** under a commission from the governor, although issued without authority, he is a *de facto* judge and his acts are valid so far as they affect the public and the rights of third persons.

2. **A de facto judge, who has acted as such through the trial of a prosecution, has no authority** to arrest judgment after a verdict has been entered, because he has become convinced that his commission is not valid. If he ceases to act as a *de facto* officer by his own volition, he has no authority to arrest a judgment; and if he is still such an officer the judgment should be pronounced.

3. **It is the duty of a court** to resolve all doubts in favor of an official act of the chief executive officer of the State.

4. **An order assigning a judge "to hold fall terms"** of a court in lieu of a deceased judge may be upheld under the power to assign such judge to hold special terms of the court under the circumstances, on the ground that the governor did not exceed the limit of his powers, although the "fall terms" were to be held at the time appointed by law for the regular fall sessions.

5. **Under a statute providing that the governor may order a special term of court** in any county whenever it shall appear to him by the certificate of a judge or of the county commissioners, or otherwise, that a certain state of facts exists, he is the sole judge of the sufficiency of the evidence to satisfy him that a special term is required.

6. **The death of a judge is an "unavoidable accident,"** within the meaning of Const., art. 4, § 11, giving the governor power, in case of unavoidable accident, to assign another judge to hold a term in lieu of the one unable to preside.

7. **Under a Constitution giving the governor power to appoint district judges,** and, in case of the protracted illness of, or an unavoidable accident to, the judge of a particular district, which renders him unable to preside, to require the judge of any district to hold specified terms of court in the district of the disabled judge, the governor may, upon the death of a judge, assign a judge from another district to hold terms in decedent's district during a reasonable time which is allowed to elapse before the appointment of a successor to the deceased judge.

(*Davis, J., dissents from propositions 3–7.*)

(December 22, 1890.)

NOTE.—*Officer* de facto.

An officer *de facto* is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law. Clark v. Easton, 5 New Eng. Rep. 559, 146 Mass. 43, citing Rex v. Bedford Level Corp. 6 East, 356; Petersilea v. Stone, 119 Mass. 465.

To make one a *de facto* officer, he must have some appearance of right to the office, which would lead the public, without inquiry, to suppose him to be the officer he assumes to be. Cox v. Houston & T. C. R. Co. 68 Tex. 226, citing Franco-Texas Land Co. v. Laigle, 59 Tex. 344; State v. Carrol, 38 Conn. 449. See *note* to State v. Peelle (Ind.) 8 L. R. A. 228.

The mere claim to be a public officer is not enough to constitute a person an officer *de facto*, but there must be some color of claim or right to the office, or, without such color, a performance of official duties, with the acquiescence of the public, for such a length of time as to raise a presumption of colorable right. Hamlin v. Kassafer, 15 Or. 456, citing Brown v. Lunt, 37 Me. 428; Burke v. Elliott, 4 Ired. L. 355; Conover v. Devlin, 13 How. Pr. 477; *Ex parte* Strang, 21 Ohio St. 610.

While an officer *de facto* is in actual possession of the office and in the exercise of its functions and the discharge of its duties, there can be no other incumbent. Hamlin v. Kassafer, 15 Or. 456.

There cannot be a *de facto* officer without a *de jure* office. Willard v. Pike, 4 New Eng. Rep. 607, 59 Vt. 202, citing Goodwin v. Perkins, 39 Vt. 598.

Two persons cannot be officers *de facto* for the same office at the same time. State v. Blossom, 19 Nev. 312.

If an office is filled, and the duties pertaining thereto are performed, by an officer *de jure*, another person, although claiming the office under color of title, cannot become an officer *de facto*. *Ibid.*, citing McCahon v. Leavenworth County Comrs. 8 Kan. 441; Boardman v. Halliday, 10 Paige, 232, 4 N. Y. Ch. L. ed. 953; Morgan v. Quackenbush, 22 Barb. 80; Cohn v. Beal, 61 Miss. 399.

11 L. R. A.

See also 12 L. R. A. 202; 48 L. R. A. 412.

APPEAL by plaintiff from an order of the judge presiding at the July Term, 1890, of the Superior Court for Rockingham County arresting judgment after verdict against defendant indicted for assault with a deadly weapon. *Reversed.*

Statement by **Avery, J.:**

This was an indictment for assault and battery with a deadly weapon, tried at the July Term, 1890, of the Superior Court of Rockingham County, before Whitaker, *J.* The judge was acting by virtue of the following commission from the governor:

"Raleigh, July 8, 1890.

"To Hon. Spier Whitaker—Greeting:

"We, reposing special trust and confidence in your integrity and knowledge, do by these presents appoint you to hold fall terms of the Superior Courts of Rockingham County beginning July 22, 1890, and Stokes County beginning August 4, 1890, in the Ninth Judicial District, in lieu of Hon. Wm. Shipp, deceased, and do hereby confer upon you all the rights, privileges and powers useful and necessary to the just and proper discharge of the duties of your appointment. In witness whereof his excellency, Daniel G. Fowle, our governor and commander-in-chief, hath signed with his hand these presents, and caused our great seal to be affixed thereto. Done at our City of Raleigh, this 8th day of July, in the year of our Lord, one thousand eight hundred and ninety, and in the one hundred and fifteenth year of our American independence. Dan'l G. Fowle, Governor. By the governor. Wm. L. Saunders, Sec. of State."

There was a verdict of guilty, prayer for judgment, motion in arrest of judgment for that: *Judge* Shipp having recently died, and the position of superior court judge for the Eleventh Judicial District being now vacant, by reason of the governor's failure to appoint his successor as required by the Constitution and laws of North Carolina to do, there is no one authorized to hold the court which in the order of rotation should have been held by *Judge* Shipp. The appointment of *Judge* Spier Whitaker to hold this regular term of court is without authority under the Constitution, he being in the order of rotation of judges required to hold the court of the Second District, *Judge* Shipp's successor, under sections 11 and 25 of article 4 of the Constitution, being the only person required or authorized to hold said term of said court. That this case is therefore *coram non judice.* His honor, having found as a fact that *Judge* Shipp was dead before his special commission to hold this court was issued, arrested the judgment, and the solicitor appealed.

Messrs. **Theodore F. Davidson,** *Atty-Gen.,* **R. H. Battle** and **Samuel F. Mordecai,** for the State.

No appearance for appellee.

