him a title to that office? The grounds upon which the power of the Assembly to make any declaration respecting the election of a governor are supposed to be lost, will be examined separately, although at the risk of some little repetition.

That part of the Constitution which must be kept in mind is section 2, art. 4: "At the meetings of the electors in the respective towns in the month of April [now November] immediately after the election of senators, the presiding officers shall call upon the electors to bring in their ballots for him whom they would elect to be governor, with his name fairly written. When such ballots shall have been received and counted in the presence of the electors, duplicate lists of the persons voted for and of the number of votes given for each shall be made and certified by the presiding officer, one of which lists shall be deposited in the office of the town-clerk within three days, and the other within ten days, after said election shall be transmitted to the secretary, or to the sheriff of the county in which such election shall have been held. The sheriff receiving said votes shall deliver or cause them to be delivered to the secretary within fifteen days next after said election. The votes so returned shall be counted by the treasurer, secretary, and comptroller within the month of April [now November.] A fair list of the persons and of the number of votes given for each, together with the returns of the presiding officers, shall be by the treasurer, secretary, and comptroller made and laid before the General Assembly, then next to be holden, on the first day of the session thereof. And said Assembly shall, after examination of the same, declare the person whom they shall find to be legally chosen, and give him notice accordingly. If no person shall have a majority of the whole number of said votes, or if two or more shall have an equal and the greatest number of said votes, then said Assembly, on the second day of their session, by joint ballot of both Houses, shall proceed, without debate, to choose a governor from a list of the names of the two persons having the greatest number of votes, or of the names of the persons having an equal and highest number of votes, so returned as aforesaid. The General Assembly shall by law prescribe the manner in which all questions concerning the election of governor or lieutenant governor shall be determined."

It is undoubtedly true that the Constitution contemplates that the declaration of the election of a governor, and, perhaps, of all the state officers, shall be made in all cases by the General Assembly, and that the declaration, when made in accordance with the provisions of the Constitution, shall be final and conclusive. The declaration is that the person declared is legally elected governor. When the people, speaking in their sovereign capacity by the Constitution, appoint a single tribunal to ascertain and declare a certain result, and that tribunal does so ascertain and declare, there is no other authority that can interfere with or revise such declaration and change the result. The declaration of the result of an election is to be made by the General Assembly, and must be made by both Houses acting jointly or concurrently. A declaration by one House without the other would have no effect. The Constitution, by its own terms, provides no evidence of the election of a governor from the examination of which the General Assembly is to make the finding and declaration except the fair list prepared by the treasurer, secretary, and comptroller, and the returns of the presiding officers. In the absence of all legislation on the subject, and in all ordinary cases, the intent of the Constitution would seem to be that the General Assembly should declare that result of the election which is shown by the fair list and those returns. The Constitution commands the General Assembly to prescribe by law the manner in which all questions concerning the election of governor and lieutenant governor should be determined. If there already has or hereafter there shall be legislation pursuant to that command, and other evidence thereby made admissible, the intent of the Constitution seems to be equally clear that the General Assembly shall also examine that evidence in making its finding and declaration as to the result of an election.

The word "return" is a word known in the law, and had the same meaning seventy years ago that it has now. 3 Bl. Com. 273. When a command has been issued from some superior authority to an officer, the "return" is the official statement by the officer of what he has done in obedience to the command, or why he has done nothing. Whatever thing the superior authority may require the officer to do, of the doing of that thing it may require him to make return. The return made by the presiding officer of an electors' meeting is his official statement of what was done at that meeting. If the General Assembly can require of the presiding officers no return of things other than such as were required by the Constitution itself, then it must follow that the General Assembly can require the presiding officer to do no other thing than such as he was required to do at the time the Constitution was adopted. If this is so, then every election law that has been passed since that time is unconstitutional, for there has been hardly one of them that has not in some way changed the method of the choice, or the duties, or the power of the presiding officers. A construction so narrow and literal as this cannot be successfully maintained.

Section 239 of the General Statutes repeats the duties required by the Constitution to be performed by the presiding officer of the electors' meetings, and adds certain others, as follows: "The presiding officer of each electors' meeting in every town . . . shall make out triplicate lists of the votes given in their respective towns for each of the following officers, viz., governor, lieutenant governor, treasurer, secretary, comptroller, senator, judge of probate, sheriff, and representatives in Congress, . . . two of which lists he shall seal and deposit in the post-office in said town, the postage being paid thereon, directed to the secretary of the state at Hartford, one within two days, the other within not less than five nor more than ten days after said meeting, and the third he shall deliver to the town clerk of said town within two days after said meeting." Section 240 of the Statutes is: "The presiding officers shall, with the certificates upon the

result of the electors' meetings which he is required to send by mail to the secretary of the State, send to the secretary his certificate of the whole number of names on the registry lists, the whole number checked as having voted at such election, the whole number of names not checked, the number of ballots found in each box, viz., 'general' and 'representative,' and the number of ballots in each box not counted as in the wrong box, and the number not counted for being double, and the number rejected for other causes, which other causes shall be stated specifically in the certificate. The secretary shall enter said returns in tabular form in books kept by him for that purpose, and present a printed report of the same to the General Assembly at its next session." These sections are thought to have been enacted in obedience to the commands of the Constitution.

It appears from the information that certificates conformable to the requirements of both these sections were sent the General Assembly, and were laid before it on the first day of the session; that the Senate has examined the fair lists made by the treasurer, secretary, and comptroller, and the certificates sent by the presiding officers from all the towns, so far as they fall within the requirements of section 239 of the Statutes, and has declared those persons to be elected to the several offices who appear to be elected by that examination; but that the Senate has refused to examine said certificates so far as they are required by section 240 of the Statutes, and declares that it has no constitutional power so to do; indeed, declares that it is forbidden by the Constitution to do it. The House of Representatives, on the other hand, has examined said certificates, —as well that part which is required by section 240 as that part required by section 239,—and declares that it is unable to find that the relator is elected governor, or that any other of the officers named therein, except the comptroller, is elected. The fourth section of a resolution of the House is "that the House will take no action declaratory of the result of the late election for state officers until the Senate shall have taken action in the matter of an examination of all the returns from the presiding officers, including those made under section 240 of the Revised Statutes of 1888 by a joint select committee on canvass of votes."

The attitude of the two Houses of the Assembly is that of complete and total opposition, on the one side the Senate declaring that it is forbidden by the Constitution to examine the certificates made under section 240, and on the other side the House declaring that it will take no action till the Senate shall have recognized those certificates. Their positions seem to be wholly irreconcilable. The unpleasant suggestion contained in the briefs that either House of the Assembly is acting from partisan motives can find no place in the mind of this court. Every presumption is that the Legislature is solicitous to obey the Constitution in its true spirit, and that neither House will intentionally violate it. So when each House has spread upon its journal a conclusion radically antagonistic to the conclusion of the other upon the same subject, it can only be regarded as an announcement that they are unable to agree. In the process of the election of governor, the Constitution intended that the General Assembly should perform the closing part. That the present General Assembly seems to be unable to perform that part in respect to the last election this court is compelled reluctantly to admit. But as the Assembly has not adjourned, and as it is possible for either or both the Houses to recede from the position it has taken, the court is not now prepared to hold that it has lost the power on this ground from acting further in the matter of the declaration of the election of a governor. Prior to the adoption of the Constitution under the operation of the charter of 1662, the General Assembly possessed all the power, legislative, executive, and judicial, which it is possible for any civilized government to possess. As expressed at the time, it was king and parliament. Its acts and decrees bound the people as fully as though every person was present within the four walls where its deliberations were carried on, and had expressly consented to them. Such power could hardly fail at times to operate harshly. Many motives may have contributed to the formation and adoption of the Constitution, but they all centered in, or rather sprang out of, the one idea to limit the power of the General Assembly. The Constitution of this State is such a limitation, in all cases covered by its provisions, leaving the power of the Assembly unimpaired in other respects. Whatever limitation there is upon the Assembly in respect to the time within which it must make the declaration of the election of governor is to be found in the language of the Constitution above quoted. That language is to be read, in order to get its true meaning, in the light of the conditions and circumstances existing at the time the Constitution was formed. Up to that time the governor had in all cases been elected or declared to be elected by the General Assembly on the first day of its session. The sessions were then short, rarely exceeding ten days. There was no reason then apparent why the sessions should become longer. Under the Constitution there was necessity to have a governor at the very beginning of the session, in order that he might approve the Act of the Assembly and the business of legislation go on. And so the instrument provided that the fair list made by the treasurer, secretary, and comptroller, together with the returns of the presiding officers, should be laid before the General Assembly on the first day of its session holden next after the electors' meetings, and that the Assembly should examine the same, find who, if anyone, was elected, and make the declaration accordingly. Immediately following, it provides that the Assembly, on the second day of the session, shall, in case no person has a majority of the whole number of said votes, proceed to elect a governor. Here the time is fixed by affirmative words, "the second day." Affirmative words are often in their operation negative of other things than those affirmed. Thus a statute which provides that a thing shall be done in a certain way carries with it an implied prohibition against doing that thing in any other way. An enumeration of powers in a statute is uniformly held to forbid the things not enumerated. When Congress gave the

Supreme Court of the United States appellate jurisdiction in certain specific cases, it was held to forbid that court from exercising appellate powers in all other cases than those specified. When national banks were empowered to make loans on personal security, it was holden that such a bank could not make loans on the security of a mortgage on real estate.

In an instrument which is a limitation of power, this rule of interpretation applies with more force than in a statute that confers power. To what end did the Constitution command the General Assembly to proceed to elect a governor on the second day of its session, if, notwithstanding such command, the Assembly is at liberty to proceed to elect any other day? If the command to proceed to elect on the second day is not prohibition to elect on any other day of the session, then the command has no force, and the instrument which was intended to be a limitation of power, in one of its most important particulars, fails to be a limitation at all. When the Constitution commands a certain course to be pursued, that course must be pursued strictly. It is not a proceeding which may be varied for another deemed to be equally eligible, except by disregarding the Constitution itself. And when the Constitution directs the General Assembly to proceed to choose a governor on the second day of its session, it, in effect, forbids any choice of a governor by the Assembly at any later day of the session. But the Assembly can never proceed to the choice of a governor unless there has been a previous determination that no person has a majority of all the votes. The power of the Assembly to choose a governor depends upon a previous examination, finding, and declaration that no person has received such majority. And as this finding and declaration must precede the right of the Assembly to choose the governor, it cannot be later than the second day of the session. The Constitution provides that the fair list made by the treasurer, secretary, and comptroller, and the returns from the presiding officers, shall be laid before the General Assembly on the first day of its session, and that said Assembly shall, after an examination of the same, find and declare. When examine, and when declare? It would seem that it must be done at once, and that the direction so to do is included in the very words used. It is obvious that the declaration of the result cannot be delayed so long as to prevent the Assembly, in case no person is chosen, from proceeding on the second day to choose a governor. The power to declare that no one is elected governor implies necessarily the power to declare that someone is elected. If the former is cut off by the words of the Constitution after the second day of the session, the latter is also cut off after that day.

This opinion is not now for the first time advanced. In 1831 there was no choice by the people of a lieutenant governor. The two Houses of the General Assembly were unable to unite in a joint ballot on the second day of its session, and there was no lieutenant governor chosen that year. It seems to have been taken for granted that any choice at a later day would be invalid. In 1871 the General Assembly, both Houses concurring, upon information that a fraud had been committed in one of the cities of the State sufficient to change the result in the choice for governor as it appeared by the returns of the presiding officers, by its committee investigated the matter, and found that a great fraud had been committed, and thereupon declared that person to be elected who was found to be rightfully elected, although it was contrary to the result which appeared by the returns of the presiding officers. The Assembly that year contained many members who were lawyers of distinction and ability. It is known that the opinion of almost every other eminent lawyer in the State was obtained, and while there was a great difference in their opinions as to the power of the General Assembly to make the investigation, there was no difference in their opinions as to the time when the result of the investigation, if one was made, must be declared, and the result in that case was declared on the second day of the session. In 1883 a somewhat similar case happened in the General Assembly. In each of these cases the opinion prevailed that the declaration in respect to the election of governor could not be made so late in the session as to prevent the Assembly, in case there was no choice, from proceeding on the second day to choose a governor. So far as usage can be relied upon to afford a correct interpretation of the Constitution in this particular, it is uniform in one direction.

It may be urged that the necessity resting upon the General Assembly to examine the fair lists and the returns of the presiding officers is inconsistent with the duty to make the declaration so early in the session. The words of the Constitution on which this argument rests are found in the section already quoted, as follows: "And said Assembly shall, after examination of the same, declare the person whom they shall find to be legally chosen, and give him notice accordingly." An examination may be very general, or it may be very particular. Whether it is to be the one or the other in a given instance must be largely determined by the purpose for which the examination is made. The examination which the Assembly is directed to make is for the purpose of finding who, if anyone, is chosen governor; and not only that, but who is legally chosen. To "find," in the meaning of the law, is to ascertain by judicial inquiry. And the command to find and declare who is legally chosen means that the examination shall be sufficiently full and careful to determine the title, so that the person declared to be chosen shall have unimpeachable title to the office. It is doubtless highly desirable that there should be a governor at the very beginning of the session. But it is still more desirable that there shall be no question about the title of the governor. To induct a person into the office of governor whose title was open to dispute, and who might be adjudged not to have been elected, would be to invite discord and delay. Those who are dissatisfied with his title would refuse to go on with legislation, animosities might be provoked, the public business would be neglected, and a condition of things alike discreditable to the participants and the State would be likely to be produced. Such a course would bring about the very evils which the

examination that the General Assembly is directed to make was intended to prevent.

The time and manner of the performance by the General Assembly of the duty to examine and find must be construed in connection with the means provided, or which may be provided, for its performance and as applicable to that condition of things which will exist when the General Assembly shall have prescribed suitable laws for its performance. That condition of things which now exists solely because of the neglect of the General Assembly to prescribe suitable laws in this respect cannot properly be urged as a reason for holding that the General Assembly should have a wider authority or a longer time for the examination, finding and declaration. The concluding sentence of that section of the Constitution above quoted is that "the General Assembly shall by law prescribe the manner in which all questions concerning the election of governor and lieutenant governor shall be determined." By this direction the wisdom of the Assembly is left unfettered as to the laws by which it shall prescribe a manner for the determination of questions concerning the election of a governor and lieutenant governor. It may require other and more complete returns from the presiding officers of the electors' meetings or from the other officers of the election, as the registrars, counters and the like, or it may empower existing tribunals or create other tribunals to hear and report upon or decided all matters and questions which may arise at any electors' meeting in any voting district, only it would seem to be necessary that all such returns or reports or decisions must be laid before the General Assembly on the first day of its session, to the end that it might itself make the final examination, finding and declaration as required by the Constitution. When the Assembly shall have performed this duty, and shall have prescribed adequate laws for the determination of these questions, then the examination, the finding and the declaration will be a matter of no intricacy or doubt, and can readily be done on or before the second day of the session.

It is a high tribute to the sobriety and to the respect for law which pervades the people of this State that for almost a century no disputed election has happened which imperatively called on the General Assembly to enact laws for the determination of the questions that arise in election contests. Such a disputed election has now come. It is perhaps not too much to hope that the General Assembly will make haste to put an end to this anomalous condition of our election laws. The "certificates" or "returns," for both words are used, prescribed by section 240 of the Statutes to be sent to the secretary by the several presiding officers, appear to be a compliance by the General Assembly with the direction of the Constitution in this behalf. No argument can be needed to prove that what the General Assembly was commanded by the Constitution to prescribe it was its duty to examine. The uncertainty attending these certificates is that the secretary is not directed to lay them before the Assembly on the first day of its session, nor is it by any specific words made the duty of the General Assembly to examine them, or to act on them if examined, and so it is claimed that either House is at liberty to disregard them if it chooses to do so.

This topic, and some of the others considered, have, perhaps, received more attention than importance demanded. Every occasion for their application will doubtless be speedily removed by further legislation. It has seemed to some of the members of this court that the General Assembly has no power subsequent to the second day of its session to make a declaration that any person is elected governor, or that no person has received a majority of all the votes, and so that no person is elected; and that, therefore, the present Assembly has no power to declare the relator to be elected governor. But as this point was not fully argued at the hearing, and as a decision upon it might affect other persons than those who are parties to this proceeding, the court does not now attempt to decide it.

From the facts spread out in the information it appears not only that the election process has broken down so that there is a failure to elect a governor, but that all legislation has ceased. Owing to the difference between the branches of the Assembly, an entire collapse in the legislative department has ensued. Whether this condition has resulted from one or the other of the causes we have mentioned it is not necessary to decide. In these circumstances is it not possible that the superior court may make an investigation, and, on finding that the relator received a majority of all the votes lawfully cast for governor on the 4th day of November, 1890,—whatever the returns of the presiding officers may show,—establish his title to that office by some judgment that shall be legally equivalent to the declaration which should have been made by the General Assembly? It must be carefully kept in mind that the courts have no function to perform in the process of an election. They disclaim any such power. The superior court cannot make the declaration which the Constitution says shall be made by the Assembly. The utmost that the court can do in a case like this is, by some judgment which it can lawfully make, to supply an omission or heal a defect. In the life of a State it may often happen that an occasion arises calling for the application of remedies which in the ordinary current of affairs would not have been thought to exist.

Whatever view of the workings of the Constitution may be taken, no one can suppose that it intends to afford opportunities for any state officer to hold office longer than the term for which he has been specifically elected. The Constitution provides for regular biennial elections for governor. There is a provision that the governor shall hold office until his successor is qualified. This was designed to cover exigencies always supposed to be brief. Until the present instance, it was never imagined that the practical operation of that provision would be to require or permit any governor to hold over for a large part of a term intended for a successor. It is only because of a singular omission on the part of the General Assembly to prescribe suitable laws by which all questions concerning the election of governor shall be determined that the present instance has been made possible. On the 4th day of

November, 1890, the voters of this State expressed their choice for him whom they would elect to be governor. They intended to choose a governor to hold office from the Wednesday following the first Monday of January, 1891, to the corresponding Wednesday in January, 1893. The respondent was not one of the persons voted for. At the same election they also chose members of the General Assembly, to whom they committed the duty of examining the results of their choice for governor, and declaring the person who was elected, and of choosing a governor in case they had made no choice themselves. By the defects in legislation already mentioned the will of the people in this respect has failed to be accomplished. A very great wrong is being done to them. The relator claims to have received a majority of all the votes cast for governor at said election. If his claim is correct, a great wrong is being done to him. He has come into a court seeking to establish his right to that office, and to obtain redress for that wrong.

It might be argued that it would bring deserved obloquy on the jurisprudence of this State, if there was no way in which the relator could establish the right which he claims. It is of the very essence of civil liberty that every individual shall have the protection of the laws whenever he receives an injury. At page 23 of the third volume of Blackstone's Commentaries, two cases are mentioned in which remedy is afforded by the mere operation of the law. "In all other cases," says that author, "it is a general and indisputable rule that where there is a legal right there is a legal remedy by suit or action at law whenever the right is invaded." As a general proposition, this rule is not denied. But it is urged that the General Assembly is the exclusive tribunal which has cognizance of the election of a governor. If, however, the General Assembly refuses to act, or if it be so that the General Assembly has jurisdiction of the election of a governor only in the manner and at the time pointed out by the Constitution, then the relator is remediless, unless the court may intervene. When the time is passed within which the General Assembly may act, its jurisdiction is gone. To hold that the Assembly has such exclusive jurisdiction, and that the court in no case can have the right to act, would be to afford an instance where a flagrant wrong was without a remedy. That such a result might follow is a powerful reason why that construction ought not to be adopted. Blackstone, at page 109 of the same volume cited above, speaking of what injuries are cognizable by the courts of the common law, adds: "And herein I shall for the present only remark that all possible injuries whatsoever that do not fall within the exclusive cognizance of either the ecclesiastical, military or maritime tribunals are for that very reason within the cognizance of the common-law courts of justice; for it is a settled and invariable principle in the laws of England that every right, when withheld, must have a remedy, and every injury its proper redress." The superior court of this State, as a court of law, is a court of general jurisdiction. It has jurisdiction of all matters expressly committed to it, and of all others cognizable by any court of law of which the exclusive jurisdiction is not given to some other court. The fact that no other court has exclusive jurisdiction in any matter is sufficient to give the superior court jurisdiction over that matter. A trial by the superior court of the questions presented in the information would not be an infringement upon the powers of the co-ordinate branches of the government. Not of the legislative, if it has been made to appear that the present Legislature is wholly unable to act in the case. It is no infringement upon the executive powers to decide who is chosen governor. To decide what person is lawfully elected to any office is a judicial process, and, where there is no tribunal specially authorized to make such decision, the courts must decide. And the courts always have jurisdiction, unless the decision of the special tribunal is final and conclusive. And where such special tribunal exists, if it refuses to act or from any cause fails to act, then the courts upon general principles, and to prevent the failure of justice, and perhaps to prevent anarchy and misrule, would seem to be authorized to make a decision.

The contention made in this case in behalf of the respondent is that his right to hold the office of governor continues till the title of a successor to that office is established. The converse of this is admitted: that, if the title of the relator of the office of governor is established, his right to hold that office would cease. It seems, then, that there can be no interference with the executive power in this case. Such arguments would come with great force, and present a very strong case. But if the court was fully convinced of them, and even if it should decide that the present Assembly was without power to make any declaration of election for governor for either of the reasons discussed, still judgment could not be rendered on this information. It does not contain the necessary averments.

In point of form in the present action, it is the right of the respondent to exercise the office of governor that is in question. But, as the right of the respondent depends upon the election of the relator to that office, it is really the title of the relator that is on trial. If the relator has been completely elected, then the right of the respondent to hold the office is ended. If the relator has not been elected, then the right of the respondent continues. The claim made in behalf of the relator is that he ought to have been declared elected by the General Assembly, because it appears by the returns from the presiding officers that he received a majority of all the votes cast for governor; and, if the Assembly did not do so, the court ought now to declare him elected, or to regard him as having been elected, by such apparent majority. This claim admits that if the General Assembly had declared the relator elected upon the returns the declaration would give him only a prima facie title to the office, and that, if inducted into it upon such declaration, he might be ousted therefrom upon its being shown that he did not in fact have the real majority of the votes cast for governor. If the court should declare the relator elected upon the same returns, it could give him no stronger title to the office than a declaration

by the General Assembly. He could still be ousted upon a proper proceeding. It would be most unseemly for the court to occupy itself in putting the relator into the office of governor, if by any possibility it might happen that the court would be required to remove him from that office as soon as he began to exercise it. The writ of quo warranto is the form of action specially adapted to try the right to an office. But it tries only the real title. It can never be used to try an apparent title. It gives judgment on that title alone which cannot be afterwards called in question. The information does not allege that the relator had the majority of all the votes, but only the majority as it appears by the returns of the presiding officers, while other parts of the information show that such apparent majority is in dispute. Nor does the information contain any allegation that the General Assembly had become unable to decide upon the relator's right to the office he claims.

If the relator shall hereafter, by an amendment of the present information, or by a new one, allege that he received a majority of all the votes lawfully cast for governor on the 4th day of November, 1890, and it shall also appear from the facts therein stated that the General Assembly is without the power to make any declaration in respect to the election for governor, a case would be presented of which the superior court might take jurisdiction.

The superior court is advised that the information is insufficient, and to sustain the demurrer.

Carpenter, J., dissenting:

I agree that the demurrer should be sustained, and mainly for the reasons expressed in the foregoing opinion, but I cannot concur in all the views expressed on other matters; especially those relating to the power of the General Assembly to examine the returns and declare the result after the second day of the session. Neither do I wish to be understood as wholly dissenting. I think it wiser to say nothing, as the court is not called upon to express any opinion on that subject for several reasons: (1) The case lays no foundation for it. The record does not present that question. (2) It has not been discussed by counsel on either side. (3) The question relates to the constitutional power of the General Assembly in a matter within its jurisdiction. As a coordinate branch of the government, it has the power, and it is its privilege, to determine that question for itself, subject, possibly, to the power of the court to declare the legislative action void, if it clearly violates the Constitution, and does injustice. (4) If at any time the Legislature should ask our advice, then the question will properly arise.

I did hope that the court would consider more fully and decide whether the Legislature had the right to consider the statutory returns in determining the result of the election, as that question is in the case, was fully discussed, and could not have been considered as *obiter*. Moreover, that is the rock on which the Legislature split. Another important point might, and I think ought to, have been considered; that is this: should or should not the returns as they stand, inasmuch as the Legislature has not corrected or changed them (assuming that it has the power to do so,) be regarded as final and conclusive, and as indicating the legal result of the election? I am aware that the opinion intimates, perhaps was intended to decide, that the superior court would have the power to determine for itself the result. I am not prepared to concur in that view. As I remember, that question was not argued. I should prefer to hear it fully argued before deciding it. If the question as to the conclusive character of the returns had been decided one way, perhaps the court might have retained jurisdiction and have disposed of the case. I think, on the whole, that it is well to let the Legislature have another opportunity to settle the matter.

PENNSYLVANIA SUPREME COURT.

Samuel T. EWING and Wife, *Appts.*,
v.
PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS R. CO.

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

Mere fright, unaccompanied with bodily injury, cannot constitute a cause of action.

(January 4, 1892.)

APPEAL by plaintiffs from a judgment of the Court of Common Pleas for Allegheny County in favor of defendant in an action brought to recover damages for injuries alleged to have been sustained by the female plaintiff because of a fright which she received through defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. **John D. Brown** and **A. M. Brown**, for appellants:

A negligent act is deemed the proximate

NOTE.—*Fright as a basis for a cause of action.*

In a few cases a recovery of damages for fright alone has been sustained without proof of any physical injury except that which resulted from the fright.

Thus a miscarriage and serious impairment to the health of a woman occupying leased premises, caused by fright produced by a boisterous and violent assault upon some negroes on the premises and in her presence, by the landlord, who knew her pregnant condition, gives a cause of action against him. Hill v. Kimball, 7 L. R. A. 615, 76 Tex. 210.

This is perhaps the only case in which such a recovery was allowed in which there was not involved some wrongful act or at least negligence, toward the person frightened, as in the cases next following.

Thus the fright and exertion of a woman in escaping from an intoxicated person who comes into her house threatening to shoot her, which result in a miscarriage, will sustain an action for damages. Barbee v. Reese, 60 Miss. 906.

14 L. R. A.

See also 16 L. R. A. 203; 23 L. R. A. 774; 32 L. R. A. 193; 34 L. R. A. 781; 38 L. R. A. 512; 40 L. R. A. 679; 42 L. R. A. 199; 47 L. R. A. 323, 325.

cause of an injury where the result is produced without any other cause intervening.

Oil Creek & A. R. Co. v. *Keighron*, 74 Pa. 316.

The test is not the peculiar result of a particular accident—it is not essential to liability for negligence that the particular result may reasonably have been foreseen. It is a question simply of the defendant's negligence, and its proximity and directness as a cause and result of the act.

Bishop, Non cont. Law, par. 457; Beach, Contrib. Neg. p. 7.

Where one negligently and wrongfully puts or seemingly puts another in danger of his life, or of serious bodily harm and injury, and under the influence of extreme alarm and terror and the excitement of the moment and situation he acts wildly and suffers an injury in consequence of his own actions, he is not guilty of, nor does his conduct in such a situation amount to, contributory negligence, and he may recover damages for the injury, whether that injury consists of sickness or disease excited, or produced by force and violence to the person, or by fright, mental excitement and nervous prostration; and mental pain and suffering is universally recognized as a distinct element of damages.

Beach, Contrib. Neg. pp. 42–45 inclusive, and foot notes; Bishop, Non-cont. Law, pars. 415, 1108; 2 Wood, Railway Law, p. 1261; *Pittsburgh* v. *Grier*, 22 Pa. 54; *Johnson* v. *West Chester & P. R. Co.* 70 Pa. 357, 366; Pollock, Torts, *387, 388 *et seq.*; Bigelow, Torts, pp. 311, 316.

The plaintiff was frightened and suffered from consequent nervous troubles and sickness. A recovery for such injuries can be sustained. It is "damage" arising from the defendant's negligence.

Baltimore & O. R. Co. v. *Bambrey* (Pa.) Nov. 5, 1888; *Schneider* v. *Pennsylvania Co.* (Pa.) 2 Cent. Rep. 74; *Scott Twp.* v. *Montgomery*, 95 Pa. 444; *Croker* v. *Chicago & N. W. R. Co.* 36 Wis. 657; *Fitzpatrick* v. *Great Western R. Co.* 12 U. C. Q. B. 645; *Barbee* v. *Reese*, 60 Miss. 906; *Brown* v. *Chicago, M. & St. P. R. Co.* 54 Wis. 342, 41 Am. Rep. 41; *Stewart* v. *Ripon*, 38 Wis. 591; *Oliver* v. *La Valle*, 36 Wis. 592; *Baltimore City Pass. R. Co.* v. *Kemp*, 61 Md. 74; *Jeffersonville, M. & I. R. Co.* v. *Riley*, 39 Ind. 568; *Houston & T. C. R. Co.* v. *Leslie*, 57 Tex. 83; *Allison* v. *Chicago & N. W. R. Co.* 42 Iowa, 274.

So damages for the fright to which a woman was subjected by the approach of cars on a side track when improperly compelled to leave a car in which she had ridden at a place several hundred feet from the depot platform, and who fell into a culvert and was injured while going along the side track to the platform, may be included in the recovery for her injuries. Stutz v. Chicago & N. W. R. Co. 73 Wis. 147.

And a verdict for $2,000 was held not excessive for putting a little girl six years old off from a train, in violation of a statute, 240 feet from a depot, where there was evidence of functional derangement of the heart caused by fright at being thus left alone on the track. Illinois Cent. R. Co. v. Latimer, 28 Ill. App. 532, affirmed in 128 Ill. 163.

A defect in a bridge which breaks through while a woman is riding over it is the proximate cause of a miscarriage which results from her fright thereby occasioned, or from her jumping out of the vehicle, or from her subsequent exertion in trying to extricate the horse, or from all these causes combined. Oliver v. La Valle, 36 Wis. 596.

A declaration alleging that plaintiff while a passenger in a railway carriage was by means of a collision "much affrighted, terrified and alarmed, whereby she became sick, sore, and disordered, and so continued from thence hitherto, during which time she suffered great pain and much anguish in so much that her life was endangered, and thereby also, by reason of the terror and alarm occasioned to her by the said collision and of such sickness occasioned thereby, she had a premature labour and bore a still-born child," was held good on demurrer. The court said the fright and the commencement of her sickness might be considered as simultaneous and that as the declaration would be good without stating the fright but stating only the sickness as the result of negligence, the statement as to the fright did not render it demurrable. Fitzpatrick v. Great Western R. Co. 12 U. C. Q. B. 645.

But it will be seen by the cases following that the courts have generally denied the right to recover for damages due to fright alone.

Injury to a pregnant woman from fright caused by a runaway horse which did not touch her will not sustain an action. Lehman v. Brooklyn City R. Co. 47 Hun, 355.

Miscarriage from a nervous shock caused by the fall of a bundle of laths which did not strike the person is too remote to sustain a recovery of damages for negligence in respect to the fall. Rock v. Denis, 4 Mont. L. Rep. 356.

Shooting at a dog from a highway is not the proximate cause of injury by fright to a woman standing near by who is not the owner of the dog and of whose presence the one who shoots is not aware, even if the shooting was wrongful, at least where it was not in any such proximity to a dwelling that injury to the inmates might be naturally and reasonably anticipated from fright or otherwise. Renner v. Canfield, 36 Minn. 90.

Mental anxiety or fears as to personal safety caused by blasting near one's residence is not alone a ground for damages where no physical injury or disease results therefrom. Wyman v. Leavitt, 71 Me. 227, 36 Am. Rep. 303.

Damages arising from mere sudden terror unaccompanied by any actual physical injury, but occasioning a nervous or mental shock, cannot be considered under any circumstances ordinary consequence of the negligence of a gate keeper in allowing persons to be placed in great peril at a railway crossing. So held by the House of Lords, reversing the decision of the supreme court. Victorian R. Comrs. v. Coultas, L. R. 13 App. Cas. 222.

Fright and mental suffering alone caused by mere risk and peril, without bodily injury, will not sustain an action although a very small bodily injury will justify damages for mental suffering. Canning v. Williamstown, 1 Cush. 451.

Damages are not recoverable for peril and fright in addition to pain and mental anguish. Atchison, T. & S. F. R. Co. v. McGinnis (Kan.) April 11, 1891.

The allowance of damages to seamen for being thrown into the water by a collision, without proof of substantial harm to them, is declared by the court to be "specially impolitic and dangerous." The Queen, 40 Fed. Rep. 694.

In the report of an early case it is stated that evidence that a woman was so terrified by a breaking into the house that she was immediately taken ill was admitted in an action for trespass only to show how outrageous and violent the breaking was, and not as a substantative ground of damage. Huxley v. Berg, 1 Stark. 98. B. A. R.

Messrs. **William Scott** and **George B. Gordon,** for appellees:

Ex damno sine injuria non oritur actio.

Waterer v. *Freeman,* Hob. 266*a.*

This maxim applies to those cases where the party aggrieved has no remedy, because no right has, in contemplation of law, been invaded.

Broom Legal Maxims, p. 200.

At common law the present action must have been either trespass or case. It could not be trespass, for that action could be brought only for "immediate injuries to the person accompanied with force."

Train & H. Pr. § 1572; Chitty, Pl. 140.

In the long list of illustrations given by Chitty on Pleading, pp. 142, 148, of cases where trespass in the case will lie, there is none, the foundation of which is not a forcible injury to the person or else a wrong caused by the commission of an illegal act (*e. g.* nuisance or libel), or the failure to perform a legal duty.

Negligence constitutes no cause of action unless it expresses or establishes some breach of duty.

Addison, Torts, § 1338.

We owed the plaintiff no duty to keep our cars on the track, and consequently we were guilty of no actionable negligence.

Fox v. *Borkey,* 126 Pa. 164.

The damages were too remote. The injury, to be actionable, must be the natural and probable consequence of the negligent act.

Pittsburgh S. R. Co. v. *Taylor,* 104 Pa. 306, 49 Am. Rep. 580; *West Mahanoy Twp.* v. *Watson,* 3 Cent. Rep. 243, 112 Pa. 574, 56 Am. Rep. 336; *Pennsylvania R. Co.* v. *Kerr,* 62 Pa. 353, 1 Am. Rep. 431; *Pennsylvania R. Co.* v. *Hope,* 80 Pa. 373, 21 Am. Rep. 100; *Hoag* v. *Lake Shore & M. S. R. Co.* 85 Pa. 293, 27 Am. Rep. 653.

The frightening of a woman is also "a thing that cannot be anticipated, and is governed by no known rules."

Huxley v. *Berg,* 1 Stark. 98; *Victorian R. Comrs.* v. *Coultas,* L. R. 13 App. Cas. 222.

In no case has it ever been held that mental anguish alone, unaccompanied by an injury to the person, afforded a ground of action.

Mayne, Damages, p. 74, *note; Wyman* v. *Leavitt,* 71 Me. 227, 36 Am. Rep. 303. See *Indianapolis & St. L. R. Co.* v. *Stables,* 62 Ill. 313; *Canning* v. *Williamstown,* 1 Cush. 451; *Johnson* v. *Wells, Fargo & Co.* 6 Nev. 224, 3 Am. Rep. 245; *Lynch* v. *Knight,* 9 H. L. Cas. 577.

Per Curiam:

The wrong of which the plaintiff Eva Ewing complains was a collision of cars upon the railway of the defendant Company, in consequence of which the cars were broken, overturned, and thrown from the track, and fell upon the lot and premises of the plaintiffs, and against and upon the dwelling-house of plaintiffs, and thereby and by reason thereof greatly endangered the life of the said Eva Ewing, then being in said dwelling house, and subjected her to great fright, alarm, fear, and nervous excitement and distress, whereby she then and there became sick and disabled, and continued to be sick and disabled from attending to her usual work and duties, and suffered and continues to suffer great mental and physical pain and anguish, and is thereby permanently weakened and disabled," etc. To this statement the defendant demurred, and the court below entered judgment for defendant upon such demurrer. This ruling is assigned as error. It is plain from the plaintiff's statement of her case that her only injury proceeded from fright, alarm, fear, and nervous excitement and distress. There was no allegation that she had received any bodily injury. If mere fright, unaccompanied with bodily injury, is a cause of action, the scope of what are known as "accident cases" will be very greatly enlarged; for in every case of a collision on a railroad the passengers, although they may have sustained no bodily harm, will have a cause of action against the company for the "fright" to which they have been subjected. This is a step beyond any decision of any legal tribunal of which we have knowledge.

Negligence constitutes no cause of action unless it expresses or establishes some breach of duty. Addison, Torts, § 1338. What duty did the Company owe this plaintiff? It owed her the duty not to injure her person by force or violence; in other words, not to do that which, if committed by an individual, would amount to an assault upon her person. But it owed her no duty to protect her from fright, nor had it any reason to anticipate that the result of a collision on its road would so operate on the mind of a person who witnessed it, but who sustained no bodily injury thereby, as to produce such nervous excitement and distress as to result in permanent injury; and, if the injury was one not likely to result from the collision, and one which the Company could not have reasonably foreseen, then the accident was not the proximate cause. The rule on this subject is as follows: "In determining what is proximate cause, the true rule is that the injury must be the natural and probable consequence of the negligence; such a consequence as, under the surrounding circumstances of the case, might and ought to have been seen by the wrong-doer as likely to flow from his act." *Pittsburgh S. R. Co.* v. *Taylor,* 104 Pa. 306, 49 Am. Rep. 580; *West Mahanoy Twp.* v. *Watson,* 112 Pa. 574, 3 Cent. Rep. 243, 56 Am. Rep. 336.

Tested by this rule, we regard the injury as too remote. We know of no well-considered case in which it has been held that mere fright, when unaccompanied by some injury to the person, has been held actionable. On the contrary, the authorities, so far as they exist, are the other way. Mr. Wood fairly states the rule in his *note* to Mayne on Damages at page 74: "So far as I have been able to ascertain, the force of the rule is that the mental suffering referred to is that which grows out of the sense of peril or the mental agony at the time of the happening of the accident, and that which is incident to and blended with the bodily pain incident to the injury, and the apprehension and anxiety thereby induced. In no case has it ever been held that mental anguish alone, unaccompanied by an injury to the person, afforded a ground of action." In *Wyman* v. *Leavitt,* 71 Me. 227, 36 Am. Rep. 303, a contractor of a railroad was blasting rocks within the right of way of the road. The blast blew rocks upon the plaintiff's land, and,

in addition to the damage to the land, plaintiff claimed damages for fright, caused by apprehension of personal injury. Held, that he could not recover. Our own recent case of *Fox* v. *Borkey*, 126 Pa. 164, was a case of fright from blasting, and it was said by our Brother Mitchell: "The injury was not the natural or proximate result of the act complained of." In *Lynch* v. *Knight*, 9 H. L. Cas. 577, *Lord* Wensleydale said: "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone." To the same point are *Indianapolis & St. L. R. Co.* v. *Stables*, 62 Ill. 313; *Canning* v. *Williamstown*, 1 Cush. 451; *Johnson* v. *Wells, Fargo & Co.* 6 Nev. 224, 3 Am. Rep. 245.

We need not discuss the authorities cited by the appellant. They are nearly all cases in which the fright was the result of, or accompanied by, a personal injury, and have no application to the case in hand.

Judgment affirmed.

WASHINGTON SUPREME COURT.

TACOMA HOTEL CO., *Respt.*,
v.
TACOMA LIGHT & WATER CO., *Appt.*

(.....Wash.....)

The rule of a water company to require payment at a stated period of the amount due from the consumer as a condition precedent to continuing his water supply is reasonable and lawful.

(December 10, 1891.)

APPEAL by defendant from a judgment of the Superior Court for Pierce County in favor of plaintiff in a suit brought to enjoin defendant from shutting off the water supply from plaintiff's premises. *Reversed.*

The facts are stated in the opinion.

Mr. **Galusha Parsons**, for appellant:

In all of the cases in which it has been held that some particular rule of a water or gas company was unreasonable, and therefore void, the principle has been recognized that such companies have a right to adopt all such rules as are reasonably necessary as between them and the public for carrying on their business. *Shepard* v. *Milwaukee G. L. Co.* 6 Wis. 539, 70 Am. Dec. 479.

The Company has the right to fix the rate to be paid.

Parker v. *Boston*, 1 Allen, 363; *Spring Valley Water Works* v. *San Francisco*, 6 L. R. A. 756, 82 Cal. 286; *Stone* v. *Farmers L. & T. Co.* 116 U. S. 307, 29 L. ed. 636.

A company may refuse to continue to furnish one who has not paid for water or gas already supplied.

People v. *Manhattan G. L. Co.* 45 Barb. 136; *Girard L. Ins. Co.* v. *Philadelphia*, 88 Pa. 393; *Williams* v. *Mutual Gas Co.* 52 Mich. 499, 50 Am. Rep. 266; *Gas Light Co. of Baltimore* v. *Colliday*, 25 Md. 1; *Morey* v. *Metropolitan G. L. Co.* 6 Jones & S. 185.

NOTE.—*Right to stop supply of water or gas for default of payment.*

A city may cut off a water supply for default of payment. Harrisburg's App. 107 Pa. 102.

Under an ordinance authorizing the supply to be cut off for default of payment mortgagees who purchase on foreclosure cannot compel the supply of water without paying arrears of water rents. Girard L. Ins. Co. v. Philadelphia, 88 Pa. 393.

And they may be compelled to pay the arrears for several years although the city officials have allowed them to accumulate while they might have cut off the supply on the first year's default. *Ibid.*

After payment of water rates for a year in advance, a city cannot during that year cut off the water for failure of a predecessor in title to pay the water rates for the preceding year. Merrimac River Sav. Bank v. Lowell, 10 L. R. A. 122, 152 Mass. 556.

But the supply of water to certain premises may be cut off for arrearages due by the previous owner where the charter of the water company provides that real estate to which the water is supplied shall be bound and liable for the use of it. Brumm v. Pottsville Water Co. (Pa.) 11 Cent. Rep. 792.

An ordinance providing that on default of payment for gas consumed, within ten days after a bill is rendered, the supply may be stopped until the bill is paid, is a reasonable regulation. Com. v. Philadelphia, 132 Pa. 288.

A gas company has no right to stop the supply of gas for refusal to pay a disputed charge for a special service, although it has power by statute to stop the supply for default of payment of regular charges. *Re* Commercial Bank of Canada, 20 U. C. Q. B. 233.

A consumer may have an injunction to prevent cutting off the supply of gas on a claim of arrearage when there is a controversy as to the indebtedness and at least something of an overcharge. Sickles v. Manhattan G. L. Co. 66 How. Pr. 314.

Furnishing gas on an application therefor without objecting on account of a former indebtedness for gas will not waive the right to shut off the gas for such prior indebtedness. People v. Manhattan G. L. Co. 45 Barb. 136.

The right to shut off the supply of gas to premises of any person who shall neglect or refuse to pay under N. Y. Sess. Laws 1859, chap. 311, § 9, does not extend to arrears of former occupants. Morey v. Metropolitan G. L. Co. 6 Jones & S. 185.

Nonpayment of a bill for gas at one house will not justify cutting off the supply for another house where the contracts for the houses are separate and authorize the stopping of the supply on default of payment for "gas consumed on said premises." Gas Light Co. of Baltimore v. Colliday, 25 Md. 1.

Nonpayment of a gas bill for premises formerly occupied by a person will not justify cutting off his supply of gas at another place where the company after the default has signed a contract to furnish him gas upon condition that it may refuse to continue it "to any premises, the owner or occupant of which shall be indebted to the company for gas or fittings used upon such premises or elsewhere," the contract must be construed to refer only to a future default. Lloyd v. Washington G. L. Co. 1 Mackey, 331. B. A. R.

14 L. R. A.

See also 29 L. R. A. 376.

The defendant had a right, in case of plaintiff's failure to pay its bills as rendered, to make the additional charge of 5 per cent.

Illinois Cent. R. Co. v. *Whittemore*, 43 Ill. 420, 12 Am. Dec. 138; *Pullman P. Car Co.* v. *Reed*, 75 Ill. 125, 20 Am. Rep. 232; *Jeffersonville R. Co.* v. *Rogers*, 28 Ind. 1, 92 Am. Dec. 276; *Indianapolis, P. & C. R. Co.* v. *Rinard*, 46 Ind. 293; 2 Rorer, Railroads, 227, pp. 982-983; Morawetz, Priv. Corp. § 501; Waterman, Corp. p. 245.

Messrs. **W. Lair Hill** and **Thaddeus Huston** for respondent.

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

The appellant is the owner by assignment of a grant and franchise by ordinance of the City of Tacoma, granting to John W. Sprague, his associates and assigns, "the right and privilege of supplying the city of Tacoma and the inhabitants thereof with pure and fresh water, for which they shall be and are hereby authorized to charge the consumers thereof reasonable rates." The appellant, operating under said grant, supplied to the premises of the respondent water for and during the three months ending October 1, 1890, for which supply it demanded the sum of $478.10, which the respondent refused to pay. The appellant added a penalty to said sum, increasing the same to $502, and again demanded payment, and, upon the continued refusal of the respondent to pay appellant, threatened to shut off and stop supplying the water for respondent's premises; whereupon respondent brought this suit to enjoin the appellant from so doing.

The complaint sets forth the corporate character of the parties to the action; the plaintiff's ownership of the premises described; that the building thereon is a large and expensive hotel, and "that the use of the water furnished by the defendant is absolutely necessary to the use and occupancy of said hotel for the purposes for which it was constructed;" the demand of the sum of $502 claimed; an allegation that said charge is unreasonable, excessive and unlawful; an allegation that the plaintiff is and at all times was ready and willing to pay a reasonable sum; and alleging the purpose of the defendant to shut off the water, and deprive plaintiff of its use, thereby causing the plaintiff great and irreparable injury, etc. The answer denies that the charge is unreasonable, excessive or unlawful; denies the readiness of the plaintiff to pay a reasonable sum; admits that it was and is defendant's purpose to deprive the plaintiff of the use of its water for said hotel and premises until it should pay the reasonable charges of defendant for the water furnished it for the quarter ending on the 1st day of October, 1890; denies that it would cause plaintiff great and irreparable injury, etc.; and contains an affirmative defense, wherein the corporate capacity of the defendant is fully set forth; also its ownership of the water franchise, and its rights and authority thereunder. It also contains the following allegations: "(4) That for the transaction of the business for which it was incorporated, and to enable it to furnish water as in said ordinance provided to the said city of Tacoma and its inhabitants, at reasonable rates, it adopted, among others, a rule in the words following, to wit: 'Sec. 19. Water rents will be due and payable quarterly on the first days of January, April, July, and October. In case of nonpayment of rents within ten days after they are due, five per cent additional will be added, and, if the rents are not paid within fifteen days after they are due, the water will be shut off from the premises, as provided for in sections 20 and 21.' (5) That to secure compliance with said rules, without which the proper management of the business of said company would have been wholly impracticable, it adopted a further rule, as follows: 'Sec. 20. On failure to comply with the rules and regulations established as a condition to the use of water, or to pay the water-rents in the time and manner hereinbefore provided, the water may be shut off until payment is made of the amount due, with fifty cents in addition for the expense of turning the water off and on.' (6) That said rules were made a part of the contract with all persons applying to be furnished with water by this defendant. (7) That prior to the 6th day of May, 1890, this defendant established the following rates as the rates to be paid by persons desiring that they should be supplied with water by meter, to wit: Meter rates from 1,000 to 50,000 gallons per month, per 1,000 gallons, $.25; meter rates, from 50,000 to 100,000 gallons per month, per 1,000 gallons, $.20; meter rates, all over 100,000 gallons per month, per 1,000 gallons, $.15. That said rates were reasonable and far below the rates usually charged by water companies in the United States. That the said rates so charged were well known to the directors and managing officers of this plaintiff. That, well knowing the rates of charges of this defendant for water furnished by measurement to the inhabitants of said city, plaintiff applied in writing to this defendant to furnish water for the use of the said hotel, and thereupon agreed to comply with the rules and regulations of this defendant in respect thereto; and that, in default thereof, or of prompt payment at the rates so established, or of a failure to comply with the said rules and regulations, the water might be turned off from the premises so supplied, and discontinued until the bills for water furnished previously thereto should have been paid. (8) That in pursuance of said request, and in accordance with its rules and regulations, defendant furnished water for the use of said hotel for the months of July, August, and September, 1890, to the amount of 4,789,500 gallons. That at the established rate when said water was so furnished, to wit, at the rate of fifteen cents for 1,000 gallons, it would have amounted to the sum of seven hundred and seventeen and 12-100 dollars ($717.12) which sum would have been a reasonable and just charge therefor. (9) That, nevertheless, said defendant having, after the making of said application, reduced its charges below the established rates therefor, as they then existed, to consumers whose consumption should exceed 200,000 gallons per month, to wit, to the sum of ten cents per thousand gallons, it voluntarily, and without having agreed so to do, reduced the rate of charges to this plaintiff from fifteen cents to ten cents per thousand gallons. (10) The defendant presented to

plaintiff its said bill for four hundred and seventy-eight dollars and 10-100, ($478.10,) and, plaintiff having wholly neglected and refused for fifteen days after the same became due to pay for the water so consumed by it, and as provided by the said rules, this defendant, in accordance with its rules and regulations, to wit, with said rule nineteen, added to the said bill the sum of five per cent (5) of the amount thereof, and presented to this plaintiff a bill therefor, to wit, for the sum of five hundred and two dollars, ($502.00,) as stated in said complaint, which sum still remains wholly unpaid. (11) And this defendant further says that it has at all times been, and is now, ready and willing to furnish to the said plaintiff all the water that it may require or demand for its use, at reasonable rates, and below the rates usually charged by water companies elsewhere for the like service, to wit: If the same exceed 200,000 gallons per month, at the rate of ten cents per thousand gallons, upon condition that the plaintiff pay for the same as provided by the established and published rules of this defendant, and that it conform to such rules, all of which the said plaintiff, in writing, at the time of its application to be supplied with water, agreed to do." The plaintiff demurred to the answer on the ground that it did not state facts sufficient to constitute a defense. The court sustained the demurrer, and, upon the refusal of the defendant to plead further, rendered a judgment and decree for the plaintiff.

The controversy is over the reasonableness of the rules and the rate charged, and as to whether appellant had a right to estop supplying the water upon the refusal of respondent to pay the sum in arrears. It is contended by appellant that the demurrer admits not only that the rules were reasonable, but that it was impracticable for appellant to carry on its business without the rules which the answer alleges it had adopted, and that the defendant at the time of its application knew what the rules were, and agreed to be bound by them, and that it is likewise admitted that the rate charged was reasonable. The respondent claims there is no admission that it agreed to comply with the rules and regulations of the appellant; and, quoting from paragraph 7 aforesaid of the answer, says: "This is really the only attempt at an affirmative allegation in the answer, and is very ingeniously pleaded. Much stress is laid upon it by counsel for appellant. It is argued that, because respondent made an application in writing to be furnished with water on its premises, it 'thereupon,' by inference or implication, agreed to comply with the rules and regulations of appellant, whatever they might be, reasonable or unreasonable; and that therefore appellant has the right to shut the water off, and deprive respondent of the use thereof, regardless of consequences, simply to enforce the payment of a disputed claim and penalty. This pretended right respondent disputes, and the demurrer does not admit it." It contends that the actual issue raised by the pleadings is whether the appellant has a legal right to enforce or attempt to enforce the payment of a sum claimed by it to be due, which includes a penalty of 5 per cent for nonpayment for water furnished by it to respondent, by shutting off the water connections with respondent's premises, and depriving it of the use of water furnished by appellant under its franchise. That said franchise confers upon appellant valuable rights and privileges, and, while it is not an exclusive grant by the terms of its charter, that it is so practically. That these rights and privileges are granted by the public, and in consideration therefor it owes something to the public, viz.: The "supplying the city of Tacoma and the inhabitants thereof with pure and fresh water, for which they shall be and are hereby authorized to charge the consumers thereof reasonable rates." That no power is conferred in any way upon appellants to arbitrarily establish a rate or charge which the public should be compelled to accept as reasonable, nor is the appellant in any way given any power, right, or privilege to proceed to the enforcement of the payment of any sum it may claim to be due it in any other way than that possessed by any other individual or corporation,—that is, through the courts, under the forms of law. The respondent further contends that the rules as well as the rate charged are unreasonable; that the pleadings disclose a dispute between the parties thereupon, and that the respondent has a right to have these matters determined by the courts in the usual way; and contends further that the answer of appellant is bad on demurrer because it admits the purpose of appellant to shut off and deprive the respondent of the use of said water on its said hotel premises, which use the complaint alleges is absolutely necessary to enable it to conduct its hotel business.

Some of the matters so contended for by respondent, it seems to us, are not involved in the case in its present aspect. The appellant corporation has been expressly granted the right to supply the city of Tacoma and its inhabitants with pure and fresh water, with the right to lay pipes, etc., in the public streets and alleys, for the purpose of carrying the same into effect. Its business is such as is usually carried on by the public or associated capital, and it is dependent upon the needs of the people in its immediate vicinity for its profit. Its relations to the people, and the rights and privileges it must from the very nature of its business necessarily exercise, give it a public character, and to some extent a monopoly, which, it is true, can only be tolerated upon the ground of a reciprocal duty to meet the public want. Its duty is to supply the inhabitants of Tacoma within the extent of its business, who may apply to it therefor, with water, for a reasonable price, and upon reasonable conditions. This it can be compelled to do, and respondent is right in its contention that appellant cannot arbitrarily establish prices which must be paid, and conditions which must be submitted to, by the inhabitants of that city, without any regard as to whether such prices and conditions are reasonable or necessary. But, as we view the case, this question is not now before us. It does not appear that the city has undertaken in any way to fix prices or lay down rules to govern appellant's business, and whatever rights the city may have in this respect we are not called upon to consider; but cer-

tainly, in the absence of any such attempt upon the part of the city, appellant has a right to establish prices to be paid, reasonable in amount, and to make all needful rules for the management and regulation of its business, and under such circumstances, at least, whenever a contest arises over them, these will be questions for the courts to determine. But the answer in this case alleges that the rate of prices established is a reasonable one, and, under the familiar rule of pleading that a demurrer admits everything which is well pleaded, this fact, under the present aspect of the case is settled. So also is the fact of the indebtedness for the water previously furnished likewise admitted. We wish this understood as limited to the sum first demanded. The power of the water company to impose an additional sum by way of penalty in case of nonpayment stands upon a different footing from that of the power to establish the price in the first instance, not being dependent upon any facts as to the cost and expenses of supplying the water and carrying on its business, and a reasonable profit thereon. As to whether the penalty could be sustained, might be regarded as a question of law for us to determine, as to its being authorized, or a reasonable charge, did we find it necessary for us to pass upon it in the disposition of the case, unless it should be sustained upon the ground that it was a part of the original price which the respondent contracted and agreed to pay in case of the contingency arising. But, in any event, it stands admitted that the rate fixed is reasonable; that the respondent used the water for a time specified; and that it is indebted to the appellant therefor in the sum first demanded; and there is no claim that it has ever tendered any sum. The allegation in the complaint of a readiness and willingness to pay does not amount to this, even if it could be considered.

Now, then, could the Water Company refuse to supply the Hotel Company with water any longer unless it would pay the sum already due? Whether the contract between the parties was for a specified time not yet expired, or was a continuing one, is not apparent, and it does not matter, for it is admitted that the sum stated was due under the contract, whatever it was. There was no new application for water subsequent to the one under which the water up to October 1, 1890, had been furnished, and we are of the opinion that the Water Company had the right to require the payment of the sum so due as a condition precedent to its continuing to supply the Hotel Company with water under the general rule it had previously established, and it is not necessary to discuss the question whether the reasonableness or necessity of this rule is admitted by the pleadings, for we find as a matter of law that it is reasonable. Nor are we required to find whether it stands admitted by the pleadings that the Hotel Company contracted in writing in its application for water to be bound by the Water Company's rules, for it was bound in any event by the reasonable rules of the Water Company, of which it had actual notice; and it did have notice of this rule, at least when payment was demanded, and it is not claimed that the Hotel Company made any attempt to comply therewith, nor that it was not given a reasonable time therefor. We do not decide that the Water Company could not refuse to furnish water until the sum due had been paid, whatever the facts may have been as to the contract, or in case of a new application, unless, perchance, the contract provided otherwise, or a new contract should be entered into ignoring the sum due.

In *Williams* v. *Mutual G. Co.*, 52 Mich. 499, 50 Am. Rep. 266, it is held that the gas company had the right to demand a deposit of money in advance, by way of security, before it could be compelled to furnish gas. In that case the applicant had been using about $60 worth of gas per week, and its requirements were increasing, and the court sustained a demand for a deposit of $100. Seventy-five dollars had been tendered therefor. In *Shepard* v. *Milwaukee G. L. Co.*, 6 Wis. 539, 70 Am. Dec. 479, the court says: "The third rule of the company, allowing the company to demand security for the gas consumed, or a deposit of money to secure payment thereof, appears to be just and necessary to guard against loss. As the delivery of the gas is necessarily its consumption, and as the amount delivered is ascertained by the amount consumed, it would seem to be just and right that the company should not be compelled to furnish it without reasonable security for payment in convenient amounts, and at proper periods." In *People* v. *Manhattan G. L. Co.*, 45 Barb. 136, it is held that the company may shut off the supply of gas until it has been paid the amount due for gas previously furnished. And the authorities apply as well to a water company as to a gas company, although water is a necessary of life. So far as its use is required as a necessity of life, if a case could possibly arise where an applicant could not get water, otherwise there, or go elsewhere to get it, it would be the duty of the public authorities to furnish it to him at the public expense. In *Girard L. Ins. Co.* v. *Philadelphia*, 88 Pa. 394, it is said that the supplying of water and gas is not a municipal duty. "Hence, when the city undertakes to do so, it acts, not by virtue of any rights of sovereignty, but exercises merely the functions of a private corporation. *Western Sav. Fund Soc.* v. *Philadelphia*, 31 Pa. 175, 72 Am. Dec. 730; *Wheeler* v. *Philadelphia*, 77 Pa. 338. The introduction of water by the city into private houses is not on the footing of a contract, but of a license, which is paid for. *Smith* v. *Philadelphia*, 81 Pa. 38, 22 Am. Rep. 731. It may very well be that when a license has been given by the city to the owner of a house to use the water such license may not be withdrawn arbitrarily, or from mere caprice. But it is equally clear that the city may adopt such rules in regard to the use of the water and the payment therefor as the municipal authorities shall deem expedient." And it was held in that case, where the ownership of the premises had changed, and where payment for the water furnished for one year immediately preceding the purchase had been tendered by the new owner, it being conceded that this was a proper charge under the city ordinance, that the city could not be compelled to furnish water for the premises aforesaid unless the applicant would pay the sum in arrears for water

furnished during three years preceding the change of ownership, with certain penalties thereunto added, although the city had neglected to take any steps according to the terms of the ordinance to collect the sums so due for the previous years. As to the authority of such companies to establish reasonable rules, see 1 Morawetz, Priv. Corp. § 501; 1 Waterman, Corp. § 77; 2 Rorer, Railroads, § 13. A condition imposed that the Company might refuse to furnish water to an applicant refusing to pay it a sum due for water furnished thereunder is in one sense a security for the payment thereof. Instead of forming an estimate of the water that would likely be used, and requiring a deposit in advance of a sufficient sum of money to cover the same, or requiring other security for the payment thereof, the Water Company provides that at stated periods payments shall be made in order that a large sum may not accumulate, it being willing to take its chances for a stated time without other security. Surely this is more lenient than either to demand a bond or other security, or a deposit of a sum of money in advance large enough to be reasonably certain of covering the sum that should become due.

Under the view we have taken of the state of the case, the authorities cited by respondent, going to cases where an issue has been raised over the amount due, are not applicable. Of course, the respondent has the right to contest the fact of the indebtedness, and of the reasonableness of the rate, unless it has agreed to pay according to such rate, and even in that case, should it appear that it was compelled to make such an agreement in order to obtain the immediate necessary use of the water. Appellant makes the point that the demurrer to the answer could not be sustained in any event, whatever the court might hold upon the other questions, because the demurrer goes to the whole answer, and, as the first part of it only denies and tenders an issue upon the allegations of the complaint, it is unquestionably good. Consequently the demurrer should only have been directed to the new matter; otherwise, the answer raising an issue as to the allegations contained in the complaint, the demurrer must be overruled. While we think this point is well taken, we have considered the real merits in the other questions raised as they appeared to us.

Reversed and remanded.

Anders, *Ch. J.*, and **Hoyt** and **Stiles,** *JJ.*, concur.

Dunbar, *J.:* I concur in the result.

NEW YORK COURT OF APPEALS (2d Div.).

James P. KERNOCHAN *et al.*, *Respts.*,
v.
NEW YORK ELEVATED R. CO. *et al.*, *Appts.*

(.....N. Y.....)

An opinion of a witness as to what the rental value of property would have been several years after a railroad was built in front of it if the road had not been built is not competent evidence.

(December 1, 1891.)

APPEAL by defendants from a judgment of the General Term of the Superior Court of the City of New York affirming a judgment of a special term in favor of plaintiffs in a suit brought to enjoin the operation of defendants' road until compensation should be made to plaintiffs for the injuries caused to their property by the road. *Reversed.*

Statement by **Potter,** *J.:*

The action was commenced April 3, 1888, and was tried June 28, 1889. The premises in question is No. 160 Pearl Street, in the city of New York, consisting of a lot and brick building, in front of which defendants constructed and operated an elevated railroad. The complaint contains the usual allegations which characterize the numerous cases of this class of actions against defendants, and asks for judgment for the depreciation of the rental and fee values of the premises, and for an injunction as incidental to the latter, from the 7th day of November, 1886, since which time plaintiffs have owned and possessed said premises, to the time of the trial of this action, in consequence of the maintenance and operation of the railroad by defendants. The plaintiffs were awarded judgments accordingly.

Messrs. **Julien T. Davies, Samuel Blythe Rogers** and **J. C. Thomson,** for appellants:

It was error to permit witnesses for plaintiff to state what, in their opinion, would have been the fee and rental values of this property had the railway not been built.

This evidence was incompetent, as being the conclusion of a witness upon a matter which it was the sole province of the court to determine.

McGean v. *Manhattan R. Co.* 117 N. Y. 219; *Avery* v. *New York Cent. & H. R. R. Co.* 121 N. Y. 31.

Mr. **G. Willett Van Nest,** for respondents:

Conceding for the purpose of argument that the *McGean Case*, 117 N. Y. 219, decides that it is not proper to ask a witness the value of property "if there were no elevated road in front thereof," yet it was clearly proper to ask as to the value of the property as it stood. To raise the McGean question the defendants should have objected to the latter part of the question.

Hochrieter v. *People*, 2 Abb. App. Dec. 363;

NOTE.—This case is published as illustrating the application of the rule laid down in Roberts v. New York Elev. R. Co., 13 L. R. A. 492, 128 N. Y. 455, the opinions and briefs in which contain an exhaustive discussion of the subject.

New York v. *Second Ave. R. Co.* 3 Cent. Rep. 822, 102 N. Y. 582.

A motion to strike out is in the discretion of the court. A party cannot wait to hear whether evidence is favorable to him or not and if not then move to strike out.

Platner v. *Platner*, 78 N. Y. 90; *Marks* v. *King*, 64 N. Y. 628; *Hatch* v. *Attrill*, 118 N. Y. 387.

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

It will not be necessary to consider all the questions sought to be raised upon this appeal, for we think a new trial must be ordered for the errors to be found in the record in relation to the evidence of value received by the learned trial court. The question was, What was the rental value with and without the railroad in the years 1883 to 1884, 1885 to 1886, 1886 to 1887, and from that year to the year 1888? This was objected to upon the ground that it was incompetent, irrelevant, and immaterial, and not within the issues in this action, and not a proper method of proof. The objections were overruled, and the witness answered the question in both respects. The defendants excepted. After answering that question, the case discloses that the witness proceeded to testify in relation to the selling value of this property with and without the road. He testified that the selling value of this property in 1879 was $22,000 the selling value of the property to-day (upon the day of the trial, I suppose) is $35,000; and that the selling value at the last-mentioned time, if there was no railroad there, would be $47,500. It will be observed that the witness was not in terms asked what, in his opinion, was the rental value with and without the railroad, and it does not appear from the record whether the witness was asked any question in respect to the selling value of the property with or without the railroad, nor that there was any distinct renewal of the former objections made to this kind of evidence. All the testimony seems from the record to have been given by the witness in response to the question put to him as to the rental value, and that question was not in terms to obtain the opinion of the witness as to such value. But it is quite apparent that the court, counsel, and witness understood that the question called for the opinion of the witness. This is shown from the nature of one branch of the inquiry, which was as to what would the rental value of the premises have been several years after the railroad was built, if it had not been built. The answer to this question, in the condition of the case on trial at which it was asked, seems to me to involve far more objectionable evidence than that which may be given by an expert; for, in order to be an expert, the witness must have some knowledge or experience in relation to facts of the same or of a similar nature to those on which the opinion is to be based, and there is no pretense that this railroad has ever been removed, or has ceased to be operated for any length of time, since it was constructed, and there is no suggestion that the witness had ever known or heard of a railroad of any kind that had been removed, or its operation suspended, at any time or at any place. Hence his answer could not be that of an expert, who must have some knowledge of the effects from similar causes, and must be wholly speculative, or without the knowledge essential to constitute an expert. The character of two of the objections that were made to the question, viz., that it was "incompetent and not a proper method of proof," in order to ascertain the damages, plainly indicate that the answer must be, to an essential degree, the opinion or speculation of the witness. Moreover, the answer of the witness to a material part of the inquiry conclusively shows that he was giving opinion evidence, for he says: "In my opinion the rental value from May, 1882, to May, 1883, had there been no such elevated railroad in front of the property, would have been over $3,500." The defendants' counsel, in addition to the objection made at the outset of the introduction of this species of evidence, made a motion at the close of it to strike it out upon the same grounds that the objections had been made, and specifically that such evidence "did not bear upon the proper measure of damages." The court denied the motion, and defendants duly excepted. Immediately after the denial of the motion to strike out the evidence the witness distinctly stated: "I form my opinion that the fee value of that property to-day is $47,000, if there were no railroad there, by taking the way that other property in other streets has advanced without the elevated railroad." This is abundantly sufficient to bring the evidence of the witness within the rule of condemnation laid down in the recent decision of this court in *Roberts* v. *New York Elev. R. Co.*, 128 N. Y. 455, 13 L. R. A. 499, even if there were any serious doubts whether the evidence given by the witness in respect to the fee or selling value of the property, without the railroad, was objected to upon the same grounds. In the *Roberts Case*, *supra*, the court held these questions, viz., "What do you estimate the rental value of the property to be, the railroad not being there?" and "That is, you think that the four houses fronting on Third Avenue are worth $30,000 now, and that they would be worth $110,000 if the structure and railroad were not there?"—that is, upon the street in front of the premises,)—to be improper and incompetent, and ordered the case to be sent back for a new trial by reason of such error. In support of such ruling *Judge* Peckham delivered a conclusive and exhaustive opinion, in which five of the seven members of the court concurred, and there is no occasion or room for any further discussion or elaboration upon that point.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

All concur.

MICHIGAN SUPREME COURT.

John N. CHADDOCK, *Appt.*,
v.
Alonzo PLUMMER.

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

A toy gun is not such a dangerous instrument that a man can be held negligent in giving it to his boy nine years old with caution to be careful with it and not to lend it, and he is not liable for the damages where in his absence his wife permits it to be taken by a visiting boy, who puts out the eye of a man in the street with a shot from it.

(October 30, 1891.)

ERROR to the Circuit Court for Berrien County to review a judgment in favor of defendant in an action brought to recover damages for the loss of plaintiff's eye through the alleged negligence of defendant. *Affirmed.*

The facts sufficiently appear in the opinion.

Mr. **N. A. Hamilton,** for appellant:

A man who places in the hands of a child an article of a dangerous character, and one likely to cause injury to the child itself or to others, is guilty of an actionable wrong.

Binford v. *Johnson*, 82 Ind. 427.

If persons chargeable with a duty of care and caution towards them leave exposed to the observation of children anything which would be tempting to them, and which they in their immature judgment might naturally suppose they were at liberty to handle or play with, they should expect that liberty to be taken.

Powers v. *Harlow*, 53 Mich. 507, 51 Am. Rep. 154; *Harriman* v. *Pittsburgh, C. & St. L. R. Co.* 9 West. Rep. 438, 45 Ohio St. 11; *Lane* v. *Atlantic Works*, 111 Mass. 136.

The law requires of persons having in their custody instruments of danger that they should keep them with the utmost care.

Dixon v. *Bell*, 5 Maule & S. 198.

If one is guilty of negligence in leaving anything dangerous in a place where it is extremely probable that some other person will unjustifiably set it in motion to the injury of a third, and if that injury should be so brought

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NOTE.—*Negligence in respect to guns and similar dangerous agencies.*

The law requires of those who use dangerous agencies the greatest care in the custody and use of them. Pittsburgh, C. & St. L. R. Co. v. Shields, 8 L. R. A. 464, 47 Ohio St. 387.

As fire-arms are more than ordinarily dangerous when loaded, those who handle them are bound to use more than ordinary care to prevent injury to others. Moebus v. Becker, 46 N. J. L. 41.

But the ground of liability for accidental injury from the discharge of a gun is negligence. Weaver v. Ward, Hob. 134; Lynch v. Nurdin, 1 Q. B. 29, 2 Steph. N. P. 1017; Reg. v. Salomon, 43 L. T. N. S. 573; Underwood v. Hewson, Strange, 596; Welch v. Durand, 36 Conn. 182, 4 Am. Rep. 55; Cole v. Fisher, 11 Mass. 137; Moody v. Ward, 13 Mass. 299; Morgan v. Cox, 22 Mo. 373, 66 Am. Dec. 625; Castle v. Duryee, 2 Keyes, 169; Dalton v. Favour, 3 N. H. 465; Tally v. Ayres, 3 Sneed, 677.

Quite similar to the main case is a decision that the sale of cartridges loaded with powder and ball for a toy pistol with instructions as to their use to boys ten and twelve years of age respectively, one of whom left the pistol on the floor where his brother six years of age picked it up and discharged it, inflicting on one of the older boys a wound which caused his death, renders the dealer liable to an action for negligence. Binford v. Johnston, 82 Ind. 426.

So selling and delivering gun powder to a child eight years old with knowledge that he is an unfit person to be intrusted with it will make one liable for injuries which he receives by its explosion. Carter v. Towne, 98 Mass. 567, 96 Am. Dec. 682.

Allowing a loaded gun to be given to a mulatto girl thirteen or fourteen years of age, although the priming was first removed, is negligence which will create a liability for an injury to a third person by discharge of the gun on her playfully aiming it at him and pulling the trigger, without supposing that it would go off. Dixon v. Bell, 5 Maule & S. 198.

Leaving a dynamite cartridge among the sawdust in a common packing box on the ground under a rude shed and marked "powder" is negligence which will create a liability for injuries sustained by a small boy who cannot read, and who, while rightfully on the premises, obtains the cartridge and cracks it upon a stone. Powers v. Harlow, 53 Mich. 507, 51 Am. Rep. 154.

A personal injury received by the negligent discharge of a cannon on a pleasure yacht during the absence of the owner, by one of the crew not in the course of any employment or duty of the master, but merely as a salute to another yacht in passing, does not render the owner liable to the person injured. Haack v. Fearing, 35 How. Pr. 459.

One hunting in a wilderness is not bound to anticipate the presence within range of his shot of another man, and is not liable for injury unintentionally caused to the latter by shooting. Bizzell v. Booker, 16 Ark. 308.

For firing a pistol through the front door of a restaurant when told by a companion who is inside to fire a salute after the latter has obtained entrance at midnight through a side door makes the person firing and the one advising it both responsible for injury by the shot to the restaurant keeper, who had refused them admission, where there is an ordinance prohibiting the discharge of fire-arms in the street. Daingerfield v. Thompson, 33 Gratt. 136, 36 Am. Rep. 733.

Taking a loaded gun into town and leaving it in a store without any necessity or cause for doing so is an uncalled for and reckless act which will make one liable for an injury by its accidental discharge while taking it away. Tally v. Ayres, 3 Sneed, 677.

The discharge of a gun carried by one of two persons who were quarrelling while he was stooping down to pick up a stick makes him liable to the other, who is thereby hurt, for gross negligence in handling it. Chataigne v. Bergeron, 10 La. Ann. 669.

Presenting a loaded pistol in a room among many persons while engaged in a quarrel renders one liable for accidental injury to a third person by its discharge. Chiles v. Drake, 2 Met. (Ky.) 146, 74 Am. Dec. 405.

Shooting a dog while aiming at a fox under cover creates a liability to the owner of the dog for the loss. Wright v. Clark, 50 Vt. 130, 28 Am. Rep. 496.

A boy about twelve years of age is liable for gross negligence in shooting an arrow at another boy putting out one of his eyes. Bullock v. Babcock, 3 Wend. 391. R. A. R.

See also 15 L. R. A. 475; 17 L. R. A. 726; 18 L. R. A. 759; 24 L. R. A. 679; 36 L. R. A. 523; 41 L. R. A. 503.

about, the sufferer may have redress by action against both or either of the two, but unquestionably against the first.

Lynch v. *Nurdin*, 1 Q. B. 29; *Tally* v. *Ayres*, 3 Sneed, 677; *Morgan* v. *Cox*, 22 Mo. 373, 66 Am. Dec. 623.

The boy Tabor is probably liable to the plaintiff.

Bullock v. *Babcock*, 3 Wend. 391.

Suppose the defendant himself were the party whose eye was shot out by Tabor, and suppose he had brought an action against Tabor,—wouldn't the law say to him you cannot recover; by your own act in leaving the gun where the boy found it or allowing it to be so left you contributed to the injury. Does it not follow that because he thus contributed to the plaintiff's injury he is liable?

Powers v. *Harlow*, 53 Mich. 507, 51 Am. Rep. 154; *Binford* v. *Johnson*, 82 Ind. 426; *Harriman* v. *Pittsburgh, C. & St. L. R. Co.* 9 West. Rep. 438, 45 Ohio St. 11; *Clark* v. *Chambers*, L. R. 3 Q. B. Div. 327; *Tally* v. *Ayres*, 3 Sneed, 677; *Castle* v. *Duryee*, 2 Keyes, 169; *Cole* v. *Fisher*, 11 Mass. 137; *Carter* v. *Towne*, 98 Mass. 567, 96 Am. Dec. 682; *McDonald* v. *Snelling*, 14 Allen, 296, 92 Am. Dec. 768; *Vincent* v. *Stinehour*, 7 Vt. 61, 29 Am. Dec. 145; *Vanderburg* v. *Truax*, 4 Denio, 564, 47 Am. Dec. 268; *Guille* v. *Swan*, 19 Johns. 381; *Audige* v. *Gaillard*, 8 La. Ann. 71; *Wright* v. *Clark*, 50 Vt. 135, 28 Am. Rep. 496; *Knott* v. *Wagner*, 16 Lea, 481.

Mr. **George S. Clapp,** for appellee:

Plaintiff sues Mr. Plummer to recover for damages sustained through an accident. Inevitable accident is not a ground of liability.

Pollock, Torts, *118; *Brown* v. *Kendall*, 6 Cush. 292; *Nitro Glycerine Case*, 82 U. S. 15 Wall. 524, 21 L. ed. 206; *Harrey* v. *Dunlop*, Hill & D. Supp. 193; *Morris* v. *Platt*, 32 Conn. 85; *Alderson* v. *Waistell*, 1 Car. & K. 358.

The happening of an accident in extraordinary circumstances in a manner that could not have been prevented by any ordinary measures of precaution is not itself any evidence of negligence.

Blyth v. *Birmingham Waterworks Co.* 11 Exch. 781; *Crafter* v. *Metropolitan R. Co.* L. R. 1 C. P. 300; *Glover* v. *London & S. W. R. Co.* L. R. 3 Q. B. 25; *Cox* v. *Burbridge*, 13 C. B. N. S. 430; *Lee* v. *Riley*, 18 C. B. N. S. 722, cited by Pollock, Torts, p. 40; *Metropolitan R. Co.* v. *Jackson*, L. R. 3 App. Cas. 193; *Sharp* v. *Powell*, L. R. 7 C. P. 253; *Chasemore* v. *Richards*, 7 H. L. Cas. 349.

If it be said that Mr. Plummer did not prevent the accident and was therefore liable, what ground is there for the charge? To so become liable he must have failed to act with due foresight. There must have been the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

Blyth v. *Birmingham Waterworks Co. supra;* Pollock, Torts, *36, 39.

Mr. **George M. Valentine** also for appellee.

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

Plaintiff brought this suit in the Berrien Circuit Court to recover damages for the loss of his right eye, which was destroyed by a shot from an air-gun in the hands of a boy named Roscoe Tabor. The circuit judge directed a verdict for the defendant. The facts proven are substantially as follows: During the last of July or first of August, 1890, the defendant bought an air-gun, and gave it to his son, Harry Plummer, a lad aged about nine years. Defendant also bought at the same time some shot, such as are used in air-guns. Defendant cautioned his son to be careful in using the gun. The shot were all used in about two days, and some time later defendant bought his son more shot, which were used in half a day. No other shot were bought or furnished by the defendant, or by his order, or with his knowledge. Mrs. Plummer, the wife of the defendant, bought her son Harry some shot, which he also fired, except four shot, by one of which plaintiff was injured. On the morning of the accident, September 3, 1890, Harry fired the shot bought by his mother, except the four shot, and put the gun in the storm-house, which was a part of the dwelling, and put the four shot on a table-cloth, and went to school. Mr. Plummer was not at home. The Tabor boy came there with some rutabagas, and then began looking and traveling about the premises, and found the gun in the storm-house, and then asked Mrs. Plummer for some shot, and she handed him the four shot which Harry had left on the table. She directed him to shoot at the hen-coop in the rear of the house. The boy fired one shot at the hen-coop, one at an apple tree, and then he went around to the north side of a new house, which Mr. Plummer was building, to a point about a rod east of the front of the new house, and eight or ten feet north of it. The boy was facing the west, and the street was to the west of him, and the street runs northwest and southeast. He put a grape on a plank, and looked to see if anyone was in the street, and, seeing no one, he held the muzzle of the gun about two and one half feet from the grape, and the gun was pointed down, and fired. The distance west to the street from where the boy was, when he shot, is from 70 to 100 feet. Mr. Chaddock at the time the shot was fired was standing in the street, looking at this new house of the defendant. The shot glanced from the board, and struck him in the eye, destroying it. The street was a frequently traveled highway in the village of Benton Harbor, then containing about 3,700 inhabitants, and at a point where defendant had long resided. Defendant's boy Harry was nine years of age when the gun was purchased, and the Tabor boy was ten years old when the shot was fired. The gun was the common make of toy air-gun for children, breaking in the middle for the insertion of the shot, and, when closed again, operating with a spring, compressing the air and expelling the shot. The shot used were "BB," or "double B." Harry was told by his father not to lend the gun to other boys, as they might break it. The Tabor boy lived out in the country, and occasionally visited at defendant's. It does not appear that the defendant knew of the purchase of shot by his wife,

or that his boy had used all the shot purchased for him by defendant.

The contention of the plaintiff is that the air-gun in question is a dangerous weapon, and that plaintiff did not use sufficient care in the keeping of it upon his premises; that, at any rate, the question whether he did use such care or not should have been submitted to the jury. But, as the facts are, the defendant cannot be held responsible for the injury to plaintiff, unless it was negligence, sufficient to support this action, in buying the gun and allowing his son to use it. He cannot be considered negligent in any other respect. He cautioned his boy to be careful in its use, and no carelessness of his own son was shown at any time in his use of it. The defendant and his son were neither of them responsible in any way, except owning the gun, for the use of it by the Tabor boy. It was kept inside the house, for the storm-door was an inclosure. If it came into the hands of Tabor through the negligence of anyone, it was the negligence of the wife, for which the defendant is not liable. This air-gun may be a dangerous weapon in a certain sense. The shot fired from it will not penetrate clothing, but it will put out the eye of a person, and will kill small birds and some small animals. These guns are in common and every-day use by children; over 400 of them were sold in one season by one dealer at Benton Harbor. But it is not more dangerous in the hands of children than a bow and arrow and many other toys. It would hardly be good sense to hold that this air-gun is so obviously and intrinsically dangerous that it is negligence to put it in the hands of a child nine years of age; and that such negligence would make the person, so putting it in the hands of the child, responsible for the act of another child, getting possession of it without defendant's consent or knowledge. Even if the gun had been left lying on the ground in the yard of the defendant, and the Tabor boy had picked it up outside the house, and used it, the defendant would not have been responsible for the damage done by the boy. An axe is considered a dangerous weapon, but if one leaves an axe by his wood-pile, and a child comes into the yard, picks it up, and injures another with it, is the owner of the axe liable for damage because he has not put this deadly weapon under lock and key? And if it be granted that this air-gun loaded is a dangerous weapon, as is a gun loaded with powder and ball, would this fact make the defendant liable? I think not. Suppose a person, owning a shotgun, should put the same unloaded within the storm-door of his house, and a neighbor's boy, ten years of age, without the knowledge or consent of the owner, should pick up the gun, and obtain from the wife or some other member of the household a loaded cartridge, and take the gun out and discharge it, accidentally wounding someone, would the owner of the gun be responsible for the damage resulting to the injured person? To so hold him responsible would necessitate the keeping of unloaded fire-arms under lock and key, with the key in the possession at all times of the owner. This is not a case of leaving a torpedo or dynamite where it may be expected that children will find and play with it. An unloaded gun is harmless; a torpedo or dynamite is not, but is dangerous anywhere, and under all circumstances, to those not acquainted with the proper method of handling it, and liable to explode even in the hands of those who are expert in using it. In my opinion, it was not negligence *per se* for the defendant to buy this toy gun, and place it in the hands of his boy nine years of age; and there were too many intervening causes without the act or knowledge of the defendant, between the buying of the gun and the injury, to hold the defendant liable for its use in this case. If his own son had, in any manner, contributed to the accident, a different question would arise, upon which I express no opinion.

The judgment must be affirmed with costs.

The other Justices concurred.

KENTUCKY COURT OF APPEALS.

STANDARD OIL CO., *Appt.*,
v.
M. J. TIERNEY.

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

1. A shipper of naphtha described as "carbon oil" in the freight bill in barrels marked "unsafe for illuminating purposes" is liable to the conductor of the train who was injured by an explosion while in the car where the naphtha was, with a lamp, if he did not know what was in the barrels, although the carrier had been informed of their contents, unless the jury find that he had sufficient notice of the dangerous character of the substance.

NOTE.—*Excessive verdicts in suits for damages for personal injuries.*

While there is no fixed rule in the absence of statute, by which the maximum amount of damages to be allowed in a suit to recover for personal injuries can be determined, it may be interesting and helpful to collect the cases in which the courts have sustained or refused to sustain verdicts for amounts as large or larger than the limit of $10,000, suggested in the opinion in the principal case.

Thirty thousand dollars is not excessive for injuries to a strong and well man forty years old resulting in concussion of the spine causing chronic inflammation and an impairment of the faculties with the probability of paralysis and premature death. Harrold v. New York Elev. R. Co. 24 Hun, 184.

Twenty-five thousand dollars for injuries to an engineer young and earning good wages is not excessive where the injuries render him an almost helpless cripple and invalid for life. Hall v. Chicago, B. & N. R. Co. 46 Minn. 439.

Twenty-five thousand dollars is not excessive where plaintiff, formerly a healthy man, became almost a total wreck both physically and mentally. Chicago & E. R. Co. v. Holland, 18 Ill. App. 418.

Twenty-five thousand dollars was not excessive for injuries to a person thirty years old in good

See also 18 L. R. A. 759; 27 L. R. A. 583; 36 L. R. A. 586; 40 L. R. A. 528.

2. Evidence that plaintiff has a wife and child is not admissible in an action for personal injuries.

3. Evidence that wooden barrels are safe for shipping naphtha, and that it is ordinarily so shipped is admissible in an action for negligence in thus shipping it.

4. A subsequent change in the manner of branding naphtha cannot be proved in an action for negligence in shipping it improperly branded.