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

If *Judge* Spier Whitaker was acting either *de jure* or *de facto* as judge of the Superior Court of Rockingham County, in opening and organizing that court, and in presiding at the trial of the defendant, until the jury returned a verdict of guilty, it was error to allow the motion of the defendant, and enter the order arresting the judgment. Were we to concede not only that the governor did not have the power under the Constitution to appoint him and clothe him with the rightful authority, but that his acts as a *de facto* officer also ceased to be valid and binding, as to the public and third persons, when he declared in open court his purpose to abdicate because he was of opinion that the said term could not have been lawfully held except by a successor regularly appointed and commissioned by the governor to fill the vacancy caused by the death of *Judge* Shipp, still his refusal to proceed further with the business of the court would not affect the validity of any previous act done under color of his appointment from the governor, and when he was holding himself out to the public as the rightful incumbent by virtue of the special commission entered of record. *Judge* Whitaker was a *de facto* officer, so long as he continued to preside and to assert his power under and by virtue of the commission issued by the governor, even if we concede for the sake of the argument that he was not the rightfully constituted judge of the Superior Court of Rockingham County, and that his power as a *de facto* officer continued only so long as he exercised it. *Chief Justice* Butler, in the case of *State* v. *Carroll,* 38 Conn. 449, after a very exhaustive examination and review of the English and American authorities, defines and classifies officers *de facto* as follows: "An officer *de facto* is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised: *first,* without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people, without inquiry, to submit to or invoke his action, supposing him to be the officer he assumed to be; *second,* under color of a known and valid appointment or election, but where the officer failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like; *third,* under color of a known election or appointment, void because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity in its exercise, such ineligibility, want of power or defect being unknown to the public; *fourth,* under color of an election or appointment by or pursuant to a public unconstitutional law before the same is adjudged to be such."

If it be admitted that the governor was not empowered by art. 4, § 11, of the Constitution, to require *Judge* Whitaker to hold the term of Rockingham Court, which *Judge* Shipp before his death had been assigned to hold, still, when the commission was issued even without authority, and the appointee undertook to discharge the duties required of him, he was, in so far as it affected the public and the rights of third persons, *de facto* judge of the court, so long as he assumed to act in that capacity, belonging to the third class mentioned in the opinion of *Chief Justice* Butler. The defendant, finding the judge holding the court by authority of a commission from the governor re-

quiring him to discharge that duty, without objection, if he had ground for raising any, pleaded not guilty to the charge of assault and battery, and, after a trial in which no exceptions were entered to the rulings of the court, the jury returned a verdict of guilty. Up to this point, his honor was assuming his judicial functions, and it is not material, if his real purpose was to make a case on appeal for this court in which the validity of his official acts as judge of that court would be brought in question, because, so long as he proceeded in the transaction of the business of the term, he was judge *de facto* of the Superior Court of Rockingham County, and his acts were as valid and conclusive on the defendant, Lewis, as though he had claimed himself, and been admitted by all others, to be the judge *de jure* of that court. If the defendant should be again put upon trial for the same offense, there can be no question that the record of this trial, including a copy of *Judge* Whitaker's commission, would sustain a plea of former conviction. After the judge had determined that he was not empowered to hold the court by virtue of the commission, he ordered, on motion, that the judgment be arrested. If, by his own volition, he ceased to be a *de facto* officer after the verdict was entered, then he had no authority to arrest the judgment. If he was still a *de facto* officer, there was no sufficient reason why the judgment of the court should not have been pronounced, as it must hereafter be entered, on motion of the solicitor. The principles we have stated, as embodied in the opinion in *State* v. *Carroll*, *supra*, are sustained by the decisions of this court as well as the courts of other States. *Burke* v. *Elliott*, 4 Ired. L. 355; *Gilliam* v. *Reddick*, Id. 368; *People* v. *Staton*, 73 N. C. 546; *State* v. *Edens*, 95 N. C. 693; *State* v. *Speaks*, Id. 689; *Atty-Gen.* v. *Crocker*, 138 Mass. 214; *Petersilea* v. *Stone*, 119 Mass. 465; *State* v. *Carroll*, *supra*, and authorities cited; *Diggs* v. *State*, 49 Ala. 311; *Venable* v. *Curd*, 2 Head, 582; *Conover* v. *Devlin*, 15 How. Pr. 470; *State* v. *Williams*, 5 Wis. 308; *Woodruff* v. *McHarry*, 56 Ill. 218.

The views which we have thus far presented have the approval of all the members of the court.

A majority of the court concur in resting our ruling upon two additional grounds: (1) That there is nothing in the record which, in legal contemplation, excludes the posibility that the governor appointed the judge to hold two special terms,—one in Rockingham and the other in Stokes County; and if he did not have the power to require the judge assigned to a different district to hold "specified regular terms," under the provisions of section 11, art. 4, it will nevertheless be presumed that he was exercising his rightful authority in ordering the holding of special terms. (2) That the governor did not in fact transcend his authority, if he issued the commission, not because it appeared to him that special terms were necessary in the counties named therein, but under the idea that he was empowered to require the judge appointed to hold "specified" regular terms, on account of the death of the judge assigned to the Ninth Judicial District, and while he had under consideration the selection of his successor.

Section 11, art. 4, of the Constitution is as follows: "Every judge of the superior court shall reside in the district for which he is elected. The judge shall preside in the courts of the different districts successively, but no judge shall hold the courts in the same district oftener than once in four years, but in case of protracted illness of the judge assigned to preside, or any other unavoidable accident to him, by reason of which he shall be unable to preside, the governor may require any judge to hold one or more specified terms in said district in lieu of the judge assigned to hold the courts of the said district."

Section 913 of the Code is as follows: "The governor shall have power to appoint any judge to hold special terms of the superior court in any county, and, by consent of the governor, the judges may exchange the courts of a particular county or counties; but no judge shall be assigned to hold the courts of any district oftener than once in four years, and, whenever a judge shall die or resign, his successor shall hold the courts of the district allotted to his predecessor."

Section 11, art. 4, of the Constitution, in its bearing upon the Statute in reference to special terms, has been more than once construed by this court, and it is now well settled that the governor under its express provisions has the power to require a judge to hold one or more special terms in different districts from that to which he has been assigned in the regular course of rotation. *State* v. *Speaks*, 95 N. C. 691.

In the case of *State* v. *Watson*, 75 N. C. 139, *Justice* Rodman, for the court, says: "The reason assigned by the governor in the commission, stated to be that two judges had agreed to a partial exchange of districts, does not in our opinion avoid the commission. The governor is not bound to assign any reason in the commission, or to this court. As to all the world, except the Legislature, he is the final judge of the fitness of his reasons. It may be that he desired to accommodate the judges, and no public inconvenience occurred to him as probable. If so, we cannot say that the reason was insufficient, and that being insufficient it avoided the commission. In doing so, we would clearly encroach on the executive duty and responsibility."