5. A verdict for $25.000 is excessive in an action for personal injuries by which a railroad conductor thirty years old was badly burned about the face so as to disfigure him for life and also lost the use of his left arm besides receiving some injury to his right hand and both feet.

(December 10, 1891.)

APPEAL by defendant from a judgment of the Louisville Law and Equity Court in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. **Humphrey & Davie** for appellant.

Messrs. **Willson & Thum,** for appellee:

The shipment of such dangerous substance as naphtha exposed to all the incidents of transportation is of itself gross negligence as matter of law.

Louisville Gas Co. v. *Gutenkuntz,* 82 Ky. 439; *Central Pass. R. Co.* v. *Kuhn,* 86 Ky. 583; *Louisville & N. R. Co.* v. *Mitchell,* 87 Ky. 337; *Delaware, L. & W. R. Co.* v. *Converse,* 139 U. S. 469, 35 L. ed. 213.

The evidence as to plaintiff's having a wife and child was properly admissible.

Louisville, C. & L. R. Co. v. *Mahony,* 7 Bush, 238.

At least the admission was not reversible error in case of gross negligence.

Chicago v. *O'Brennan,* 65 Ill. 163; *Coal R. Co.* v. *Tipton,* 5 Ky. L. Rep. 774.

The instructions as to the items of damages which might be considered cured any error in the admission of such evidence.

Civil Code, § 134; *Baltimore & O. R. Co.* v. *Shipley,* 31 Md. 368; *Chesapeake & O. R. Co.* v. *Reeves* (Ky.) 11 Ky. L. Rep. 14; *Gilbert* v. *Burtenshaw,* Cowp. 230.

The following authorities favor the admission of evidence as to the wife and child:

Winters v. *Hannibal & St. J. R. Co.* 39 Mo. 468; *Laing* v. *Colder,* 8 Pa. 479; 2 Rorer, Railroads, 1099; *Central Pass. R. Co.* v. *Kuhn,* 86 Ky. 578. *Contra, Pittsburg, Ft. W. & C. R. Co.* v. *Powers,* 74 Ill. 341; *Pennsylvania Co.* v. *Roy,* 102 U. S. 451, 26 L. ed. 141; *Chesapeake & O. R. Co.* v. *Reeves* (Ky.) 11 Ky. L. Rep. 14.

The damages were not excessive, as appears from the following authorities:

Gilbert v. *Burtenshaw,* Cowp. 230; 2 Sedgw. Damages, 653; *Becker* v. *Crow,* 7 Bush, 200; *Varble* v. *Bigley,* 14 Bush, 698; *Com.* v. *Springfield, M. & T. P. Co.* 10 Bush, 256; *Patrick* v. *Marshall,* 2 Bibb, 42; *Hickman* v. *Southerland,* 4 Bibb, 194; *Berg* v. *Chicago, M. & St. P. R. Co.* 50 Wis. 419 ($11,000); *Louisville & N. R. Co.* v. *Fox,* 11 Bush, 495 ($35,000, compromised, $14,999); *Houston & G. N. R. Co.* v. *Randall,* 50 Tex. 255 ($12,000); *Schultz* v.

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health, well educated, married, and whose family depended upon him for support, where after his injury he could do nothing and though he might live some years in suffering he would never improve physically. Alberti v. New York, L. E. & W. R. Co. 43 Hun, 421.

Twenty-five thousand dollars for the loss of a leg by a child three years and six months of age is not excessive. Ehrman v. Brooklyn City R. Co. 38 N. Y. S. R. 990.

Twenty-two thousand two hundred and fifty dollars are not so excessive as to cause the court to set aside the verdict in an action for damages by a woman who was struck by a locomotive engine which resulted in her losing one arm and in bruising and injuring the other one so as to greatly impair her health and memory. Shaw v. Boston & W. R. Corp. 8 Gray, 45.

Twenty thousand dollars is not excessive where the injuries were exceedingly painful, serious, and of a permanent nature, and the plaintiff was in his early manhood and engaged in an extensive and lucrative business, his share of the profits of which were $18,500 a year, which was impaired by his inability to give it requisite attention, and he was afflicted with bodily derangements which might measurably unfit him for the duties of his profession. Walker v. Erie R. Co. 63 Barb. 260.

Twenty thousand dollars is not excessive where there was evidence that the injured person, who before the accident was an industrious and able-bodied mechanic, is a wreck both in body and mind subject to epileptic fits, and his physical and mental condition render him unfit to labor, while it is probable that his sufferings will be permanent. International & G. N. R. Co. v. Brazzil, 73 Tex. 514.

Nineteen thousand dollars is not excessive where a married woman of twenty-eight was injured by falling into an excavation negligently left unguarded thereby inflicting great suffering and in all probability materially shortening her life. Groves v. Rochester, 39 Hun, 5.

Eighteen thousand five hundred dollars is not excessive for injuries to a boy seven years old by which both legs were so badly crushed that amputation was necessary and he required a constant attendant and was left in a state, both physically and mentally, such as to render his life a burden hard to bear. Heddles v. Chicago & N. W. R. Co. 77 Wis. 228.

Sixteen thousand six hundred and sixty-six dollars will not be set aside where the injured man was disabled for life and suffered in an 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. Galveston, H. & S. A. R. Co. v. Porfert, 72 Tex. 344.

Fifteen thousand six hundred and ninety-five dollars and sixteen cents is not excessive for severe injuries followed by pain, deformity, and inability to work. Schultz v. Third Ave. R. Co. 14 Jones & S. 211.

Fifteen thousand dollars is not excessive for injuries to a miner thirty-four years old who had no means of support except his occupation in a mine, where by the accident his right shoulder and some ribs were broken, his right arm disabled, a leg had to be amputated, and he was confined to his bed six weeks. Solen v. Virginia & T. R. Co. 13 Nev. 106.

Fifteen thousand dollars is not excessive for injuries to a physician which compelled him to abandon his practice, which had amounted to $2,500 a year and the injuries to his leg, back, and nervous system were of a permanent character. Woodbury v. District of Columbia, 3 Cent. Rep. 783, 5 Mackey, 127.

Fifteen thousand dollars is not excessive where a person is caught between railroad cars and has his pelvic bone crushed and his thigh broken in two places, his leg broken so that it is two inches shorter on recovery, and is otherwise seriously and per-

Third Ave. R. Co. 14 Jones & S. 211 ($15,000); *Chappin* v. *New Orleans & C. R. Co.* 17 La. Ann. 19 ($25,000); *Campbell* v. *Portland S. Co.* 62 Me. 552, 16 Am. Rep. 503 ($9,500); *Walker* v. *Erie R. Co.* 63 Barb. 260 ($20,000); *Barksdall* v. *New Orleans & C. R. Co.* 23 La. Ann. 180 ($15,000); *Boyce* v. *California S. Co.* 25 Cal. 460 ($16,500); *Belair* v. *Chicago & N. W. R. Co.* 43 Iowa, 662 ($11,000); *Porter* v. *Hannibal & St. J. R. Co.* 71 Mo. 66 ($10,000); *Harrold* v. *New York Elev. R. Co.* 34 Hun, 184 ($30,000); *Atchison, T. & S. F. R. Co.* v. *Moore*, 31 Kan. 197 ($10,000); *Chicago & N. W. R. Co.* v. *Jackson*, 55 Ill. 492 ($18,000); *Shaw* v. *Boston & W. R. Corp.* 8 Gray, 45 ($22,500); *Fair* v. *London & N. W. R. Co.* 21 L. T. 326 ($26,250); *Louisville & N. R. Co.* v. *Mitchell*, 87 Ky. 327 ($10,000 for crushing a foot and ankle); *Central Pass. R. Co.* v. *Kuhn*, 86 Ky. 579 (injury to skull, likely to last through life, general result in such cases epilepsy or weakness of mind, $5,000, sustained); *Louisville & N. R. Co.* v. *Sheets* (Ky.) 11 Ky. L. Rep. 781 ($4,000—loss of hand); *Louisville C. R. Co.* v. *Mercer* (Ky.) 11 Ky. L. Rep. 810 ($1,325—expulsion from street-car, affirmed); *Crosby* v. *Bradley* (Ky.) 11 Ky. L. Rep. 954 ($2,750—assault and battery, no great bodily injury, by boy on woman); *Louisville & N. R. Co.* v. *Brooks*, 83 Ky. 129 ($10,000—life of brakeman); *Sherley* v. *Billings*, 8 Bush, 155, 8 Am. Rep. 451 ($4,500 compensatory damages—assault and battery and loss of one eye); *Danville, L. & T. P. R. Co.* v. *Stewart*, 2 Met. (Ky.) 122 ($4,000—fractured thigh); *Maysville & L. R. R. Co.* v. *Herrick*, 13 Bush, 127 ($5,000—broken leg; suffering and probable permanent injury); *Van Zant* v. *Jones*, 3 Dana, 465 ("must be so enormous as to indicate passion, etc."); *Louisville & P. R. Co.* v. *Smith*, 2 Duvall, 556 ($4,750—cut and bruised right arm); *Treanor* v. *Donahoe*, 9 Cush. 228 ($1,800—libel); *Letton* v. *Young*, 2 Met. 553 ($4,000—slander); *Blanchard* v. *Morris*, 15 Ill. 35 ($700—assault, etc.); *Goddard* v. *Grand Trunk R. Co.* 57 Me. 202, 2 Am. Rep. 39 ($4,850—for brutal misconduct of brakeman in threatening sick passenger); *Crusoe* v. *Butler*, 36 Miss. 160 ($4,500 for carrying plaintiff 400 yards beyond station and refusing to carry him back); *Kentucky M. R. Co.* v. *Stump* (Ky.) 12 Ky. L. Rep. 316; *Louisville S. R. Co.* v. *Minogue* (Ky.) 12 Ky. L. Rep. 373; *Alberti* v. *New York, L. E. & W. R. Co.* 6 L. R. A. 765, 118 N. Y. 77 (verdict $25,000, affirmed, question not made).

Mr. **William Lindsay** also for appellee.

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

In April of the year 1888 the Standard Oil Company, at its place of business in the city of Louisville, loaded two cars belonging to the Louisville & Nashville Railroad Company with oil. One of the cars contained 65 barrels; 35 of those barrels being naphtha oil, and the remainder the ordinary illuminating oil. This car was loaded by the company, the car being on a side track near its warehouse, belonging to the Louisville & Nashville Railroad, and was intended to be shipped south. The testimony shows that the cars were known as "cattle cars," with open lattices; and that offered by the defense shows that the oil was in bar-

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manently injured. Louisville, N. O. & T. R. Co. v. Thompson, 64 Miss. 584.

Fifteen thousand dollars is not excessive for injuries to a man thirty-six years of age who had always been well and healthy, where the injury was to the nerves of the back and to the spinal column and was permanent and had continued to be very painful and necessitated constant care and attendance and his lower limbs were so paralyzed that he had little use of them. Reddon v. Union Pac. R. Co. 5 Utah, 344.

Fifteen thousand dollars is not excessive in favor of a person of good health and vigorous constitution earning from $165 to $195 per month, who, by the injuries, was incapacitated to perform any useful or profitable labor and had become a physical wreck. Texas Pac. R. Co. v. Johnson, 76 Tex. 421; Texas Pac. R. Co. v. Overheiser, Id. 457.

Fifteen thousand dollars is not excessive for injuries totally disabling for work a robust young man twenty-seven years of age. Chicago, B. & Q. R. Co. v. Sullivan, 21 Ill. App. 580.

Fifteen thousand dollars is not excessive for injuries to a physician whose expectation of life was twenty-three years, and whose income was from $1,200 to $1,500 per year, and who, by his injuries, 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.

Fifteen thousand dollars for the loss of a leg by a boy sixteen years old is not excessive. Chicago City R. Co. v. Wilcox, 33 Ill. App. 450.

Fifteen thousand dollars is not excessive where the injuries prevent the person from standing erect, creating a physical deformity for life and incapacitating him for labor, besides causing more or less pain. Schneider v. Second Ave. R. Co. 39 N. Y. S. R. 370.

Fourteen thousand dollars is not excessive where the injured person before the injury was full of life and vigor and has been made a physical wreck and will spend the remainder of his life in suffering and without comfort, and has expended a large sum for medical aid. Wallace v. Vacuum Oil Co. 35 N. Y. S. R. 697.

Fourteen thousand dollars is not excessive in favor of a conductor and acting brakeman earning $100 a month who was injured so seriously that the flesh on one leg was shoved up so that the bone stuck out and the foot was crushed while he was also crushed in the chest and his ribs were torn loose from the breast bone and he suffered amputation four different times causing him great pain and making him a perfect wreck, permanently incapacitated for any labor. Joliet, A. & N. R. Co. v. Velie, 36 Ill. App. 450.

Thirteen thousand dollars is not excessive in the case of a healthy man of thirty-nine able to earn $100 or more per month, resulting in the loss of both legs in such a manner that artificial limbs cannot be adjusted and he must drag himself along upon his knees. Colorado M. R. Co. v. O'Brien (Colo.) 19 Ry. & Corp. L. J. 351.

Twelve thousand dollars is not excessive for personal injuries which made a man a cripple for life and compelled him to suffer great mental and physical pain. Texas M. R. Co. v. Douglas, 73 Tex. 525.

Twelve thousand dollars is not excessive for injuries to a telegraph operator which caused suffering and expenses amounting to $2,000 when his compensation had been about $30 a month and his arm was amputated below the elbow impairing his usefulness as an operator to the extent of one half, although he suffered no loss of income while undergoing treatment and the nature of the case allowed only compensatory damages. Dougherty v. Missouri R. Co. 97 Mo. 647.

Twelve thousand dollars is not excessive for the loss of a leg by a boy of five years. Akersloot v. Second Ave. R. Co. 40 N. Y. S. R. 231.

rels that had been carefully inspected, and such barrels as were generally used in shipping naphtha or other products of petroleum, and the barrels containing naphtha branded, as they maintain, as required by the statute, "Unsafe for illuminating purposes." The head of the barrel was painted white, with this brand in black letters in the center. The cars were taken from this switch by the Louisville & Nashville Railroad by its freight engine or train in charge of the appellee, who was the conductor. After leaving Louisville, when some twenty or thirty miles from the city, the appellee discovered that oil was leaking from some one of the barrels, and after passing one or two depots, he directed one of the employés to ascertain where the leak was. There is a window about two feet square at the end of the car, to which the employé climbed with his lantern, and, passing through this window into the car, discovered the barrel that was leaking. The appellee being informed by the employé of the condition of the barrel, the two with a lamp each, passed through this window into the car, and finding that they could not handle the barrel, the appellee called for another employé, who passed through this window with his lamp. They set their lamps on the heads of the barrels, and proceeded to raise the leaking barrel from the floor, when by the motion of the barrel, or its peculiar position when being moved, the naphtha spouted out in a stream as large as a pencil, took fire from the burning lamp, and seriously injured the appellee. Whether the liquid was thrown on the lamp or the explosion took place from the vapor produced by the naphtha is a mooted question. The appellee was badly burned, and instituted this action against the appellant to recover damages for the injury, alleging that this naphtha was shipped as carbon oil and that he had no notice whatever of the inflammable character of the fluid. He claimed damages to the amount of $25,000, and that sum the jury awarded him. He was badly burned about the face, so much so as to disfigure him for life; suffered much pain and anguish for several months; lost the use of his left arm, and his right hand is to some extent injured; his feet were also badly burned; but the principal injury after his recovery consists in the loss of the use of his left arm, and the disfigurement of his face.

The defense relies upon various grounds for a reversal: (1) That it took all the necessary care and precaution in shipping the oil; that it marked it "Unsafe for illuminating purposes;" that the carrier knew the car contained barrels of naphtha; and that the entire product of petroleum had been shipped and was being shipped as carbon oil under an agreement to that effect with the railroad company; and that it was the duty of that company to have notified its employés of the danger. (2) That the court erred in admitting incompetent testimony, and in denying to the defendant the right to introduce testimony that was competent. (3) In giving erroneous instructions to the

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Eleven thousand five hundred dollars is not excessive in case of a person eighty years old where he was thrown down by the negligence of a street-car driver and injured so that he could not attend to business and suffered great pain having to undergo expensive surgical treatment and have a large portion of one of his feet amputated. Jordon v. New York, H. & H. R. Co. 30 N. Y. S. R. 670.

Eleven thousand dollars is not excessive for injuries to a young man thirty years old engaged in an employment having a regular system of promotions and earning $540 a year, which permanently disabled him. Bielair v. Chicago & N. W. R. Co. 43 Iowa, 662.

Eleven thousand dollars is not excessive in case of injuries to a strong, healthy laboring man having a wife and four children which necessitated the amputation of one leg above the knee, and who a year after the accident was unable to work, and testified that if he walked, stood, sat or kept his leg down for any length of time he became dizzy. Berg v. Chicago, M. & St. P. R. Co. 50 Wis. 419.

Ten thousand one hundred and seventy-five dollars to a physician sixty years of age having an annual income of $2,500 from his profession for injuries which made him a physical wreck is not excessive. Gratiot v. Missouri Pac. R. Co. (Mo.) May 19, 1891.

Ten thousand dollars is not excessive for severe injuries followed by pain, deformity, and inability to work. Porter v. Hannibal & St. J. R. Co. 71 Mo. 66, 36 Am. Rep. 454.

Ten thousand dollars is not excessive for loss of a leg by an accident which caused very severe pain and suffering. Atchison, T. & S. F. R. Co. v. Moore, 31 Kan. 197.

Ten thousand dollars is not excessive for injuries to a physician earning $2,000 a year which was by the accident cut off. Carthage Turnp. Co. v. Andrews, 102 Ind. 138, 52 Am. Rep. 653.

Ten thousand dollars is not excessive where a woman was injured in a collision by which both legs were broken, one in several places and the lower part of the bone crushed and she was otherwise severely bruised and the injuries were permanent. The George Washington v. Cavan, 76 U. S. 9 Wall. 513, 19 L. ed. 787.

Ten thousand dollars is not excessive where a person was struck down in the noon of life and made a paralytic with little or no hope according to medical testimony of amendment in the future. United States v. Juniata, 93 U. S. 337, 23 L. ed. 930.

Ten thousand dollars is not excessive for the loss of an arm by a boy belonging to a laboring family. Ketchum v. Texas & Pac. R. Co. 38 La. Ann. 777.

Ten thousand dollars is not excessive for personal injuries causing permanent loss of health and ability to labor. Columbia & P. R. Co. v. Hawthorne, 3 Wash. Ter. 353; Gulf, C. & S. F. R. Co. v. Silliphant, 70 Tex. 623.

Ten thousand dollars is not excessive where the injured person is a young man and the injury unfits him for pursuing his calling, and his wages about equaled the interest on that sum. Bowers v. Union Pac. R. Co. 4 Utah, 215.

Ten thousand dollars is not excessive where the injured person was lamed and deformed in one leg for life, his shoulder disabled, and he was rendered wholly unable to perform manual labor. Daniels v. Union Pac. R. Co. (Utah) March 1, 1890.

Ten thousand dollars is not excessive for incurable injuries which deprive a person of power to earn a livelihood and which have necessitated medical treatment for several years. Ketter v. Manhattan Elev. R. Co. 36 N. Y. S. R. 611.

Ten thousand dollars is not excessive in favor of a boy of seven years for the loss of one leg and the permanent weakening of the other. Ft. Worth & D. C. R. Co. v. Robertson (Tex.) June 16, 1891.

Verdicts held excessive.

In contrast with the above cases are the following, in which the court has either set aside or reduced a verdict for excessiveness. In this list have been placed verdicts less than $10,000 in amount for the obvious reason that if the smaller amount

jury, and in refusing to give defendant's instructions. (4) The damages are excessive.

There were numerous instructions asked by the plaintiff and the defendant, all of which were refused, and the instructions prepared and given by the trial judge. In determining the questions raised by the instructions it will be necessary to notice the testimony for the defense that was excluded, as this testimony, if admitted, must have an important bearing on the issue in establishing at least its good faith on the part of the appellant in delivering this naphtha to the carrier. It was offered by way of defense on the part of the appellant that the railroad company, whose agent and employé the conductor was at the time of the injury, knew that this car contained naphtha, and, if not, that under an agreement with the company through its officials it had been shipping on its cars barrels of naphtha for a long period, branded in the manner specified, with bills of lading under the general designation of "carbon oil," the railroad company knowing that the term embraced naphtha, and taking it with that understanding, charging the same freight, and shipping it as any other oil. The court refused to permit this testimony to go to the jury, and this is one of the errors complained of. It is evident that if the owner, when shipping explosive or combustible substances, fails to notify the carrier or his agent of the danger attending its use when transporting it, and an injury results to the employés of the carrier, the owner is liable for the injury sustained; but when the carrier is notified of the dangerous article or product, (and there is none more so than naphtha when coming in contact with a burning lamp or with fire,) and there is marked on the head of the barrel that which must necessarily apprise the carrier of its dangerous nature, and the carrier in his ordinary line of business undertakes to transport it, and an injury occurs to one of its employés, the question then arises, Is the shipper liable because knowledge was not brought home to its employé? We think not. This, however, is not the question arising in this case. It is the mode of shipping and branding this naphtha, adopted by both parties under an agreement, or implied understanding at least, between them, from which this liability to the employé springs, if any exists. The railroad company had been in the habit of receiving and shipping this naphtha as carbon oil under an arrangement with the appellant, with a brand placed on the head of each barrel. "Unsafe for illuminating purposes." There was an implied, if not a positive, duty on the part of both corporations to notify those who handled this substance of its dangerous character, and no arrangement between them, although made in the best of faith, by which dynamite was to be shipped as powder or naphtha as carbon oil, should protect the appellant from a violation of this duty it owed to the hands or employés whose duty it was to keep it secure, and to handle it when necessary. The freight bill or paper by which this plaintiff was guided showed that it was oil, or

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is regarded as excessive, the fate of a larger verdict in similar cases is clearly indicated.

Thirty thousand dollars for injuries resulting in the amputation of a boy's legs, one at the ankle and the other at the knee, is excessive. Heddles v. Chicago & N. W. R. Co. 74 Wis. 239.

Twenty-five thousand dollars as actual damages and $16,927.40 exemplary damages, was held excessive in Gulf, C. & S. F. R. Co. v. Gordon, 70 Tex. 80, although a *remittitur* was entered for exemplary damages.

Twenty-five thousand dollars was reduced to $5,000 where the injury resulted in inflammation of the hip joint which caused great pain and subjected the injured person to loss of time and business and required large expenses for medical assistance, but left him able to go about without crutches fully able to earn his livelihood and well disposed to enjoy life, needing only proper treatment for a complete cure. Peyton v. Texas Pac. R. Co. 41 La. Ann. 861.

Twenty thousand seven hundred and fifty dollars is excessive for injuries to the ankle joint of a man fifty-four years old which required amputation of the foot and resulted in inability to walk without crutches attended by much pain and inconvenience, where he was able to attend to his business as a merchant except where manual labor was required, and there was no proof of injury to his business; the court, however, consented to let the verdict stand for $10,750. Kennon v. Gilmer, 5 Mont. 257, 51 Am. Rep. 45.

Eighteen thousand dollars is excessive for injury to a brakeman which almost wholly unfits him for business where interest thereon at the legal rate would amount to $1,800, which is three times as much as he would have earned in his business. Chicago & N. W. R. Co. v. Jackson, 55 Ill. 497.

Fifteen thousand dollars was reduced to $2,000 where the injury was to the hand of a person earning $60 a month and about the age of forty-three, and the usefulness of the hand was not entirely impaired. Bomar v. Louisiana, M. & S. R. Co. 42 La. Ann. 983.

Fifteen thousand dollars was reduced to $5,000 where the injury was to a woman fifty-three years old and probably crippled her for life owing to injury to the spinal cord, causing intermittent suffering and an inability to walk. Furnish v. Missouri Pac. R. Co. 102 Mo. 438.

A verdict of $15,000 was set aside where the evidence of actual damage did not justify it. International & G. N. R. Co. v. Underwood, 64 Tex. 465.

Fourteen thousand eight hundred and thirty-three dollars for injuries to a man twenty-one years old, thus depriving him of the employment from which he realized over $50 per month, was excessive. Southwestern R. Co. v. Singleton, 66 Ga. 252.

Ten thousand dollars for injuries to a man seventy years old, by which he was confined to his house for several months, and which caused a shortening of the leg two inches, was excessive. Chicago West. Div. R. Co. v. Haviland, 12 Ill. App. 561.

Ten thousand dollars is excessive for a compound fracture of a leg. Union Pac. R. Co. v. Hause, 1 Wyo. Ter. 27.

Ten thousand dollars in favor of a married woman for pain and suffering resulting from injuries causing nervous prostration and the reappearance of a certain internal inclination from which she had been free for about three years is excessive. Lockwood v. Twenty-third St. R. Co. 15 Daly, 374.

Ten thousand dollars for injuries to a stout healthy woman by which her leg was broken, her arm dislocated, her back, shoulder and side injured so that she had not recovered and was able to do little work at the end of two years, and was unable to walk for four months after the accident, was reduced to $5,000. Missouri Pac. R. Co. v. Texas Pac. R. Co. 41 Fed. Rep. 311.

Ten thousand dollars is excessive where the proof shows that defendant's negligence was but slight

carbon oil; and it seems to us the only question for the jury to decide is, "Was the brand on these barrels sufficient notice to the appellant of the dangerous substance within them?" The dangerous quality of naphtha requires more vigilance and care in shipping and handling it than almost any other explosive substance, and as a means of great precaution it would be prudent to give other warning than the mere name of the substance. As an explosive, it is said, the danger is ten times greater than that of gunpowder. It ignites as soon as the blaze is applied to it, and becomes explosive when the vapor from it mingles with the atmosphere in which there happens to be a burning lamp or other light. The conductor might not have known the danger if the word "naphtha" had been placed on these barrels; still it would doubtless have put him on inquiry, and shown that it was not carbon oil, and at the same time removed all question of negligence from the door of the appellant. The contention by counsel is, that the brand, "Unsafe for illuminating purposes," was intended by the statute as the warning to be given those who handled naphtha. Whether this provision of the statute applies to naphtha, or to the production from petroleum less dangerous and known as "oil," is uncertain, and it is manifest that the car purporting to be loaded with carbon oil from the freight bill did not apprise the appellee of the danger. While the testimony of the agreement between the two corporations as to the manner of shipping should have gone to the jury to show an absence of bad faith on the part of the appellant, still it was its duty, looking to the very great danger connected with the movement of such a substance on trains, to have so branded the barrels as to have informed the conductor of the inflammable character of the substance they contained, and, unless they were so marked as that one exercising ordinary care and prudence with reference to his own personal safety, and whose duty it was to handle the barrels, should have ascertained the danger, the appellant is liable; the converse of the proposition being that, if so branded as that one of ordinary care and prudence should have discovered the danger, the verdict should be for the defendant. While the instructions given by the court below embrace this view of the case, this is the issue to be tried. The appellee had to deal with and deliver this naphtha, and he should have been informed in some way that the barrels contained it.

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and plaintiff's was greater. Central R. Co. v. Smith, 76 Ga. 230.

Ten thousand dollars is excessive for injuries to a brakeman, which resulted in the amputation of his leg about ten inches below the knee, where there was no evidence as to what he was earning at the time of the injury or what he had paid or had contracted to pay out by reason of the injury, or that he lost any time, or that his ability to earn money was impaired. Missouri Pac. R. Co. v. Dwyer, 36 Kan. 58.

Ten thousand dollars for compensatory and punitive damages is excessive although the injuries were caused by gross negligence and are serious causing several months' confinement, a severe nervous shock, and partial paralysis of one leg, where it is not clearly shown that the injuries are permanent. Louisville S. R. Co. v. Minogue, (Ky.) 12 Ky. L. Rep. 378.

Eight thousand dollars were held excessive and reduced to $6,000 for loss of a hand by a cooper who was at the time of the accident employed as a teamster where his own negligence contributed to the injury and there was little evidence of his former or present capacity for labor, and none as to the amount of his ordinary earnings. Murray v. Hudson River R. Co. 47 Barb. 196.

Nine thousand two hundred and fifty dollars was held excessive for injuries to an engineer which resulted in concussion of the spinal cord producing a diseased condition of the nervous system where he was most of the time free from pain and able to engage in business, though not as an engineer. Sioux City & P. R. Co. v. Finlayson, 16 Neb. 578, 49 Am. Rep. 724.

Seven thousand five hundred dollars was reduced to $4,500 where the injuries resulted in the loss of a leg by a negro who would probably earn $300 a year and was twenty-four years of age. Lampkins v. Vicksburg S. & P. R. Co. 42 La. Ann. 997.

Six thousand six hundred dollars was reduced to $3,000 for the fracture of the arm of a child five years old which remained permanently disfigured. Ryder v. New York, 18 Jones & S. 230.

Six thousand five hundred dollars for the loss of a thumb and forefinger is excessive. Kansas Pac. R. Co. v. Peavey, 34 Kan. 472.

Six thousand dollars for injuries to a woman not permanent in their nature, which deprived her temporarily of the opportunity of earning $9 a week, is excessive where no reasonable estimate of the pain and suffering could justify it. Langley v. Sixth Ave. R. Co. 16 Jones & S. 542.

Six thousand dollars for injuries to a common laborer employed in digging clay, which permitted him to resume lighter work in a short time and to continue it at intervals, although suffering from the hurt, is excessive. Chicago Anderson P. B. Co. v. Sodkowiak, 34 Ill. App. 312.

Six thousand dollars was held excessive and reduced to $1,000 where a passenger on a railroad had his leg broken and received some flesh wounds in the head and was restored to sound health after ten months, the only permanent result being that one leg was somewhat shorter than the other. Clapp v. Hudson River R. Co. 19 Barb. 461.

Five thousand dollars is excessive where the injury was a temporary loss of the sight of one eye. Tinney v. New Jersey S. B. Co. 5 Lans. 507.

Five thousand dollars was reduced to $3,000 where the injury was caused by falling into an excavation and consisted of a laceration of the right arm whereby the hand became somewhat smaller and flexed the wrist joint, the circulation being impaired and a slight use of the hand being possible, and the evidence showed that the hand and arm might be restored to a great extent. Orleans v. Perry, 24 Neb. 851.

Four thousand five hundred dollars is excessive for injuries resulting in the fracture of an arm where the only evidence of permanence of the injury is the testimony of plaintiff and a fellow laborer that he could not do the work of an able-bodied man in his occupation as grain stower in an elevator. Chicago West. Div. R. Co. v. Hughes, 87 Ill. 94.

Four thousand dollars is excessive for a mere broken leg where the fracture had perfectly united and would never again cause trouble. South Covington & C. St. R. Co. v. Ware, 84 Ky. 267.

Three thousand six hundred and thirty-eight dollars in favor of a seaman who fell through an open hatchway was reduced to $1,200, where although seriously wounded he was discharged from the hospital in three months with his wounds healed; although four years later he swore that he still felt the effects of his fall but was uncorroborated by his own medical experts, and it was shown that he exhibited no signs of existing or permanent injury. The Grecian Monarch, 32 Fed. Rep. 855. H. P. F.

There are other questions raised as to the admission and rejection of testimony. It was shown that the appellee had a wife and child, over the objections of the appellant. Were this fact may not have influenced the finding, it should not have been admitted. The defense offered to prove that the Louisville & Nashville Railroad Company, whose conductor the plaintiff was, had been informed that the words "carbon oil," contained in the bill of lading, meant naphtha. This was refused, and properly, because an employé of even more than ordinary intelligence would not have attached such a meaning to this bill of lading. The court, however, should have admitted the testimony showing that wooden barrels were safe, and that naphtha was ordinarily shipped in that way by prudent business men.

Another error complained of by the appellant is in the trial court permitting the appellee to prove that after this accident both corporations changed the manner of branding the barrels and labeling the cars. There seems to be some diversity of opinion on this point, the weight of authority being opposed to the admission of this character of testimony as a means of showing neglect on the part of the defendant. The Minnesota court, in *Morse* v. *Minneapolis & St. L. R. Co.*, 30 Minn. 465, said: "We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence." In *Lang* v. *Sanger*, 76 Wis. 71, in an action for an injury sustained by reason of defective machinery, the court held that it was erroneous to show that the defects were repaired after the accident. In *Terre Haute & I. R. Co.* v. *Clem*, 123 Ind. 15, 7 L. R. A. 588, it is said: "To declare such evidence competent is to offer an inducement to omit the use of such care as new information may suggest, and to deter persons from doing what the new experience informs them may be done to prevent the possibility of future accidents." Other cases determine that such evidence is open to the objection that it raises distinct and independent issues for the consideration of the jury. *Nalley* v. *Hartford Carpet Co.* 51 Conn. 524, 50 Am. Rep. 47; *Payne* v. *Troy & B. R. Co.* 9 Hun, 526; *Ely* v. *St. Louis, K. C. & N. R. Co.* 77 Mo. 34; *Reed* v. *New York Cent. R. Co.* 45 N. Y. 574.

There is still another question in this case that every case of final resort approaches with reluctance, and that is the one of excessive damages. The verdict in this case is for $25,000,—the entire sum claimed in the petition. As said by Mr. Sedgwick in his work on the Measure of Damages: "It is one thing for a court to administer its own measure of damages in a case properly before it, and quite another thing to set aside the verdict of a jury merely because it exceeds that measure." "There must," says he, "be some mistake of the principles upon which the damages have been estimated, or some improper motives or feelings or bias influencing the jury." Section 1320. It is not for this court to determine the amount the plaintiff is entitled to recover in this character of action, and the verdict in every case for an injury to the person must depend upon the facts and circumstances connected with the commission of the wrong in the particular case, the verdict and judgment in no one case being a criterion by which the court and jury are to be controlled in all cases of a similar character. It was the province of the jury to fix the compensation to which the appellee was entitled, and the court in the instructions given placed properly before them the mode of ascertaining the damages if, from the evidence, the appellee was entitled to recover. The jury reached the conclusion that the appellant was guilty of such an omission of duty as entitled the appellee to a verdict, but was not authorized to increase the amount of recovery by reason of any willful design on the part of the appellant to injure the appellee. The mode of ascertaining the compensation to which the plaintiff was entitled is found in instruction No. 11, given by the court. The jury was told that, "if they find for the plaintiff, they will give him such damages as they believe from the evidence will fairly compensate him for any suffering, mental or physical, heretofore experienced by him, directly resulting from the injuries complained of, and for any suffering or disability that they may believe from the testimony is reasonably certain he will experience in the future as the direct and necessary result of said injuries, and for any reduction in his power to earn money in the future, if such reduction there be directly resulting from the injury, not exceeding twenty-five thousand dollars, claimed in the petition." The appellee at the time of the injury was about thirty years of age; was a vigorous man, and a laborious and useful conductor. His conduct at the time of the burning, as described by the witnesses, deserved admiration and created a sympathy with both judge and jury. His appearance before the jury after the injury, with a disfigured face and limbs as described in the testimony, doubtless excited a feeling with every juror, however honest, that drove them to fix the verdict beyond the proper limit of compensation. We are to judge of this question by the light of the cases before us involving verdicts where compensation was the measure of damages, or even verdicts based upon the willful neglect of the defendant, and where punitive damages were sought and recovered. It is by comparison with verdict after verdict in this State where more flagrant wrongs were committed and punitive damages claimed, in which juries composed of men, as we have the right to assume, of like intelligence, passion and feeling, have made their findings for a much less amount; and without enumerating the cases it will be found that $10,000 is the extent to which a verdict has been sustained by this court. Besides, in the case of *Louisville & N. R. Co.* v. *Fox*, reported in 11 Bush, 495, where the verdict was for $30,000, and set aside as excessive, most of the cases are referred to. While we do not pretend to adjudge that no verdict would or ought to be sustained for a larger amount than $10,000, we do say that some moderation should be indulged in when arriving at verdicts in this class of cases. As said by the court in *Hedden* v. *Chicago & N. W. R. Co.*, 74 Wis. 239, where the injury resulted in the amputation of both legs of the plaintiff, and a verdict for $30,000 was set aside: "No rational being would change places with the injured man for an amount of gold that would fill the rooms of the court, yet no lawyer would contend that such is the legal

measure of damages. Courts and juries must deal with such questions in a deliberate and practical sense."

In our opinion, the verdict in this case is excessive, and it is therefore *reversed and remanded*, with directions to set it aside, and for proceedings consistent with this opinion.

MARYLAND COURT OF APPEALS.

PHILIP STONE, Admr., etc., of Thomas E. Herrick, Deceased, *Appt.*,

v.

MUTUAL FIRE INSURANCE CO., of Montgomery County.

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

After the election of an insurer to rebuild under a policy giving it an option so to do, and the letting of a contract for the work, although the premises were already advertised for sale under a mortgage, the insurer is not liable to garnishment for the amount of the insurance by creditors of the insured.

(November 12, 1891.)

APPEAL by complainant from a judgment of the Circuit Court for Montgomery County in favor of defendant in a garnishment proceeding to reach money which defendant was alleged to have in its possession belonging to Harvey C. Fawcett, against whom complainant had recovered a judgment. *Affirmed.*

The facts are stated in the opinion.

Argued before Alvey, *Ch. J.*, and Irving, Miller, Bryan, McSherry and Fowler, *JJ.*

Messrs. **Philip D. Laird, H. W. Talbott** and **Peter & Henderson** for appellant.

Messrs. **Albert & Warner** and **Anderson & Bouic** for appellee.

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

On the 1st of August, 1868, Harvey C. Fawcett was insured against loss by fire by a policy issued by the Mutual Fire Insurance Company of Montgomery County. The policy contained a clause providing that all the property and securities of said company should be forever subject and liable to pay said Fawcett, his heirs and assigns, the loss which might happen by reason of fire to the property insured, "unless the said Company shall within ninety days after proof of such damage or loss, proceed to repair, rebuild, or replace the same in as good order, condition, and quality as it was before it was so injured by fire." The policy further provided that whatever the said Company had paid the amount mentioned therein, or had rebuilt or replaced any buildings destroyed by fire as herein provided, said policy should be utterly "null and void, and of none effect, either in law or equity." About fifteen years after the date of this policy, Mr. Fawcett, together with his wife, mortgaged his farm and the insured buildings thereon to Mrs. E. H. Riggs to secure the payment of a considerable sum of money, in which mortgage there was contained the usual power of sale in case of default; and some years after the execution of said mortgage the appellant recovered his judgment against Fawcett in the Circuit Court for Montgomery County. On the 14th of April, 1890, the dwelling house, one of the buildings covered by the policy of insurance, was totally destroyed by fire; and the Insurance Company, the appellee here, on the 15th of May following, by a resolution of its board of directors, determined to adjust the claim of Fawcett by rebuilding in accordance with the provisions of the policy before referred to. Subsequent to the passage of this resolution, the appellant had an attachment issued on his judgment, and directed it to be laid in the hands of the appellee to effect the insurance money claimed by the appellant to be due to Fawcett by reason of the burning of his dwelling-house. It appears, therefore, that the policy of insurance on which the appellee Company bases its contentions long antedated both the mortgage under which the land was sold and the judgment on which the appellant issued his attachment. It also appears that the proof of loss was returned on the 29th of April, 1890, and that within ninety days, the time limited by the policy, the appellee had determined to rebuild; and finally that, in pursuance of this resolution, a valid contract had been made by the appellee with a builder to erect the new building on the site of the old one.

The statement of the foregoing facts, it seems to us, is sufficient to show that the appellant, claiming here under his attachment, has no standing, for it is apparent that, under the rebuilding clause contained in the insurance policy, there never was a debt due by the appellee to Fawcett, nor any sum of money in its hands which he could legally claim, or which could be reached by his creditors by means of an attachment or otherwise. The Insurance Company having duly exercised its election to rebuild, it is clear neither Fawcett nor his creditors can, under the terms of the policy, claim the insurance money. It would certainly be a great hardship and an apparent injustice to subject the Insurance Company, being guilty of no fraud, to a suit on the part of the insured to recover on the policy, on the theory that the rebuilding clause is void, and at the same time render it liable to an action by the builder to recover damages for breach of the building contract, which it must be admitted it had the right to make, under the circumstances of this case. For it is not contended that the title to the land on which the new building was to be erected had ceased to be in Fawcett when the Insurance Company made the contract with the builder, but it is said the property was then advertised under the mortgage already mentioned. But it does not follow that the land would be sold or cease to be owned by Fawcett because it was advertised; and if the

NOTE.—For *note* on election of insurer to rebuild, See Quarles v. Clayton (Tenn.) 3 L. R. A. 179.

appellee had waited until the mortgage sale had been finally ratified, before exercising its election to rebuild, it might have then been too late to avail itself of that valuable right under the policy. There being nothing in the hands of the Insurance Company which Fawcett could legally claim, it follows, of course, that the attachment must fail. *Myer* v. *Liverpool, L. & G. Ins. Co.* 40 Md. 600. Cases may, no doubt, arise in which the insured, either from peculiar circumstances or fraud in the exercise of the right to rebuild, should have some remedy. And this is well illustrated by the case of *Anderson* v. *Commercial Union Assur. Co.*, 55 L. J. Q. B. 146, so much relied on by the appellant both in his brief and oral argument. But, so far from being an authority sustaining the contention of the appellant, it is directly to the contrary. In the case just mentioned, the policy contained a clause similiar to the one in question, giving the insurers the discretion to repair and replace the machinery insured. The building in which the machinery was located and used, when insured, as well as the machinery itself, was damaged by fire; and the former ceased to be occupied, or in the possession of the assured, because he failed to pay the stipulated rent. Against the protest of the insured the insurer persisted in reinstating and repairing the machinery in the said building. An action on the policy was brought, under these circumstances, by the insured to recover the amount of loss by fire; and it was held that both parties were wrong,—the defendant, that is, the insurance company, because, although it had not lost its right to reinstate the machinery, it should not have been reinstated in the same place, but in the same State, in which it was before the fire; and the plaintiff, that is, the insured, was wrong because he did not remove the machinery to some reasonable place, to be reinstated and repaired by the insurer. But all the judges held that, whatever rights the insured might have, he could not recover, in his action on the policy, the amount of the loss. And we think there is as little reason as there is authority to sustain the contention of the appellant in this case, namely that he is entitled to recover the amount which it had been ascertained the new building would cost. Where there is a failure to rebuild after an election so to do, it has been held the proper remedy of the assured is, not an action *ex contractu* on the policy, for the amount of loss by fire, but an action to recover damages for not rebuilding, and that the amount of the insurance mentioned in the policy ceases to be the measure of damages. *Brown* v. *Metropolitan C. L. Ins. Soc.* 1 El. & El. 853; *Morrell* v. *Irving F. Ins. Co.* 33 N. Y. 429, 88 Am. Dec. 396.