It is the duty of this court to resolve all doubts in favor of the constitutionality of a statute passed by the Legislature, or of an official act of the chief executive officer of the State. As the court says in *State* v. *Watson*, *supra*, "the governor was not bound to assign a reason;" nor must we, because a reason has been embodied in the commission, conclude that the governor had no other sufficient grounds for requiring *Judge* Whitaker to hold the court. It may be, for aught that appears to the contrary in the record proper, that the governor acted on a certificate framed under the provisions of the Code, § 914, and sufficient to warrant his calling a special term at the time when the regular terms were ordinarily held. He had the power to do so, and might issue the order direct to the judge. Neither the certificate forwarded to the executive office nor the notice sent down to the county commissioners (Code, 915) constitute an essential part of the

record of the term. This court is not bound to conclude that courts were not special terms because they are called "fall terms" in the commission, nor because they were held at the time appointed by law for holding the regular fall sessions. *Judge* Shipp being dead, the governor had the power to call special terms of the courts both in Rockingham and Stokes Counties. We should always assume that he did not in fact exceed the limit of his powers under the Constitution, when, consistently with every fact disclosed, it may be that his acts were valid. If it be granted that the successor of *Judge* Shipp, had he been appointed and inducted into office, would have been the proper officer to hold the regular term of the court in Rockingham at the precise time when *Judge* Whitaker presided there, this court is not at liberty to jump to the conclusion that some delay in filling a vacancy is not allowed, in order that the governor, when he thinks the public interest will be best subserved by doing so, may take time to consider and inquire as to the fitness of persons whose names are suggested for a position so important and responsible. Where the appointment is tendered and declined, or if for any other reason there is delay, while the chief executive is instituting inquiry for the purpose of selecting a suitable person to fill the office, he is not prohibited from requiring a judge who is not engaged in holding the courts of another district to hold one or more terms in that to which there is no judge assigned. If the governor should purposely and unreasonably postpone the exercise of the appointing power, for that, like any other misfeasance in office, the Legislature may call him to account.

Since section 11, art. 4, of the Constitution, as amended in 1875, was construed in *State* v. *Monroe*, 80 N. C. 373, to prohibit only the holding by any judge twice in four years of the whole series of courts comprehended in one district (and that case has been since approved in *State* v. *Speaks*, 95 N. C. 692), it is too late to contend that the constitutional convention intended to put an end to all exchanges or the holding of the courts in the same county oftener than once in four years, with only the two exceptions,—where the judge assigned is disabled by protracted illness, or some accidental injury. Courts have been held in all portions of the State by judges acting under commissions from the governor, and we are not disposed to entertain a proposition to overrule adjudications so often acted upon by the chief executive officer of the State. In section 25, art. 4, of the Constitution, we find the provision that "if any person elected or appointed to any of said offices shall neglect and fail to qualify, such office shall be appointed to, held and filled as provided in case of vacancies occurring therein," viz., by the governor. Suppose the governor should appoint one to fill such a vacancy, and the appointee should accept but fail to qualify immediately, would the governor have the right, and would it be his duty, without regard to circumstances, to make a second appointment immediately, because there was some official work awaiting the qualification of the new appointee? Would the courts be justified in declaring the acts of the old incumbent void, because the governor's first appointee, in lieu of the person elected and declining, neglected to qualify, and the governor had unreasonably postponed making a second appointment?

Where the Constitution has clothed the governor with the power to require a judge to hold a court in a district different from that to which he is by general law assigned, upon certain conditions, as to the fulfillment of which he must of necessity be the judge, when he issues the commission, this court will assume if he could, for any reason, lawfully require such service of a judge, that in fact the emergency had arisen, that called for the exercise of the authority given him by law. *State* v. *Watson*, *supra*.

Constitutional as well as statutory provisions, made in pursuance of the Organic Law, are often so framed that the governor is left to determine in his discretion whether the contingency, on the happening of which he is to exercise a certain power, has arisen. Cooley, Const. Lim. marg. pp. 41 and 187; *Kendall* v. *Kingston*, 5 Mass. 533. And in such instances there is no power lodged elsewhere to correct a mistake of judgment on his part. The Legislature can notice a willful abuse of authority.

It is provided in section 914 of the Code that the governor may order a special term of the superior court to be held in a county, whenever it shall appear to him "by the certificate of any judge, a majority of the board of county commissioners, or otherwise," that a certain state of facts exists. He is the sole judge of the sufficiency of the evidence to satisfy him that the business of a court is such as to require the holding of a special term. The Legislature could not require the governor to exercise his power of appointment within a given period, and therefore the Statute must be understood (in a qualified sense growing out of this limit to their authority) as meaning that the successor, when appointed, "shall hold the courts of the district allotted to his predecessor" that shall not have been previously held. But, looking exclusively to the phraseology of section 11, art. 4, we think that we are warranted in resting our ruling upon the ground that the Constitution by its express terms empowered the governor to appoint *Judge* Whitaker to hold the two "specified terms" in lieu of the judge assigned to the district because he had not, for want of sufficient time to select among eligible lawyers, or for other good reason, designated the successor to *Judge* Shipp, who had died, after being assigned by law to the Ninth Judicial District. The word "accident" in its legal sense has been defined to be "(1) an event happening without the concurrence of the will of the person by whose agency it was caused; (2) an event that takes place without one's foresight or expectation." The death of *Judge* Shipp of course is due to Divine agency, and therefore the first of the two definitions could not be adopted upon our theory in this case; but, on the other hand, the additional qualifying and intensifying word "unavoidable" would imply, not simply the passive state of having no agency in bringing about the event, but the active exertion of one's powers to prevent it. Death is an event that takes place without the foresight or expectation of its victim, as well as in spite of the natural resistance of his vital powers and energies, and is an "unavoidable accident," happening not only without the con-

currence of the will of the man, but because, although summoning all of his will power, he cannot prevent it. Webster says that the word "accident" is often used in the sense of "an undesigned and unfortunate occurrence of an afflictive nature; a casualty; a mishap, as to die by accident." The same author defines "unavoidable" as meaning "incapable of being shunned or prevented; inevitable." Combining the synonyms of the two words, it seems that we might say with propriety and accuracy that *Judge* Shipp, though dead, had, on account of an "inevitable mishap, or an occurrence to him of an afflictive nature," that could not have been prevented, been unable to preside. If, using the word "accident" in the sense of "chance," we hold that the framers of our Organic Law meant to provide only for the contingency of the judge being disabled by some unforeseen injury to him, can we give effect to the adjective "unavoidable," by looking into the facts attending his mishap, and declaring judicially that it could not have been shunned by any degree of care on his part, and that any occurrence to him, except death, was utterly inevitable, had he exerted all of his power to obviate it? Anderson, in his Law Dictionary (p. 12), says: "An accident is an event or occurrence which happens unexpectedly from the uncontrollable operations of nature alone, and without human agency;"—and that unavoidable accidents are "such as are 'inevitable,' or absolutely unavoidable because effected or influenced by the uncontrolable operations of nature." Id. p. 13. The same author gives also another definition as follows: "An accident not occasioned in any degree, remotely or directly, by want of such care or skill as the law holds every man bound to exercise." But from the nature of the case the framers of the Constitution could not have intended to make their meaning dependent upon the decision of a question of negligence, and must have used the words in the other sense in which they are defined by the authors. This interpretation brings this section into harmony with section 25, art. 4, where it is provided that until a newly elected officer, or one appointed in place of a newly elected officer, failing to qualify, shall comply with the conditions precedent to his lawful induction into office, the incumbent shall hold over. In that event the duties are discharged by the person whose regular time has expired, even while the governor is searching for a suitable person to appoint in lieu of another chosen to succeed him. In our case we interpret the Constitution to mean that while the chief executive officer is taking a reasonable time for deliberation, and acquiring information that will aid him in choosing a competent and worthy officer, he may require an unoccupied judge to hold a specified term or terms of the courts of the district to which his appointee will be assigned by the general law immediately on his qualification. If we have fairly construed the language of the framers of the Constitution, the consequences of giving the section a proper interpretation are to be considered by those intrusted with making statute law, and suggesting alterations in the Organic Law. But we see no ground for apprehending that a governor will ever abuse his power by such unreasonable delay as to impose upon eleven judges the duties and labor of twelve. Such an unreasonable dereliction in the discharge of a duty imposed by the Constitution, as would appear palpably to be a willful abuse of his power, would make him amenable before the General Assembly, the highest of all criminal tribunals in the State.

The order arresting judgment in this case is reversed, and the court below will proceed to enter such judgment as it may deem proper, if the solicitor shall pray the judgment of the court.

Judgment reversed.

Davis, *J.*:

Judge Whitaker was *de jure* judge, and his acts, while holding *de facto* a regular term of Rockingham Superior Court, which was by law to have been held by *Judge* Shipp, or by his successor in the event of a vacancy, were valid; and this is sufficient to decide the question before us. But I do not concur in the opinion that the governor had the power to require him to hold that court under article 4, § 11, of the Constitution, or to appoint him to hold it under section 913 of the Code; and I will content myself with a brief statement of my opinion, without elaboration. I think article 4, § 11, of the Constitution, as amended by the convention of 1875, means to provide for the inability of a living judge, regularly assigned in order of rotation to preside in any district, to do so because of his protracted illness, "or any other unavoidable accident to him, by reason of which he shall be unable to preside," in which event "the governor may require any judge to hold one or more specified terms in said district in lieu of the judge assigned to hold the courts of said district;" and I do not think that, by any fair and unstrained implication, it can be made to apply to a vacancy, for that is provided for in clear, express and unmistakable language in section 25 of the same article, and section 11 provides only for courts to be held in lieu of the disabled living judge, who, as soon as his disabilities shall be removed, will return to hold his courts, and not in lieu of his successor who fills the vacancy caused by his death, resignation or otherwise, unless he also shall be under some temporary disability. Under section 913 of the Code, the governor has power to "appoint any judge to hold a special term of the superior court in any county," and to consent to the exchange of courts by judges, but he has no power to appoint a special term of the court except as provided, and only as provided, by sections 914 and 915 of the Code; for it will be observed that the constitutional provision.—art. 4, § 14, of the Constitution of 1868 as it existed when *State* v. *Watson*, 75 N. C. 136, was decided,—authorized the governor, "for good reasons which he shall report to the Legislature at its current or next session, to require any judge to hold one or more specified terms of said courts in lieu of the judge in whose district they are." This provision does not appear in the amended Constitution. I am not aware of any construction that has been placed upon article 4, § 11, of the present Constitution, or upon section 913 of the Code, by this court, that will confer upon the executive power to appoint or require a judge to hold a regular term of the court in a vacant judicial district. *State* v. *Watson*, *supra*, does not con-

strue either, but is based upon and is a construction of article 4, § 14, of the Constitution of 1868, which by express language conferred upon the governor, for "good reasons which he shall report to the Legislature," etc., power to require a judge "to hold one or more specified terms in lieu of the judge in whose district they are." And that case does not do more than declare that the governor under that section of article 4 of the Constitution of 1868 "is the final judge of the fitness of his reasons" as to all the world, except the Legislature, to which he is required to report them. There is no such provision in the present Constitution or laws, and it is no authority in construing the provisions now being considered. *State* v. *Munroe*, 80 N. C. 273, so far as it relates to article 4, § 11, only asserts that it does not restrict the Legislature from creating an extra term of the superior court of any county, and designating the presiding judge to hold the same; and *State* v. *Speaks*, 95 N. C. 689, so far as this question is concerned, only asserts that the acts of an officer *de facto* are as binding as if he were an officer *de jure;* and, in that, all concur.

It is not contended by me that the amended Constitution intended to put an end to all exchanges, or that the Legislature has not the power to provide, within the limits of the Constitution, for the creation of additional or special courts, inferior to the supreme court, and to provide for the manner in which they may be held, but I do not think that the courts which *Judge* Whitaker was required to hold were special terms or additional courts provided for by any law. This court is bound to take judicial notice of the times and places at which the regular terms of the superior courts are held, and we are bound to know, judicially, that it was the regular fall term, and not a special term of Rockingham Court that *Judge* Whitaker was required to hold.

We are charged with the knowledge that the governor had no power to appoint a special term of Rockingham Superior Court, except as provided for in sections 914 and 915 of the Code, and there is no evidence to warrant the assumption or presumption that the governor was acting under those sections. So far from it, it appears from the record, and is found as a fact, that it was a regular term which was to have been held by *Judge* Shipp. I do not think that the governor is the sole judge of the sufficiency of the evidence to satisfy him that the business of the court is such as to require the holding of a special term; and, even if we could presume, without any evidence and against the record and knowledge with which the court is charged, that *Judge* Whitaker was required to hold a special term of Rockingham Superior Court, the governor had no power to appoint such a court to be held at the same time as the regular term; and if it appeared at any time other than a regular term, by the certificate of any judge, a majority of the board of county commissioners, or otherwise, that the business of the county required it, the duty of the governor is imperative, whatever may be his opinion as to the necessity of the special term, to order it. The language of the Statute is "shall," and his executive duty is to obey.