It will be unnecessary to pass upon the various exceptions taken to the rulings of the court below on the admissibility of testimony, for they are all involved in the action of the court upon the prayers; and it follows, from what we have said, that the appellant's prayers were properly rejected, and those of the appellee were properly granted.

Judgment affirmed.

ILLINOIS SUPREME COURT.

John FRITTS, *Appt.*,
v.
Elizabeth FRITTS.

(.....Ill.....)

1. A wife's refusal to have sexual intercourse with her husband is not willful desertion within the meaning of a statute authorizing a divorce in case a husband or wife has "willfully deserted or abstained himself or herself" from the other for two years.

2. One act of force and violence preceded by deliberate insult and abuse, even though committed wantonly and without provocation, does not constitute "extreme and

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NOTE.—*Refusal of marital intercourse as ground for divorce.*

A wife's refusal to allow her husband to have unrestrained carnal intercourse with her, and her declarations that she will never bear children to him, will not justify a divorce on the ground of cruel and barbarous treatment. Magill v. Magill, 3 Paige, 23.

Her refusal of sexual intercourse does not constitute cruelty which will justify granting him a divorce. Holyoke v. Holyoke, 3 New Eng. Rep. 109, 73 Me. 404; Cowles v. Cowles, 112 Mass. 238.

Neither is it ground for annulling the marriage. Cowles v. Cowles, *supra*.

Nor is it desertion. Southwick v. Southwick, 97 Mass. 327; Steele v. Steele, 1 McArth. 505; Segelbaum v. Segelbaum, 39 Minn. 278.

At least not "utter desertion." Stewart v. Stewart, 3 New Eng. Rep. 827, 73 Me. 548, 37 Am. Rep. 822.

And such refusal does not justify him in deserting her. Reid v. Reid, 21 N. J. Eq. 331.

The same rule applies to such a refusal on the part of the husband; the fact that he occupies a separate bed will not give the wife a divorce on the ground of cruelty. Gordon v. Gordon, 48 Pa. 228; Eshbach v. Eshbach, 23 Pa. 343; D'Aguilar v. D'Aguilar, 1 Hagg. Eccl. 773.

But when, in addition to refusal of sexual intercourse, a husband denies to his wife his companionship and refuses to live with her, she is entitled to a divorce for desertion, although he has continued to contribute to her support. Magrath v. Magrath, 166 Mass. 577, 4 Am. Rep. 572.

Also a husband's rejection of his wife from his bed with refusal to recognize her as his wife, and charging her with infidelity to her marriage vow, was held to be "such indignities offered to her person as to render her condition intolerable or life burdensome. Cobb v. Cobb, 56 N. C. 322.

So where the husband after a certain date and for some time before deserting the family residence ceased to occupy the bedroom of his wife and slept on a lounge in the kitchen, and had no matrimonial intercourse, companionship or communication with his wife whatever, it was held that his desertion began at that date. Stein v. Stein, 5 Colo. 55.

A husband's withdrawal, without cause, from cohabitation with his wife, although he continues to support her, is held in England to justify a judicial separation on the ground of his "desertion" under

See also 25 L. R. A. 697; 31 L. R. A. 608; 47 L. R. A. 750.

repeated cruelty" which will justify a divorce under the Illinois statute.

(November 4, 1891.)

APPEAL by complainant from a judgment of the Appellate Court, Fourth District, affirming a judgment of the Circuit Court for Pope County in favor of defendant in an action brought to obtain a divorce for the alleged causes of desertion and extreme cruelty. *Affirmed.*

The facts are stated in the opinion.

Messrs. **James C. Courtney** and **Sheridan & Moore,** for appellant:

A wife, who, from motives of dislike, and for no other cause, persistently refuses to permit the husband to have sexual intercourse with her for nine years is guilty of desertion or abandonment.

1 Bishop, Mar. & Div. § 779; *Heermance* v. *James*, 47 Barb. 120.

At common law there were four causes only for divorce *a vinculo matrimonii*, viz., pre-contract, consanguinity, affinity and impotency; adultery and cruelty were causes for divorce *a mensa et thoro*, from bed and board.

Harman v. *Harman*, 16 Ill. 88; 6 Bacon, Abr. 466; 1 Bl. Com. 146.

The remedy for withdrawal from intercourse was ample and complete, and consisted of a suit for the restitution of conjugal right, by which the party injured could compel the other by imprisonment to return to cohabitation. The offense was called subtraction or desertion.

2 Bouvier, Law Dict. 472; 1 Bishop, Mar. & Div. § 771; Stephen, Common Law, 2; 3 Bl. Com. 94.

This remedy provided by the common law has never been adopted in this State. Bishop says that it is a relict of the dark ages, and that no State has adopted it.

1 Bishop, Mar. & Div. § 29; *Coverdill* v. *Coverdill*, 3 Harr. (Del.) 13.

One malicious blow struck with a deadly weapon, preceded and followed for many years by frequent threats to poison, and all other imaginable cruelty that can be devised, is a sufficient cause for divorce.

Ward v. *Ward*, 103 Ill. 483; *Harman* v. *Harman*, 16 Ill. 85; *Evans* v. *Evans*, 1 Hagg. Consist. 35; *Turbitt* v. *Turbitt*, 21 Ill. 438; *Von Glahn* v. *Von Glahn*, 46 Ill. 138; *Embree* v. *Embree*, 53 Ill. 395; *Coursey* v. *Coursey*, 60 Ill. 188; *Farnham* v. *Farnham*, 73 Ill. 499; *Henderson* v. *Henderson*, 88 Ill. 248; *Sharp* v. *Sharp*, 116 Ill. 509. See 1 Bishop, Mar. & Div. 6th ed. § 730.

Mr. **James C. Courtney,** also filed a separate brief for appellant:

The refusal of the wife to have sexual intercourse with the husband, without reasonable cause, for the space of two years is desertion under the statute.

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the Divorce Act, 20 & 21 Vict. chap. 85, § 16. Yeatman v. Yeatman, 1 Prob. & Div. 489.

In this case the husband took the wife to Germany and left her there with a relative and the court says: "A wife is entitled to her husband's society and the protection of his name and home in cohabitation." Evidently this was more than a case of mere refusal of sexual intercourse. It must be remembered also that this is a not a case of absolute divorce but of mere judicial separation.

A statute making the joining of a religious society which teaches that the relation of husband and wife is unlawful with refusal of cohabitation a ground of divorce, applies where a husband or wife joins the Shakers, who teach that the contract of marriage is lawful but that cohabitation is not. Dyer v. Dyer, 5 N. H. 271; Fitts v. Fitts, 46 N. H. 184.

Mr. Joel Prentiss Bishop in his work on Marriage, Divorce and Separation, persists in the doctrine advocated in his earlier work on the same subject, which is in conflict with the decisions of the courts. After criticising the decisions of Maine and Massachusetts, which are among those above referred to, he says in § 1682 that in accord with just principle "the courts of numbers of our states, hold the conduct we are considering to be desertion;" and he cites in support of his statement Steele v. Steele, 1 McArth. 506; Heermance v. James, 47 Barb. 120, 126, 52 Am. Rep. 388, *note;* Sisemore v. Sisemore, 17 Or. 542, and Magill v. Magill, 3 Pittsb. 25.

But of these cases Magill v. Magill and Steele v. Steele decide exactly the contrary of what he alleges, while Heermance v. James is not in any sense a decision on the question, but is concerning the right to sue a third person for alienation of affections. In the remaining case of Sisemore v. Sisemore the decision was that a wife had deserted her husband where she by acts, although not by express words, persistently refused to return to his home with him.

In the case of Magill v. Magill, *supra*, the court not only explicitly denied a divorce, which was not asked on the ground of desertion at all, but said, in reference to the alleged grounds of divorce: "In what respect the refusal by the wife to allow the husband access to her bed can be termed cruel and barbarous I cannot conceive; nor having a reference to the proper meaning of terms can I see how such treatment will render his life burdensome or condition intolerable."

It thus appears that the cases which he cites to support his text utterly fail to do so, and that several of them flatly contradict it.

He further cites Fishli v. Fishli, 2 Litt. 337, 341, and Moss v. Moss, 24 N. C. 55, "in addition to the more direct rulings," as he says.

In the case of Moss v. Moss, 24 N. C. 55, there is nothing to justify the claim that denial of marital intercourse constitutes desertion. A divorce was there denied the husband for the wife's adultery because it was committed after he had practically driven her from his house, and explicitly declared that he would from thenceforth never receive her as his wife because, as he falsely alleged, the child of which she was pregnant at the time of the marriage was not his.

In Fishli v. Fishli, 2 Litt. 337, the decision was that the right to a divorce for abandonment by the husband was not defeated by his offer to support her in his own house or elsewhere, which offer was accompanied with groundless insinuations against her chastity and was made under circumstances which showed that it was a mere artifice to defeat her right to a divorce. The court said: "The offer was not to live with her in the relation of husband and wife, and she was not bound to accept of an offer to stand in any other relation." This which is the only case that even apparently supports his text manifestly falls far short of saying that mere refusal of sexual intercourse would constitute desertion; and yet Mr. Bishop says: "The court's refusal to admit this as ending the desertion is a direct affirmance by solemn adjudication of what we have seen to be better doctrine." R. A. R.

1 Bishop, Mar. & Div. §§ 779, 782; *Heermance* v. *James*, 47 Barb. 120; *Fishli* v. *Fishli*, 3 Litt. 337.

One wanton blow inflicted, preceded and followed by threats to kill, coupled with conduct which may raise a reasonable apprehension of bodily hurt rendering cohabitation unsafe, is extreme and repeated cruelty.

Harman v. *Harman*, 16 Ill. 85; *Ward* v. *Ward*, 103 Ill. 484; *Kennedy* v. *Kennedy*, 73 N. Y. 372; *Bebe* v. *Bebe*, 10 Iowa, 133; *Briggs* v. *Briggs*, 20 Mich. 34; *Butler* v. *Butler*, 1 Pars. Eq. Cas. 329; *Moyler* v. *Moyler*, 11 Ala. 620.

Mr. **W. S. Morris**, with *Mr.* **W. B. Morris**, for appellee:

Marriage is not a means to sexual commerce.

1 Blackstone's Commentaries, bk. 1, p. 455, bottom paging 362, says: "The main end and design of marriage is the ascertainment and fixing upon some one certain person to whom the care, the protection, the maintenance and the education of children may belong." And again at the same page, "The main end of marriage is the protection of infants."

See also 1 Bouvier, Law Dict. p. 101.

Counsel for complainant are in error when they agree with Bishop that the point in this case has never been decided.

A withdrawal of the person for the statutory period and refusing sexual intercourse during that time do not amount to desertion.

Southwick v. *Southwick*, 97 Mass. 327; *Eshbach* v. *Eshbach*, 23 Pa. 353; Pritchard, Dig. *Desertion*, *note 4*; 2 Kent, Com. Holmes' ed. part IV. *127, *note 1*.

The statutes under which these decisions were had are identical with our own except upon the one single question of time, which is required in them to be of greater duration than with us.

2 Kent, Com. Holmes' ed. part IV. *97, *note a*.

The request to instruct that whenever force and violence, preceded by deliberate insult and abuse, have been once or twice wantonly and without provocation used by the wife to her husband, then the wife would be guilty in law of extreme and repeated cruelty does not comport with the latest expression of the views of the supreme court of this State on this point.

Ward v. *Ward*, 103 Ill. 483; *Poor* v. *Poor*, 8 N. H. 307, 29 Am. Dec. 664; *Kennedy* v. *Kennedy*, 73 N. Y. 269; *Harman* v. *Harman*, 16 Ill. 99.

This expression of the court in *Harman* v. *Harman*, *supra*, from *Evans* v. *Evans*, 1 Hagg. Consist. 35, is to be taken with reference to the fact that in that case (*Evans* v. *Evans*, *supra*), all that was prayed was a decree of divorce *a mensa et thoro*.

2 Kent, Com. *125.

Verbal threats are not sufficient to establish extreme and repeated cruelty.

Birkby v. *Birkby*, 15 Ill. 121; *Vignos* v. *Vignos*, 14 Ill. 187; *Embree* v. *Embree*, 53 Ill. 305.

When the legislature has said that the cruelty must be extreme and repeated to constitute grounds of divorce, the court cannot say that a single act will suffice.

De La Hay v. *De La Hay*, 21 Ill. 254; *Henderson* v. *Henderson*, 88 Ill. 250.

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

This is a bill filed in the Circuit Court of Pope County on April 17, 1889, by the appellant against the appellee, his wife, praying for a divorce from her upon the alleged grounds that she "has willfully absented herself from your orator, without any reasonable cause, for the space of two years, and has been guilty of extreme and repeated cruelty." The defendant answered, denying the allegations of the bill, and replication was filed to the answer. The verdict of the jury and the judgment of the trial court were in favor of the defendant. The present appeal is from the judgment of the appellate court affirming the judgment of the circuit court.

The first question in the case arises out of the refusal of the trial court to give the 3d, 4th, 5th, 6th, and 7th instructions asked by the complainant below. These instructions, in substance, announce the doctrine that, where a wife refuses, without good cause, to have sexual intercourse with her husband for a period of two years or more, such conduct amounts to willful desertion. Mr. Bishop, in his very able work upon Marriage and Divorce, gives this doctrine his support. 1 Bishop, Mar. & Div. 6th ed. §§ 778, 778*a*, 779. It is not, however, sustained by well-considered authorities. The cases favoring it, to which we have been referred, are *Heermance* v. *James*, 47 Barb. 120; *Fishli* v. *Fishli*, 2 Litt. 337; *Sizemore* v. *Sizemore*, 17 Or. 542. In no one of these cases did the question fairly arise whether the neglect of this one of the marital duties, without the neglect of any other of such duties, by itself constituted willful desertion. The *Heermance Case* was an action for damages for depriving the plaintiff of the affections, comfort, fellowship, society and aid and assistance of his wife in his domestic affairs, and arose upon demurrer to the complaint filed in the action. In the *Fishli Case* the husband had abandoned his wife for the space of two years, and sought to meet the charge of such abandonment by setting up that, a few weeks before the expiration of the two years, he had made an offer to support his wife in his own house, or in lodgings, as she might prefer. In the *Sizemore Case* it appeared that the offense of the wife was not so much the one now under consideration as her refusal to remove to a new home selected by her husband in another county. The doctrine contended for rests mainly on the idea that sexual intercourse is "the central element of marriage, to which the rest is but ancillary;" and while it may be urged with no little force that the refusal of such intercourse by one of the parties to the marriage contract is such a violation of marital duty that it ought to be regarded as a good ground of divorce, yet the question before us is simply as to the meaning of our statute. The Divorce Act provides that a divorce may be granted where either party "has willfully deserted or absented himself or herself from the husband or wife, without any reasonable cause, for the space of two years." Rev. Stat. chap. 40, § 1. We think that the willful desertion here referred to was intended to mean the abnegation of all

the duties of the marital relation, and not of one alone.

In *Carter* v. *Carter*, 62 Ill. 439, "desertion" is treated as synonymous with absence," and absence involves the neglect of other duties than the one in question. The Supreme Court of Maine, in speaking upon this subject, says: "Sexual intercourse is only one marital right or duty. There are many. There are many other important rights and duties. The obligations the parties assume to each other, and to society, are not dependent on this single one. Many of these obligations, fidelity, sobriety, kind treatment, etc., have legal sanctions, and can be enforced, or their breach remedied by legal process." *Stewart* v. *Stewart*, 78 Me. 548, 3 New Eng. Rep. 387, 57 Am. Rep 822. The view of this subject which commends itself to our approval is that announced by the Supreme Court of Massachusetts in *Southwick* v. *Southwick*, 97 Mass. 327, where *Chief Justice* Bigelow says: "The word 'desertion' in the statute does not signify merely a refusal of matrimonial intercourse, which would be a breach or violation of a single conjugal or marital duty or obligation only, but it imports a cessation of cohabitation, a refusal to live together, which involves an abnegation of all the duties and obligations resulting from the marriage contract." The latter case of *Magrath* v. *Magrath*, 103 Mass. 577, 4 Am. Rep. 579, does not overrule the *Southwick Case*, in so far as the latter holds that the refusal of matrimonial intercourse is not of itself sufficient to justify a divorce on the ground of desertion. The divorce for desertion was allowed in the *Magrath Case*, because, in addition to the husband's intentional and permanent abandonment of all matrimonial intercourse with his wife, he withdrew from her his companionship and the protection of his home.

It is there said, after referring to the *Southwick Case*: "The case at bar goes much further. Here there has been, for the time required by the statute, an abnegation on the part of the husband of all the chief duties and obligations which result from the marriage contract and distinguish it from others. There is no more important right of the wife than that which secures to her in the marriage relation the companionship of her husband and the protection of his home." The same view has been adopted in Maine. In *Stewart* v. *Stewart*, *supra*, it is said: "This case therefore presents the question whether the Legislature, by that statute, intended to authorize a divorce where one party, without good cause, denies the other sexual intercourse for three consecutive years. . . . It has been expressly held that such refusal is not the desertion contemplated by the statutes authorizing divorces for desertion. *Southwick* v. *Southwick*, 97 Mass. 327; *Steele* v. *Steele*, 1 MacArth. 505. . . . We do not think our Legislature intended to call the denial of this one obligation an 'utter desertion,' while the party might be faithfully, and perhaps meritoriously, fulfilling all the other marital obligations." Some importance is attached in the *Stewart Case* to the fact that the Maine statute uses the word "utter" before "desertion." But we do not think that the absence of that word from our statute affects the construction of its language with reference to the point now under consideration. It is a mistake to say, as it is stated in *Stewart* v. *Stewart*, *supra*, and in Bishop, Mar. Div. & Sep. § 1680, that the *Southwick Case* is based upon a statute providing for "utter" desertion. The *Southwick Case* was decided in 1867, before the Massachusetts Statute of 1882, referred to in *Stewart* v. *Stewart*, was passed, and the statute in force in Massachusetts in 1867 did not use the word "utter," as is shown by the remarks of the court in *Southwick* v *Southwick*, *supra*. In our opinion, refusal of sexual intercourse alone cannot be construed to mean willful desertion without reasonable cause, under the Illinois statute, any more than it can be construed to mean utter desertion under the Maine statute. In harmony with the Massachusetts and Maine cases is the case of *Steele* v. *Steele*, *supra*, where it was the opinion of the court that a husband could not maintain a suit for divorce solely on the ground that his wife had denied matrimonial intercourse to him.

In 2 Kent, Com. 12th ed. § 27, *128, *note 1*, it is said: "Keeping a separate bed-chamber in the same house, and refusing to have sexual intercourse for the statutory time, is not desertion. *Southwick* v. *Southwick*, 97 Mass. 327; *Eshbach* v. *Eshbach*, 23 Pa. 343. See Pritchard, Dig. *Desertion*, *note 4*." At common law, whenever either the husband or wife was guilty of the injury of subtraction, or lived separate from the other without any sufficient reason, a suit could be brought in the ecclesiastical courts for a restitution of conjugal rights. But those courts made a distinction between "marital intercourse," or sexual intercourse, and "marital cohabitation," or living together. They enforced the latter, but not the former. They merely require the offending party to return and live with the libelant. In such proceedings, the cessation of cohabitation warranted a decree, but the suit for restitution of conjugal rights could not be maintained on the ground of a refusal of marital intercourse. Desertion, in such suits, was held to signify a refusal to live together; and, in this country, the action for divorce on the ground of desertion is a substitute for the English proceeding for the restitution of conjugal rights. Bl. Com. bk. 3, *94; 1 Bishop, Mar. & Div. 6th ed. § 778; *Orme* v. *Orme*, 2 Addams, Eccl. 382; *Forster* v. *Forster*, 1 Hagg. Const. 144, 154; *Stewart* v. *Stewart*, *supra*; *Southwick* v. *Southwick*, *supra*.

It will be noted that under our statute the desertion or absence which will justify a divorce must be "without any reasonable cause." It has been held that the "reasonable cause which justifies a wife's desertion and abandonment of her husband must be such as would entitle her to a divorce." *Eshbach* v. *Eshbach*, *supra*. It has also been held that the refusal of marital intercourse without sufficient reason will not justify desertion. *Reid* v. *Reid*, 21 N. J. Eq. 331; *Stewart* v. *Stewart*, *supra*; Browne, Com. Div. & Ali. p. 153.

It follows that the denial of marital intercourse will not entitle a husband or wife to a divorce, and therefore cannot be regarded as such desertion as is contemplated by the statute. In this State, courts derive their power to decree divorces solely from the statute, and

for such causes only as have been designated by the Legislature. For the reason thus stated, we are of the opinion that the court below committed no error in refusing to give the instructions numbered 3, 4, 5, 6 and 7, which were asked by the complainant.

The appellant assigns as error that the trial court refused to give the second instruction asked by the complainant, and gave the eighteenth instruction asked by defendant. The second and last clause of said second instruction is as follows: "Wherever force and violence, preceded by deliberate insult and abuse, have been once or twice, wantonly and without provocation, used by the wife to her husband, then the wife would be guilty in law of extreme and repeated cruelty." This clause announces the proposition that one act of force and violence, preceded by insult and abuse, constitutes extreme and repeated cruelty. The eighteenth instruction given for the defendant announced the contrary of such proposition. We do not think that the error thus complained of is well assigned. In the late work of Bishop on Marriage, Divorce and Separation, (vol. 1, § 1608), it is said: "The words in Illinois are 'extreme and repeated cruelty;' and it is plain that a single act, though it may be 'extreme' in point of cruelty, is not therefore 'repeated.' The consequence of which is that there can be no one act of violence which alone will bring a case within this statute." In *Vignos* v. *Vignos*, 15 Ill. 186, one act of violence, together with unkind treatment and the use of harsh language, was held to come far short of what the statute means by "extreme and repeated cruelty." In *Harman* v. *Harman*, 16 Ill. 85, we said: "This court in *Birkby* v. *Birkby*, 15 Ill. 120, and in *Vignos* v. *Vignos*, 15 Ill. 186, has held that one instance of personal violence did not constitute a statutory cause, although coupled with abusive and derogatory language." In *De La Hay* v. *De La Hay*, 21 Ill. 252, we said: "And when the Legislature has said that cruelty must be extreme and repeated, to constitute a ground, the courts cannot say that a single act will suffice." See also *Turbitt* v. *Turbitt*, 21 Ill. 438. In *Embree* v. *Embree*, 53 Ill. 394, this court, speaking through *Mr. Justice* Walker, said: "It is a positive requirement of the statute that there shall be extreme and repeated cruelty to authorize the courts to dissolve the marriage tie. One act has not, in this State, been held to answer the requirements of the statute; and the uniform construction given to the Act by this court . . . is that the cruelty must consist in physical violence, and not in angry or abusive epithets, or even profane language." In *Farnham* v. *Farnham*, 73 Ill. 497, although abusive language, used by a husband towards his wife in private, and in the presence of strangers, which consisted of false charges against her virtue and fidelity to her marriage vows, was allowed to be considered by the jury as characterizing his acts of physical cruelty, yet two distinct acts of personal violence to the wife were clearly proven. In *Henderson* v. *Henderson*, 88 Ill. 248, we again said: "This court . . . has held that it [extreme and repeated cruelty] must be bodily harm, in contradistinction to mere harsh, or even opprobrious, language, or mere mental suffering; that the cruelty must be grave, and endanger life or limb, or, at any rate, subject the person to danger of great bodily harm." See also *Coursey* v. *Coursey*, 60 Ill. 186. In *Ward* v. *Ward*, 103 Ill. 477, although it was said that extreme and protracted suffering might be produced primarily by operating on the mind alone, and that threats of physical violence and false charges of adultery, maliciously made, were competent evidence to prove cruelty, yet it is at the same time the plain doctrine of that case that the threats must be such as raise a reasonable apprehension of bodily hurt, and must be accompanied or followed by acts of actual, malicious, physical violence, and must serve to magnify the atrocity of such acts. It is also there said that any willful misconduct of the husband which endangers the life or health of the wife, which exposes her to bodily hazard and intolerable hardship, and renders cohabitation unsafe, is extreme cruelty, and that "many acts" are not necessary to constitute such extreme cruelty; yet it is nowhere intimated that there can be repeated cruelty without more than one act of violence. On the contrary, the *Farnham Case* is quoted with approval in the *Ward Case*, and the proof in the latter case showed that the husband had committed four or five distinct assaults and batteries upon his wife, apparently without provocation, and, in addition thereto, had insulted and abused her constantly for three years. Even in *Sharp* v. *Sharp*, 116 Ill. 509, where the circumstances were peculiar and of an unusual character, it was shown that the husband had been guilty of at least two acts of physical violence, although they were separated from each other by a considerable period of time. In the case at bar the husband is charging the wife with extreme and repeated cruelty, and, in such case, "it is not sufficient to show acts of violence on her part towards him, so long as there is no reason to suppose he will not be able to protect himself by a proper exercise of his marital powers." *De La Hay* v. *De La Hay*, *supra*.

We do not think that the court erred in refusing to instruct the jury that one act of force and violence, preceded by deliberate insult and abuse, even though committed wantonly and without provocation, was sufficient to constitute extreme and repeated cruelty. Several other objections are made by the appellant, based upon the giving or refusal of instructions. After a careful examination of all the instructions in connection with the evidence, we find no sufficient reason for disturbing the result reached by the lower courts.

The judgment of the Appellate Court is affirmed.

PENNSYLVANIA SUPREME COURT.

LAFLIN & RAND POWDER CO.
v.
J. J. STEYTLER *et al.*, Doing Business as the Youghiogheny Coal Co., Limited, *Appts.*

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

1. The "full name" of a member of a limited partnership is signed to the statement as required by the Act of 1874 when signed in the form habitually used by him in business and by which he is known in the community, although it consists only of a surname and initials.

2. A description of several tracts of land acquired by different titles but merged together for coal works with a valuation as one tract constitutes a sufficient description and valuation in a schedule of property subscribed to a limited partnership.

3. A description of buildings, engines and other property belonging to coal works is sufficient in a schedule of property subscribed to a limited partnership if it identifies the property so far that a creditor or sheriff could go upon the land and identify or levy upon it.

(January 4, 1892.)

APPEAL by defendants from a judgment of the Court of Common Pleas, No. 1, for Allegheny County, in favor of plaintiff in an action brought to render defendants personally liable for debts due by a firm which they alleged to be a limited partnership. *Reversed.*

The schedule of the property contributed to the capital stock of the concern set out several tracts of land described separately, but valued together in a lump as a coal mine, and also buildings, tools, vehicles, machinery, etc., and was signed by all but one of the partners with initials, followed by the surname, without giving the Christian and middle names in full.

Further facts are stated in the opinion.

Messrs. **W. F. McCook** and **James C. Doty**, for appellants:

At common law, a man may adopt any name he pleases. He may change it from time to time, and may accept and make conveyances, "contract, sue and be sued by his reputed or his adopted name."

Linton v. *First Nat. Bank of Kittanning*, 10 Fed. Rep. 894; *Bill* v. *Sun Print. & Pub. Co.* 10 Jones & S. 567.

We have been unable to find any case growing out of the partnership (limited) statutes in New York, Virginia or England, where such

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NOTE.—*The acquisition and use by an individual of a name.*

The law in regard to names is perhaps as good an illustration as may be found of the elasticity of the common law and its capacity to meet the requirements of increasing population and civilization and the demands of business.

Formerly the Christian name was the more important of the two. *Re* Snook, 2 Hilt. 503.

Coke states that in grants it was requisite that the purchaser be designated by his name of baptism and his surname, and that special heed be taken to the name of baptism, for that a man cannot have two names of baptism as he may have diverse surnames. But if the grant was to one by description he might take although his Christian name was mistaken. And he might receive a new name at confirmation which could be lawfully used instead of the Christian name. Co. Litt. 3a.

And that seems to have been the limit of his power to change his Christian name. The rigor with which a person was held to the use of the name received at baptism is illustrated by the following decisions:

An indictment against Elizabeth Newman *alias* Judith Hancock was quashed because a person could not have two Christian names. Rex v. Newman, 1 Raym. 562.

A process against Evanum *alias* Ievanum Loyd is void because he cannot have two Christian names. Loyd's Case, Noy, 135. See also East Skidmore v. Vaudstevan, Cro. Eliz. 56.

A bond entered into by Edmund Leusage under the name of Edward Leusage is void. Kent v. Wichall, Owen, 48.

And where Edward Watkins was obligated and Edmund Watkins sued, there could be no recovery. Watkins v. Oliver, Cro. Jac. 558.

One signing a bond must be sued by the name which he signed. Ryckman v. Shotbolt, 3 Dyer, 279.

Chief Justice Popham in Button v. Wrightman, Poph. 56, in speaking of grants, said: "The law is not precise in the case of surnames but for the Christian name this ought always to be perfect."

A person might have different surnames and he would be held to be estopped to deny that a surname which he used in a deed is his. Bacon, Abr. *Misnomer* A, citing 3 Henry VI. 25; 2 Rolle, Abr. 146.

Form of the Christian name.

The doctrine that there could be but one Christian name seems to have been broadened so as to exclude the acquisition of a name consisting of two words or of a word and a letter or initial.

By the common law a full name consists of one Christian or given name and one surname or patronymic, and the two constitute the legal name of the person. The middle names or initials do not affect the legal name and they may be inserted or not, or a wrong initial may be inserted in a deed or contract without affecting its validity. Schofield v. Jennings, 68 Ind. 222.

The law knows of only one Christian name. Franklin v. Talmadge, 5 Johns. 84; Roosevelt v. Gardinier, 2 Cow. 463.

The Christian or first name is in law denominated the proper name; and a person can have but one, for middle or added names are not regarded. *Re* Snook, 2 Hilt. 502.

The middle name of a person is no part of his name. State v. Martin, 10 Mo. 391.

An initial letter between the Christian and surname is no part of either. Bratton v. Seymour, 4 Watts, 329; Isaacs v. Wile, 12 Vt. 674; Hart v. Lindsey, 17 N. H. 235, 43 Am. Dec. 597; Allen v. Taylor, 26 Vt. 598; Bietch v. Johnson, 40 Ill. 118; Thompson v. Lee, 21 Ill. 242.

Of course if the middle initial is no part of the name its use or omission, or even a mistake in regard to it, is immaterial, and so it has been held.

The omission or insertion of the middle name or of the initial letter of that name in a deed is immaterial. Games v. Stiles, 39 U. S. 14 Pet. 327, 10 L. ed. 478; Fink v. Manhattan R. Co. 29 N. Y. S. R. 153.

That one described as Margaret A. Giddings in a deed signed it as Margaret S. Giddings is immaterial. Erskine v. Davis, 25 Ill. 255.

Where it was doubtful whether the middle letter

14 L. R. A.

See also 16 L. R. A. 429; 17 L. R. A. 354; 19 L. R. A. 82; 22 L. R. A. 573; 23 L. R. A. 818; 26 L. R. A. 721; 27 L. R. A. 74; 43 L. R. A. 654.

associations exist, covering the question in controversy in this case. A statute of Georgia requires that the names of the panel of jurors shall be delivered to the defendant in capital cases before the trial. Upon the question being raised before trial that the name of a juryman called to serve in the trial was not given the prisoner, but only his initials, the objection was overruled and the defendant convicted, with the juryman sitting who had been objected to.

Minor v. *State*, 63 Ga. 318. See also *Fields* v. *State*, 52 Ala. 348.

The statutes of New York require that elections for public offices shall be by ballot, "which ballot shall contain the name" of the candidate, and that "the inspectors shall set down in writing the 'names' of the persons voted for." Henry F. Yates was a candidate, and votes were cast for H. F. Yates, and were received by the court upon proof that he was so known in the community.

People v. *Ferguson*, 8 Cow. 102.

In the following cases, where statutes required a true bill to be returned, "signed by" or "under the hand" of the foreman, initials were sustained as equivalent to the Christian name of the foreman.

Com. v. *Hamilton*, 15 Gray, 480; *Easterling* v. *State*, 35 Miss. 210; *State* v. *Taggart*, 38 Me. 298; *Anderson* v. *State*, 26 Ind. 89; *State* v. *Groome*, 10 Iowa, 308.

Messrs. **J. S. Ferguson** and **E. G. Ferguson**, for appellee:

If parties seek to have all the advantages of a partnership, and yet limit their liability as to creditors, they must comply strictly with the Act.

Maloney v. *Bruce*, 94 Pa. 252; *Eliot* v. *Himrod*, 108 Pa. 569; *Hite Nat. Gas Co's App.* 10 Cent. Rep. 805, 118 Pa. 436; *Hill* v. *Slatter*, 127 Pa. 145.

When the Legislature said that they should set out their full names, it is no answer to admit that they have not set out their full names and then say that they have set out the names as they usually wrote them. A full name consists of one Christian or given name and one surname or patronymic; the two, using the Christian name first and the surname last, constitutes the legal name of the person.

Schofield v. *Jennings*, 68 Ind. 233; *Vawter* v. *Gilliland*, 55 Ind. 278; *Frank* v. *Lexie*, 5 Robt. 599.

The plain object of the provision in the supplementary Act was to enable the creditors to ascertain precisely of what the property consisted, and to judge of its value. It is no defense that the creditors had actual knowl-

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of the name under which plaintiff contracted was "W" or "H" the court held that it was immaterial since the letter was no part of his name. Milk v. Christie, 1 Hill, 102.

A service of notice by publication is not void because of the insertion of the wrong initial between plaintiff's Christian and surnames. Morgan v. Woods, 33 Ind. 24.

The omission of the initial letter of the middle name in the appointment of a justice of the peace is immaterial and he may officiate under such appointment. Alexander v. Wilmorth, 2 Aik. 413.

The omission of the middle letter from the name of a witness is immaterial. Sullivan v. State, 6 Tex. App. 333.

A man's name may be forged by a signature which leaves out the middle letter of it. Gotobed's Case, 6 City Hall Recorder, 25.

Where one enrolled in a militia company as J. P. appeared and answered to his name, the claim that his true name was J. A. F. is no defense to a prosecution for not being duly equipped. Wood v. Fletcher, 3 N. H. 61.

The rule that a Christian name must consist of but one word has not, however, been universally adopted. It has been held that a man may be known by two or more names which taken together constitute his Christian name. But it cannot be claimed that he is commonly known by a name composed of an appellate word preceded or followed by a letter only. King v. Hutchins, 28 N. H. 540.

In Massachusetts the middle name or initial is a part of a person's name and cannot be disregarded. Parker v. Parker, 6 New Eng. Rep. 114, 146 Mass. 339.

Where Charles Jones was the Christian name given to a person by the name of Hall he cannot be lawfully enrolled in a militia company by the name of Charles Hall. Com. v. Hall, 3 Pick. 262.

The right to use a letter singly or in combination with another letter or with a word as a Christian name has been recognized although courts are not yet agreed that it may be done, and as appears from the cases cited above the weight of authority may be said to be against it.

It has been held that I. Shakspeare may be assumed by the court to be a man's Christian name. Lomax v. Landells, 6 C. B. 577.

So it was held that a consonant cannot be taken to be the Christian name of a person; hence a declaration against John M. Knott is demurrable. Kinnersley v. Knott, 7 C. B. 989.

But in Reg. v. Dale, 5 Eng. L. & Eq. 360, 15 Jur. 657, *Lord* Campbell said he could not agree that a consonant could not be a Christian name while a vowel could be, and held that Lee B. & L. H. might be Christian names.

In this country a man may take the letters A. W. for his first name; for there is no union between church and state and no obligation on parents to baptise their children; the first name may be as often changed as the patronymic. City Council v. King, 4 McCord, L. 487.

So J. W. may constitute the Christian name of a person. Tweedy v. Jarvis, 27 Conn. 42.

"*Junior*" *and* "*senior*."

It has been held that if father and son have the same name a mention of it prima facie refers to the father. Lepiot v. Browne, 1 Salk. 7; Sweeting v. Fowler, 1 Stark. 106; Hussey v. Hussey, 1 Comyn, 251; Wilson v. Stubs, Hob. 330a.

In consequence of this doctrine some early cases held that if it is desired to designate the son "Jr." must be added. State v. Vittum, 9 N. H. 522.

So where father and son of the same name reside in the same town it seems that the omission of "Jr." in a writ against the son is good cause of abatement. Zuill v. Bradley, Quincy, 6.

Although the elder of two persons of the same name need not be designated specially as such when referred to. Rex v. Bailey, 7 Car. & P. 264.

And the weight of authority is that "Junior" is no part of a man's name. Jameson v. Isaacs, 12 Vt. 611; State v. Grant, 21 Me. 171; Brainard v. Stilphin, 6 Vt. 12; Coit v. Starkweather, 8 Conn. 290.

So a daughter of the same name as her mother may be designated by the name without the word "Junior." Ging v. Pesce, 3 Barn. & Ald. 579.

One to whom a note is assigned without the addition of the word "Junior" to his name may give a

edge of the facts required to be set out on the recorded statement.

Stehle v. *Strong*, 128 Pa. 315.

A general description of the extent of the property, or a lumping valuation, is not such a schedule as the Act requires.

Maloney v. *Bruce*, 94 Pa. 249.

The law contemplates property available for the business of the company and the payment of its debts.

Vanhorne v. *Corcoran*, 4 L. R. A. 386, 127 Pa. 265.

The question of what constitutes the full name is further developed in a brief filed by Messrs. John S. Ferguson, E. G. Ferguson and James H. Porte, in the case of *Carroll* v. *Gearing*, argued at the same term with this one.

The effect of designating a candidate for election by his initials has been variously decided.

People v. *Cicott*, 16 Mich. 283, 97 Am. Dec. 141; *People* v. *Ferguson*, 8 Cow. 102.

On examination, however, it will be found that where the initials were held to be sufficient such ruling was based upon the proposition that, the identity of the person being established, the citizen voting should not be disfranchised by reason of the informality.

Men sue and are sued every day by their initials. After judgment no advantage can be taken of this fact. But in the case of the plaintiff, the defendant at the beginning of the suit could compel him to amend by setting out his Christian name.

Walgamood v. *Randolph*, 22 Neb. 493; *Fisher* v. *Northrup*, 7 L. R. A. 629, 79 Mich. 247.

In this State it was said that an initial letter interposed betwixt the Christian and surname is no part of either.

Bratton v. *Seymour*, 4 Watts, 329.

On the other hand, it is held in Massachusetts that the middle name is part of the name.

Com. v. *Shearman*, 11 Cush. 546.

Even in Pennsylvania the omission of the middle letter in a name in the judgment index is fatal to a lien.

Hutchinson's App. 92 Pa. 186.

A man may have divers names at divers times, but not divers Christian names.

Co. Litt. 3i.

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

The Limited Association Act of 24 June, 1874, was a wide departure from the principles of the common law governing partnerships and the liability of the individual partners to the firm creditors. It was not the first, nor has it been the last, of such changes. On the contrary, it is but one step in a line of concessions to the business views and habits of a commer-

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good title by assigning it with the word added to his name. Johnson v. Ellison, 4 Munroe, 527.

The younger of two persons bearing the same name may properly be enrolled in a militia company under his name with the word "Second" added as well as with the name "Junior," as neither word is a part of his name. Cobb v. Lucas, 15 Pick. 7.

A road commissioner elected under his name with the appellation "Jr.," added, may lawfully sign his returns with that word omitted. People v. Collins, 7 Johns. 549.

One who has brought an action without adding "Jr.," to his name upon a written promise to him as "Jr.," may lawfully amend so as to show that he was the payee. Kincaid v. Howe, 10 Mass. 203.

There is no variance between a declaration on a note made to Samuel Headley and proof of one made to Samuel Headley, Jr. Headley v. Shaw, 39 Ill. 354.

Right to change name.

There is an early case which tended to relax the strict rule of the common law as stated above. An action was brought against Benjamin Walden and he pleaded that he was baptized John and was never known as Benjamin. The court held that a traverse of the allegation that he was never called Benjamin was good, and stated that it was not sufficient to show a baptism by a name without also showing that he had always been called and known by it. Holman v. Walden, 1 Salk. 6, 6 Mod. 115.

That case is, however, also reported in 2 Ld. Raym. 1015, where it seems to turn on the principle that the plea was bad in that it would have been sufficient to have pleaded the matter of baptism, and that it was made bad by showing that he was never called or known by any other name, such allegation making it merely dilatory and not being to the merits.

And it seems that now a man may change either his Christian or surname as radically and as often as he desires, if for an honest purpose, and it does not result in injury to third persons.

A person may legally name himself, change his name, or acquire a name by reputation or general usage, or habit. England v. New York Pub. Co. 8 Daly, 375.

Even at common law a man might lawfully change his surname and was bound by any contract into which he might enter under an adopted or reputed name. Linton v. First Nat. Bank of Kittanning, 10 Fed. Rep. 827.

There is nothing to prevent a man from changing his name if he so desires. *Re* Snook, 2 Hilt. 563.

The name which a man "always went by," which he declared to be his name in his dying declaration, and by which his mother had always known him, will be deemed to be his right name although one witness testified that he was baptized by another name. Binfield v. State, 15 Neb. 485.

Where a person is rightly described by the name of Edward in the body of a deed his mistake in executing it by the name of Edmund is immaterial. Middleton v. Findla, 25 Cal. 81.

A person must be sued upon a bond by the Christian name which he has attached to it. If objection is made that such is not his name it may be replied that he is known as well by one name as the other and the bond will be evidence of it. Gould v. Barnes, 3 Taunt. 504.

To a plea of misnomer it is sufficient to reply that the party is known as well by one name as by the other. Selman v. Shackelford, 17 Ga. 615.

Where a person had signed a contract with the initials of his Christian names and his surname, and had been arrested in an action growing out of such contract by a wrong middle name, the court said that if he had led the other party to know him by a name which was not his Christian name he could not complain if he was sued by such wrong name. Newton v. Maxwell, 2 Cromp. & J. 216.