But it is said that the death of *Judge* Shipp was an accident, within the meaning of article 4, § 11, of the Constitution. I cannot concur in this view. It would never occur to me to say that *Judge* Shipp was "unable to preside" at Rockingham Court by reason of the accident of his death. Death would put no accidental suspension to his ability to hold the court, but it would create a vacancy, and no one could hold it in lieu of him until the vacancy was filled, for there was no one in existence in lieu of whom it could be held. One may fill a vacancy created by the death or resignation of another, but can it be said that he is acting in lieu of the dead man? His power to act ended with his life, and, when that ended, his place was vacant, and until filled there was no one in it to act, or for whom another could act. So much of the opinion as is based upon the supposed necessity that might otherwise be imposed upon the governor to act hastily is an argument *ab inconvenienti*, the force of which is, I think, greatly lessened, if not rendered nugatory, by the provisions of sections 914 and 915 of the Code, under which special terms, if any necessity or emergency may exist, may be appointed in the manner plainly prescribed by law, without the exercise of any doubtful or uncertain power which may not exist. Concurring in the conclusion arrived at, and regretting that I cannot concur in the entire opinion of the majority of the court, which, however harmless it may be at the present time, may, I fear, in the future, become a dangerous precedent in the hands of an unwise or unconscientious executive, I feel constrained to enter my dissent to so much of the opinion as holds that the governor had the rightful power to require *Judge* Whitaker to hold the regular fall term of Rockingham Superior Court, made vacant by the lamented death of *Judge* Shipp, who, in the order of rotation, would have been the proper judge to preside.

IOWA SUPREME COURT

George E. CROW, *Appt.*,
v.
W. H. BROWN *et al.*

(....Iowa....)

Property purchased by a pensioner of the United States Government with his pension money is exempt from execution or attachment for his debts under U. S. Rev. Stat., § 4747, providing that pension money shall inure wholly to the benefit of the pensioner.

(Robinson, J., dissents.)

(October 24, 1890.)

NOTE.—See Johnson v. Elkins (Ky.) 8 L. R. A. 552; Holmes v. Tallada (Pa.) 3 L. R. A. 219.

APPEAL by plaintiff from a judgment of the District Court for Adams County sus-

taining a demurrer to the petition in an action brought to enjoin the sale upon execution of certain real estate alleged to be exempt therefrom. *Reversed.*

Statement by **Rothrock,** *Ch. J.:*

This is an action in equity by which the plaintiff seeks to enjoin the sale of certain real estate upon an execution against him and in favor of the defendant Brown, upon the ground that the said real estate is exempt from execution and sale. There was a demurrer to the petition, which was sustained. Plaintiff appeals.

Messrs. **Davis & Wells** for appellant.

Messrs. **Dale & Brown** and **J. J. Davis,** for appellees:

The power to exempt real property in a State from the process of its courts is of the nature of a police regulation, and belongs to the State wherein the real property is situated. It pertains exclusively to the domestic affairs of the State, over which the Congress of the United States has no control or jurisdiction.

United States v. *DeWitt,* 76 U. S. 9 Wall. 41, 19 L. ed. 549.

If Congress has authority to exempt the land in this case from process of the courts of this State, it must have derived it from some power expressly conferred by the Constitution of the United States, or necessarily implied from such power so conferred.

Martin v. *Hunter,* 14 U. S. 1 Wheat. 326, 4 L. ed. 102; Cooley, Const. Lim. p. 10.

What provision of the Constitution confers this new power, either in express terms or by necessary implication?

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

In the month of October, 1875, the defendant Brown recovered a judgment against the plaintiff for the sum of $400, and costs. At that time the plaintiff was insolvent. The plaintiff was a soldier in the War of the Rebellion, and in the month of October, 1886, he received a pension from the United States on account of physical disability incurred while in the military service. He was allowed and paid the sum of $1,440 as arrears of pension. Upon receiving said sum of money he bought 120 acres of land for which he paid out of said pension money the sum of $5 an acre. He built a house on said land, into which he moved his wife and family, and has since occupied the premises as a homestead. On the 18th day of May, 1889, the defendant Brown caused an execution to be issued on said judgment, and levied on the land, and by this action the plaintiff seeks to restrain the defendant Pomroy, who is sheriff, from selling the land in satisfaction of the judgment.

In the case of *Webb* v. *Holt,* 57 Iowa, 712, it was held that pension money was exempt from the payment of the debts of the pensioner while it was in course of transmission to him, but not after it came into his possession. This construction of section 4747 of the Revised Statutes of the United States was adopted by a majority of this court. The same principle has since been adhered to in the cases of *Triplett* v. *Graham,* 58 Iowa, 135; *Baugh* v. *Barrett,* 69 Iowa, 495; *Farmer* v. *Turner,* 64 Iowa, 690, and in *Foster* v. *Byrne,* 76 Iowa, 295, 300.

In the first and last of the cited cases *Mr. Justice* Beck, and the writer hereof, dissented from the opinion of the majority. No formal dissent was entered in the other cases. Since the final opinion was filed on rehearing in the case of *Foster* v. *Byrne,* the *personnel* of this court has been changed, and upon a full examination of the question a majority of the court are of the opinion that the property purchased with pension money is exempt from execution or attachment, under the Act of Congress above cited. The reasons for such holding are fully set forth in the dissenting opinions above referred to, and need not be repeated here. It is sufficient to say that, if force and effect are to be given to that clause of the Act of Congress which provides that pension money "shall inure wholly to the benefit of the pensioner" to the exclusion of his creditors, there appears to us to be no escape from the conclusion that the property purchased with pension money is exempt. Any other construction of the law would permit creditors to subject the money as soon as it reaches the hands of the pensioner. It is correct, as claimed by counsel for appellees, that the weight of authority is contrary to our present holding. But courts are not always controlled by the weight of authority. If they were, the duties of courts of last resort would be simply to ascertain the number of cases involving the question, and follow the majority. There is the other important consideration that the weight of authority should commend itself to the judgment and conscience of the court having before it the question for determination. If the rule adopted by this court heretofore were such as that rights have accrued by reason of the rule whereby the law as declared has become what is known in the law as "a rule of property," we might well hesitate to overrule the cases above cited. But no such result will follow our present holding. The relation of the creditor of the veteran pensioned soldier has been in no sense changed by the decisions of this court. The defendant in this action has not extended credit to the plaintiff by reason of the former decisions of this court.

The decree of the District Court is reversed.

Robinson, *J.,* dissenting:

It is true that courts are not always controlled by the weight of authority, but when numerous courts of high standing have duly considered a statute, and all but one or two agree as to its intent and scope, one of the courts so agreeing should not overrule its decisions, and adopt a different view of the statute, excepting for reasons of controlling force. In cases of doubt it is usual and proper to give great consideration to the weight of authority. The section of the Federal Statute construed in the foregoing opinion is as follows: "No sum of money due or to be become due to any pensioner shall be liable to attachment, levy or seizure, by or under any legal or equitable process whatever, whether the same remains with the pension office, or any officer or agent thereof, but shall inure wholly to the benefit of such pensioner." The exemption applies in terms only to money due or to become due,

and there is no suggestion in the Statute that it is designed to apply to any other kind of property. The exemption applies only to such money, "whether the same remains with the pension office or any officer or agent thereof," the clause quoted necessarily controlling and limiting the effect of the clause of the section immediately following. That is not peculiar to the Statute under consideration, but has been frequently incorporated in substance and effect in Acts of Congress relating to pensions. It has heretofore, as a rule, been considered and treated as designed to exempt the pension from seizure for liability of the pensioner until it should be received by him. Had it been the intent of Congress to exempt, not only the money, but also all property in which it should be invested, such intent could readily have been expressed in language which would have left no room for doubt. To give the Statute the effect ascribed to it by the opinion of the majority requires the interpolation of words which Congress deemed it proper not to use.