One may lawfully take upon himself a surname for the purpose of bringing himself within the terms of a will which provides that no person can take the estate unless he takes such name. The court said a name assumed by the voluntary act of a young man at the outset of his life, and adopted by all who know him, and by which he is constantly called, becomes as much, and as effectually, his

cial age and community, and it should be construed in the spirit of its enactment. A review of the course of legislation may help us towards the true intent of the statute. The Act of the 21st of March, 1836, (Pub. Laws, 143,) was an elaborate scheme for the introduction of a new kind of partnership, not previously known to the law. One or more general partners were required, and they alone were authorized to transact the business or sign the firm name, and their names alone, without the word "company" or other general term, could appear in the firm title. The special partners must contribute actual cash as part of the capital, could not withdraw any part of it during the term, nor receive profits, or even interest, which lessened its amount, and any violation of these provisions, or any participation in the transaction of the business with the public, or the appearance of their names in the firm title, subjected them to be treated as general partners. A certificate of the facts had to be sworn to, acknowledged in the manner of acknowledgment of deeds, and recorded, before the partnership was legally constituted; and any change as to any fact set forth in the certificate must be again certified in like manner on penalty of liability of all parties as general partners. The influence of common law ideas of partnership is apparent throughout the Act. It was manifestly regarded as an experiment, to be entered upon cautiously and hedged about with restrictions. But the Act met the needs of the community, and, in the language of the present hour, it had come to stay. After more than half a century, it is still on our statute book as the basis of the system, and every change since has been a step forward in the same direction, and not backward. By joint resolution of the 16th of April, 1838, (Pub. Laws, 691,) a partner, general or special, or his executor, in case of his death, could, with the assent in writing of the others, sell and assign his interest without causing a dissolution, such alterations being certified, etc., as before. By the Act of the 21st of April, 1858, (Pub. Laws, 383,) the sale of a partner's interest, or an increase of the capital, either by increased contributions from the original partners, or by taking in new special partners, could be provided for in advance in the articles of partnership or in a separate instrument, such changes being required to be certified and recorded as before; but, most notable of all, the omission to record was not to work a dissolution as before, or subject the special partners to general liability. The spirit of progressive legislation had discovered that changes which left the business intact, or even increased in capital, did not demand the punishment of special partners by imposing general liability for neglect of

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name, as though he had obtained an Act of Parliament to confer it on him. Doe v. Yates, 5 Barn. & Ald. 544.

In King v. Billingshurst, 3 Maule & S. 250, Abraham Langley was held to have properly changed his name to George Smith.

In Gulliver v. Ashby, 4 Burr. 19 40, *Lord* Mansfield seems to have thought that the king's license or an Act of Parliament was essential to entitle a man to assume a new name.

But it has been decided otherwise. Davies v. Lowndes, 1 Bing. N. C. 619.

Business name.

In business matters a contract or obligation may be entered into by a person by any name he may choose to assume. Bell v. Sun Print. Pub. Co. 10 Jones & S. 570; *Re* Snook, 2 Hilt. 568.

One may carry on business in the name of his agent. Chandler v. Coe, 54 N. H. 561.

Julia Graham may lawfully carry on business under the name of Freeman Graham, Agent. Graham v. Fiszner, 28 Ill. App. 229.

An individual may do business under a corporate name. Bryant v. Eastman, 7 Cush. 111; Fuller v. Hooper, 3 Gray, 334.

A business name can consist of a combination of initials with the surname. Oakley v. Pegler, 30 Neb. 629.

Whether or not a re-arrangement of a person's Christian names or the substitution of one for another will make a fictitious or assumed name, within the meaning of a clause of a fire insurance policy vacating it if obtained under a fictitious or assumed name, is a question for the jury. Pollard v. Fidelity F. Ins. Co. (S. Dak.) Feb. 11, 1891.

In New York there is a statute making it a penal offense for a person to obtain credit by carrying on his business under an assumed name. Barron v. Yost, 35 N. Y. S. R. 340.

Signatures and indorsements on commercial paper.

Initials are enough to charge one as indorser of a check. Merchants Bank v. Spicer, 6 Wend. 443.

The indorsement of the initials of three names of the holder on due-bills is sufficient to transfer title to them. Weston v. Myers, 33 Ill. 432.

A bill may be lawfully signed by initials. Palmer v. Stevens, 1 Davies, 471.

An indorsement may be made simply by figures. Brown v. Butchers & D. Bank, 6 Hill, 443.

A person may bind himself by signing an assumed name to commercial paper. Grafton Bank v. Flanders, 4 N. H. 239.

A note assigned to C. R. Rogers may be sued by Charles R. Rogers. Birch v. Rogers, 3 Mo. 257.

One who has placed a fictitious name on commercial paper, which is taken by a third person in ignorance of the fact that he signed it and without relying upon him as security, is not liable on the bill if the name is not one under which he transacted or held himself out as transacting business. Bartlett v. Tucker, 104 Mass. 342, 6 Am. Rep. 240.

Name for carrying on suit.

Simply stating the initials of the Christian name of plaintiff is not sufficient and will not withstand a plea in abatement. Norris v. Graves, 4 Strob. L. 32.

A suit cannot be carried on by the initial merely of the Christian or first name of the plaintiff against the objection of defendant although the one commencing the action does not know the correct name. Fisher v. Northrup, 7 L. R. A. 629, 79 Mich. 297.

It is immaterial if plaintiff leave the middle letter out of the name by which he brings suit. Dills v. Kinney, 15 N. J. L. 130.

The entire omission of the Christian name of plaintiff in the statement of a claim against a decedent's estate is only a matter of abatement and the objection may be obviated by amendment. Peden v. King, 30 Ind. 181.

Where plaintiff sued by his surname preceded by Monsieur, and defendant pleaded in abatement a replication that he was known as well by that name as by his Christian name, this was held bad. Labat v. Ellis, 1 N. C. 22.

Where the Christian name of plaintiff is given as J. M., and there is nothing in the petition to show

mere formalities. The Act of March 30, 1865, (Pub. Laws, 46,) made two important further changes: The firm title, where there were more than two general partners, may contain the words "and company," (previously forbidden,) the names in full of all the partners, special as well as general, being put upon a sign; and the special partners were allowed to contribute their share of the capital in goods, the value, however, being first appraised under oath by an appraiser appointed by the court of common pleas. By the Act of the 21st of February, 1868, (Pub. Laws, 42,) the firm name may consist of the name of any one general partner, with the addition "and company," notwithstanding the name may be common to such general partner, but the sign must be put up as required by the Act of 1865. This was the state of the law when the Legislature passed the Act of the 2d of June, 1874, (Pub. Laws, 271,) for the formation of partnership associations with limited liabilities, under which the present defendants were organized. By this Act no general partners are required, nor is any restriction put upon the firm name or title, except that the word "limited" must be the concluding word. The persons desiring to form the association must sign and acknowledge a statement, setting forth, *inter alia*, "the full names of such persons." The Act speaks only of "subscribing and contributing capital," total amount, "and when and how to be paid," etc. But this being held to mean money capital only, a supplement was passed

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that such is not his Christian name, a demurrer on the ground that the petition does not state his name cannot be sustained. Perkins v. McDowell (Wyo.) Jan. 31, 1890.

A suit brought and judgment rendered in the name of plaintiff by initials only for his given name is not open to objection on that ground in the absence of a showing that he had another name. It will not be presumed that he had any other name than the initials used in bringing suit. Fewlass v. Abbott, 28 Mich. 270.

The objection that plaintiff in instituting an action has used simply the initials of his Christian names instead of the names in full must be taken by motion to require the full names to be set out or it will be regarded as waived. Wilganood v. Randolph, 22 Neb. 493.

After judgment it is too late to object that plaintiff sued by the initials of his Christian names rather than by setting out the names in full, since he may have had no Christian name but simply distinguished himself by initials from other persons of the same surname. Breedlove v. Nicolet, 32 U. S. 7 Pet. 413, 8 L. ed. 731.

Effect on criminal prosecutions.

Where the indictment alleged that J. R. R. was robbed, and the proof showed that J. B. R. was robbed, there was no variance. Miller v. People, 39 Ill. 458.

On the trial of an indictment for larceny, the name of the owner of the property may be amended from James Marshall to James Cicero Marshall. Haywood v. State, 47 Miss. 1.

So D. W. Humphries may be amended to D. G. Humphries. Unger v. State, 42 Miss. 649.

But it has been held in Ohio that if the middle letter of one against whom burglary was committed is set out, it must be proved as laid. Price v. State, 19 Ohio, 423.

Although the name given to one at his baptism is to be taken as original, and presumed to continue his name, yet if after his baptism he adopts and uses another, by which he is subsequently well known in the community where he resides, it is sufficient to describe him by that name in a prosecution for illegally selling liquor to him. Com. v. Trainor, 123 Mass. 414.

An information charging the illegal sale of liquors need not set out the middle name or initial of the one to whom they were sold, and proof of the middle name at the trial will not constitute a variance. State v. Feeny, 13 R. I. 627.

A complaint by Charles J. Rock alleging that defendant unlawfully did sell intoxicating liquors to Charles Rock aforesaid is sufficient. Com. v. O'Hearn, 122 Mass. 553.

Upon an information for offering a bribe to an officer named Thomas Babbs there is no variance, though the proof shows his name to be Thomas Tyrrel Babbs, where the evidence further shows that he is best known by the name appearing in the information. Atty-Gen. v. Hawkes, 1 Cromp. & J. 120.

It seems that if a person has but one Christian name it will not do to use the initial letter of it merely, but the whole name must be stated. Choen v. State, 52 Ind. 347, 21 Am. Rep. 179.

Abbreviations, etc.

The court may take judicial notice of the abbreviations of a man's given name, but as to his surname, query. Fenton v. Perkins, 3 Mo. 144.

A notice concerning a pauper whose Christian name was Sally, calling her Sarah or Sally is sufficient. Shelburne v. Rochester, 1 Pick. 470.

A court may take judicial notice that the name Christy or Christ McElhenon, signed to a note, was intended for Christopher McElhenon. Wilkerson v. State, 13 Mo. 90.

An allegation of sale of intoxicating liquors to Jack Murphy is sustained by proof of a sale to John Murphy. Walter v. State, 2 West. Rep. 758, 105 Ind. 589.

Signature of Christian names by their initials.

The reason of the rule which required the Christian name to be written in full in England is held not to exist in Kansas, and in that State no written instrument can be regarded as a nullity because the Christian name is not written in full. Ferguson v. Smith, 10 Kan. 462.

It has grown into such universal practice to sign one's given name by initial that it has had the effect to relax the common-law rule. Cummings v. Rice, 9 Tex. 529.

A person may execute an instrument and bind himself as effectually by his initials as by writing his name in full. Palmer v. Stephens, 1 Denio, 478.

Corporators may sign the articles of association by their usual signatures, and the use of initials to designate the Christian names is not objectionable. State v. Beck, 81 Ind. 501.

Where a statute required the voting papers at an election of borough councilors to be signed with the names of the burgesses voting, the parties' usual signatures are sufficient, and it is no valid objection that the Christian names are denoted only by the initials. Reg. v. Avery, 18 Q. B. 575.

Where a form for notice of claims showed the Christian names in full it was held that a notice was sufficient if the Christian names were represented by initials only. Reg. v. Hartlepool, 2 Lowndes, M. & P. 686.

Whether the name R. P. O'Neil signed to a power of attorney to convey land was meant for Rev. Patrick O'Neil, the owner of the land, cannot without other proof be submitted to the jury. Burford v. McCue, 53 Pa. 431. H. P. F.

the 1st of May, 1876, (Pub. Laws, 89,) authorizing contribution "in real or personal estate, mines, or other property, at a valuation to be approved by all the members." The Act of 1874, it will be seen, was not a mere amendment or supplement to anything that went before, but like the Act of 1836, a new scheme, carefully and elaborately drawn, creating a new kind of artificial person, standing between a limited partnership as previously known and a corporation, and partaking of the attributes of each. It was, however, a step forward in the same line of legislative recognition of business demands uniformly pursued since the start, in 1836.

With this review, we may now turn to the two points especially involved in the present case. And, first, we are to inquire what is meant by the full names of the members. This phrase first made its appearance in the Act of 1865, in connection with the requirement that there should be "put up in some conspicuous place on the outside, and in front of the building," a sign on which should be painted, in legible English characters, "all the names in full, of all the members of said partnership, stating who are general and who are special partners." Previously to this Act only the names of the general partners could appear in the firm title, and "without the addition of the word 'company' or any other general word." This Act required the use of the names of all the general partners, except when there might be more than two, in which case the names of any two could be used with the addition of the words "and company," and the sign, as already noted, "stating who are general and who are special partners." This last requirement is the key note of the intent; it was to give information to the public as to the persons who composed the firm, and the capacity in which they stood connected with it, as generally or only specially responsible. The object aimed at was the identification of the person, and the requirement of his full name had nothing further in view. A man's name is the designation by which he is distinctively known in the community. Custom gives him the family name of his father, and such *prænomina* as his parents choose to put before it, and appropriate circumstances may require "Sr." or "Jr." as a further constituent part. But all this is only a general rule, from which the individual may depart if he chooses. The Legislature in 1852 provided a mode of changing the name, but that act was in affirmance and aid of the common law, to make a definite point of time at which a change shall take effect. But without the aid of that act a man may change his name or names, first or last, and, when his neighbors and the community have acquiesced and recognized him by his new designation, that becomes his name. Two noted examples are at hand for illustration. The blunder of the friendly congressman who nominated him to West Point transposed and altered the names by which General Grant has gone into history, and considerations of taste or convenience have induced President Cleveland to omit one of the names his parents bestowed upon him. A name, therefore, is the title used for the identification of an individual, and the intent of its requirement in full is certainty of such identification. The full name, therefore, is no more than the whole of such title, as it is used by himself and his neighbors for such purpose. To construe the statute to require the literal and absolute following of the entire list of names which the person may have had bestowed upon him would be giving it not only a very narrow and technical construction, which serves no purpose of the Act, but even one which might tend to defeat its real intent. A statement signed "Stephen Grover Cleveland" would not create certainty, but doubt, as to its author.

The Act of 1874, as already said, made no restrictions upon the firm title, except the compulsory termination "limited," and omitted the requirement of the sign, but in lieu thereof substituted the statement containing the "full names" of the persons composing the association. This phrase was borrowed from the Act of 1865, and its intent was the same in both,—to secure the identification of the individual by having his name plainly set forth in the full form by which the community would recognize him. The appellants gave evidence that the names as signed to the statement were in the form habitually used by them in business, and by which they were generally known in the community. This, if proved, was a sufficient compliance with the statute.

The Act of 1836 required the special partners to contribute actual cash, and for nearly thirty years this requirement was absolute and unyielding. The Act of 1865 for the first time permitted goods to be put in as capital, but required their value to be fixed by a sworn appraiser appointed by the court. The Act of 1874, as amended in 1876, did away with all these restrictions, and allowed the capital to be contributed in "real or personal estate, mines, or other property," without any other check as to the valuation than the agreement of all the subscribers. The statement is to certify the kind of capital contributed, whether money or property, and, in the latter case, a schedule with a description and valuation. By the plain terms of the Act the valuation is in the discretion of the parties, and (assuming, of course, good faith) may be sanguine or cautious. *Rehfuss* v. *Moore*, 134 Pa. 462, 7 L. R. A. 663. The description, therefore, is plainly for the information of parties interested, so that they may, if they desire, have the *data* for their own judgment of value. Accordingly it has been uniformly held by this court that a vague or general or lumping description is not sufficient. *Maloney* v. *Bruce*, 94 Pa. 249; *Vanhorn* v. *Corcoran*, 127 Pa. 255, 4 L. R. A. 386. It is not intended, however, nor would it be practicable in many cases where an existing business is the basis of the new firm, to require minute specification of details that may change from day to day. Certainty to a fair business intent is the safe, practical criterion, as was indicated in *Rehfuss* v. *Moore*, 134 Pa. 462, 7 L. R. A. 663, where a lumping valuation of six distinct patent rights, at a very high figure, was sustained on the ground that they were all expected to be used in the operation of a single device, embodying the principle of all, and were considered valuable only in combination. The schedule in the present case described several tracts of land which it appears were re-

quired by different titles, but which had been merged together, and formed into a coal-works called the "Buffalo Mines." The schedule valued them as one tract. It also set out certain buildings, tenement-houses, engines, etc., in considerable, but not minute, detail, valuing each item separately, but as a part of one entire plant, for the operation of coal mining. It is claimed that the various items of property are sufficiently specified and described for a creditor or the sheriff to go upon the land and identify or levy upon them. This was sufficient. The Act expressly mentions "mines" as the subject of contribution as capital, and it cannot be intended that every pick and shovel or mule and harness should be specified and valued separately. A fair business description of the mine and its equipment is all that the statute requires.

Judgment reversed, and *tenire de novo* awarded.

RHODE ISLAND SUPREME COURT.

Charles W. LYNCH *et al.*
v.
George E. WEBSTER.

(.....R. I.....)

An administrator should be personally charged with costs by the judgment against him where he fails in an action brought by him under a statute providing that "in all civil causes at law the party prevailing shall recover costs."

(October 13, 1891.)

PETITION for a writ of mandamus to compel the clerk of the Court of Common Pleas for Providence County to issue an execution against an administrator *de bonis propriis* for costs recovered by the petitioners in an action against them by the administrator, in which they prevailed. *Granted.*

The facts are stated in the opinion.

Mr. **Henry J. Dubois** for petitioners.

Mr. **George E. Webster** defendant *in propria persona.*

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

This is a petition for a writ of mandamus to require the clerk of the court of common pleas to issue an execution for costs against an ad-

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NOTE.—*Personal liability of executors and administrators for costs.*

English rules.

Independently of Statute 3 and 4 Wm. IV., chap. 42, § 31, the court has the power to punish an administrator or executor for misbehavior in the conduct of the suit brought by him, by imposing costs. Comber v. Hardcastle, 3 Bos. & P. 115.

An unsuccessful plaintiff executor cannot be exempted from costs, under 3 and 4 Wm. IV., chap. 42, § 31, by his good faith in suing, if by caution he might have discovered that the claim was groundless. Engler v. Twisden, 2 Bing. N. C. 263.

An administrator suing upon a contract made with the intestate, but broken after his death, necessarily sues in a representative capacity, and is not liable for costs, if defeated. Tattersall v. Groote, 2 Bos. & P. 253; Cooke v. Lucas, 2 East, 395.

Where an executor has blended his testator's estate with his own, so that his own executor cannot distinguish whether there are any assets of the first estate, the latter should not be made to pay the costs to a successful plaintiff suing for a debt of the first testator. Sandys v. Watson, 2 Atk. 80.

Under Statute 3 and 4 Wm. IV., chap. 42, § 31, an executor cannot be relieved from the payment of costs, when nonsuited, in an action upon a promise to him, of which the consideration was partly an account stated with him as executor and partly a demand due his testator. Spence v. Albert, 2 Ad. & El. 735.

Nor can an executor be relieved from the payment of costs, although suing in good faith, unless there be improper conduct on the part of the defendant. Birkhead v. North, 4 Dowl. & L. 732; Farley v. Briant, 3 Ad. & El. 839; Southgate v. Crowley, 1 Bing. N. C. 518.

Under the English statute executors and administrators, when defendants, have no privileges as to costs. If the plaintiff obtains a verdict, he is entitled to judgment for the whole in the first instance *de bonis testatoris*; and if there are not assets, then to the costs *de bonis propriis*. Marshall v. Wilder, 9 Barn. & C. 655.

American rules.

The question is largely controlled by statute in America, the principal statutory provisions being indicated below.

Alabama.

In a contest between an administrator and distributees as to whether certain property belongs to the estate or to the administrator personally, upon a decision adverse to the administrator he is personally chargeable with costs. Jones v. Deyer, 16 Ala. 221.

In an action by an administrator *de bonis non* upon a note given to the administrator in chief, the plaintiff, if defeated, is not chargeable personally with costs. Stewart v. Hood, 10 Ala. 600.

Where the avails of an action prosecuted by an administrator would, if successful, be assets of the estate he represents, he is not chargeable personally with costs of the action if he is defeated therein. Hutchinson v. Gamble, 12 Ala. 36; Chandler v. Shehan, 7 Ala. 251.

Costs may be awarded against an executor when a judgment is revived against him by *scire facias*. Hanson v. Jacks, 22 Ala. 549.

Georgia.

A verdict having been rendered against an administrator who had been brought in as a party defendant after the death of his intestate that "defendant pay the costs of said suit," a judgment for costs against the administrator individually is erroneous. Clements v. Maloney, 17 Ga. 289.

An administrator is not personally liable for costs of a suit brought by him to recover for a wrong done to his intestate in his lifetime, although the estate is insolvent. Clark County Justices v. Haygood, 20 Ga. 847.

Missouri.

An administrator plaintiff suing upon a cause of action which accrued to his intestate in his lifetime, is not personally liable for costs. Ross v. Alleman, 60 Mo. 269; Wooldridge v. Draper, 15 Mo. 470.

ministrator, running against his own goods, chattels, and estate, instead of the goods and chattels of the intestate in the hands of the administrator. The petitioners recovered a judgment in the court of common pleas for their costs of suit in an action in which an administrator and another were plaintiffs and they were defendants. The respondent, upon application of the petitioners for execution, declined to issue it, except against the goods and chattels of the intestate in the hands of the administrator, and he now contends that it can properly issue only in that form. The petitioners applied to the court of common pleas for an order to the clerk to issue execution against the goods, chattels, and estate of the administrator, but the court declined to make the order. Of course the execution should conform to the judgment. The allegation of the petition is simply that the petitioners recovered judgment for their costs, without stating whether the judgment was against the administrator personally or only against the goods and chattels of the intestate in the hands of the administrator. We assume, however, that the judgment was against the administrator personally, and that the question which the parties desire to raise for our determination is whether a judgment against an administrator personally is a proper judgment. If so, it necessarily follows that the execution should issue against his own goods, chattels, and estate. The subject of costs in proceedings by and against executors and administrators is one concerning which there has been a diversity of opinion and practice, and which is largely regulated by statute. In England, in the early practice, an executor or administrator might recover costs if successful in a suit brought by him, but if the decision was against him he was not liable for costs, the reason being that the Statute (23 Hen. VIII. chap. 15, § 1) by which costs were first given to defendants was confined to cases of wrongs done to and contracts made with the plaintiff. Now, however, under the Statute of 3 and 4 Wm. IV., chap. 42, § 31, an executor or administrator, with respect to costs, is put on the same footing as other suitors, except that, if the action be in the right of the testator or intestate, the court in which the action is pending, or the judge of a superior court, may otherwise order. But, independently of the latter statute, and by virtue of the former, if an executor or administrator brought an action on a wrong done in his own time, or upon a contract, express or implied, made with himself, and failed in the action, he was liable to the defendant for costs, even though he sued as executor or administrator. *Nicolas* v. *Killigrew*, 1 Ld. Raym. 436; *Jenkins* v. *Plume*, 1 Salk. 207; *Goldthwayte* v. *Petrie*, 5 T. R. 234; *Pol-*

Otherwise where he sues upon a cause of action accruing to himself. *Ibid.*

One who assumes to sue as administrator without legal authority is personally liable for defendant's costs. Lewis v. McCabe, 16 Mo. App. 398.

Illinois.

In Illinois defendants cannot recover costs in actions prosecuted by executors or administrators. Rev. Stat. Cothran's Anno. ed. chap. 33. § 8.

Costs should not be adjudged against an administrator personally for instituting in good faith a proceeding to sell lands of a stranger, which he believed belonged to the estate, for the payment of debts of the estate. MacKay v. Riley (Ill.) Jan. 22, 1891.

New Hampshire.

In Folsom v. Blaisdell, 38 N. H. 100, it is said: "The only statutory provision of this State which recognizes any personal liability of an executor or administrator for costs, in a suit founded upon a cause of action in favor of or against the testator or intestate, is contained in Rev. Stat., chap. 161, § 13, which provides that, upon return of 'no goods' or 'waste' made by the sheriff on an execution in a suit where the cause of action was against the person deceased, an execution may be awarded on *scire facias* against the goods or estate of the administrator as for his own debt, to the amount of such 'waste,' if it can be ascertained; otherwise for the whole debt."

The same case holds that such execution can only be issued where the administrator fails to appear, or fails to show cause why execution should not be issued. It is not to be awarded as a matter of course upon *scire facias*.

An executor or administrator suing, as such, upon a cause of action alleged to have arisen since the death of the testator or intestate, is personally liable for the costs awarded to the defendant. Keniston v. Little, 30 N. H. 318, 64 Am. Dec. 297; Moulton v. Wendell, 37 N. H. 406.

Pennsylvania.

An administrator plaintiff is not personally liable for costs on a verdict and general judgment for the defendant. Callender v. Keystone Mut. L. Ins. Co. 23 Pa. 471, overruling Ewing v. Furness, 13 Pa. 531, and Muntorf v. Muntorf, 2 Rawle, 180. (This case must have escaped the attention of the learned chief judge, who wrote the opinion in the principal case, in his examination of the law in Pennsylvania.)

An administrator plaintiff defeated in a wanton and vexatious suit is personally liable to the defendant for costs. Show v. Conway, 7 Pa. 136.

An executor plaintiff is liable for costs in an action for a conversion of goods of the estate after his appointment. Gebhart v. Shindle, 15 Serg. & R. 235.

In Penrose v. Pawling, 8 Watts & S. 379, the plaintiff, as administrator, succeeded before the arbitrators. The defendant appealed and paid the costs of the appeal. On the trial the plaintiff became nonsuited. It was held that the plaintiff was personally liable for the costs paid to him by the defendant. This case is declared in Callender v. Keystone Mut. L. Ins. Co. 23 Pa. 471, not to support the doctrine that an administrator is personally liable for costs.

Texas.

Execution should not issue for costs against an administrator personally, but should be certified to the probate court to be allowed and settled in due course of administration. Davis v. Thomas, 5 Tex. 390.

Indiana.

Every executor or administrator shall have full power to maintain any suit in any court of competent jurisdiction, in his name as such executor or administrator, for any demand, of whatever nature, due the decedent, in his lifetime, for the recovery of the possession of any property of the estate, and for trespass or waste committed on the estate of the decedent in his lifetime; but he shall not be liable, in his individual capacity, for any costs in such suit. Ind. Rev. Stat. 1881, § 2231.

Where a plaintiff executor necessarily brings an action in his representative capacity, and no de-

lard v. *Spencer*, 7 T. R. 358; *Tattersall* v. *Groote*, 2 Bos. & P. 253; *Cooke* v. *Lucas*, 2 East, 395; *Dorbiggin* v. *Harrison*, 9 Barn. & C. 666; *Jelson* v. *Forster*, 1 Barn. & Ad. 6; *Slater* v. *Lawson*, Id. 893.

Some of the courts in this country, in the absence of statutes regulating the subject, have held that where the cause of action accrued wholly after the death of the testator or intestate, the executor or administrator, if he fails in an action brought by him, must pay the costs, but that he is not to be held liable when the cause of action accrued wholly or partly within the lifetime of his testator or intestate. The reason assigned for the distinction is that in the former case, being a party to the transaction, he is presumed to know all about it, and to act upon his own responsibility, and therefore ought not to be permitted to saddle the estate with the costs in case of failure; whereas, in the latter case, not being privy to the original transaction, he cannot be presumed to know exactly what the case may turn out to be upon investigation, and therefore ought not to be required to pay the costs himself. *Ketchum* v. *Ketchum*, 4 Cow. 87; *Chamberlin* v. *Spencer*, Id. 550; *Barker* v. *Baker*, 5 Cow. 267; *Buckland* v. *Gallup*, 40 Hun, 61; *Potts* v. *Smith*, 3 Rawle, 361, 24 Am. Dec. 359; *Pillsbury* v. *Hubbard*, 10 N. H. 224; *Kenston* v. *Little*, 30 N. H. 318, 64 Am. Dec. 297; *Folsom* v. *Blaisdell*, 38 N. H. 100; *Hutchcraft* v. *Gentry*, 2 J. J. Marsh. 499; *Frink* v. *Luyten*, 2 Bay, 166.

On the other hand, it has been held in Pennsylvania that an executor or administrator who is plaintiff is bound to pay costs to the defendant in cases of nonsuit or a verdict for the defendant, not only when the cause of action accrued after the death of the testator or intestate, but also upon a cause of action which accrued within the lifetime of the testator or intestate, for the reason, as it was said, that it is obvious justice that one against whom a vexatious suit has been brought should recover his costs, and that it is nothing to him on whom the costs fall, whether on the estate or the executor or administrator personally. *Muntorf* v. *Muntorf*, 2 Rawle, 180; *Penrose* v. *Pawling*, 8 Watts & S. 379; *Shou* v. *Conway*, 7 Pa. 126.

The petition before us does not show whether the cause of action in the suit in which costs were recovered by the petitioners accrued during the lifetime of the intestate or subsequent to his death. We do not, however, deem this a material consideration. Pub. Stat. R. I., chap. 217, § 1, provides that "in all civil causes at law the party prevailing shall recov.

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fault, negligence, or improper conduct is alleged against him, he cannot be charged with costs *de bonis propriis*. Harrison v. Warner, 1 Blackf. 385; Cooper v. Thatcher, 3 Blackf. 59; Pollard v. Buttery, 3 Blackf. 239.

Iowa.

If judgment be rendered against an executor for costs in any suit prosecuted or defended by him in that capacity, execution shall be awarded against him as for his own debt, if it appear to the court that such suit was prosecuted or defended without reasonable cause. In other cases the execution shall be awarded against him in his representative capacity only. McClain, Anno. Iowa Code, 1888, § 3382.

Kentucky.

A personal representative, plaintiff or defendant, in any action, shall, if unsuccessful, be adjudged to pay costs as other litigants. The judgment for costs, in such cases, shall only be against the assets which have or may come to his hands. Ky. Gen. Stat. 1888, p. 330, § 17.

Maine.

Executions for costs shall run against the goods and estate, and, for want thereof, against the bodies of executors and administrators in actions commenced by or against them, and in actions commenced by or against the deceased, in which they have appeared, for costs accrued after they assumed the prosecution or defense, to be allowed to them in their administration account, unless the judge of probate decides that the suit was prosecuted or defended without reasonable cause. Me. Rev. Stat. 1871, p. 689, chap. 87, § 2.

Mississippi.

Executors and administrators shall be entitled to, or be answerable for, costs, in the same manner as the testator or intestate would have been, and shall be allowed for the same in their accounts, if the court awarding costs against them shall certify that there were probable grounds for instituting, prosecuting, or defending the action on which the judgment or decree shall have been given against them. Miss. Rev. Code 1880, chap. 64, § 2377.

When costs are adjudged against an executor or administrator, in any suit at law or in equity, and he shall obtain the certificate of the court before which the suit was tried that there was probable cause for bringing or defending the same, he shall not be individually liable for costs, although the estate may be insufficient to pay them. Miss. Rev. Code 1880, chap. 64, § 2378.

Ohio.

In any suit or proceeding upon any claim presented to an executor or administrator, the referees or court before whom the same shall be tried may direct such costs to be awarded against the creditor or against the executor or administrator personally, or to be paid out of the assets of the estate, as a part of the costs of administration, as shall be just, having reference to the facts that appeared upon the trial. Ohio Rev. Stat. (Giauque) §§ 6106, 6242.

Under a general judgment in a cause, defendant having died, and action having been revived against his administrator, no costs can be recovered against the latter. Farrier v. Cairns, 5 Ohio, 45.

West Virginia.

When a court enters of record that if he (the personal representative) had prudently discharged his duty, the suit or motion would not have been brought or made, the judgment or decree, so far as it is for costs, shall be ordered to be paid out of his own estate. W. Va. Code 1891, chap. 131, p. 856, § 21.

Virginia Code 1891, § 2677, is same as the West Virginia Statute.

California.

In an action, prosecuted or defended by an executor, administrator, trustee of an express trust, or a person expressly authorized by statute, costs may be recovered, as in an action by and against a person prosecuting in his own right; but such costs must by the judgment be made chargeable only upon the estate, fund or party represented, unless the court directs the same to be paid by the plaintiff, or defendant, personally, for mismanagement or bad faith in the action or defense. Cal. Code Civ. Proc. § 1031.

Statutory provisions substantially the same as

er costs, except where otherwise specially provided." There is no provision of statute which exempts an administrator from liability for costs out of his own estate in case he brings a suit which he fails to maintain. The statute does not say from whom the party prevailing shall recover. It is manifest, however, that it is from the party against whom he prevails. It may be argued that, if an executor or administrator be that party, and he is suing in his representative character, the judgment should be against him in that character, or against the estate in his hands. We think, however, that, in the absence of any provision of the statute directing a special judgment or exempting an executor or administrator who has failed to maintain his suit from liability, it is a more natural construction of the statute that the judgment for costs should be against him personally. This, we understand, is in accordance with the practice which has prevailed in this court. We think, too, that such a judgment is better calculated to secure the interests of all parties. The same question was before the Supreme Judicial Court of Massachusetts in *Hardy* v. *Call*, 16 Mass. 530, under a statute which provided that, "when any party shall in any stage of his action become nonsuit, or discontinue his suit, the defendant shall recover costs against him; and in all actions, as well those of *qui tam* as others, the party prevailing shall be entitled to his legal costs against the other." Stat. Oct. 30, 1784, § 9. It was held that, when an administrator commences an action and fails to support it, judgment for costs is to be entered against him *de bonis propriis*. The court after disposing of the question as to the construction of the judgment which had been entered against the administrator, goes on to say: "This leads us to consider what ought to have been the form of the judgment in the original action, and we are clearly of the opinion that it ought to have been entered against the present defendant *de bonis propriis*. He was the party prosecuting, and is personally responsible to the adverse party by the statute respecting costs, and such form of judgment best comports also with the rights of executors and administrators and all concerned in the settlement of the estates of deceased persons, for, if judgment for costs could be legally recovered against the goods and estates of testators and intestates, all such goods and estates might go for the payment of costs in frivolous and groundless suits. Judgment, therefore, in every case commenced by

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that of California exist in the following named states and territories:

Dakota. Dakota Code [Levisee, 1885] p. 116, § 391.

Florida. Bush's Digest of Laws of Florida [1872] p. 527, § 261.

Idaho. Rev. Stat. 1887, § 4910.

Minnesota. Minn. Stat. 1873, § 12, p. 765.

North Carolina. N. C. Code, §§ 535, 1429.

New York. N. Y. Code Civ. Proc. §§ 1835, 1836, 3246.

South Carolina. S. C. Code Civ. Proc. § 330.

Wisconsin. 2 Sanborn & Berryman, Anno. Stat. § 2832, p. 1695.

In Knox v. Bigelow, 15 Wis. 415, it was held that this statute abolished the old distinction between causes of action that accrued before and those accruing after the death of the decedent, and that in neither case is the executor or administrator personally liable, unless the court specially directs.

But under N. Y. Code Civ. Proc., § 3246, it is held that if an executor fails to recover on a cause of action accruing after the testator's death, he is personally liable for the costs as a matter of course. Bostwick v. Brown, 13 Hun. 308; Buckland v. Gallup, 20 Hun. 61; Brockett v. Bush, 18 Abb. Pr. 337; Holdridge v. Scott, 1 Lans. 303; Lyon v. Marshall, 11 Barb. 241.

An action by an administrator with will annexed, for money in the hands of the executor in chief at the time of his death, is necessarily brought in the plaintiff's representative capacity, and no costs are recoverable against him personally in case he is defeated. Spencer v. Strait, 40 Hun. 463.

An action by an executor on a claim arising out of transactions between his testratrix and the defendant's testator while both were alive is necessarily brought in his representative capacity, and he cannot be charged personally with costs. Hone v. DePeyster, 9 Cent. Rep. 475, 106 N. Y. 645.

Where plaintiff declared in trover for a conversion in the lifetime of his intestate, and in a second count for a conversion after his death upon a verdict for defendant, plaintiff was held liable for costs personally upon the second count. Farley v. Farley, 2 Bail. L. 319.

In Clark v. Wright, 26 S. C. 196, it was held error to charge an administrator, personally, under Code Civ. Proc., § 330, with costs of a suit instituted for the benefit of the estate, under the advice of counsel, which was dismissed, both upon the trial and upon appeal, in the absence of bad faith or mismanagement in the prosecution.

Massachusetts.

As to pending actions which survive the death of a party, it is provided, in Massachusetts, as follows: "When an executor is nonsuited or defaulted without having taken upon himself the prosecution or defense of the action, he shall not be personally liable for costs in the action; but the estate of the deceased in his hands shall be liable for costs as well as for the debt or damages, if any are recovered." Mass. Pub. Stat. chap. 165, § 11.

If judgment is recovered against an executor or administrator, for costs, in a suit commenced or prosecuted by him in that capacity, the estate in his hands shall not be taken on execution therefor, but execution shall be awarded against him as for his own debt, and the amount paid by him thereupon shall be allowed in his administration account, unless it appears to the probate court that the suit was commenced or prosecuted unnecessarily or without reasonable cause. Mass. Pub. Stat. 1882, chap. 144, § 10, chap. 166, § 9.

This was the rule followed in Massachusetts prior to these statutes. Look v. Luce, 136 Mass. 249.

When a judgment is entered against an executor for debt and costs, although the execution for th debt may be stayed on account of proceedings in insolvency, the execution against the executor, personally, for the costs, may be enforced in any event. Greenwood v. McGilvray, 120 Mass. 516.

Statutes substantially the same as those of Massachusetts, with the exception that they cover costs, in actions resisted as well as prosecuted by executors and administrators, exist in the following named states and territories:

Arizona. Rev. Stat. 1887, ¶ 1126, § 162.

Michigan. Howell's Anno. Stat. 1882, § 5961.

Nebraska. Compiled Stat. 1891, § 286, p. 457.

Vermont. Rev. Laws 1880, §§ 2103, 2145, 2156.

The intention of the statute was to put executors and administrators on the same footing as other suitors regarding costs. O'Hear v. Skeeles, 22 Vt. 152. J. G. G.

an executor or administrator, in which the defendant becomes entitled to costs, ought to be entered against such executor or administrator personally. After payment he may charge the amount in his account of administration, to be allowed or not, as it may appear to the judge of probate that the suit was discreet or otherwise; and thus justice may be done to all parties interested, and the discretion of executors and administrators may be subjected to a wholesome restraint." The doctrine of *Hardy* v. *Call* was affirmed and approved in *Brooks* v. *Stevens*, 2 Pick. 68; *Burns* v. *Fay*, 14 Pick. 8; *Pierce* v. *Sarton*, Id. 274; *Blake* v. *Dennie*, 15 Pick. 385; and appears to have continued to be the law in Massachusetts until a further regulation of the subject by statute in the revision of the Statutes in 1836. It may, perhaps, be urged that this rule might operate to deter an executor or administrator who has no assets in his hands from prosecuting a just claim in favor of an estate, and, therefore, that the interests of estates would suffer. To this it may be answered that the rule would not be likely to so operate unless it was doubtful whether the claim could be maintained. In such case, if a creditor or the next of kin desired the claim prosecuted, the executor or administrator might properly require indemnity against costs; and, in case of a failure to sustain the claim, obvious justice requires, as was said in the Pennsylvania case of *Muntorf* v. *Muntorf*, cited, that a defendant who is compelled to defend against an unfounded claim should be reimbursed, to the extent at least of his taxable costs, for the expenses he has incurred, and which he would otherwise be without the means of recovering. For the reasons stated in *Hardy* v. *Call* we are of the opinion that judgment for costs against an administrator who has failed to maintain his suit should be entered against him personally.

Petition granted.

NEW YORK COURT OF APPEALS (2d Div.).

Peter LAWYER, *Respt.*,
v.
Peter G. FRITCHER, *Appt.*

(.....N. Y.....)

1. Fraud in obtaining the consent of parents to the marriage of an infant daughter to a man who has a lawful wife living will vitiate the consent so as to make him liable for seduction.

2. There is a loss of service which will sustain an action where an infant daughter is taken away as a wife by one who fraudulently obtains the consent of her parents to a void marriage.

NOTE.—*Loss of service as an element in actions by father for seduction of child.*

This note will be confined to the consideration of actions brought in case and not in trespass, since, although loss of service may be an element in each, yet in trespass the illegal entry is the gist of the action. Sargent v. ——. 5 Cow. 106.

General rules.

In the absence of statutory provisions a father cannot maintain an action as such for the seduction of his child. The right to sue is supported wholly by his character of master and the ground of his recovery was originally in fact, and is at present in theory, the loss of services which his servant was under obligation to render to him and of which he was deprived by the act of the seducer. Thus it is laid down in the books that no action will lie for debauching a daughter unless on the ground of loss of service. Satterthwaite v. Dewhurst, 4 Dougl. 315; Grinnell v. Wells, 7 Mann. & G. 1033; Russell v. Corne, 2 Ld. Raym. 1031.

While the child is under age and a member of the father's family all the authorities agree that the action may be maintained although but little if any actual loss of service is shown. In such cases the father has the right to receive the services if he desires them, and the mere fact that he has not been in the habit of exacting them is regarded as quite immaterial. A very slight service is sufficient. Fores v. Wilson, Peake, N. P. 55.

It is not necessary to show any acts of service. It is enough if she lives in the father's family under such circumstances that he has a right to her services. Maunder v. Venn, Mood. & M. 323.

Plaintiff might recover if he had not parted with his right to claim his daughter's service, or proved any act of service, however slight. Blagge v. Ilsley, 127 Mass. 199, 34 Am. Rep. 361.

The law is different in the United States from that in England in cases where the child is a minor at the time of seduction, but is living with or working for a stranger. In England the relation of master and servant is held to be dissolved in such cases and no recovery is allowed, while in the United States the doctrine of constructive service has been developed under which a recovery is permitted.

The law as administered in England.

An action cannot be maintained by a father for the seduction of his daughter while she was in the domestic service of another person although she was under age and intended to return to her father's house whenever she quitted such service. Blaymire v. Haley, 6 Mees. & W. 55.

The action will not lie where the daughter is residing with a stranger, although the father receives a portion of the wages. Carr v. Clarke, 2 Chitty, 260.

Where the daughter was living at the house of her brother-in-law with no purpose of returning to her father's house, although there was no contract of service and she might have left at any time she chose, there was held to be no proof of loss of service by the father which will sustain the action, although after she found herself pregnant she returned to his house where she was confined. Dean v. Peel, 5 East, 45.