It was said in *Rozelle* v. *Rhodes*, 116 Pa. 134, 7 Cent. Rep. 656, that "the exemption provided by statute upon any fair and reasonable construction will only protect the fund while it is in course of transmission to the pensioner; after that it is liable to seizure as other money."

In *Friend* v. *Garcelon*, 77 Me. 26, it was said: "The question is whether this provision furnishes any protection to or exemption of the money after it comes into the pensioner's hands? A careful examination inclines us to the conclusion that it does not. The meaning of the section seems to be that the protection is extended so long as the money remains in the pension office or its agencies, or is in the course of transmission to the pensioner. It is money 'due' or to 'become due,' and not money collected, that is protected by the law. By another provision of the Federal Statutes a pensioner is not allowed to pledge or sell any right or interest in his pension. The extent of all the interference of the government seems to be to insure the actual reception of its bounty by the person entitled to it. When the money is actually in the possession of the pensioner, the protection is gone." That doctrine is adhered to in *Crane* v. *Linneus*, 77 Me. 61.

In *Cranz* v. *White*, 27 Kan. 319, it was said that the protection afforded by the Statute was to an undelivered sum of money, and that the clause, "but shall inure wholly to the benefit of such pensioner," is qualified by and must be read in the light of the preceding words of the section, and that it "applies to money due or to become due, and not to money paid and in possession." It was further said that "nowhere in the section is there reference to pension money in the hands of the pensioner. It does not purport to exempt money in such hands from the operation of state laws, either those of taxation or the ordinary statutes concerning exemptions and indebtedness." The construction adopted in the foregoing cases has been approved in the following: *State* v. *Fairton Sav. Fund & Bldg. Asso.* 44 N. J. L. 376; *Robion* v. *Walker*, 82 Ky. 61; *Faurote* v. *Carr*, 108 Ind. 126, 6 West. Rep. 281; *Spelman* v. *Aldrich*, 126 Mass. 117; *Hissem* v. *Johnson*, 27 W. Va. 652; *Stockwell* v. *Malone Nat. Bank*, 36 Hun, 583.

The doctrine of the majority opinion was approved in *Folschow* v. *Werner*, 51 Wis. 87, and, so far as I am aware, it has been approved by no other court of last resort, although something in the nature of dictum was said in approval in *Hayward* v. *Clark*, 50 Vt. 617.

It is interesting to note, in this connection, that the only case cited by the Supreme Court of Wisconsin to support its views is *Eckert* v. *McKee*, 9 Bush, 355. That case, so far as it supports the doctrine of the Wisconsin court, was overruled by the court which decided it in *Robion* v. *Walker*, *supra*.

It has been held that, before the pension check is cashed, it so far represents money in the course of transmission that it may be disposed of by the pensioner, and the pension money thus be placed beyond the reach of creditors of the pensioner. *Farmer* v. *Turner*, 64 Iowa, 690; *Hissem* v. *Johnson* and *Hayward* v. *Clark*, *supra*.

The appellee contends that Congress has no power to exempt from execution pension money after its payment to the pensioner. That power was questioned in *Webb* v. *Holt*, 57 Iowa, 716, in *Hissem* v. *Johnson*, *supra*, and in *Cranz* v. *White*, *supra*. It was referred to, but not determined, in *United States* v. *Hall*, 98 U. S. 343, 25 L. ed. 180, that case going no further than to hold that Congress may enact laws to protect pension money until it shall have passed into the hands of the pensioner. The power to enact laws, which shall have the effect necessarily given to the section under consideration by the opinion of the majority, is not expressed in the Constitution, and, if possessed by Congress, it is an implied or incidental power. In the view I take of the Statute, it is not necessary to determine whether that power exists; but the fact that, if exercised, it would create in many, if not all, the States a new class of exemptions, and would be contrary to the general policy of Congress not to interfere unnecessarily with the domestic affairs of the several States, is an additional reason in favor of the conclusion that Congress did not intend to exempt property in the hands of the pensioner, purchased with the pension money, from liability for his debts, but did intend to leave the matter of creating such exemption to the discretion of the State Legislature. Happily, the General Assembly of Iowa, by chapter 23 of the Acts of the 20th General Assembly, has extended the protection provided by Congress to investments made by the pensioner, and the question involved in this case will be of interest in comparatively few cases. Believing, as I do, however, that the construction of the Federal Statute adopted by the majority is not sanctioned by the rules of construction, and that it does not effectuate the intent of Congress, I cannot but dissent from their opinion.

Certainly the prior decisions of this court should not be overruled, and the great weight of authority disregarded, unless for reasons so convincing as to leave little room to doubt the correctness of such a course; and this does not seem to me to be a case of that kind. In my opinion, the judgment of the district court should be affirmed.

Petition for rehearing overruled.

Louis HARBACH, *Appt.*,

v.

DES MOINES & KANSAS CITY R. CO.

(....Iowa....)

1. **Laying a railroad track in a street** being prohibited by Code, § 464, until the damage is ascertained and paid to abutting owners, the company or its assignee may be enjoined from operation of the road until payment of the damages, although a prior judgment for the damages has been obtained against the company in an action at law, which remains unpaid.

2. **An adjudication on an issue presented by an intervening petition,** which asks no relief by injunction, although there was a prayer for injunction in the original complaint, does not bar another suit by the intervenor for an injunction.

3. **A judgment for damages caused by laying a railroad track** without payment of compensation merges a defense of consent to the laying of the tracks, and is a bar to such defense in a suit for injunction against operating the road until the damages are paid.

4. **When the purchaser of a railroad from a trespasser,** who has laid the track without right to do so, takes possession, a new cause of action arises, and as to such purchaser the Statute of Limitations begins to run from that date.

(January 29, 1890.)