Where the daughter was a domestic servant living in the house of her master, the mere fact that by his permission she was in the habit during leisure time of assisting her parent in gaining a livelihood is not sufficient to sustain the action. Thompson v. Ross, 5 Hurlst. & N. 18.

Where the daughter was in service as a governess and was seduced while on a three days' visit with her employer's permission to her home, during which she gave some assistance in the household

3. Punitive damages are allowable in the case of seduction.

(December 1, 1891.)

APPEAL by defendant from a judgment of the General Term of the Supreme Court, Third Department, affirming a judgment of the Schoharie County Circuit in favor of plaintiff in an action brought to recover damages for the alleged abduction and seduction of plaintiff's daughter. *Affirmed.*

Statement by **Potter**, *J.*:

This action was brought by plaintiff against defendant to recover damages, as alleged in the complaint, for the abduction of plaintiff's infant daughter from the service of the plaintiff, her father, and also for seduction while she was absent from her father's house. It appears that the defendant, who is a man sixty years of age, and has a wife from whom he is not legally divorced, and who is living absent from him, on the 6th of May, 1886, came to the plaintiff's house and had an interview with the plaintiff as well as his daughter. On the 16th day of May following he again came to the plaintiff's house, and had an interview with him and plaintiff's wife upon the subject of marrying Edith, plaintiff's daughter. During the interview with the plaintiff upon the latter day, upon the subject of the marriage of defendant to plaintiff's daughter, there was a conversation between them in regard to his legal right to contract marriage, and whether the conditions of separation from defendant and his wife were such as to allow of a valid marriage between defendant and plaintiff's daughter. The defendant represented that he had a legal right to marry, and the defendant drew a consent, or contract to carry out such design, and induced the plaintiff and his wife to sign it. The consent or contract was in these words: "To Home it may Concern: We, the undersigned, are the father and mother of the bearer, Edith Lawyer. Whereas, Edith and P. J. Fritcher, of Sharon, wish to be united, we give our consent to their contracts. Richmondville, May 16, 1886. Peter Lawyer. Catherine Lawyer." Said Catherine Lawyer was not able to write her name, and Edith was requested to sign her name for her, and did so. After these representations were made, and this instrument signed, the defendant carried Edith to Portlandville, in Otsego County, a distance of about thirty miles from her home and residence of plaintiff; stayed at a public house at that place, and said to the lady who kept the house that he was married; occupied the same bed with Edith on the night of the 17th. The next day the defendant carried Edith to Sharon, Schoharie County, where the defendant resided, and stated to his housekeeper, who was a sister of Edith, that she was his wife. On the night of the 18th of May the defendant and Edith occupied the same room and the same bed. After Edith arrived there, and during the 18th and 19th days of May, there was a conversation between Edith and Julia, her sister, defendant's housekeeper, in which Julia told Edith that the defendant could not marry; that he had a wife living, and was not divorced

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duties, it was held that no proof of the relation of master and servant was shown, and it appearing that the confinement took place while she was performing her duties of governess away from home it was held there was no damage which would entitle the parent to sue. Hedges v. Tagg, L. R. 7 Exch. 283.

But where the seduction took place while the daughter was on her way home after leaving the place where she had been at work the action will lie. Terry v. Hutchinson, L. R. 3 Q. B. 598.

So the fact that the seduction takes place while the daughter is away from home on a visit will not defeat the action. Griffiths v. Teetgen, 28 Eng. L. & Eq. 371.

So the fact that the daughter does not sleep in the father's house is immaterial if she performs all the duties of a servant. Mann v. Barrett, 6 Esp. 32.

So where the daughter was married, but had separated from her husband and returned to her father's house and was rendering services to him, he was held entitled to maintain the action. Harper v. Luffkin, 7 Barn. & C. 387.

Where the father owned two farms seven miles apart, and the daughter managed the household affairs upon one of them, she was sufficiently his servant to entitle him to maintain the action. Holloway v. Abell, 7 Car. & P. 528.

A daughter who works by the day is sufficiently in the service of the father to permit him to maintain the action if she renders services to the family mornings and evenings. Ogden v. Lancashire, 15 Week. Rep. 158.

So where the daughter was engaged to work each day from seven in the morning to six in the evening, and spent the remaining hours of the day and night at home assisting in the work of the house, there was sufficient evidence of service to sustain a verdict. Rist v. Faux, 4 Best & S. 409.

If the defendant procured the daughter to enter his service for the purpose of getting her out from under her father's protection so as to seduce her the action may be maintained. Speight v. Oliviera, 2 Stark. 493.

The American rule of constructive service.

As long as the father retains his right to control the services of his infant daughter he can sue for her seduction although he has allowed her to receive her earnings in the service of one by whom she had been seduced. Simpson v. Grayson, 54 Ark. 404.

It is sufficient that the father has the right to the control of the daughter's services although she is at the time living away from home. Greenwood v. Greenwood, 28 Md. 370.

Where the daughter is a minor there is a constructive service. Bolton v. Miller, 6 Ind. 222.

The fact that the daughter has left home under a parol agreement by the father to permit her to reside in the family of a stranger for a number of years is immaterial. Mobry v. Hoffman, 86 Pa. 378.

Where the daughter was temporarily away from home living with her uncle, with whom there was no agreement as to the duration of her service, the father was held entitled to recover, the court stating that she was his servant *de jure* though not *de facto* at the time of the injury. Martin v. Payne, 9 Johns. 387, 6 Am. Dec. 288.

The father was held entitled to maintain the action although the daughter was at the time living in the family of his sister in another city, because of the unpleasant relations between herself and her stepmother. Hornketh v. Barr, 8 Serg. & R. 36, 11 Am. Dec. 568.

Where the daughter was absent from the father's house during the whole time covering the period of her seduction and confinement, and there was

from her. Edith, the plaintiff's daughter, was about seventeen years of age, generally lived in her father's family, and performed service for him, though she did work out occasionally, but her father had received her wages. Among the declarations made at the interview of the 16th between plaintiff and defendant, the plaintiff testifies that the defendant said: "I am just as clear from my wife as though I never had married her." The plaintiff also testified that he believed such statement to be true. This statement and belief preceded signing the paper above set forth. On the 17th or 18th day of May, and after defendant had arrived at his home and made the statement above to Julia, she procured from a drug-store in the vicinity of defendant's residence some poison. Edith partook of that poison, and died of it on the 20th day of May.

The principal question involved in this case is whether the plaintiff proved a loss of service and damage in consequence thereof sufficient to maintain the action. The trial judge charged the jury that the plaintiff was not entitled to recover damages for any loss of service by reason of the taking of the poison and the death of Edith in consequence. Nevertheless the jury, under the charge of the court, found a verdict in favor of the plaintiff of $800, besides costs. The general term was not unanimous in affirming the judgment on the verdict of the jury. One of the learned judges of the general term, as shown by his dissenting opinion, uses the following language, which indicates the view taken by him and the grounds for his dissent from the affirmance of the judgment: "The defendant, a married man over sixty years of age, took plaintiff's daughter Edith, about seventeen years old, from her father's house on Monday, May 17th. He did this with the consent of the parents. But the verdict of the jury establishes that he obtained this consent by fraud. That night he stayed with her at an hotel, and occupied the same bed with her, saying to the landlady that Edith was his wife. . . . The next day, after dinner, Edith became sick. She had taken poison. The day following, Thursday, the 20th, she died from the effects of the poison. Before death she told her sister that she took poison because she did not want to live, and that she did not want to see anybody. There was evidence that Edith had recovered from her usual monthly courses a week before she went away with the defendant, and that before her death her underclothes were spotted with blood, which a physician supposed to be the menstrual flow. The important point in this case is whether on these facts the court could properly submit to the jury the question whether the plaintiff sustained damage, other than that of death, for loss of service by reason of the seduction. It will be seen that there is no evidence of seduction before Monday night; no evidence of Edith's condition from Monday night till Wednesday noon, when she took the poison; and, of course, no evidence of pregnancy."

Mr. **A. B. Coons,** for appellant:

A father cannot maintain an action for debauching his daughter if he consented to or

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no proof that the father took care of her or expended anything on her account during her sickness, he was held entitled to recover upon the ground that she was constructively in his service. Mulvehall v. Millward, 11 N. Y. 343.

The facts that the father had given the daughter her time absolutely, and she had left home with the understanding that she was to provide for herself, will not defeat the action. Clark v. Fitch, 2 Wend. 459, 20 Am. Dec. 639.

The fact that the seduction was accomplished while the daughter was away from home on a visit will not defeat the father's right of action if he had retained the right to receive her services if he should demand them. Lavery v. Crooke, 52 Wis. 612, 38 Am. Rep. 768.

The father may maintain the action although the daughter had one year previously left her father's house with no intention of returning with his consent to her departure and his license that she may appropriate her time and services to her own use. Boyd v. Byrd, 8 Blackf. 113, 44 Am. Dec. 740.

In an action by a father for the seduction of his daughter the relation of master and servant is presumed if she is under age and under his control. Barbour v. Stephenson, 32 Fed. Rep. 66.

In Howland v. Howland, 114 Mass. 517, 19 Am. Rep. 381, evidence was admitted to show that the father was not legally married to the mother of the daughter for the purpose of rebutting a presumption of service by showing that plaintiff had no legal right to it although the court stated that if actual service was proved a recovery might be had.

Actual service.

The rule as to what facts are sufficient to show an actual service is somewhat more liberal in the United States than in England.

Thus where a widowed mother sent for her daughter, who was out at service, to come home for a few days to assist in taking care of sick persons in the family, and while she was engaged in such duties she became pregnant, she was in the actual service of the mother in such sense that the action could be maintained although a day or two afterwards she returned to the service of her employer. Gray v. Durland, 51 N. Y. 424.

So where the daughter was employed by a third person but the father required her to spend a part of every Sunday at home, during which time she did work for him, he was held entitled to maintain the action. Kennedy v. Shea, 110 Mass. 147, 14 Am. Rep. 584.

So the facts that the daughter owns the house and that the mother lives with her will not defeat the action if the mother was the head of the house and the daughter rendered services for her. Villepigue v. Shular, 3 Strobh. L. 484.

Relinquishment of right to services.

If the father has by contract devested himself of the right to control the daughter's services he cannot recover. White v. Murtland, 71 Ill. 252, 22 Am. Rep. 100.

So where the seduction is accomplished while the daughter is living with one to whom she has been legally indented as a servant and the father has thus lost control over her he cannot maintain an action. Dain v. Wycoff, 7 N. Y. 191.

But where prior to the seduction the father had indentured the daughter to a third person into whose service she had gone, but soon afterward it was ascertained that they could not get along together and she had left with the consent of such person and had afterward with her father's consent worked out for different persons, during which time the seduction was accomplished the father

connived at her intercourse with the defendant.

Seagar v. *Sligerland*, 2 Cai. 219; *Travis* v. *Barger*, 24 Barb. 614; *Smith* v. *Masten*, 15 Wend. 270; *Bunnell* v. *Greathead*, 49 Barb. 106; 2 Greenl. Ev. § 578.

Where the father consents, or where the child is bound out, he is not entitled to her services, and cannot recover damages for her seduction.

Dain v. *Wycoff*, 7 N. Y. 191.

The relation of master and servant is the foundation of the action for the loss of service.

Ibid.; *Bartley* v. *Richtmyer*, 4 N. Y. 38, 53 Am. Dec. 338; *Mulvehall* v. *Millward*, 11 N. Y. 343.

There was no proof that plaintiff's daughter had been seduced. The most that could be said was, there was a possibility that defendant might have seduced her. That is not sufficient to go to the jury with.

Morrison v. *New York, N. H. & H. R. Co.* 32 Barb. 568.

The defendant is unimpeached and uncontradicted upon this point; he swears positively he did not have sexual intercourse with her.

Where a fact not improbable is positively testified to by unimpeached and uncontradicted witnesses, it is error if the court submit it to decision of a jury.

Robinson v. *McManus*, 4 Lans. 380; *Storey* v. *Brennan*, 15 N. Y. 524, 69 Am. Dec. 629; *Algar* v. *Gardner*, 54 N. Y. 360; *Raymond* v. *Richmond*, 14 N. Y. Week. Dig. 396; *Murray* v. *Troy & W. T. Bridge Co.* 15 N. Y. Week. Dig. 16.

There must be a loss of service, not speculative or guess work, but an actual loss, flowing from the seduction, or the direct consequence of it.

Knight v. *Wilcox*, 14 N. Y. 415.

Mere seduction, without pregnancy, consequent ill health or injury to the servant will not give the right of action. This action is not maintainable upon the mere relation of parent and child.

Ingerson v. *Miller*, 47 Barb. 47.

To constitute seduction as a cause of action for the parent of the female, it must appear that defendant used insinuating arts to overcome her opposition, and by his wiles and persuasions, without force, debauched her. The bare fact of criminal connection does not constitute it.

Hogan v. *Cregan*, 6 Robt. 138.

Mr. **William C. Lamont**, with *Mr.* **Albert Baker**, for respondent:

If the paper consenting to the marriage of Edith with defendant was procured by false and fraudulent representations, then it was no consent and entirely unavailing. It left defendant in the same situation as if he had, secretly and by force, in the night-time, taken plaintiff's daughter from her home.

People v. *DeLeon*, 11 Cent. Rep. 882, 109 N. Y. 226; *Reg.* v. *Hopkins*, Car. & M. 254.

She was taken wrongfully by defendant on the 16th of May, 1886. She died on the 20th, four days after. During this time plaintiff

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was held entitled to recover. Emery v. Gowen, 4 Me. 33, 16 Am. Dec. 233.

The action cannot be maintained, although the daughter is under age, if the father has abandoned her and removed to another State, leaving her to provide for herself. Ogborn v. Francis, 44 N. J. L. 441.

So where the daughter left the home of her mother at the age of eight or nine years with the intention of remaining away because her mother was a common prostitute, and was seduced at the age of seventeen or eighteen, never after her departure having had any intercourse with the mother whatever, the latter could not maintain an action for the seduction. Roberts v. Connelly, 14 Ala. 235.

Relation must exist at time of seduction.

There is no doubt that in England the relation of master and servant must subsist at the time of the seduction. Davies v. Williams, 10 Q. B. 725.

In this country the rule cannot be said to be uniform although some of the earlier cases which departed from the English rule have been since overruled.

In Sargent v. ——, 5 Cow. 106, a mother who had bound her daughter out as an apprentice was permitted to maintain an action for her seduction while thus bound out where the articles of indenture were afterwards canceled and the daughter returned to her mother's house, where the confinement took place, the court remarking that "it cannot be necessary, according to the theory or just principles by which this action is regulated, that the parent in order to sustain it should be entitled to the services of the daughter at the very instant when the act is committed which subsequently results in loss of service or necessary pecuniary disbursements."

The doctrine there announced is sustained by at least two other cases.

Thus an action may be maintained by a mother for the seduction of her minor child although it took place in the lifetime of the father and the loss of service happened after his death. Coon v. Moffitt, 3 N. J. L. 169, 4 Am. Dec. 362.

So if the daughter lives with the mother before and at the time the child was born, performing service for her, the action may be maintained by her although the father was living at the time of the seduction and had died before the birth of the child. Parker v. Meek, 3 Sneed, 30.

But in Bartley v. Richtmyer, 4 N. Y. 38, 53 Am. Dec. 338, a case which involved the right of a stepfather to sue for the seduction of his step-daughter, who was not in his service at the time of the seduction but returned to his house in order to be confined there, the court says that it is quite clear that the reasoning in Sargent v. ——, 5 Cow. 106, cannot be supported.

And in Logan v. Murray, 6 Serg. & R. 175, 9 Am. Dec. 422, in which the action was trespass, the court treats the question as immaterial whether the action was trespass or case, and states that a mother cannot recover damages for the seduction of her daughter accomplished in the lifetime of the father, with whom the daughter resided, though after the father's death she remained with the mother, who bore the expense of her lying-in and supported her and her child.

So where the seduction took place while the daughter was in the service of a stranger the facts that she returned to her mother's house and became her servant before the confinement, and that the mother bore her lying-in expenses, will not give her a right of action. South v. Denniston, 2 Watts, 476.

So an action for seduction cannot be brought by the mother after the father's death if at the time

was entitled to the services of his daughter and servant. Of these services by the wrongful, villainous, and fraudulent conduct of defendant, plaintiff was deprived. This made out a cause of action.

Lipe v. *Eisenlerd*, 32 N. Y. 229; *Laurence* v. *Spence*, 99 N. Y. 669.

This action can be maintained without pregnancy or disease.

White v. *Nellis*, 31 N. Y. 405, 88 Am. Dec. 282, affirming 31 Barb. 279; *Ingerson* v. *Miller*, 47 Barb. 47; *Lipe* v. *Eisenlerd*, *supra*; 2 Sedgw. Dam. 7th ed. 312.

The English rule requiring proof of actual service has been relaxed, and it is only necessary to show that the parent has the legal right to command the services of the child and very slight evidence of loss of service will suffice.

See *Badgley* v. *Decker*, 44 Barb. 589; *LeCoup* v. *Eschensse*, N. Y. Daily Reg. June 11, 1884; *Maurell* v. *Thomson*, 2 Carr. & P. 303; *White* v. *Nellis*, 31 N. Y. 408, 88 Am. Dec. 282. See also *Lipe* v. *Eisenlerd*, 32 N. Y. 234.

To sustain the recovery in this case, it is not necessary to go to the extent of reasoning as to a fiction.

Hewitt v. *Prime*, 21 Wend. 79.

A father can sustain an action for the seduction of his daughter without proving any actual loss of service. It is enough that the daughter be a minor residing with her father, and that he has the right to claim her services.

See also *Furman* v. *Van Sise*, 56 N. Y. 441, 15 Am. Rep. 441; *Hewitt* v. *Prime*, *supra*.

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

I should not feel justified, in departing from my rule in this court, not to write an opinion upon the affirmance of a judgment in a common and ordinary case, except to reconcile differences of opinions by the judges of the court below, and to remove any resort to strained or doubtful reasoning to sustain the judgment appealed from, by a brief presentation of a feature of the case that was not distinctly brought out in that court. This action was brought to recover damages which the plaintiff alleged he has sustained by the unwarranted interference of the defendant with plaintiff's right to service. It is as well settled that he who unlawfully interferes with another's right to service, whether it be the service of a male or female, a minor or an adult, is liable for actual or compensatory damages in the same manner, and upon the same grounds, that he would be liable for an unlawful interference with any other property right of another. The plaintiff alleges that he is the father of Edith Lawyer; that at the time of the acts of the defendant complained of by the plaintiff she was 17 years of age, and was residing with the plaintiff, and that he was entitled to her services; and that without the consent of the plaintiff, the defendant, on or about the 16th day of May, 1886, enticed and persuaded the said Edith Lawyer to leave the residence and service of the plaintiff, and to accompany him (the defendant) to Portlandville, in the county of Otsego, etc. The

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it took place the father was alive. Vossel v. Cole, 10 Mo. 634, 47 Am. Dec. 136.

In George v. VanHorn, 9 Barb. 523, the court says that so far as principles can be deduced from adjudged cases they hold that the relation of master and servant must exist between the plaintiff and the seduced at the time of the seduction, and that there must be a loss of service to the plaintiff or a charge brought upon him in consequence of the seduction.

Where the child is of full age.

If the daughter is over twenty-one years of age, but is still living in her father's house in such a way that he enjoys and can command her services, he may maintain the action. Wert v. Strouse, 38 N. J. L. 185.

It is immaterial that the daughter was of full age. It is sufficient that she was the father's servant. Applegate v. Ruble, 2 A. K. Marsh. 563.

Where the daughter was twenty-five years of age, but lived in her mother's family and rendered services there, the action was held maintainable although no contract for services was shown. Badgeley v. Decker, 44 Barb. 577.

In New Jersey, where the attaining of the age of twenty-one is not ipso *facto* an emancipation of the child, service done by one, although over twenty-one years of age, for her parents is regarded as done because due to them in such sense that the father can maintain an action for loss of it through her seduction. Sutton v. Huffman, 32 N. J. L. 58.

Postlethwaite v. Parkes, 3 Burr. 1878, is reported as saying that where the daughter was of full age and away from her father's house at service when the seduction was accomplished, he had no right of action. And that is the present rule. Nickleson v. Stryker, 10 Johns. 115, 6 Am. Dec. 318; Mercer v. Walmsley, 5 Harr. & J. 27, 9 Am. Dec. 486.

Where the daughter is of full age and the seduction occurred while she was in the employment of a third person the father cannot recover although the contract for her services was made with him and he was receiving her wages. McDaniel v. Edwards, 29 N. C. 408, 47 Am. Dec. 332.

Where at the time of the seduction the daughter was over twenty-one years of age, was residing with her brother, and her father was alive, the mother was held not entitled to maintain the action where after the father's death the daughter came home to her and was confined there. George v. VanHorn, 9 Barb. 523.

Where the daughter was of full age and at service in the family of a stranger the action cannot be maintained although the seduction took place while she was on her way home on a visit of eight or ten days and returned to his home to live four or five months before the birth of the child. Phipps v. Garland, 20 N. C. 44.

Where at the time of the daughter's impregnation she was over twenty-one years of age and was living with her sister, and before the child was born she was married, and it did not appear that the father had been to any expense on her account or had lost any service, the action would not lie. Patterson v. Thompson, 24 Ark. 70.

The action could not be maintained where at the time of seduction the daughter, who was twenty-three years of age, was at work for a third person under a twelve months' contract for a price to be paid her for her own use. Lee v. Hodges, 13 Gratt. 729.

Where the female was twenty-six years of age at the time of her seduction and had lived with a third person as his housekeeper for a period of about three years, it was held that no action would lie. Millar v. Thompson, 1 Wend. 447.

What service is sufficient in case child is of age.

A contract of service is not necessary in case the

plaintiff also alleges that on the 17th day of May, 1886, the defendant debauched the said Edith, etc. The evidence in this case establishes beyond question that on and previous to the 16th day of May, 1886, Edith was the servant of plaintiff both in law and fact. It follows from that relation that plaintiff was entitled to command and to have her services wholly and without interruption, save such time as was necessary for her rest, health and preservation, until the plaintiff should give a valid consent to dispense with the service or the law should terminate the relation. The defendant came to plaintiff's house, where she was in fact performing, and was in law bound to perform, services for the plaintiff, and took her from and deprived the plaintiff of such service. If this was done, as plaintiff alleges, without his consent, the defendant is liable to make plaintiff compensation for the loss of service. If the plaintiff's consent was obtained by defendant through fraud it was void, for fraud vitiates all contracts and all consents. Consent or no consent was one of the issues to be tried by the jury; and the jury has found, upon competent evidence for that purpose, that any consent given by plaintiff was given through fraud, and so was no consent. With this finding by the jury the court cannot interfere. Edith was taken away from the plaintiff by the defendant, and remained with him at an hotel, and on the way to defendant's home, and at his home, for the space of four days; and the plaintiff was in the mean time deprived of her services, and his right to them was unlawfully interfered with.

The gravamen of the action, and of all actions of this nature, is the loss of service; and both pleadings and the proofs in this case make out a cause of action in entire harmony with the fullest requirements of such actions, and entirely dispenses with any necessity or occasion to resort to fiction, as is said to be done in some instances to maintain the recovery of damages in these cases. In the aspect we have been considering this case, it presents an actual and measurable pecuniary damage to the plaintiff. The loss of service constitutes the cause of action, and it can make no difference as to the right of action whether that has been accomplished by an unlawful persuasion of the servant to leave the master's employment or through fraud upon the master, or force upon the servant, or by both such fraud and force. The loss of service is the cause of action, and when that is established, a basis for damages to some extent exists; and whether that loss is caused or attended by or followed by sexual intercourse, defilement or pregnancy, loss of health or disability to serve, or for the purpose or with an intention of obtaining those results through a formal, but criminal, marriage, has relation more especially to the damages the plaintiff may recover than to his cause of action.

It is true the complaint charged debauchment and ill health as a consequence, as well as the taking of the servant from the master. Whether the debauchment was proven or not, the taking away by the defendant was proven without any contradiction, and this gave plaintiff a cause of action and a right to damages.

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daughter is of age. Briggs v. Evans, 27 N. C. 20; Bennett v. Allcott, 2 T. R. 166; Kendrick v. McCrary, 11 Ga. 603.

Any accustomed service due to the father will be sufficient provided it be service due and not merely voluntary, although it consists of slight acts done out of the time which is devoted to the service of a third person. Sutton v. Huffman, 32 N. J. L. 58.

Where the daughter was over twenty-one years of age, but had always lived with her parents while working during the daytime at a mill, and in the evening daily performing some ordinary woman's work about the house, the service was held sufficient to sustain the action. Lamb v. Taylor, 67 Me. 85.

The relation of mistress and servant was held to be established in case of a daughter over twenty-one years of age where she was living in a family with her mother and brother and sister, and the children earned wages and supported the establishment which the mother conducted with the money furnished her by the children, and the daughter at times made garments for the mother and assisted her in the household affairs. Moran v. Dawes, 4 Cow. 412.

But where the daughter carried on the business of a milliner and furnished part of the support for her mother and younger sisters, it was held this was not sufficient service to the father to entitle him to maintain the action. Manley v. Field, 7 C. B. N. S. 96.

Although the daughter was upwards of twenty-one years of age and the seduction occurred while she was rendering services to a neighbor in assisting him in preparing for and placing his house in order after a party and ball, which took place during the midwinter holidays, the father was held entitled to recover, it appearing that she usually rendered services in her father's household where she lived and was supported. Lipe v. Eisenlerd, 32 N. Y. 229.

Where the seduction took place on the night before the daughter, who was twenty-four years of age, was to emigrate to a foreign country and soon after she reached such country, upon discovering that she was pregnant she left her service and returned to her own country and went to live with her sister until after her confinement, when she returned to her mother's house, the court, upon the authority of Joseph v. Corvander, cited in Roscoe's N.P. 878, 13th ed., held that there was sufficient evidence of loss of service to maintain the action. Long v. Keightley, 11 Irish, L. T. 77.

What impairment of serving power must be shown.

In the absence of a statute authorizing it, proof of seduction merely will not sustain the action. White v. Nellis, 31 N. Y. 405, 88 Am. Dec. 282; Eager v. Grimwood, 1 Exch. 61.

There are some *dicta* which show a tendency on the part of the courts to break through the legal fiction and permit the father to maintain the action for the seduction pure and simple. Thus Ellington v. Ellington, 47 Miss. 329, is a strong case in favor of the maintenance of the action by the parent as such for the defilement of the daughter, although the facts of the case did not call for such an extension of the doctrine. So Hewitt v. Prime, 21 Wend. 79, has been thought to favor such an extension and has been the subject of considerable attack, but when properly limited it is in line with the authorities. In that case it appeared that the daughter became pregnant and was delivered of a child, which within all the cases is a sufficient loss of service upon which to found the action; but the chief justice goes on to remark that "the old idea of loss of menial services which lay at the foundation of the action has gradually given way to more en-

In such cases the jury have the right to impose punitive damages, in their discretion, in addition to compensatory damages. I think these views are abundantly supported by numerous decided cases, to a few of which I make reference and extracts. *Judge* Andrews, in *People* v. *De Leon*, 109 N. Y. 229, 11 Cent. Rep. 882, says: "In *Reg.* v. *Hopkins*, Car. & M. 254, the case of an indictment for the abduction of an unmarried girl under sixteen years of age, 'against the will' of her father, it appearing that the consent of the parents was induced by fraud, the indictment was sustained; and Gurney, *B.*, said, (in that case,) 'I mention these cases to show that the law has long considered fraud and violence to be the same.'"

In *Lipe* v. *Eisenlerd*, 32 N. Y. 238, (which was an action by the father to recover damages for the seduction of his daughter, who was twenty-nine years of age, but living in her father's family,) this language is used: "And any illegal act by which the right of the father, such as it was, to her services, was interfered with, to his detriment, was a legal wrong, for which the law affords redress." On page 236 of the same case the judge uses this language: "Finally, it is urged by defendant's counsel that only compensatory damages should have been allowed. The judge refused so to direct the jury, and I think he was right. The object of the action, in theory, is to recover compensation for the loss of the services of the person seduced. This is so far adhered to that there must be a loss of that kind or the action will fail; but when that point is established the rule of damages is a departure from the system upon which the action is allowed. The loss of service is often merely nominal, though the damages which are recovered are very large. It is too late to complain of this as a departure from principle, for it has been the law of this State and of the English courts for a great many years." The same judge further on in the opinion uses this language: "The true rule, [this being an action brought by plaintiff for the seduction of his daughter,] I think, is that the plaintiff's right to the services may be made out in either way, and that, when established so that the action is technically maintainable, the court and jury are to consider whether the plaintiff, on the record, is so connected with the party seduced as to be capable of receiving injury through her dishonor. A mere master, having no capacity to be injured beyond the pecuniary worth of the services lost, should undoubtedly be limited in his recovery to the value of these services. But the case of this plaintiff, as has been mentioned, is quite different." In *Hewitt* v. *Prime*, 21 Wend. 79–82, *Judge* Nelson, in delivering the opinion of the court in an action like the one under consideration, uses this language: "It is now fully settled, both in England and here, [citing several authorities in both countries,] that acts of service by the daughter are not necessary. It is enough if the parent has a right to command them, to sustain the ac-

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lightened and refined views of the domestic relation. As one of the fruits of this the loss sustained by the parent from the corruption of the daughter's mind and the defilement of her person is considered ground for damages," and the judge continued that "the action was sustained in his judgment by proof of the act of seduction," but this argument on his part goes beyond what the cases either before or afterward will justify.

If pregnancy results the action may be sustained, and the action need not be delayed until after the birth of the child. Briggs v. Evans, 27 N. C. 29; Stiles v. Tilford, 10 Wend. 338.

Lord Denman said in Joseph v. Corvander, cited in Roscoe's N. P. 15th ed. p. 878, that the action would lie though the daughter had not been actually confined before action brought, and though the plaintiff had voluntarily turned her out of his house upon discovering her pregnancy.

The editor of the Irish Law Times in a note to the case of Long v. Keightley, 11 Irish. L. T. 77, states that the action has been more than once sustained in Ireland before actual confinement had taken place.

In Ingerson v. Miller, 47 Barb. 47, in which the daughter became pregnant and died suddenly about four months after conception from congestion of the brain caused by a physician's refusal to perform an abortion, the court held that there was sufficient proof of loss of service and intimated that the mere fact of pregnancy is sufficient to disqualify a woman for service, and that in that case the daughter must have been in no condition for ordinary physical exercise for some weeks prior to her death.

But in Humble v. Shoemaker, 70 Iowa, 223, it is held that if the daughter marries after her seduction and prior to her confinement, no action lies on the part of the father, and this would tend to show that, in that State the mere fact of pregnancy will not sustain the action.

For marriage of the daughter to the seducer after the birth of the child is not a bar to the action. Eichar v. Kistler, 14 Pa. 282.

The communication of a venereal disease by which she was made sick and unable to labor is sufficient to sustain the action. White v. Nellis, 31 N. Y. 405, 88 Am. Dec. 282.

Loss of service caused by nervousness and excitability followed by an impairment of health is sufficient to sustain the action though there is no pregnancy or sexual disease. Blagge v. Illsley, 127 Mass. 199, 34 Am. Rep. 361. The court says in that case that there is no sound distinction between the loss of service as the result of physical disability produced by physical causes alone and loss of service the result of mental suffering and disturbance.

So an instruction that an action for seduction cannot be maintained unless it is followed by pregnancy or sexual disease is erroneous, the court stating that it may be accomplished under such circumstances that its proximate effect would be mental distress or disease, impairment of health and destruction of capacity to labor, in which case the action might be maintained. Abrahams v. Kidney, 104 Mass. 222, 6 Am. Rep. 220.

The court in Vanhorn v. Freeman, 6 N. J. L. 333, intimates that in its opinion if incapacity to perform her accustomed duties results immediately from the mental suffering of the daughter, which is caused proximately by the seduction, there is no case or principle of law which will defeat the action, although in that case there was sufficient physical injury to sustain an action independently of the mental suffering.

Proof that after the seduction the girl was in a state of very great agitation and continued so for some time receiving medical attendance and requiring watching to prevent her from doing herself injury, is sufficient to raise the presumption of loss of service. Manvell v. Thomson, 2 Car. & P. 303.

tion. . . . The ground of the action has often been considered technical, and the loss of service spoken of as a fiction, even before the courts ventured to place the action upon the mere right to claim the services; they frequently admitted the most trifling and valueless act as sufficient." Further on in the opinion the judge uses this language: "The action, then, being fully sustained, in my judgment, by proof of the act of seduction in the particular case, all the complicated circumstances that followed come in by way of aggravating the damages."

In *White* v. *Nellis*, 31 N. Y. 405–409, 88 Am. Dec. 282, (which was an action for debauching plaintiff's minor daughter, and communicating to her a venereal disease, by which she was made sick and unable to labor,) the judge uses the following language: "Whenever the wrongful act, by immediate and direct consequence, deprives the master of the service of his servant, or injuriously affects his legal right to such service, the law gives a remedy." "It is not sufficient to sustain the action to prove the seduction merely. That is the wrongful act from which it must appear that a direct injury to the relative rights of the master has followed. The right of the master, as recognized by the law, is to have the services of the servant undisturbed by the wrongful act of another. . . . In cases of debauchery, the ordinary consequences that affect the master are the pregnancy and lying-in of the servant, during which she is unable to render him service. Hence the precedents of pleadings in this form of action have perhaps invariably alleged a loss of service through those consequences. But it by no means follows that there is no remedy where the loss of service is the direct effect of the wrongful act, although produced by some other consequence. All that the law can require is *damnum et injuria;* for these constitute, when directly connected, the proper and complete elements of an action on the case; and, whenever they combine as an immediate cause and effect, the law cannot deny a remedy without a departure from principle. It is maintainable because a wrongful act has caused a direct injury to a lawful right. In such case, the right of the master to a remedy for an enjoyment of the services of his servant is equally clear, whether it be produced by beating and wounding the servant, or enticing him from employment, or forcibly abducting him, or wrongfully debauching and impregnating with child, or with disease. Nor, in my judgment, does the remedy depend upon the sex of the servant. . . . We have now to determine the abstract right to maintain any action at all; and that is something quite independent of the question what damages may be recovered if the action be allowed."

In the case of *Ingerson* v. *Miller*, 47 Barb. 47–50, the general term use this language: "It is no objection to the maintenance of the action that no expense or actual loss of service is proved. It is sufficient that the father was at the time entitled to the services of the daughter, and might have required them had he

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Whether a loss of service caused by illness resulting from the daughter's abandonment by the seducer will sustain the action,—*quære*. Boyle v. Brandon 13 Mees. & W. 738.

In New York, a case which was several times before the court is instructive upon this question. When the case was first before the general term the court held that if sickness is produced by shame for the defilement an action may be sustained. Knight v. Wilcox, 15 Barb. 279.

When it came again before the general term the court said that the exposure and the loss to the plaintiff proceeding from it must be regarded as incidents of the wrong as legitimately and directly connected with it. Knight v. Wilcox, 18 Barb. 220.

But when the case reached the court of appeals that court ruled that where there was no loss by sickness until three months after the seduction, when the daughter suffered some illness in consequence of being threatened with exposure because the facts had been made public, the seduction was not the proximate cause of the loss of service so as to sustain an action on the part of the father. Knight v. Wilcox, 14 N. Y. 413

Construction of statutes.

For the purpose of relieving this action of its anomalous character statutes have been passed in many states the scope and effectiveness of which may be seen from the following illustrations:

Under the Indiana statute it is not necessary, to justify a recovery, that the daughter should have been in the service of the parent or that any loss of service shall be shown. Felkner v. Scarlet, 29 Ind. 154.

Under the Iowa statutes the father may recover though the minor daughter is not living with him and there is no actual loss of service. Updegraff v. Bennett, 8 Iowa, 72.

If the seduction is accomplished before the daughter attains her majority the father may maintain the action although she is not confined until after she becomes of age. Stevenson v. Belknap, 6 Iowa, 97, 71 Am. Dec. 392.

Since the statutes give the daughter the right to sue for her own seduction if she is of age, the father cannot sue unless at the time of the seduction she was a minor. Dodd v. Focht, 72 Iowa, 579.

The Kentucky statute permitting the parent to bring an action for the seduction is cumulative and does not take away the common-law right. And the father may maintain the action for seduction of his daughter of full age, who is living with and rendering service for him at the time. Wilhoit v. Hancock, 5 Bush, 568.

In Michigan the statutes have abolished the legal fiction and furnished adequate redress for the substantial wrong, the ground of damages being in no respect the alleged loss of service. Stoudt v. Shepherd, 73 Mich. 588.

Under the Tennessee statute the father may recover although the daughter was not living with him nor in his service, and he need not show any loss of service. Franklin v. McCorkle, 16 Lea, 609, 57 Am. Rep. 244.

In Virginia an action may be maintained without any allegation or proof of the loss of service. Fry v. Leslie, 87 Va. 269.

The statute which dispenses with proof of loss of service, if intending to give an action for the seduction merely, is at all events merely cumulative and the father may still maintain the common-law action for loss of service and expenses. Clem v. Holmes, 33 Gratt. 726.

In West Virginia the statute has done away with the necessity of showing loss of service, but it is still necessary to show that the relation of master and servant exists. Riddle v. McGinnis, 22 W. Va. 253. H. P. F.

chosen to do so." "The master has a property in the labor of his servant, and any wrongful act creating or producing a disability in the servant to perform what the master has a right to require operates as a disturbance or infringement of such right, to which the law will attach at least nominal damages as a result of the injury." "But proof of the slightest loss of service, or the most trifling injury, if the direct result of the wrongful act is sufficient to uphold the action." In *Badgley* v. *Decker*, 44 Barb. 588, the opinion of the court at general term holds this language: "There was evidence in this case sufficient to go to the jury upon the question of the relation of master and servant existing between the plaintiff and her daughter. The slightest degree of service has been holden sufficient to maintain the action, and to allow a recovery for the heaviest damages; . . . but, to accommodate the action to cases where the daughter rendered no service, a presumed or a fictitious service is resorted to as the gravamen."

The judgment should be affirmed, with costs.

All concur, except **Parker, J.**, not sitting.

NEW YORK COURT OF APPEALS.

PEOPLE of the State of New York, *ex rel.* BRUSH ELECTRIC ILLUMINATING CO., *Appt.*,
v.
Edward WEMPLE, *Respt.*

(.....N. Y.....)

1. **The provision for an appeal from the comptroller to a board composed of the secretary of state, attorney-general and state treasurer, in the matter of a corporation tax** under the last clauses of section 1 of the Act of 1881 does not apply where a corporation has neglected or refused to make any report, but only to cases where the comptroller, not being satisfied with the report, may proceed to make a valuation of his own and settle an account against the company upon the basis of it.

2. **An electric-light company is included within a general exemption of manufacturing companies** from taxation in the absence of a statute expressly taking it out of the exemption clause.

(January 20, 1892.)

APPEAL by relator from a judgment of the General Term of the Supreme Court, Third Department, confirming the action of the state comptroller in refusing to correct a tax account so as to credit relator with the amount of taxes which it had paid under compulsion and protest for certain years when it claimed to be exempt from taxation as a manufacturing company. *Reversed.*

The facts are stated in the opinion.

Mr. **John W. Houston**, for appellant:

The operations of companies engaged in the business of the relator are essentially manufacturing operations, the result is a manufacture, and consequently the relator is a manufacturing corporation within the meaning of the statute exempting such corporations from the payment of a tax to the State.

Electricity is produced in various ways, may be measured, stored, and transported like gas, and its effects are visible. A gas company is a manufacturing corporation within the meaning of the statute.

Nassau Gas-Light Co. v. *Brooklyn*, 89 N. Y. 409.

The Supreme Judicial Court of Maine speaks of the business of furnishing electric light as identical with that of furnishing gas.

Edison United Mfg. Co. v. *Farmington Electric L. & P. Co.* 82 Me. 464.

The Supreme Court of South Carolina speaks of the manufacturer of electricity.

Mauldin v. *Greenville*, 8 L. R. A. 291, 33 S. C. 1.

The Massachusetts court used the expression "to manufacture gas or electricity."

Opinion of the Justices, 8 L. R. A. 487, 150 Mass. 592.

If gas is furnished it must be manufactured; if light or heat is furnished it also must be manufactured.

Emerson v. *Com.* 108 Pa. 111.

The executive officers of the government have themselves construed the word "manufacturing" to include electric lighting companies. This construction is entitled to great weight.

United States v. *Moore*, 95 U. S. 763, 24 L. ed. 589; *United States* v. *The Recorder*, 1 Blatchf. 218; Sedgw. Stat. 216; *People* v. *Beach*, 19 Hun, 259.

Mr. **Charles F. Tabor**, *Atty-Gen.*, for respondent:

Exemptions of property from taxation are not favored, and must be clearly established. They cannot be established by doubtful implication; taxation being the rule and exemption the exception.

People v. *Commissioners of Taxes*, 76 N. Y. 64; Burroughs, Taxn. p. 132, § 70; Delaware Railroad Tax, 85 U. S. 18 Wall. 206, 21 L. ed. 888; *North Missouri R. Co.* v. *Maguire*, 87 U. S. 20 Wall. 46, 22 L. ed. 287; *Erie R. Co.* v. *Pennsylvania*, 88 U. S. 21 Wall. 492, 22 L. ed. 595.

Relator is not a manufacturing corporation in the sense in which that term is used in the Act of 1881.

It does not manufacture electricity; nor does it manufacture light.

Com. v. *United States Electric Lighting Co.* (Pa. C. P.) June, 1888; *Nassau Gas-Light Co.* v. *Brooklyn*, 89 N. Y. 409.

Courts have uniformly refused to apply the term to cases where a natural product, substance, or element was simply rendered by artificial processes or by manipulation more suit-

NOTE.—For *note* on what constitutes manufacture, see Com. v. Northern Electric L. & P. Co. (Pa.) *ante*, 107.

See also 22 L. R. A. 228, 232; 33 L. R. A. 508; 36 L. R. A. 130; 41 L. R. A. 228.

able for use by or adaptation to the wants of man.

People v. *Knickerbocker Ice Co.* 99 N. Y. 181; *People* v. *New York F. D. D. Co.* 92 N. Y. 487; *Byers* v. *Franklin Coal Co.* 106 Mass. 131; *Dudley* v. *Jamaica Pond Aqueduct Corp.* 100 Mass. 183; *Frazee* v. *Moffitt*, 20 Blatchf. 267.

O'Brien, J., delivered the opinion of the court:

This appeal brings here for review a judgment entered upon the return to a writ of certiorari, sued out by the relator, for the purpose of reviewing a decision or determination of the defendant as comptroller of the State, whereby the relator was adjudged liable to pay certain taxes and penalties to the State under chapter 361 of the Laws of 1881 and the laws supplementary thereto and amendatory thereof, providing for the assessment and payment of taxes to the State by certain corporations. The relator is a domestic corporation, organized by filing a certificate February 17, 1881, under the Act of 1848, providing for the formation of corporations for manufacturing and other purposes. Since its organization it has been engaged in the business of producing electricity, and supplying the same to its customers in the city of New York for the purpose of lighting public and private places in that city. The relator contended that it was a manufacturing corporation, and as such exempt from paying the tax to the State upon its business, and made no reports and paid no taxes till July, 1889, and then only by force of chapter 353 of the Laws of 1889, which took electric light companies, by name, out of the exemption clause in favor of manufacturing corporations. The relator is beyond all controversy liable for the tax since the passage of the Act last mentioned, but denies that it is liable for anything before, as the exemption clause covering manufacturing corporations then applied to it. In the year 1889, the comptroller caused an examination of the affairs of the relator to be made by a commissioner appointed by him, and upon his report made a statement of the account between the relator and the State, and determine the amount of the tax and penalty due to the State at $10,752.50. The comptroller then issued his warrant to the sheriff, under the statute, directing the collection of the tax out of the relator's property, and it was thus compelled to pay, in order to protect its property from sale, and it did pay under protest. By chapter 463 of the Laws of 1889 power is given to the comptroller at any time to revise and readjust any account for taxes settled against any corporation by him or any of his predecessors in office for taxes arising under the statute, when it is made to appear by evidence submitted to him that the same has been illegally paid, or when it includes taxes that could not have been lawfully demanded; and he was required to resettle the account according to law and the facts, and to charge or credit, as the case might be, the difference, if any, resulting from such revision and resettlement, upon the current account of such corporation. The relator, claiming the benefits of this statute, filed with the comptroller, August 4, 1890, an application in writing in the form of a petition for a revision and re-adjustment of the taxes previously levied and paid. This application was verified, and accompanied by proofs to show that the relater was a manufacturing corporation, and for that reason the taxes paid by it could not have been lawfully demanded by the State. The comptroller denied this application, and from his order, refusing the revision asked for, the relators sought relief before the court by means of the writ of certiorari. The relator did not complain of the amount determined by the comptroller, and the only question which was the subject of controversy on the application for a revision was whether the relator was or was not exempt from payment of taxes as a manufacturing corporation.

A question of practice is presented by a point made by the attorney general to the effect that the relator was not entitled to the writ of certiorari in this case, which renders it necessary to notice the various statutory provisions prescribing the methods of reviewing the determination of the comptroller in these cases. The account against the relator, which established the assessment, so far as it was within the power of the comptroller to do so, was settled July 3, 1889. Immediate notice of the assessment was given to the relator, and, after the expiration of thirty days, no proceedings having been taken to review the same under section 17 of the Act of 1881, as amended by chapter 501 of the Laws of 1885, the comptroller issued his warrant for the collection of the tax. The learned attorney-general contends that the relator, by delay, lost the right of review by certiorari. This would probably be so except for subsequent legislation, which must be presently noticed. The Code (§ 2122) provides that, except as otherwise prescribed by statute, a writ of certiorari cannot be issued to review any determination which can be adequately reviewed by an appeal to a court, or to some other body or officer; and it is urged by the attorney-general that the relator could have appealed from the determination of the comptroller to a board composed of the secretary of state, attorney-general, and state treasurer under the last clauses of section 1 of the Act of 1881, and for that reason was not entitled to the writ. The provision for an appeal to this board does not seem to apply to a case like this, where the officers of the corporation, taking the position that the Company was not subject to any taxation whatever under the Act, neglect or refuse to make any report, but to cases where reports are made by the proper officers of the corporation, and the comptroller, not being satisfied with such report, proceeds to make a valuation of his own, and to settle an account against the Company upon the basis of such valuation. Then the Company may appeal to the board above mentioned, and the question presented by the appeal would seem to be whether the valuation made by the corporate officers, or by the comptroller in disregard of it, is the correct and just one. Here the valuation and determination were not made under section 1, but under section 12, of the Act of 1881, as amended by chapter 151 of the Laws of 1882, and, chapter 501 of the Laws of 1885. But the Act of 1889, above referred to, which gives to the relator the right to apply for a revision and resettlement of the tax, also

prescribes a method for reviewing the action of the comptroller upon such application, which brings up all questions involved in the application. The Act provides that "the action of the comptroller upon any application made to him by any person or corporation for a revision and a settlement of accounts, as provided in this Act, may be reviewed, both upon the law and the facts, upon certiorari by the supreme court at the instance either of the party making such application, or of the attorney-general in the name and in behalf of the People of this State, and for that purpose the comptroller shall return to such certiorari the accounts and all the evidence submitted to him on such application; and, if the original or resettled accounts shall be found erroneous or illegal by that court, either in point of law or of fact, the said accounts shall be there corrected and restated by the said supreme court, and from any such determination of the supreme court an appeal may be taken by either party to the court of appeals, as in other cases." Whatever may be said against the policy of requiring the comptroller to revise and change accounts for taxes, years after the settlement of such accounts, and perhaps after the payment of the tax, this statute is broad enough in its language, and was, we think, intended to reach such a case as this.

The right of the State to receive the tax assessed upon the relator depends upon the question whether it was or was not a manufacturing corporation. In the original Act providing for the payment of taxes to the State by certain corporations, "manufacturing corporations carrying on manufactures within this State" were exempted from its operation. Laws 1880, chap. 542, § 3. In the practical operation of the law it was soon discovered that these broad, general words of exemption covered and protected from the payment of the tax a class of corporations which the Legislature probably did not intend to relieve when inserting the words of exemption in the statute. Accordingly it was found necessary from time to time, as the cases arose, to take out of this general exemption certain corporations by name which the Legislature thought were not within its policy. The courts held that gas companies were manufacturing companies (*Nassau Gas-Light Co.* v. *Brooklyn*, 89 N. Y. 409), and the Legislature, in 1881, proceeded to amend the law by providing that gas companies should not be taken to be within the exemption. So electric lighting and power companies were taken out of the exemption by the use of similar language. Laws 1889, chap. 353. These amendments, it is contended in behalf of the relator, show a construction by the Legislature of the term "manufacturing corporations" in harmony with its claims in this case. In so far as the action of the Legislature has any bearing on the question at all, it is, no doubt, in that direction. But the circumstances under which the Amendment of 1889 was made deprive it of much of the weight that courts are accustomed to give to what is known as "legislative construction." A controversy then existed, as it had existed for some time before, between the State on the one hand, and the companies on the other. The companies claimed that they were exempt, as manufacturing companies, from liability to pay taxes to the State under the Act; while the comptroller representing the State, asserted the contrary. In this condition of things, the Legislature stepped in, and enacted that thereafter the companies should not be deemed within the exemption clause, and this settled the controversy, so far as the future was concerned, but as to the years that had elapsed when no report was made or any taxes paid the question was left substantially where it was before. When a material change in phraseology is made many years after the passage of the Act, and after controversies and differences in regard to its construction have arisen, there is sometimes a presumption that the Legislature intended by the amendment to add a new provision to the original Act, and to make it apply to a case to which it did not apply before. When the Legislature takes certain property, for purposes of taxation, out of an exemption clause by name the question arises whether there is not a presumption in such a case that it was within it before. *People* v. *New York Board of Supvrs.* 16 N. Y. 431; *People* v. *Knickerbocker Ice Co.* 99 N. Y. 184. As the statute now reads, certain manufacturing companies are by name taken out of the exemption, and subjected to the payment of the tax. Whether, without this special exception, they would still be exempt, under the general words of the exemption clause, is substantially the question involved here. Electric light and power companies are not now manufacturing companies within the statute under consideration, because the Legislature, in 1889, so enacted. But it does not follow, because the Legislature then declared that they should not be deemed manufacturing corporations, and thus not exempt from payment of the tax, that they were not such and so exempt before. In determining whether a given case is within a clause in a statute exempting certain property or interests from taxation, the policy of the law in making the exemption must be considered, and should have great weight. If the question whether a corporation engaged in the business of furnishing electricity for lighting public and private places or for power is a manufacturing company was made to depend upon the meaning of these words as found in dictionaries, or upon the technical language of science in describing electricity as a power or as an agent in nature, it would doubtless be difficult, and perhaps impossible, to show that the process which the relator calls "manufacturing" produces anything that in a certain sense and in some form did not exist before. That, however, is true of most, if not all, manufacturing operations. The application of labor and skill to materials that exist in a natural state gives to them a new quality or characteristic, and adapts them to new uses; and the process by which this result is brought about is called "manufacturing," whether the change is accomplished by manual labor or by means of machinery. But we think that these considerations are by no means conclusive in determining the true scope and meaning of the term "manufacturing corporations," as it is used in the statute. The true inquiry would seem to be whether a corporation, organized as this is, and carrying on the business that this does, and in the manner

shown, would not be considered, in common language, as engaged in some manufacturing process, or carrying on some manufacturing business, though granting all that is said by experts and others about electricity as a natural element or force. To say that electricity exists in a state of nature, and that a corporation engaged in the business that the relator is, collects or gathers it, does not fully or accurately express the process by means of which it is enabled to sell and deliver something useful and valuable to its customers. The business in which this corporation is engaged renders it necessary, in the first place, to invest a large amount of capital in a plant which may appropriately enough be called a "factory." Then it must purchase and consume a vast amount of coal to produce steam, and to furnish power for the operation of machinery. Then it supplies and operates a complicated system of machinery, such as boilers, engines, dynamos, shafting, belting, and such other things as are commonly used in manufacturing establishments, and then, by means of wires, cables, and lamps, it lights streets and private houses by electricity for a compensation. But the electricity or electric currents that produce this result cannot properly be said to be the free gift of nature, gathered from the air or the clouds. It is the product of capital and labor, and in this respect cannot be distinguished from ordinary manufacturing operations. According to the common understanding, the electricity or thing which produces the results from which the corporation derives its income is generated or produced by the application of power to machinery, and thus, by means of a process wholly artificial, the relator is enabled to sell the product of its operations to its customers.

Passing by the refinements of scientific discussion as to the nature of electricity, it would seem to be common sense to hold that a corporation that does all this is in every just sense of the term a manufacturing corporation. The mere appropriation or use of an article or thing which is furnished by nature is not a manufacturing operation. The liberation of natural gas from its hiding place in the earth, and its transportation through pipes to consumers, would not properly be called a manufacturing operation; but the production of illuminating gas, and its distribution to customers by means similar to the operation which the relator carries on, has been held by this court to constitute manufacturing, and a corporation organized for that purpose is a manufacturing corporation. *Nassau Gas-Light Co.* v. *Brooklyn*, *supra*. So, too, we have held that the collection, storage, preparation for market, and transportation of ice is not a manufacture, but the production of ice by artificial means. *People* v. *Knickerbocker Ice Co.* 99 N. Y. 181. When we attempt to establish the proposition that the gas which lights one room is a manufactured product, and the electricity which lights another is not, we are obliged to rely more upon the definition of terms and the distinctions of scientists than the actual practical processes and operations by means of which results in all respects, or at least substantially, the same are produced. If due weight is given to the fact that electricity, as now used and applied to the business of life, such as the lighting of streets and buildings, the propulsion of cars and machinery, and like operations, is essentially the product of the skill and labor of man, there is no difficulty in reaching the conclusion that a corporation engaged in the business of generating, storing, transmitting and selling it is what was commonly known at the time of the passage of the Corporation Tax Law in 1880, a "manufacturing corporation." The learned judge who gave the opinion in one of these cases at the general term has extracted from the proofs before the comptroller on the application of the relator a concise and accurate description of the mechanical process used in the business of electrical illumination, which, on account of its clearness and brevity, conveys the idea better than any language we could employ: "A steam engine is used as a motive power for the propulsion of machinery which is attached to a driving wheel, which, by means of a belt connected with another wheel or pulley of the dynamo, turns or revolves the armature. The armature is a coil of wire, wound on a metal core, and mounted on a shaft, and is revolved by the power communicated from the engine through the means of the belt. The armature is revolved within or between the ends of a large horseshoe magnet, the opening of which is downward. The magnet is made by winding a soft, iron horseshoe, or soft, curved horseshoe-shaped iron, with a coil of conducting wire, and sending through the coil a current of electricity. When once vitalized by such current, the magnet never loses this magnetic property, even after the current stops, but is ever afterwards available for the purpose of electric currents, upon the armature being revolved between the poles of this magnet. By the rapid revolution of the armature within what is termed the 'field of force' between the poles of the magnet, this mysterious force or energy is accumulated, known as 'electricity,' and is thence conducted over copper bars or mains throughout the territory or city in which it is used, and is distributed on smaller wires or mains to the houses or places which are to be lighted." The material from which all manufactured things originate exists in a natural state; but the manufacturer, by the application to these materials of labor and skill, gives to them a new and useful property. The electricity which is generated and transmitted by the operation of the relator, and which, under its manipulation, illuminates houses and streets, is a very different thing from that mysterious element that is said to pervade nature.

The attorney-general has attached to his brief in this case a very elaborate and able opinion by the court of common pleas in Pennsylvania in the case of *Com.* v. *United States Electric Lighting Co.*, in which the learned judge arrives at the conclusion that companies of this kind are not manufacturing corporations. It is proper to say, however, that the highest court of that State, while affirming the judgment rendered by the learned judge on other grounds, did not assent to his views that electric light companies are not manufacturing corporations. *Com.* v. *Northern Electric L. & P. Co.* (Pa.) 22 Atl. Rep. 839. The case is

not yet officially reported, but the following passage from the opinion of the court by Williams, *J.*, expresses views upon this question which are applicable to the case at bar: "This Company whose character we are considering sells the electricity it makes, or 'brings into being,' as a commodity. It provides the lamps or appliances for the use of its customers by means of which the light is produced. It sells them the electricity, measures it as it is delivered, and is paid according to the quantity furnished. Whatever electricity may be, it seems absolutely within the power and under the control of the company that brings it into being. It is compelled, by the process employed, to come into being. It is secured, stored, poured out, or liberated at will. Its manifestations are both seen and felt. It moves with incredible velocity and power. It carries the tones and inflections of the human voice or moves loaded cars, depending on the volume of the current and the manner of its application. It may be in the hands of a physician, a soothing, remedial agent, and in the hands of the law, an instrument of execution, swifter and surer than the headsman's axe. It may be too early to show just what it is. The scientists, whose views the learned judge adopted may be right or wrong. We have no need to decide that question. The laws are written ordinarily, in the language of the People, and not in that of science; and, if this case depended on the question on which it turned in the court below, we should be led by the findings of fact to a different conclusion from that which was there reached, and hold that this company was a manufacturing company." The facts that are before us in this case, touching the manner of generating and using electricity are the same in substance as were before the Supreme Court of Pennsylvania in the case above referred to. One of the experts whose testimony was submitted to the comptroller by the relator on the application to revise and resettle the tax, thus described the process: "The electrical energy which is manufactured and sold by electric lighting corporations originally resides in and is extracted from the coal which is burned, or more correctly speaking, from the heat which is produced by the combustion of coal. Electrical energy is produced at the central station. It may be stored up in cells of definite capacity, known as 'accumulators.' It may be, and in fact is, measured, and sold in determinate quantities at a fixed price, precisely as are coal, kerosene oil and gas. It may be conveyed to the premises of the consumer upon a wagon, boxed up in an accumulator; or it may be sent through a wire just as gas or oil may be transported either in a close tank or forced through a pipe. Having reached the premises of the consumer, it may be used in any way he may desire, being like illuminating gas, capable of being transformed either into heat, light or power, at the option of the purchaser." The Legislature has in various acts, passed since the Corporation Tax Law was enacted, described the process of general electricity as a manufacturing process, and recently, in a revision of the statutes providing for the incorporation of such companies, they are described as corporations for "manufacturing and using electricity." Laws 1890, chap. 566, art. 6, § 60; Laws 1882, chap. 73, § 1; Laws 1887, chap. 716. This is also true with respect to the statutes passed for the incorporation and regulation of such companies in England, and in many of our sister states. 45 & 46 Vict. chap. 56; Rev. Stat. Ohio, 1890, § 8035, p. 233.

We think that until the Amendment of 1889 the relator was exempt from payment of taxes to the State under the exception in the statute in favor of "manufacturing companies" generally.

The judgment of the General Term and determination of the comptroller should be reversed, and the comptroller directed to resettle the account, and to credit the relator in its account the amount of the tax and penalties paid, with interest from the date of payment, and costs in all courts to the relator.

All concur.

Isaac ROMAINE, Receiver, etc., for Maria L. Chauncey, *Appt.*,
v.
Michael CHAUNCEY *et al.*, *Respts.*

(.....N. Y.....)

Alimony awarded to an innocent wife by a court of equity as incidental to a decree of divorce in her favor cannot be appropriated by her creditor for a debt existing prior to the decree of divorce.

(January 20, 1892.)

APPEAL by plaintiff from a judgment of the General Term of the Supreme Court, First Department, reversing a judgment of a special term for New York County in his favor in a proceeding brought by him as receiver, appointed in supplementary proceedings in aid of an execution against Maria L. Chauncey, to recover possession of alimony which had been awarded to her in divorce proceedings. *Affirmed.*

The facts are stated in the opinion.

Mr. **George V. N. Baldwin,** for appellant:

A provision made in a judgment for divorce for a wife's support is liable to be reached and seized by her creditors.

Stevenson v. *Stevenson*, 34 Hun, 157; 2 Bishop, Mar. & Div. ed. 1891, § 997.

The courts of this State can exercise no power on the subject of divorce except what is expressly specified in the statute.

Peugnet v. *Phelps*, 48 Barb. 566; *Galusha* v. *Galusha*, 43 Hun, 181; *Erkenbrach* v. *Erkenbrach*, 96 N. Y. 456.

If the powers of the courts are so strictly circumscribed, where does the general term find the authority to say that the provision made for the wife in the present case is free from the claims of creditors?

Authorities holding that policies of life insurance in favor of the wife are non-assignable place the non-assignability upon the provision

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NOTE.—On the particular question presented by the above case there seem to be no authorities, and no opportunity for direct annotation.

See also 15 L. R. A. 391, 394.

of the Laws of 1840, chap. 80, as amended by the Laws of 1858, 1862, 1866.

Eadie v. *Slimmon*, 26 N. Y. 9, 82 Am. Dec. 395.

It is essential to the very peculiar and sacred character which the court below in this case desires to attach to alimony, that it should be in its entirety a provision for the support and maintenance only of the wife, and it is vital to the theory that it should not in any case extend beyond that limit; but we find that throughout the cases in this State it is recognized as settled that the provision need not be so circumscribed.

Forrest v. *Forrest*, 8 Bosw. 640, affirmed 25 N. Y. 501; *Burr* v. *Burr*, 10 Paige, 20, 4 L. ed. 870, affirmed 7 Hill, 207; *Galusha* v. *Galusha*, 43 Hun, 181.

In Indiana, by an express clause of the statute, it is provided that the decree for alimony to the wife shall be for a gross sum and not for annual payments, and in that State it has been held that the sum so given to the wife should become her absolute property as upon an equitable partition between the parties; and that upon the provision being made by the court a debt was created from the husband to the wife.

Miller v. *Clark*, 23 Ind. 370; 2 Bishop, Mar. & Div. 1061.

Messrs. **Cowen, Dickerson, Nicoll & Brown,** for respondents:

Alimony is a provision or allowance for the support and maintenance of the wife; it is required for this purpose alone.

Code Civ. Proc. § 1759, subsec. 2.

It is no more than the judicial declaration and enforcement of the obligation assumed by the husband at marriage, which by reason of the subsequent dissolution of the marriage contract, and the living apart of the parties, must be thus defined and secured to the wife.

2 Bishop, Mar. & Div. 6th ed. §§ 368, 374.

Alimony is the maintenance or support which a husband is bound to give his wife upon a separation from her.

Burr v. *Burr*, 7 Hill, 207.

Alimony is a maintenance afforded to the wife where the husband refuses to give it, or where from his improper conduct he compels her to separate from him.

Wallingsford v. *Wallingsford*, 6 Harr. & J. 485. See *Keerl* v. *Keerl*, 34 Md. 21.

The claim of the wife for alimony is not in the nature of a debt.

Daniels v. *Lindley*, 44 Iowa, 567.

It is an allowance for the nourishment of the wife, variable and revocable.

Guenther v. *Jacobs*, 44 Wis. 354.

The object of the allowance is support merely, having no reference whatever to a distribution of the property of the husband.

Crain v. *Cavana*, 62 Barb. 109. See also *Clark* v. *Clark*, 6 Watts & S. 85; *Pain* v. *Pain*, 80 N. C. 322; *Menzie* v. *Anderson*, 65 Ind. 239.

The appropriation of the alimony to the satisfaction of the wife's debts contracted before the divorce is not an application of it to her support.

What is paid to her creditors is not used for her support.

Slattery v. *Wason*, 7 L. R. A. 393, 151 Mass. 266.

The language of section 1769 of the Code of Civil Procedure, relating to temporary alimony, is identical with that of section 1759, relating to permanent alimony, so far as relates to the purpose of the allowance. But it would be a startling proposition that these payments pending the suit could be appropriated by a third person to any other end than that of the wife's support.

See *Jordan* v. *Westerman*, 62 Mich. 170.

No specific statutory exemption is necessary to preserve the fund from the attacks of creditors.

Strong support to the doctrine we contend for is afforded by the cases laying down the rule which forbids the assignment of policies of life insurance in favor of the wife.

Eadie v. *Slimmon*, 26 N. Y. 9, 82 Am. Dec. 395; *Barry* v. *Equitable L. Assur. Soc.* 59 N. Y. 587; *Barry* v. *Brune*, 71 N. Y. 261; *Brick* v. *Campbell*, 10 L. R. A. 259, 122 N. Y. 337; *Bliss* v. *Lawrence*, 58 N. Y. 442, 17 Am. Rep. 273; *Bowery Nat. Bank* v. *Wilson*, 9 L. R. A. 706, 122 N. Y. 478, 19 Am. St. Rep. 507. See *Pope* v. *Elliott*, 8 B. Mon. 56.

Sums contributed by friends for the support and maintenance of an insolvent and his family are not liable to the claims of his creditors.

Holdship v. *Patterson*, 7 Watts, 547.

A woman cannot assign a portion of her temporary alimony to her solicitor as compensation for his services, as this would be a misappropriation of a fund allowed for a special purpose.

Jordan v. *Westerman*, 62 Mich. 170; *Hackley* v. *Muskegon Circuit Judge*, 58 Mich. 454.

It is no violation of the policy of the law to hold that alimony cannot be subjected to the payment of prior debts.

Nichols v. *Eaton*, 91 U. S. 716, 23 L. ed. 254.

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

This case presents an interesting question which we are called upon for the first time to decide. There are no direct and conclusive precedents to be followed, no explicit and specific statutes coming with an appropriate direction, but only a broad general rule on the one side, and a just and strong necessity for an exception to it on the other. The question is whether alimony awarded to an innocent wife by a court of equity as incidental to a decree of divorce in her favor can be appropriated by her creditor to the discharge of a debt contracted by her and actually subsisting prior to the date of the decree. The question was different in *Stevenson* v. *Stevenson*, 34 Hun, 157, cited as a pertinent authority; for in that case the decree of divorce was granted in 1855, and the creditor's judgments obtained in 1880. A debt contracted by the wife after the decree, presumably for her support, and with natural reliance upon the alimony by the creditor as the means of payment, stands upon a very different footing from a debt of the wife contracted prior to or during the marriage, and before its judicial dissolution. In the latter case two new elements enter into the question,—one the imposition of an unfounded duty on the husband; and the other, a perversion of the decree from its definite and intended purpose, and from that authorized by the

law. Alimony, as we all understand, is an allowance for support and maintenance, having no other purpose and provided for no other object. Like the *alimentum* of the civil law, from which the word was evidently derived, it respects a provision for food, clothing and a habitation, or the necessary support of the wife after the marriage bond has been severed, and since what is thus necessary has more or less of relation to the condition, habit of life, and social position of the individual, it is graded in the judgment of a court of equity somewhat by regard for these circumstances, but never loses its distinctive character. If sometimes, as the appellant claims, regard is had to the brutal and inhuman conduct of the husband, (*Burr* v. *Burr*, 10 Paige, 20, 4 L. ed. 870,) it serves only to make the court less considerate of his situation, and more liberal in its view of the necessities of the wife. Thus the prevailing rule in this country is said to be that where the wife has sufficient means to support herself in the rank of life to which she belongs, no alimony will be allowed, (1 Am. & Eng. Encyclop. Law, 485;) and where the parties are living apart under an agreement of separation, by the terms of which the husband has provided adequate means of support, no temporary alimony will be given, (*Collins* v. *Collins*, 80 N. Y. 1;) and, when awarded, it is not so much in the nature of a payment of a debt as in that of the performance of a duty. During the marriage the husband owes to the wife the duty of support and maintenance, although owing her no debt in the legal sense of the word; but, under the modern statutes, he does not owe to her the duty of paying her debts contracted before the marriage or thereafter, if they are solely hers, and not at all his. The divorce, with its incidental allowance of alimony, simply continues his duty beyond the decree, and compels him to perform it, but does not change its nature. The divorce and consequent separation are wholly his own fault, and do not relieve him from the continued performance of the marital obligation of support. The form and measure of the duty are, indeed, changed; but its substance remains unchanged. The allowance becomes a debt only in the sense that the general duty over which the husband had a discretionary control has been changed into a specific duty, over which, not he, but the court, presides. The authorities, therefore, cited to the effect that alimony is not strictly a debt due to the wife, but rather a general duty of support made specific and measured by the court, seem to me to be well founded. *Wallingsford* v. *Wallingsford*, 6 Harr. & J. 485; *Daniels* v. *Lindley*, 44 Iowa, 567; *Burr* v. *Burr*, 7 Hill, 207; *Guenther* v. *Jacobs*, 44 Wis. 354; *Crain* v. *Cavana*, 62 Barb. 109; *Jordan* v. *Westerman*, 62 Mich. 170.

And so it follows that as, during the marriage, the husband, while bound to support the wife, was not bound to pay her pre-existing or separate debts; so, after the divorce, he must continue the support, but is not required to pay out of his means furnished for that purpose the wife's antecedent debt. The decree cannot logically work the miracle of transforming the duty which he does owe into one which he does not and never did owe: and yet that result is inevitable if the antecedent creditor is at liberty to swoop down upon the provision, and carry it away for his own use.

That result accomplishes another thing. It perverts and nullities the decree of the court, and leaves the judgment specificially made for one purpose to operate wholly for another, and so obstruct and destroy the humane intent of the law. There is no doubt, of course, that the wife's right to alimony comes from the statute, and not from the common law. If that proposition needed the aid of a full and historical argument in its support, such has already been furnished by this court. *Erkenbrach* v. *Erkenbrach*, 96 N. Y. 456. We must look, then, to the provisions of the Code of Civil Procedure, which has recast and reproduced the terms of the previous statutes, to see when and for what purpose alimony may be allowed. Section 1769 regulates the temporary alimony which may be awarded *pendente lite*. The terms of the provision are that in an action for an absolute divorce or for a separation the court may, in its discretion, make orders requiring the husband to pay any sum or sums of money necessary to enable the wife to defend the action, or to provide suitably for the education and maintenance of the children of the marriage, or for the support of the wife, having regard to the circumstances of the respective parties. It seems to me impossible to misunderstand the force or meaning of that provision. Its palpable purpose is to enable the wife to prosecute her suit, and save her from starvation or beggary during the process. Is it conceivable that the court making such order is bound to stand silent and submissive while the whole scope and purpose of its provision is perverted and nullified? If that be so, the law of divorce has no help or remedy for the injured wife who happens to be in debt. She cannot hire counsel or feed herself and her children pending the litigation, because her pre-existing creditor seizes the humane provision at the moment it is made. The court might as well not make it at all, and simply say there is no divorce or defense for an indebted wife. Undoubtedly, in such a known state of the law, the court would find some way of making its order effective, as, perhaps, by interposing a trustee in behalf of the wife; but no one has ever yet supposed that such a safeguard was needed. And why should it be? The antecedent creditor has no equity against the fund. The husband is not bound to furnish it for such creditor's benefit, nor the wife to accept it under a rule which gives her a stone when she asks for bread. And of such character has the allowance of temporary alimony been considered that an assignment of it by the wife to her solicitor as compensation for his services has been disregarded and set aside as being a misappropriation of a fund awarded for a special purpose. *Jordan* v. *Westerman*, *supra*. Similar considerations pertain to section 1759 of the Code, which regulates permanent alimony. The second subdivision is this: "The court may, in the final judgment dissolving the marriage, require the defendant to provide suitably for the education and maintenance of the children of the marriage, and for the support of the plaintiff, as justice requires, having regard to the circumstances of the respective parties." Thus the court may

See also 20 L. R. A. 812.

require the husband to provide for the support of the wife, but may not require him to furnish a fund for the payment of her debts. He never stood under that obligation, and the decree of divorce cannot impose it. He has a right to insist that his allowance shall not be diverted to a use for which he did not in fact supply it, and was under no obligation to supply it, and to resist, as he stands here resisting, a claim upon it which, as against him, is wholly unauthorized, and a complete perversion both of the decree and of his duty. The plaintiff, in his character of receiver for the judgment creditor, comes into a court of equity in pursuit of equitable relief,—into the same court which devoted the fund to the support of the wife, and should decently respect its own authority,—and asks the aid of that tribunal to practically nullify its decree; to abandon its humane purpose; to join in an indirect robbery of the husband; to pervert his allowance to an end which he never sanctioned, and was not bound to sanction; and to disregard the public policy which seeks to protect wife and children from the pauper's necessity and fate; and he asks this without pretense of special equity against the fund, and solely on the basis of a hard legal right. I have only to say that I think equity ought not to give him that aid, but that, having both the power and the opportunity to prevent the perversion of its purpose, and to make effective and protect its own decree, it should avail itself of that opportunity and exercise that power by the simple process of refusing its assistance. Under some circumstances the court might be troubled to compel respect for its purpose, and prevent a perversion of its order, but there is no such difficulty where the wrong cannot be done except by the consent and with the active participation of the court. We have a right to refuse our assistance, not merely because the equities are balanced, but because those of the defendant are superior, and ought to prevail.

I can see the possibility and realize the plausible force of one criticism upon this view of the subject; and that is that there is a legal judgment which cannot be satisfied by execution, and the creditor has a right to pursue in equity the debtor's equitable assets, and the court has no right, upon some sentimental view of the subject, to withhold its aid. Exactly. All that is true. But it assumes the precise point of the dispute, that the wife's alimony is an equitable asset liable generally as property to the payment of her debts. It is property in one sense, but not in the broad, general sense of the term. It is a specific fund provided for a specific purpose, with restraint and limitation written all over its face by the very law and decree which brought it into existence. And here I think we may wisely avail ourselves of one of the analogies which the general term opinion has furnished for our use. Policies of life insurance in favor of the wife on the life of the husband we have persistently held to be non-assignable. *Eadie* v. *Slimmon*, 26 N. Y. 9, 82 Am. Dec. 395. We determined that their peculiar character and purpose necessarily took from them the chief and most important characteristic of property in general. As I read the later case of *Baron* v. *Brummer*, 100 N. Y. 372, 1 Cent. Rep. 708, we distinctly held "that such policies should not be subjected to the lien of creditors either of husband or wife,—as to the former, by the express words of the statute; and as to the latter, by the determination of the courts." We took from them the transferable characteristic of property, as such and tied them closely to their lawful object and purpose. The argument made now would convict us of error then. Alimony allowed by an order is in one sense a debt due and to become due to the wife and her property. In the same sense a life policy is a debt to become due or due, as to its dividends, and is property in the hands of the assured. The whole force of the argument lies in steadily ignoring the quality and character of the property, and treating it as ordinary and general assets. The appellant's criticism upon this analogy is that the doctrine as to life insurance policies was dictated by the Act of 1840, and rested specially upon the provisions of that Act. So much is undoubtedly true, but does not at all disturb the analogy; for in the present case the similar construction is dictated by the statutes of divorce, and is derived from the character of their provisions. In both cases a thing which might have had the general and ordinary characteristics of property transferable by sale, and liable to creditors, is taken out of that broad category by the terms of the statutes, whose obvious purpose and aim require a restriction and limitation to which property in general is not subjected. This class of cases indicates that the question is not one of exemptions, but of the right of creditors to a particular fund, which fund, created by equity, should have the protection of equity. It does not, therefore, answer the view we have taken of the duty of the court in this case, to appeal to the general law of property, and the general duty of the court in respect thereto. The question concerns a species of property of a peculiar and specific character, created and existing for one purpose only, and whose express limitations take it out of the general rule.

The doctrine which I have here invoked, that a court of equity, when applied to for its active assistance in the enforcement of a claim founded upon a bare legal right, will refuse its aid, where granting it would work injustice, or impose conditions calculated to mitigate or remove the injustice, has been repeatedly asserted under the old law, which permitted the husband to reduce to his possession, and become the owner of the wife's personal property. In such cases equity, not denying the legal right, has yet invariably limited and qualified it by recognizing and protecting the wife's equity, not only against the husband, but against his assignee or judgment creditor. In *Smith* v. *Kane*, 2 Paige, 303, 2 L. ed. 918, the chancellor did not hesitate, where the wife's property was less than was needed for her support, to refuse relief entirely and dissolve the injunction. This class of cases is pertinent only upon the right of the court to withhold its aid where the legal claim, however valid, is wielded to effect a wrong. The equity of the husband in the present case to prevent a perversion of his allowance to an unlawful purpose is entirely clear. That of the wife to receive it under the decree for the specific purpose which led to its award, I think, also,

should prevail over the creditor's claim. During the marriage, he had no right, legal or equitable, against her support furnished by the husband; and after its dissolution, without her fault, she ought not to be put in a worse condition. When to these equities are added the duty of the court to control and make effectual its own decree, and the public policy in which its provision is founded, it seems to me that no doubt is left as to the right of the court to dismiss the creditor, and refuse him the relief he asks.

The judgment of the General Term should be affirmed, with costs.

All concur.

INDIANA SUPREME COURT.

George C. CLARK, Exr., etc., of Jefferson Helm, Deceased, *et al.*, *Appts.*,
v.
Nannie HELM *et al.*

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

Interest on the shares of other distributees from the time of testator's death should be allowed before paying anything more to one who has received a larger advancement than they have during testator's life, where his will requires an equalization of the shares of the distributees.

(January 5, 1892.

APPEAL by defendants from a judgment of the Circuit Court for Rush County directing the payment of interest upon certain sums awarded defendants for the equalization of advancements from the estate of Jefferson Helm, deceased, before the payment of further sums to the distributees. *Affirmed.*

The facts are stated in the opinion.

Messrs. **William J. Henley** and **Lot D. Guffin**, for appellants:

In order for appellees to have claimed interest on these differences in advancements, even after one year, their complaint should have alleged some wrongful act on the part of the administrator or executor in not settling said estate at the proper time and paying into court

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NOTE.—*Interest on advancements or to equalize advancements.*

An advancement as such never draws interest. Black v. Whitall, 9 N. J. Eq. 572, 59 Am. Dec. 423; Nelson v. Wyan, 21 Mo. 347; Osgood v. Breed, 17 Mass. 356; Towles v. Roundtree, 10 Fla. 299; Kyle v. Conrad, 25 W. Va. 760; Beckwith v. Butler, 1 Wash. (Va.) 225; Yundt's App. 13 Pa. 575, 53 Am. Dec. 496; Harris v. Allen, 13 Ga. 177.

Interest on advancements, or increase of slaves given as an advancement, need not be brought into hotch-pot with the advancement. Jackson v. Jackson, 28 Miss. 674, 64 Am. Dec. 114.

But by will a testator may provide for interest on advancements. Patterson's App. 128 Pa. 269; Stewart v. Stewart, L. R. 15 Ch. Div. 539.

Interest is not chargeable on advancements before testator's death without a clear expression of his intention that they shall bear interest. Porter's App. 94 Pa. 352; Miller's App. 31 Pa. 337.

This rule applies to a debt to the testator from his child which he has turned into an advancement by his will. It is then to be valued as of the date on which the child received the money. Porter's App. *supra*.

Also to a son-in-law's debt, which is turned by will into an advancement to testator's daughter. Patterson's App. *supra*.

The intent of the testator as shown by the language of his will is to govern in determining whether debts are to be regarded as turned into advancements which will not bear interest. Taylor v. Taylor, 145 Mass. 239; Cummings v. Bramhall, 120 Mass. 552; Manning v. Thurston, 59 Md. 218.

An advancement recorded in testator's book of accounts with a statement that it "is to carry interest from the day it was got" was held chargeable with interest from that date under a will which directed the book accounts against his children to be charged to them. Fickes v. Wireman, 2 Watts, 314.

Under a will directing that advancements to sons shall not draw interest "except on what shall exceed or be over the sum of $20,000," interest is chargeable on the excess of any advancement over that sum. Treadwell v. Cordis, 5 Gray, 341.

Under a will providing that the amount of all debts due from testator's sons shall be deducted from their shares without anything more to indicate a change in the character of the debts which are interest bearing, interest will be reckoned thereon. Cummings v. Bramhall, 120 Mass. 552.

But a will directing the deduction from certain shares of all claims and demands against the donees, so that all advanced for them shall be considered as part of testator's estate, and as a part of the legacies and devises, turns the debts into advancements, and interest will not run upon them. Hall v. Davis, 3 Pick. 450.

Interest is not chargeable on a debt to the testator's estate for money paid by him or his executors, which the will directs to be deducted from a portion given thereby. Moale v. Cutting, 59 Md. 511; Manning v. Thurston, Id. 218.

A will forgiving "all advancements, loans of money and debts" "except the capital" in the hands of a certain son whom testator has aided in business, requires only the principal to be charged against him. Hutchinson's App. 47 Pa. 84.

A will directing the deduction of advancements from a daughter's share, and also that any indebtedness due from her to her brothers or sisters shall be deducted and paid over to them, does not allow a charge of interest on such advancements. Poole v. Poole, L. R. 7 Ch. App. 17.

Under a will directing that unless a son should pay a certain loan of $2,000 which testator had borrowed for him, together with a certain note for $400 with lawful interest, the same should be taken in full of all legacies and bequests to the amount of $2,500, interest is not chargeable against him on either of the sums mentioned, but he is to be charged with $2,500 only. Wilkins v. Wilkins, 43 N. J. Eq. 598.

In case of legacies under a will directing the deduction of any indebtedness that might be due to testator from the legatees with the discharge and release of any balance of such indebtedness, no interest runs thereon until after testator's death as such debts are made substantially advancements by the will. Taylor v. Taylor, 5 New Eng. Rep. 253, 145 Mass. 239.

See also 36 L. R. A. 86.

the surplus, so that the advancements could be equalized.

Legacies begin to bear interest after one year from the death of the testator.

Case v. *Case*, 51 Ind. 277.

A very few cases, notably *Kyle* v. *Conrad*, 25 W. Va. 760, and *Roberson* v. *Nail*, 85 Tenn. 124, decide that interest should be charged on advancements from the date of the death of the parent. But they do not decide that interest should be charged against one heir and the benefit of it given to another heir who has also been advanced, and no interest charged him, as the lower court has done in this cause.

On the other hand, recent cases of other states decide that interest on advancements cannot be charged before final distribution.

Davies v. *Hughes*, 86 Va. 909; *Patterson's App.* 128 Pa. 269; *Yundt's App.* 13 Pa. 575, 53 Am. Dec. 496; *Jackson* v. *Jackson*, 28 Miss. 674, 64 Am. Dec. 114; *Black* v. *Whitall*, 9 N. J. Eq. 572, 59 Am. Dec. 423.

The death of an ancestor evens any inequality in the advancements to the heirs, and the law presumes this inequality to have been settled, and the court must presume the same, as soon as the moneys of the estate have been collected sufficient for this purpose by the administrator or executor.

Bemis v. *Stearns*, 16 Mass. 200.

Where it appears to have been the intention of the testator to equalize the distribution of his estate by taking into consideration advancements made by him in his lifetime, and he fixes in his will the amount of an advancement or the value of specific advancements, such value is conclusive in the distribution.

See *Nelson* v. *Nelson*, 7 B. Mon. 672.

And the amounts as stated in the will must be taken as the basis of distribution.

See *Eichelberger's App.* 135 Pa. 160.

When a debtor is prevented by law from the payment of a debt, he is not chargeable with interest.

The very nature of an advancement precludes it from bearing interest or from being a debt.

An obligation to pay interest is created only when the debtor is put in default for the payment of the principal.

Beardslee v. *Horton*, 3 Mich. 560; *Hubbard* v. *Charlestown B. R. Co.* 11 Met. 124; *Gay* v. *Gardiner*, 54 Me. 477.

Messrs. **Ben. L. Smith** and **Claude Cambern**, for appellees:

It is the general rule of law in the distribution of estates that advancements shall not bear interest, nor is increase to be charged to the

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Receipts showing that certain amounts credited on the purchase price of land conveyed to testator's married daughters or their husbands are to be accounted for as advancements with interest from a certain date do not justify a charge of interest before testator's death; the advancement is to be charged, not upon the theory of a contract which the married women were incompetent to make, but of a gift with the intention that it should be taken as an advancement. Roberson v. Nail, 85 Tenn. 124.

Although notes bearing interest are turned into an advancement by will, the interest is not to be computed before testator's death. Krebs v. Krebs, 35 Ala. 233; Green v. Howell, 6 Watts & S. 203.

Thus a direction by will that notes against testator's children be taken as advancements and be "valued and appraised at their full amounts" will not warrant the addition of interest to the face value, although the notes bear interest. Porter's App. 94 Pa. 332.

After donor's death.