APPEAL by plaintiff from a judgment of the District Court for Polk County in favor of defendant in an action brought to enjoin defendant from operating its road until it paid the damages for the injuries resulting to plaintiff's property from the construction of the road. *Reversed.*

Statement by **Granger, J.:**

This action is based upon the following state of facts: In July and August, 1883, the Des Moines, Osceola & Southern Railroad Company, the then owner of the railroad property now owned and operated by the defendant, the Des Moines & Kansas City Railway Company, without the payment of damages to the plaintiff's abutting property, laid down a railroad track in the street south of the plaintiff's property, and another track partly in an alley on the north of the plaintiff's property, which was a lot and dwelling-house fronting south, the lot being 44 feet on the south front and running back to the alley some 56 feet. In a suit brought in the Polk Circuit Court for the May Term, 1885, to recover against the then owner of the railroad, the Des Moines, Osceola & Southern Railroad Company, the damages for laying these tracks, the plaintiff, as intervenor, was subsequently adjudged to be the owner of the property, and on October 19, 1886, recovered verdict and judgment for the damages in the sum of $1,500. In this suit the Des Moines, Osceola & Southern Railroad Company had appeared and filed an answer, which was subsequently withdrawn; and, on default for want of an answer, the case was submitted to the jury for an assessment of damages, and a verdict for $1,500 rendered, and judgment rendered thereon. The defendant herein obtained its title to the railroad property of the Des Moines, Osceola & Southern Railroad Company, through one M. V. B. Edgerly, who was the purchaser under a foreclosure sale in the federal court in October, 1887, which sale was confirmed, and possession obtained in January, 1888. The petition asks that the defendant Company be enjoined from the operation of its road, and the maintaining of its tracks as laid, until the judgment obtained against the Des Moines, Osceola & Southern Railroad Company is paid. The answer is in four divisions, and presents, in substance, defenses as follows: (1) That the suit in the federal court, by virtue of which the road was sold to the defendant Company, was commenced before the action in which the plaintiff obtained the judgment which he now seeks to collect; and that the rendition of that judgment is a merger of his cause of action therein; and that its collection must be from the company against which it was rendered. (2) That the action is barred by the Statute of Limitations. (3) That the defendant Company committed no acts of injury against the plaintiff, and that the plaintiff's remedy is merged in the former judgment. (4) That the tracks were placed and constructed in the street and alley by acquiescence and consent of the then owner of the property claimed to be injured. To this answer there was a demurrer, which was overruled; and from a judgment against him the plaintiff appeals.

Mr. **Whiting S. Clark,** for appellant:

The adjudication against the Osceola Company is conclusive as to the amount and the grounds of the verdict and judgment whereever brought in question collaterally against third parties and in this suit against the defendant as a subsequent grantee of the railroad property of the Osceola Company.

Strong v. *Lawrence*, 58 Iowa, 57; *Sidensparker* v. *Sidensparker*, 52 Me. 481; *Ferguson* v. *Kumler*, 11 Minn. 104; *Starr* v. *Starr*, 1 Ohio, 321; *Candee* v. *Lord*, 2 N. Y. 269; *Swihart* v. *Shaum*, 24 Ohio St. 432; *Scott* v. *Indianapolis Wagon Works*, 48 Ind. 75; *Smith* v. *Keen*, 26 Me. 411; 1 Herman, Estoppel, §§ 390, 391.

In all cases where a junior mortgagee or judgment lienholder has been allowed to redeem, when not made a party to the foreclosure of a senior mortgage, the decree between the proper parties has been deemed conclusive as to the amount then due, in the absence of fraud and collusion.

Holliday v. *Arthur*, 25 Iowa, 19; *Johnson* v. *Harmon*, 19 Iowa, 56; *Ten Eyck* v. *Casad*, 15 Iowa, 524; *Knowles* v. *Rablin*, 20 Iowa, 101; *Douglass* v. *Bishop*, 27 Iowa, 214; *Street* v. *Beal*, 16 Iowa, 68; *Cockes* v. *Sherman*, 1 Freem. Ch. 13.

In the case at bar the ground on which the equitable relief is asked has arisen since the judgment and is a failure to pay the judgment, and the continuance of the tracks and their operation in the street.

In principle this court has repeatedly decided, in right-of-way cases, the same questions here presented.

Henry v. *Dubuque & P. R. Co.* 10 Iowa, 540; *Richards* v. *Des Moines Valley R. Co.* 18 Iowa,

260; *Hibbs* v. *Chicago & S. W. R. Co.* 39 Iowa, 343; *Conger* v. *Burlington & S. W. R. Co.* 41 Iowa, 422; *Tharp* v. *Burlington & S. W. R. Co.* 42 Iowa, 709; *Irish* v. *Burlington & S. W. R. Co.* 44 Iowa, 380; *Varner* v. *St. Louis & C. R. R. Co.* 55 Iowa, 683.

The court has full power in granting the relief asked to fix the status of the judgment and provide against its attempted enforcement as a condition to the relief, as in the right-of-way cases.

Gear v. *Dubuque & S. C. R. Co.* 20 Iowa, 527; *Walther* v. *Warner*, 25 Mo. 277; *Hanson* v. *Chicago, M. & St. P. R. Co.* 61 Iowa, 588.

Messrs. **Kauffman & Guernsey** for appellee.

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

In our consideration of the case we will speak of the Des Moines, Osceola & Southern Railway Company as the "Osceola Company," as it is thus referred to in argument. The Osceola Company laid its track in the street in question without authority, and the plaintiff thereafter, in a proceeding at law, obtained a judgment against such company for $1,500, as the resulting damage, which is unpaid. Before the commencement of the suit for damages a foreclosure suit was commenced in the federal court, which resulted in a decree and sale of the road, under which the defendant now owns it.

1. The first question presented by the record is, Are the rights of the plaintiff so merged in the judgment against the Osceola Company as to defeat this action? To us the logical course is to first inquire if this proceeding would be available to the Osceola Company, if it still owned the road, and the plaintiff had his judgment. Code, § 464, provides that cities shall "have the power to authorize or forbid the location and laying down of tracks for railways · · · on all streets, alleys and public places; but no railway track can thus be located and laid down until after the injury to property abutting upon the street, alley or public places upon which such railway track is proposed to be located and laid down has been ascertained and compensated in the manner provided," etc.

It is to be kept in mind that this proceeding is not, in whole or in part, for property taken by the company, but for damage to property abutting on the street because of the location of the road in the street. In such a case the plaintiff could not institute proceedings, and merely have the damage assessed. *Mulholland* v. *Des Moines, A. & W. R. Co.* 60 Iowa, 740. His only method of having his damage judicially determined, at his own instance, is by a proceeding for judgment. It is, as we understand, conceded that upon a mere assessment by a sheriff's jury, or on appeal therefrom, if the damage is not paid, the company may be enjoined on the ground that it is a trespasser, and maintaining a nuisance; that the occupancy of a street in such a manner, without first taking steps to ascertain the damage, and paying the same, is a nuisance. See *Merchants Union Barb Wire Co.* v. *Chicago, B. & Q. R. Co.* 70 Iowa, 105.

As we understand, then, this question is practically involved: If a company or person shall become a continuing trespasser on the premises of another, and the injured party shall obtain a judgment for the damage, which because of the insolvency of the party, or for other reasons, is not collectible, does the mere fact of obtaining the judgment devest the property owner of the right, by other proceedings, to remove the trespasser, and abate the nuisance caused by the trespass? If so, we naturally inquire, Why? Has the position the support of authority or reason? We are referred to *Coy* v. *Lyons City Council*, 17 Iowa, 1; *Lamb* v. *McConkey*, 76 Iowa, 47; *Hawk* v. *Evans*, 76 Iowa, 593, and *Whitaker* v. *Johnson Co.*, 12 Iowa, 596. But, with our understanding of the cases, they involve no such question. The question involved in this suit was in no way involved, nor do we see how it could have been, in the suit for damage. It is true that an injunction suit might have been in lieu of the suit for damage; but the plaintiff had the right to prosecute his claim for damage to a judgment, with the hope or belief that when the damage was fixed it would be paid. The most that can be said of the suit for damage is that it adjudged the company a trespasser, and determined the damage. To know what right this judgment gave the defendant Company, we must look to the terms of the judgment and the law. The judgment fixes the damage, and gives the plaintiff a right to collect the same by the ordinary processes of the court. The law (Code, § 464) provides that the track shall not be laid until the damage is ascertained and paid. The law contemplates both ascertainment and payment before the right of occupancy exists. We see nothing in the facts of the Company becoming a trespasser, and that the plaintiff sought by other means or methods to get his pay, and failed to create a right of occupancy in behalf of the Company. This conclusion has strong support in the cases of *Henry* v. *Dubuque & P. R. Co.*, 10 Iowa, 540, and *Richards* v. *Des Moines Valley R. Co.*, 18 Iowa, 259. The case of *Conger* v. *Burlington & S. W. R. Co.*, 41 Iowa, 419, gives recognition to this kind of proceeding, "as a means of coercing payment of damages." See also *Irish* v. *Burlington & S. W. R. Co.*, 44 Iowa, 380, in which case there seems to have been a judgment, and not a mere assessment of damages. See also *Varner* v. *St. Louis & C. R. R. Co.* 55 Iowa, 677.

This reasoning has been on the basis of dealing with the Osceola Company. We next inquire what advantage has the defendant Company that the Osceola Company could not have? A point especially urged is that the foreclosure suit in the federal court was commenced before the suit for damage was, and that the defendant Company can in no way be affected by the adjudication in the damage suit. That is probably true, but we think there is a misapprehension as to the real purpose of this proceeding. If the effect of this proceeding is to establish a liability against the defendant Company for the judgment in question, then the force of appellee's position is apparent. But we do not understand plaintiff to assert the defendant's liability on the judgment, but only that by its purchase it obtained no right to maintain the tracks in the streets in question; that the Osceola Company had no such right, even after the judgment for damage, and that

the defendant Company took only the rights of the Osceola Company. With this view there seems to be little room for controversy as to this branch of the case. The defendant Company purchased only the Osceola Company's roads and tracks, with such rights as the company possessed. If the Osceola Company had not the right to maintain the tracks in the street, this Company has not. This proceeding is to give the Company its choice to pay the damage and occupy the street, as the Osceola Company might have done, or, without payment, to abandon the street, as the Osceola Company could have been required to do. The authorities cited have no application to such a state of facts. As we view the case, the defendant Company has no right to the streets, by virtue of its purchase, that should not be accorded to the Osceola Company, if it were a defendant in this proceeding.

One other point urged can best be considered in this connection. It is that in the suit for damage there was a prayer for an injunction, as in this case; and hence that the point has been adjudicated, and is a bar to this proceeding. It is doubtful if the question properly arises under the state of the record; but it is sufficient to say that the damage suit was originally commenced by one Kelly, who then owned the abutting premises, and his petition did contain such a prayer. Pending the suit the plaintiff, Harbach, became the owner of the premises, and the interested party adverse to the company, and came into the suit by intervention. The adjudication was finally on the issue presented by the intervention petition; and no relief is therein asked by way of injunction, nor did that proceeding involve any issue in this case.

2. The fourth division of the defendant's answer pleads that the tracks were laid upon the streets in question by the acquiescence and consent of the then owner of the abutting premises, given by parol. The demurrer, of course, admits the facts, but denies their sufficiency. The petition alleges the obtaining of the judgment against the Osceola Company for damage, and that fact stands undenied in the case, and is to be treated as a fact; and, as to the Osceola Company, that judgment operates as a merger of whatever defenses might have been pleaded in the suit. The fact that it occupied the street by the consent of the abutting property owner, of course, could have been pleaded, and would have been a good defense. By the neglect to so plead, that company would be barred. The defendant Company is in no better position. By its purchase it succeeded to no more rights than the Osceola Company had.

3. The only remaining question requiring consideration is that of the Statute of Limitations. It is true that more than five years elapsed after the tracks were laid before the commencement of this suit. The case of *Pratt v. Des Moines N. W. R. Co.*, 72 Iowa, 249, is relied upon by appellee as controlling this point in the case. We, however, think the point must be ruled on a state of facts entirely different, and as to which the case has no applicability. A few words, to our minds, should be conclusive of this branch of the case. The Osceola Company, while occupying the street, was, as we have held, a trespasser. It had no right to maintain the track in that place. Having no such right, a conveyance of its interest to the defendant Company could give it no such right. So far as the defendant Company is concerned its trespass began when it assumed to maintain the track in the street. Its act in this respect is entirely distinct from that of the Osceola Company. The judgment for the trespass against the Osceola Company is not against this Company; and, if it pays it, it is only to secure a right in consideration of the payment. The Osceola Company had the right to pay the judgment, and continue its tracks on the street. The most that the defendant Company can claim in this respect is the right to do the same thing. When the defendant Company took possession of the street, a new cause of action arose. The plaintiff might permit the Osceola Company to remain, as a favor, or for other reasons. Such a privilege would not pass by a sale of the road to this Company. This cause of action did not arise until January, 1888, and is not barred by the Satute of Limitations. The answer does not state a defense to the plaintiff's cause of action, and the district court erred in overruling the demurrer.

Reversed.

Petition for rehearing denied October Term, 1890.

A. R. WILLETT, *Appt.*,
v.
S. YOUNG *et al.*

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

1. **Trustees of a township are not personally liable** on an order directed to the town clerk to be paid out of the township fund and signed by them with the words "trustees" added to their signature.
2. **The invalidity of a trustees' order** given for property purchased for a township will not make them personally liable on the order.

(February 9, 1891.)

APPEAL by plaintiff from a judgment of the District Court for Story County in favor of defendants in an action brought to hold township trustees personally liable upon an order given by them in payment for property purchased for the township. *Affirmed.*

The facts are stated in the opinion.

Mr. **J. W. Willett** for appellant.

Messrs. **Funson & Gifford** and **F. D. Thompson** for appellees.

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

1. The order upon which the suit was brought was in these words:

OFFICE OF THE BOARD OF TRUSTEES
State of Iowa, } of the
Story County. } Township of Milford.
June 30, 1877.

To the clerk of said township:

Pay to the Wauchope Grader Company, or bearer, three hundred and seventy-five dollars,