The authorities for the most part hold that advancements bear interest from the date of donor's death. Moore v. Burrow, 89 Tenn. 101; Steele v. Frierson, 85 Tenn. 430; Roberson v. Nail, Id. 124; Knight v. Oliver, 12 Gratt. 33; Kyle v. Conrad, 25 W. Va. 760.

If in some cases the rule that advancements bear interest from testator's death would not reach equality it can be applied so as to produce that result. Johnson v. Patterson, 13 Lea, 657.

A Pennsylvania case holds that interest is rightly chargeable on advancements from the time of filing an executor's account up to the time of final distribution. Ford's Estate, 11 Phila. 97.

This rule was modified in a Virginia case by making advancements chargeable with interest from the death of a life tenant, which was made by the will the time when those who had received a part of the estate should "account for it upon a division." Cabells v. Puryear, 27 Gratt. 902.

And in a later case, where suits for large and uncertain amounts made distribution improper until a certain date, it was held under a will providing for equality of shares after debts, devises, etc., were paid that interest should not be computed on the advancements until that date. Barrett v. Morriss, 33 Gratt. 273.

The court said in this case that if one who had received an advancement would be liable at all for interest it could only be from the time the estate was ready for a final distribution.

And in a recent Virginia case it is laid down as a well-settled rule that interest should not be charged upon an advancement until final distribution. Davies v. Hughes, 86 Va. 909.

Unless the court means by this the time when final distribution ought to be made this would make the present rule in Virginia an exception to that held by most courts, and which was followed in that State in Knight v. Oliver, *supra*.

The principle is that the distributees to whom advancements have been made are regarded as having received the amounts thereof at testator's death, and therefore should be charged interest thereon from that time until distribution. McDougald v. King, 1 Bail. Eq. 154.

But under a will directing distribution when a son reaches eighteen years of age, and in the meantime the use of the property was given to such of the family as should remain with testator's wife, such use off-sets the use of advancements made in testator's lifetime, and they should bear no interest until the date of distribution. *Ibid.*

Adding interest on an advancement was upheld where by the mode of computation it amounted to the same thing as introducing the advancement without interest at the date when distribution ought to have been made. Yundt's App. 13 Pa. 575, 53 Am. Dec. 496.

Interest is not to be charged in distributing the estate on the excess of the value of some devises over others, although the will directs that each devisee shall receive an equal portion. Nelson v. Wyan, 21 Mo. 347.

The equality of portions under a will directing portions including advancements to be equalized out of testator's estate, is to be made first from the principal alone and then the interest or increase of each portion follows the principal thereof. Barclay v. Hendrick, 3 Dana, 374. R. A. R.

party to whom the advancement was made. Children last paid are, however, entitled to interest from the time when the other children received their shares.

1 Wait, Act. & Def. p. 212, § 11; *Fundt's App.* 13 Pa. 575, 53 Am. Dec. 496; *McDougald* v. *King*, 1 Bail. Eq. 154; 2 Woerner, Am. Law of Administration, p. 1222; *Kyle* v. *Conrad*, 25 W. Va. 760; *Stewart* v. *Stewart*, L. R. 15 Ch. Div. 539; *Steele* v. *Frierson*, 85 Tenn. 430.

As between the children and the estate, the legacies unquestionably bore interest from the death of the testator.

King v. *Talbot*, 40 N. Y. 92; *Johnson* v. *Patterson*, 13 Lea, 657; *Williams* v. *Williams*, 15 Lea, 438; *Kyle* v. *Conrad*, 25 W. Va. 760.

Case v. *Case*, 51 Ind. 277, held that a widow was entitled to interest on a legacy from the death of the testator, notwithstanding the settlement of the estate and the payment of the legacy was delayed by an unsuccessful contest by her of the will.

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

The ancestor of the appellees and the testator of the appellant Clark died on the 15th day of January, 1888, leaving a large estate. The testator in his will directed that the executor should convert the notes and accounts held by the testator, at the time of his death, into money, with which, with other money, he should equalize the shares of the respective heirs. During his lifetime the testator made the following advancements to his children: To William Helm, $28,000; to Florence Cutter, $24,490; to Elizabeth Pattison, $24,300; and to his grandchildren the following advancements: To Nannie, George and Bertha Helm, $20,050. The court adjudged that the shares of the distributees should be equalized, and that Florence Cutter was entitled to receive $3,510 in addition to the sum advanced to her; that Elizabeth Pattison was entitled to the additional sum of $3,700, and Nannie, George and Bertha Helm were jointly entitled to the additional sum of $7,950, and that they are also entitled to interest on the sums to which they are respectively entitled from the 15th day of January, 1888, to be paid before any more money is distributed to William Helm.

The contest in this case is as to the allowance of interest to the distributees who had received a less sum than that advanced to William Helm.

It is very doubtful whether the question argued by counsel is presented. It certainly does not arise on the pleadings, for the complaint is unquestionably good in so far as it asks that the shares be equalized, and if good to that extent it will repel a demurrer, even if it should be conceded that it claims too much in claiming interest. *Bayless* v. *Glenn*, 72 Ind. 5.

Nor does the motion for a new trial properly present the question, inasmuch as there is no specification properly challenging the allowance of interest. Neither do the exceptions to the finding properly present the question, for there is no special finding in the record. But, as the appellee's counsel interpose no objection to the mode of presenting the question, and as the case is a peculiar one, we have thought it best to decide the main question.

Upon the general question whether a distributee can be allowed interest after the death of the ancestor there is stubborn conflict of authority. *Davies* v. *Hughes*, 86 Va. 909; *Patterson's App.* 128 Pa. 269; *Fundt's App.* 13 Pa. 575, 53 Am. Dec. 496; *Jackson* v. *Jackson*, 28 Miss. 674, 64 Am. Dec. 114; *Black* v. *Whitall*, 9 N. J. Eq. 572; *Kyle* v. *Conrad*, 25 W. Va. 760; *Roberson* v. *Nail*, 85 Tenn. 124; *McDougald* v. *King*, 1 Bail. Eq. 154; *Stewart* v. *Stewart*, L. R. 15 Ch. Div. 539–545; *Steele* v. *Frierson*, 85 Tenn. 430; *King* v. *Talbot*, 40 N. Y. 92; *Johnson* v. *Patterson*, 13 Lea, 657; *Williams* v. *Williams*, 15 Lea, 438.

Our own court has given its sanction in a general way to the doctrine that interest may be allowed after the death of the ancestor, although the question was not expressly decided. *Case* v. *Case*, 51 Ind. 277.

Judge Woerner asserts that interest should be allowed. 2 Woerner, Law of Administration, p. 1222.

But in this instance we are not required to enter the field of conflict, for we think that the will of the testator so influences the case as to make it our duty to hold that the distributees are entitled to interest. Our opinion is that the testator intended that all the heirs should receive an equal share of his estate, and that it was his purpose to impose upon the executor the duty of equalizing the distribution. The will expresses the purpose of the testator to divide his estate into four shares and to allot to the persons respectively entitled to distribution an equal share. This intention will be defeated unless the appellees are allowed interest from the time of the testator's death. The use of money is valuable and the right to interest is property, so that William Helm has had more than his share of the estate, inasmuch as he has had the use of the excess advanced to him. It is therefore equitable and just, under the terms of the will, that the other distributees be put upon equality with him by being allowed interest from the time of the testator's death. The appellees cannot, of course, recover anything directly from William Helm, for our statute precludes such a recovery. Rev. Stat. § 2407.

Nor do they ask a recovery of that kind. What they asked and the court awarded is, that before distributing anything more to William Helm interest shall be added to their respective claims. This we think they had a right to ask and receive.

We may add, to prevent misunderstanding, that we do not hold, nor mean to hold, that they can be allowed interest unless there is money remaining for distribution. They cannot have interest at the expense of creditors of their ancestor, but they may have interest added to their claims if there is money to be distributed; and, while nothing can be recovered from William Helm, he may nevertheless be put off as to further payments to him in order to enable the executor to equalize the shares of the appellees by allowing them interest from the time of the testator's death. This is nothing more than an equitable distribution under the will of the testator, and the conclusion asserted does not violate any rule of law.

Judgment affirmed.

UNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF MISSOURI.

Re HOUSTON.

Re GERYE.

(47 Fed. Rep. 539.)

Offering to sell his sample at one house, followed by a sale and delivery of it at the next one, will not bring an agent employed in soliciting orders for his principal in another State within the provisions of a state statute imposing a license tax upon persons who shall "deal in the selling" of goods, wares or merchandise.

(September 28, 1891.)

PETITIONS for writs of habeas corpus to release petitioners from custody to which they have been committed for an alleged violation of a Missouri statute defining and regulating the rights and duties of peddlers. *Granted.*

The facts are stated in the opinion.

Mr. **E. D. McKeever** for petitioners.

Philips, *J.*, delivered the opinion o. the court:

This is an application for a writ of habeas corpus. The parties make separate applications: but, as the cases involve the same questions of law, and arise out of substantially the same state of facts, they will be considered together.

Petitioners were arrested and imprisoned under proceedings instituted against them in a justice's court at the city of Nevada, Vernon County, in this State. The prosecution is predicated of an alleged violation of the state statute defining and regulating the rights and duties of peddlers. The charge is that the defendants were engaged in the act of peddling wares and merchandise in said city and county without having first taken out therefor a peddler's license. The facts, as developed on this hearing, are substantially as follows: The petitioners are citizens of the State of Kansas, and at the time of their arrest they were acting as agents for Price & Buck, merchants of the city of Topeka, State of Kansas, a firm engaged in a general mercantile business at Topeka, making a specialty, however, of the sale of clocks, silver-ware and lace curtains. In the prosecution of their business this firm employed a large number of canvassers, throughout the country, extending into other states. These canvassers were furnished with samples of the goods to be sold, which they carried around with them from house to house, soliciting custom. The terms of sale were one sixth in cash, the remainder to be paid in five equal monthly installments. The first payment was made to the solicitor, which represented the amount of his commission. An order was then sent in by the agent, or drummer, to the house at Topeka for the article contracted for, upon which the firm shipped to the agent, who delivered to the purchaser, and the remaining payments were collected by a collecting agent of the firm. In the case of the petitioner Houston, the evidence does not show that he ever made a sale otherwise than according to the custom above indicated. In the case of the petitioner Gerye, the evidence shows that, while he pursued a like course, there was one exception, when he offered to sell to a lady the sample clock carried around by him. She declining to take it, he went to a neighboring house, and made sale to the lady of the house, delivered the clock immediately to her, receiving from her the first payment of one sixth of the purchase price. The right of a nonresident merchant to thus employ agents to go beyond the limits of the State in which the merchant resides to solicit purchases, by taking orders on the house, to be filled, and the goods shipped into another State for delivery, without the goods being subject to a license tax of the State, or to an occupation tax on the solicitor, has been established, beyond further controversy, by decisions of the Supreme Court of the United States. *Robbins* v. *Shelby County Tax. Dist.* 120 U. S. 489, 30 L. ed. 694; *Leloup* v. *Port of Mobile*, 127 U. S. 640, 32 L. ed. 311; *Asher* v. *Texas*, 128 U. S. 129, 32 L. ed. 368.

The method of sending solicitors into another State for orders of sale, employing samples for exhibition, is one of the recognized lawful methods of carrying on trade between the different states; and if the local community where the solicitor thus goes may subject him to an occupation tax or a license fee, no matter by what name or under what disguise, whether as peddler or merchant, who shall limit the amount of such tax, to prevent actual prohibition? As said by the court in *Robbins* v. *Shelby County Tax. Dist.*, *supra:* "To say that such a tax is not a burden upon interstate commerce is to speak at least unadvisedly, and without due attention to the truth of things."

There was no question made by respondent at the hearing of this case that, if the conduct of the petitioners was strictly limited or confined to the mere solicitation of orders, in the manner stated, the acts of petitioners are within the protection of the commerce clause of the Federal Constitution. But the principal contention was and is that the act of Gerye, in making sale of one clock without taking an order therefor on the house, according to the instruction of the house and the custom of the agents, brings his case within the definition of a peddler, and subjects him to the operation of the state law. The state statute thus defines a peddler: Whoever shall deal in the selling of patents, patent-rights, patent or other medicine, lightning-rods, goods, wares, or merchandise, except books, charts, maps, and stationery, by going from place to place to sell the same, is declared to be a peddler.

It is to be observed that it is essential under this statute to constitute a peddler that he should "deal in the selling" of the given article. The question, therefore, presents itself, whether the single instance of Gerye delivering the clock which he carried as a sample, without first sending in an order to the Topeka house,

NOTE.—For note on what constitutes "dealing," see State v. Ray (N. C.) *ante*, 529.

and awaiting the shipment of its counterpart, constituted him a peddler under this statute, so as to deprive him of the protection which the Constitution gives to interstate commerce. At first impression it seems plausible that one offer to sell and deliver, and then one sale, followed by delivery, would constitute a dealer. As applied to the statute regulating the sale of liquors under the Federal Revenue Law, such acts would be sufficient to constitute the vendor a retail liquor dealer. But the rule of construction, under like state statutes, is quite different. The language of Edicott, *J.*, in *Com.* v. *Farnum*, 114 Mass. 267–271, in construing a like provision, and discussing a like state of facts, may well be applied here: "He was an agent soliciting orders, and a carrier delivering machines ordered. He made no direct sales himself. He did not carry and expose goods for sale, within the mischief the statute is intended to prevent. The article he carried was a sample of that which he proposed the purchaser should buy of the company. The fact that he occasionally delivered the sample machine to a purchaser desirous of obtaining one immediately cannot so change the character of his business as to bring it within the statute, nor did the fact that he sold one attachment, and one tuck-marker, capable of being attached, make him liable; it distinctly appearing that it was not his practice to make such sales. The question is to be determined on the general character and scope of his business. If this does not bring him within the statute, he is not liable for single sales of particular articles, such sales being exceptional, and not in the course of his ordinary employment." See also *Kansas* v. *Collins*, 34 Kan. 434–437, and cases cited.

Such seems to be the well-settled rule of onstruction of similar statutes. To hold that uch sporadic, casual sale fixes upon the party he office of a dealer does not obtain outside of he practice under the Revenue Laws, which re designedly rigid, and controlled by the letter of the Act. The cases of *State* v. *Emert*, 11 L. R. A. 219, 103 Mo. 241, and *Hynes* v. *Briggs*, 41 Fed. Rep. 468, are not in conflict with the views above expressed, when properly distinguished. The agreed statement of facts on which the former case was submitted is not as clear as it ought to have been to present an exact point for decision. While it is true the facts stated indicate that the agent was soliciting orders for the nonresident manufacturer, and that in traveling around from house to house he did sell out of his wagon one sewing-machine, it perhaps, in justice to the opinion of the court, ought not to be said that it held such single sale constituted the vendor a peddler under the state statute. The holding would be singular in that aspect, as it would be in conflict with the current of state authorities construing similar statutes. The third paragraph of the agreed statement of facts recites that the property "was forwarded to this State by said company, and delivered to defendant, as its agent, for sale on its account;" from which it is inferable that it was not being used merely as a sample, but was sent by the manufacturer to be sold, and, therefore, was sold in the usual course of defendant's trade. It is not necessary that all that is said in that opinion should receive assent or any part disapproved to warrant the conclusion reached on the facts at bar. In the case of *Hynes* v. *Briggs*, the facts were that the nonresident merchant and manufacturer, while employing agents as canvassers, shipped into the State of Arkansas large consignments of said goods, which were stored in a warehouse, and sales made by its solicitors were filled from this store-house, and were not completed by shipments from without on orders sent in by the solicitor. Such goods were held to have become so far mingled with the common property of the *situs* as to become liable to state regulation and police, and subject to the license tax, if otherwise constitutional as a state enactment. Whether it will be maintained by the supreme court that a solicitor for a nonresident merchant or manufacturer, who limits his operations to merely taking orders on such nonresident, who supplies the goods from a provisional store-house established within the State where such orders are taken, would thereby become liable to a license fee imposed by the State, is yet an open question. It is sufficient for the purpose of the case at hand to say that *Mr. Justice* Bradley, in *Robbins* v. *Shelby County Tax. Dist.*, *supra*, suggested that it could not be entertained that the nonresident merchant or manufacturer, in order to avail himself of the right of free interstate commerce guaranteed by the Constitution, should be given to the "silly and ruinous proceeding" of procuring a store-room, and shipping in his goods, before he could reasonably anticipate a demand for them; and, that, therefore, the means of effecting such sales through the agency of "drummers" taking orders in advance are permissible, and the right is not to be interfered with nor hampered by subjecting the solicitor to the imposition of a state license fee, or tax in other form. This view was sustained by the majority opinion, and reaffirmed in *Asher* v. *Texas*, 128 U. S. 129, 32 L. ed. 368. The latest holding must be the law for the government of this court, until reversed by the court of last resort.

It results that, the petitioners being restrained of their liberty in contravention of the third clause of section 8, art. 1, of the Federal Constitution, which gives to Congress alone the power to regulate commerce among the several states, *they are entitled to be discharged* therefrom.

It is accordingly so ordered.

GEORGIA SUPREME COURT.

George B. PRITCHARD, Admr., etc., of William R. Pritchard, Deceased, *Plff. in Err.*,
v.
SAVANNAH STREET & RURAL RESORT R. CO.

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

***An action against a railroad company for personal injuries** pending when the Act of November 12, 1889, amending section 2967 of the Code, was passed, was not abated by the death of the plaintiff; nor is that Act, as applicable to actions pending at the time of its passage, unconstitutional.

(May 27, 1891.)

ERROR to the Superior Court for Chatham County to review a judgment refusing to allow the administrator of William R. Pritchard, deceased, to become a party to and prosecute an action brought by the latter before his death to recover damages for injuries alleged to have resulted from defendant's negligence. *Reversed.*

On October 25, 1889, William R. Pritchard filed his action in the Superior Court of Chatham County against defendant to recover damages alleged to have been sustained by him through the negligence of the defendant in running its cars on March 14, 1889. At the time of filing this suit the common-law rule, *actio personalis moritur cum persona*, was in force in Georgia. Pending the said action and before any trial was had thereon, the Legislature passed an Act, which was approved on the 12th of November, 1889, providing that "no action for the recovery of damages for homicide or for injury to person or to property shall abate by the death of either party; but such cause of action in the case of the death of the plaintiff shall, in the event there is no right of survivorship in any other person, survive to the personal representatives of the deceased plaintiff; and in case of the death of the defendant shall survive against said defendant's personal representatives."

*Head note by LUMPKIN, J.

NOTE.—*Effect of statutes to defeat or preserve pending civil actions.*

The only limit imposed by the Federal Constitution on the power of the states to pass retrospective laws is that they shall not be *ex post facto* and shall not impair the obligation of contracts. With these limitations a state Legislature may pass retrospective laws unless limited by the state Constitution, although they devest vested rights. Baltimore & S. R. Co. v. Nesbit, 51 U. S. 10 How. 395, 13 L. ed. 469; Satterlee v. Matthewson, 27 U. S. 2 Pet. 380, 7 L. ed. 458; Watson v. Mercer, 33 U. S. 8 Pet. 88, 8 L. ed. 876; Charles River Bridge v. Warren Bridge, 36 U. S. 11 Pet. 420, 9 L. ed. 773; Drehman v. Stifle, 75 U. S. 8 Wall. 595, 19 L. ed. 508; Randall v. Kreiger, 90 U. S. 23 Wall. 137, 23 L. ed. 124.

A statute giving a remedy does not apply to a pending suit unauthorized when brought unless the statute so provides. Wetzler v. Kelly, 83 Ala. 440.

A statute relating to an allowance to a tenant for improvements where he has no title applies to pending actions as well as those subsequently brought. Bacon v. Callender, 6 Mass. 303.

A statute giving an illegitimate child the right to inherit will not be construed to aid a pending action of ejectment based on such right of inheritance. McCool v. Smith, 66 U. S. 1 Black, 459, 17 L. ed. 259.

But a statute passed after the reversal of a judgment in ejectment for invalidity of plaintiff's title, by which the relation of landlord and tenant existing between him and the defendant is made lawful and his title therefore made valid on the second trial as against the defendant on the ground of estoppel, does not violate the Constitution of the United States as it merely gives effect to the parties' own contract. Satterlee v. Matthewson, *supra*.

A statute authorizing a suit by one firm against another having a common member may be made applicable to pending suits. Hepburn v. Curts, 7 Watts, 300, 32 Am. Dec. 760.

A statute allowing an action of covenant against an assignee of a lessee for years is not invalid as applied to a pending action. Taggart v. McGinn, 14 Pa. 155.

A statute confirming levies of executions on real estate except where the title attempted to be acquired thereby "has been finally decided against the creditor" applies to a levy in a case wherein judgment has been rendered but a motion for new trial reserved with stay of execution for advice of all the judges of a higher court. Mather v. Chapman, 6 Conn. 54.

A statute confirming entries of judgments made on the first instead of on the third day of a term of court may validate such a judgment from which a writ of error is then pending. Underwood v. Lilly, 10 Serg. & R. 97.

Pending drainage proceedings may be made valid by a statute, even as to errors which go to the jurisdiction. Miller v. Graham, 17 Ohio St. 1.

Errors in proceeding to discontinue a road may be cured by a statute passed pending a certiorari to review the proceedings. People v. Ingham County Suprs. 20 Mich. 95.

The same is true of proceedings to lay out and improve a street. Newark v. State, 32 N. J. L. 453.

To defeat actions.

It must clearly appear that the Legislature so intended before a statute will be construed to bar a pending action. Chalker v. Ives, 55 Pa. 81.

After a judgment has been rendered declaring the invalidity of a tax a statute cannot heal the defects so as to overthrow the judgment. Moser v. White, 29 Mich. 59.

The right to an appeal or writ of error may be taken away by statute after the decision is rendered. Leavenworth Coal Co. v. Barber (Kan.) July 9, 1891.

Even after an appeal has been taken and a motion to dismiss denied after argument, the jurisdiction of the court may be taken away by statute. *Ex parte* McCardle, 74 U. S. 7 Wall. 506, 19 L. ed. 264.

An Act taking away the jurisdiction of the court will apply to pending appeals to that court. Baltimore & P. R. Co. v. Grant, 68 U. S. 398, 25 L. ed. 231.

A pending action by a creditor against a sheriff for the escape of an imprisoned debtor is not defeated by a statute allowing the sheriff in such cases to plead the prisoner's recapture or return before suit. Dash v. Van Kleeck, 7 Johns. 477, 5 Am. Dec. 291.

A statute allowing payment of a stamp duty upon an indenture of apprenticeship within a certain specified time in discharge of any penalty for

See also 16 L. R. A. 482.

At the time of the passage of this Act W. R. Pritchard was in life; subsequently, on the 27th day of July of the next year, the said suit still pending, he died. After his death, George B. Pritchard was duly appointed and duly qualified as administrator upon his estate. On the 20th of January, 1891, George B. Pritchard, administrator, (the death of William R. having been duly suggested of record,) made application to the court to be made a party to said case in the stead of his intestate. This application was denied by the court and upon motion of defendant's counsel the case was dismissed.

Messrs. **Jackson & Whatley** and **A. C. Wright**, for plaintiff in error:

The right to have the suit abate upon the death of the plaintiff is not a vested right.

The conditions necessary to give the Act application to this case having arisen after the Act was passed, is it not flying in the face of the plain meaning of the word to say that its operation is "retroactive?" The Act is purely preservative.

See *Kring* v. *Missouri*, 107 U. S. 248, 27 L. ed. 516; *Merrill* v. *Sherburne*, 1 N. H. 213, 8 Am. Dec. 52.

Matters of possible defense, which accrue under provisions of positive law which are arbitrary and technical, introduced for public convenience or from motives of policy, which do not affect the substance of the accusation or defense, and form no part of the *res gestæ*, are continually subject to the legislative will, unless in the meantime, by an actual application to the particular case, the legal condition of the accused has been actually changed.

Kring v. *Missouri*, 107 U. S. 248, 27 L. ed. 516.

Remedial statutes are not inoperative, although of a retrospective nature.

Searcy v. *Stubbs*, 12 Ga. 439; *Johnston* v. *Bradstreet Co.* (Ga.) March 23, 1891.

Messrs. **Lawton & Cunningham** for defendant in error.

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

The first proposition stated in the above head-note was settled by this court in the case of *Johnson* v. *Bradstreet Co.* (Ga.) 13 S. E.

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prior neglect does not apply to a pending action for such a penalty, as that would defeat plaintiff's vested right and punish him with costs for pursuing a remedy which he had a right to when brought. Couch v. Jeffries, 4 Burr. 2460.

A statute providing that entry upon private premises within the limits of a jail-yard shall not be regarded as an escape, although changing the law, will defeat a pending action for an escape brought on the prisoner's bond. Patterson v. Philbrook, 9 Mass. 151.

An Act of Congress to legalize a bridge across a navigable river will defeat a pending suit to remove the bridge as a nuisance. Gray v. Chicago, I. & N. R. Co. (The Clinton Bridge) 77 U. S. 10 Wall. 454, 19 L. ed. 969.

The Legislature may cure defects in voting and charging a school-tax upon a suit to restrain its collection. Cowgill v. Long, 15 Ill. 202.

Effect of repeals.

If a law conferring jurisdiction is repealed without any reservation as to pending cases all such cases fall with the law. Gurnee v. Patrick County, 137 U. S. 141, 34 L. ed. 601; Butler v. Palmer, 1 Hill, 324; Merchants Ins. Co. v. Ritchie, 72 U. S. 5 Wall. 541, 18 L. ed. 540; United States v. Boisdore, 49 U. S. 8 How. 113, 12 L. ed. 1009; McNulty v. Batty, 51 U. S. 10 How. 27, 13 L. ed. 333; *Ex parte* McCardle, 74 U. S. 7 Wall. 506, 19 L. ed. 264; Gates v. Osborne (The Assessor v. Osbornes) 76 U. S. 9 Wall. 567, 19 L. ed. 748; United States v. Tynen, 78 U. S. 11 Wall. 88, 20 L. ed. 153; Baltimore & P. R. Co. v. Grant, 98 U. S. 398, 25 L. ed. 231.

The Legislature may repeal a law imposing a penalty pending an action therefor and thus defeat the action. Oriental Bank v. Freeze, 18 Me. 109, 36 Am. Dec. 701; Mix v. Illinois Cent. R. Co. 3 West. Rep. 486, 116 Ill. 502; Pope v. Lewis, 4 Ala. 489; Norris v. Crocker, 54 U. S. 13 How. 429, 14 L. ed. 210; United States v. The Reform, 70 U. S. 3 Wall. 617, 18 L. ed. 105; Maryland v. Baltimore & O. R. Co. 44 U. S. 3 How. 534, 11 L. ed. 714.

Or pending an appeal from a judgment therefor, and thus defeat the judgment. Denver & R. G. R. Co. v. Crawford, 11 Colo. 598; Specker v. Louisville, 78 Ky. 287.

Or after judgment and before execution. Lewis v. Foster, 1 N. H. 61.

But a statute abolishing distress for rent, even if construed to repeal provisions as to a penalty for aiding the tenant to remove his property from the premises to avoid payment of rent, will not affect the landlord's right to recover such a penalty in a case then pending on appeal as his right to it became vested the instant the wrongful act was done. Palmer v. Conly, 4 Denio, 374.

This case is apparently in conflict with those preceding which relate to penalties.

The repeal of an Act giving a forfeiture defeats a pending suit therefor. Governor v. Howard, 5 N. C. 495.

The expiration pending an appeal of a statute under which the forfeiture of a vessel accrued will prevent an affirmance of the sentence of condemnation. The Rachel, 10 U. S. 6 Cranch, 329, 3 L. ed. 239; Yeaton v. United States, 9 U. S. 5 Cranch, 281, 3 L. ed. 101.

Road proceedings fall with the repeal of a statute on which they are based. *Re* Road in Hatfield Twp. 4 Yeates, 392; Menard County v. Kincaid, 71 Ill. 587.

So do insolvency proceedings. Miller's Case, 1 W. Bl. 451; Stoever v. Immell, 1 Watts, 258.

So do proceedings to sell an intestate's real estate for debts. Bank of Hamilton v. Dudley, 27 U. S. 2 Pet. 492, 7 L. ed. 496.

The repeal of a statute authorizing an auditor of public accounts to assess a tax for payment of bonds terminates all proceedings to compel him to make the assessment. Musgrove v. Vicksburg & N. R. Co. 50 Miss. 677.

But the repeal of an Act giving half pilotage fees to a pilot for speaking a vessel which declines his services does not defeat a pending action for such fees, as his right is vested under a transaction in the nature of a contract. Pacific Mail S. S. Co. v. Joliffe, 68 U. S. 2 Wall. 450, 17 L. ed. 805.

The mere repeal by an amendment of a statute of a provision giving an action for damages against a county for negligence in respect to a highway does not defeat a pending action, unless there is an evident intent of the Legislature to do so; and it seems that an attempt to give it such effect would violate a constitutional provision for a "remedy by the course of law for injury." Eastman v. Clackamas County, 32 Fed. Rep. 24.

Rep. 250 (decided at the present term). In that case, however, the main question was whether or not the above-mentioned section of the Code applied to actions for libel, and no question was raised in the argument as to the applicability of the amending Act to pending suits, or its constitutionality as to them, if held applicable. This court, in the case just mentioned, considered the first of these questions, and decided that the Act did apply to actions pending at the time of its passage, but did not discuss it *in extenso* in the opinion. The constitutional question was not considered or decided in that case. We will now examine both of them.

As stated in the case above cited, the language of the Act seems sufficiently broad and comprehensive to include pending actions. The law, as amended, reads: "Nor shall any action of tort for the recovery," etc., "abate by the death of either party." The words "any action" may as well mean any action now in existence as any action hereafter commenced, and it is not straining to give them this interpretation. In *Bailey* v. *State*, 20 Ga. 742, very similar reasoning is used. The Legislature had passed an Act declaring "who are qualified to serve as jurors in criminal cases," and its first section enacted that certain described persons shall be "liable to serve as jurors upon the trial of all criminal cases." The second section began: "When any person stands indicted," etc., *Judge* Benning said: " 'Criminal cases' is an expression that includes criminal cases of every sort." " 'All criminal cases' includes criminal cases of every kind." " 'Any person' is a universal term." The Act in question was accordingly held applicable to cases happening before its passage. A Vermont Act, providing that in case of the removal of sheriff or high bailiff from the State an action of *scire facias* may be brought directly upon the recognizance of such officer, was held to apply to all causes of action, whether existing at the time it took effect or accruing thereafter, although the Act contained no provision expressly applying it to pending actions. *Hine* v. *Pomeroy*, 39 Vt. 211. In *Kimbray* v. *Draper*, L. R. 3 Q. B. 160, it was held that a statute requiring plaintiffs to give security for costs in certain cases applied to such cases then pending (citing *Wright* v. *Hale*, 6 Hurlst. & N. 227), in which it was held that when the plaintiff in any action recovers less than five pounds, he shall not be entitled to any costs if the judge certifies to deprive him of them, and the judge may so certify in an action commenced before the passage of the Act. In *Hepburn* v. *Curts*, 7 Watts, 300, 32 Am. Dec. 760, it was held that the Legislature may pass laws affecting "suits pending, and give to a party a remedy which he did not previously possess, or modify an existing remedy, or remove an impediment in the way of recovering redress by legal proceedings." An action of assumpsit was proceeding in the name of a firm, which included among its members one Samuel Hepburn, against another firm of which the same man was also a member. Defendants insisted that the suit could not be maintained, because the same person was among both the plaintiffs and the defendants. The objection was sustained, and a bill of exceptions taken. While these proceedings were pending, the Legislature passed an Act providing in effect that an action brought by one firm against another should not abate by reason of one individual being a member of both firms, and it was held that this Act applied to the case then pending. A married woman sued alone for personal injuries to herself, when she had no right to bring such action without being joined therein by her husband. While her case was pending, the Legislature of Wisconsin passed an Act authorizing married women to bring such suits alone, and it was held that this Act applied to her pending suit, and made it good, even though it must have been abated if a motion to that effect had been made before the passage of the Act. *McLimans* v. *Lancaster*, 63 Wis. 596. This Act was also distinctly held not to be unconstitutional, although retroactive as to the case pending, because it affected only the remedy. In *Weldon* v. *Winslow*, L. R. 13 Q. B. Div. 784, it was held that a married woman might, by virtue of the Married Woman's Property Act of 1882, sue alone for a tort committed before the Act came into operation, the law before the passage of that Act being that she could not sue without joining her husband with her in the action.

Being satisfied that our Act of 1889, now under consideration, was intended to, and does, apply to pending actions, we will now inquire into its constitutionality. It will be noticed that some of the following authorities are also applicable to the question just disposed of. Section 6 of the Code provides that "laws looking only to the remedy or mode of trial, may apply to contracts, rights, and offenses entered into, or accrued or committed prior to their passage." The Constitution of 1865 forbade the passage of "retroactive laws, injuriously affecting any right of the citizen." No provision against retroactive legislation appears in the Constitution of 1868. That of 1877 forbids the passage of a "retroactive law." Construing together the above constitutional provisions in connection with the section of the Code cited, we take it that they all amount to substantially the same thing, and mean that retroactive laws, which do not injuriously affect any right of the citizen, that is to say, laws curing defects in the remedy, or confirming rights already existing, or adding to the means of securing and enforcing the same, may be passed. In *Boston* v. *Cummins*, 16 Ga. 102, it was held that "retrospective laws often operate for the benefit of society, and to repudiate them altogether would be to obliterate a large portion of the statute law of the State;" and accordingly it was ruled that a Registry Act, requiring deeds to be recorded within a limited time, applied to deeds executed before the passage of the Act. In the same volume, in *Knight* v. *Lasseter*, 151, it was held that an Act operating only on the remedy, though retrospective, was not unconstitutional. The Legislature of Mississippi passed an Act authorizing a court of chancery to refuse confirmation of a sale, provided the party objecting to the confirmation would make a certain bond, and it was held that the provisions of this Act applied to a sale made under a mortgage executed prior to the passage of the Act, and that as the Act affected the remedy only

and not the mortgagee's contract rights, it was not, therefore, unconstitutional. Before the passage of this Act the power of a chancery court to set aside a sale was much more limited. *Chaffe* v. *Aaron*, 62 Miss. 29. It is not unconstitutional for the Legislature to take away a right which is not vested, but contingent upon some event subsequent to the date of the statute. Before the occurrence transpires upon which an inchoate right is to become vested and unalterable, a law may be passed providing, in effect, that the happening of such occurrence shall not make that right complete. Thus, a joint tenancy may be converted into a tenacy in common, thereby destroying the right of survivorship, and the statute will apply to estates already vested at the time of its enactment. *Burghardt* v. *Turner*, 12 Pick. 538; *Bambaugh* v. *Bambaugh*, 11 Serg. & R. 191. So an estate tail may be changed into a fee-simple, and thereby destroy a remainder limited upon the fee-tail. *De Mill* v. *Lockwood*, 3 Blatchf. 56. It has been often held that the right of dower, before it becomes consummated by the death of the husband, may be taken away or changed at the pleasure of the Legislature. *Lucas* v. *Sawyer*, 17 Iowa, 517; *Noel* v. *Ewing*, 9 Ind. 37; *Hamilton* v. *Hirsch*, 2 Wash. T. 223; *Morrison* v. *Rice*, 35 Minn. 436; *Henson* v. *Moore*, 104 Ill. 403; *Barbour* v. *Barbour*, 46 Me. 9; 7 Lawson, Rights, Rem. & Pr. § 3867; 1 Sharswood & B. Lead. Cas. Real Prop. 300, and cases cited; 2 Hare, Const. Law, 824, Cooley, Const. Lim. 6th ed. 440 *et seq.* In *Wilbur* v. *Gilmore*, 21 Pick. 250, it was held that an Act allowing an action to be brought by an executor for an injury in the lifetime of his testator was not unconstitutional, even when applied to a trespass committed before this Act went into operation, inasmuch as it affected the remedy only. "The presumption against a retrospective construction has no application to enactments which affect only the procedure and practice of the courts, even where the alteration which the statutes make has been disadvantageous to one of the parties. . . . A law which merely alters the procedure may, with perfect propriety, be made applicable to past as well as future transactions. . . . No person has a vested right in any course of procedure, nor in the power of delaying justice, nor of deriving benefit from technical and formal matters of pleading. He has only the right of prosecution or defense in the manner prescribed, for the time being, by or for the court in which he sues; and if a statute alters that mode of procedure, he has no other right than to proceed according to the altered mode. The remedy does not alter the contract or the tort. It takes away no vested right, for the defaulter can have no vested right in a state of the law which left the injured party without, or with only a defective remedy." Endlich, Interpretation of Statutes, § 285, and cases cited. See also sections 286, 287. "No person can claim a vested right in any particular mode of procedure for the enforcement or defense of his rights. . . . A remedy may be provided for existing rights, and new remedies added to or substituted for those which exist." See Suth. Stat. Const. § 482, and cases there cited.

Judge Cooley lays it down as a rule that "a party has no vested right in a defense based upon an informality not affecting his substantial equities." Cooley, Const. Lim. 454. In *New Orleans* v. *Clarke*, 95 U. S. 644, 24 L. ed. 521, the court held: "It is competent for the Legislature to impose upon a city the payment of claims just in themselves, for which an equivalent has been received, but which from some irregularity or omission in the proceedings creating them, cannot be enforced at law." This legislation was held not to be within the provision of the Constitution of Louisiana, inhibiting the passage of a retroactive law. The Constitution of Louisiana contains a provision similar, in effect, to that of our own. "The best general rule laid down touching the validity of such statutes is given in 1 Kent, Com. 456, where it is stated that statutes which go to confirm existing rights, and in furtherance of the remedy by curing defects, and adding to the means of enforcing existing obligations, are clearly valid." See notes to *Goshen* v. *Stonington* (Conn.) 10 Am. Dec., beginning on page 131. "Any statute which changes or affects the remedy merely, and does not destroy or impair vested rights, is not unconstitutional, though it be retrospective, and although, in changing or affecting the remedy, the rights of parties may be incidentally affected." *Rich* v. *Flanders*, 39 N. H. 304. The decision in this case was made in construing a statute making competent as witnesses persons who were not so before, and it was held applicable to pending suits, the Act expressly so declaring. Sargent, *J.*, who delivered the opinion, quotes and adopts the following language of Daniel Webster in his argument in the case of *Foster* v. *Essex Bank*, 16 Mass. 245, 8 Am. Dec. 135: "A distinction must be made between acts which affect existing rights, or impose new obligations, and acts which give new remedies for existing rights, and enforce the performance of previous obligations." See also cases cited in *Rich* v. *Flanders*, *supra*.

In California it was held that an Act requiring a purchaser of property sold for delinquent taxes to give notice of the expiration of the time of redemption was constitutional, and applied to sales previously made. *Oullahan* v. *Sweeney*, 79 Cal. 537. "A statute altering the mode of proceeding in point of form, in a suit pending when the Act passed, so as to prevent a delay and hasten the time of trial, is not unconstitutional. Such an Act will be construed liberally, and general words, not expressly prospective, will be applied to a pending proceeding. The rule that a statute should not be so construed as to affect vested rights does not apply to a statute which alters the form of the remedy merely." *People* v. *Tibbets*, 4 Cow. 384.

We have quoted copiously from the numerous authorities above cited, making little comment thereon, because they seem to be strongly in point, and sustain the doctrine sought to be established more forcibly than would perhaps any language of our own. The case of *Wilder* v. *Lumpkin*, 4 Ga. 208, cited by counsel for the defendant in error, is not in conflict with our conclusions in the case at bar, either as to the applicability of the Act of

1889 to pending actions, or to its constitutionality. That case was ruled mainly upon the ground that the Act of 1847, providing "it shall not be necessary to make securities on appeal and injunction bonds parties to writs of error," was not intended to apply to cases pending at the time of its passage. *Judge* Nisbet, says, in effect, that the Legislature did not contemplate that the Act should have retrospective operation, because, by its own terms, it is made to take effect from and after its passage. No such language appears in the Act of 1889. This great and learned judge then proceeds to discuss the question of the constitutionality of the Act of 1847 as to its applicability to pending cases, and concluded that, so applied, it would not be constitutional. It appears that the rights of Lumpkin, the defendant in error, had been fixed by a judgment, and a subsequent statute affecting the manner in which that judgment might be set aside affected, not merely the remedy, but the right itself. *Judge* Nisbet lays great stress upon this idea, and, after referring to Lumpkin's rights under the judgment in his favor, remarks that "to give the law a retrospective operation would be to devest rights which had already vested in the defendant in error." We will not follow him further through the opinion delivered in this case. It evidences considerable research, great ability, and much learning, and has become celebrated. Of the correctness of the decision, in so far as it holds that the Act was not intended to be applicable to pending cases, there can be no doubt; and if a distinction between that case and the one at bar, on the constitutional question, cannot be soundly rested on the fact that Lumpkin's rights were vested because fixed by a judgment, we will only add that we do not feel constrained to adopt every assertion made in the splendid argument of our illustrious predecessor.

The Act of the Legislature of Tennessee, construed in the case of *Chicago, St. L. & N. R. Co.* v. *Pounds*, which case was relied on by counsel for the defendant in error, as will be seen by an examination of the same, not only affected the remedy, but gave a new, distinct, and additional cause of action, which, of course, could not constitutionally be done. 11 Lea, 127, 15 Am. & Eng. R. R. Cas. 510. The same criticism is applicable to the case of *Osborne* v. *Detroit*, 32 Fed. Rep. 36. In the latter case an Act limiting the amount of recovery to be had for injuries occasioned by a defective sidewalk was held not applicable to pending suits. So it appears in that case that not only was the plaintiff's remedy affected, but also the measure of his damages a substantial matter.

After a careful consideration of the questions involved in this case, and in view of the authorities cited, we affirm the ruling made by this court in the case *Johnson* v. *Bradstreet Co.*, that the Act of 1889 is applicable to actions pending at the time of its passage; and we rule in the present case that this Act, when so applied, is not unconstitutional.

Judgment reversed.

NORTH DAKOTA SUPREME COURT.

Arthur EDMUNDS *et al.*, *Appts.*,
v.
Peter HERBRANDSON *et al.*, *Respts.*

(.....N. Dak.....)

***1. Chapter 56 of the Laws of 1890, regulating the relocation of county-seats, is unconstitutional,** as being repugnant to section 69 of article 2 of the State Constitution, prohibiting special legislation locating or changing county-seats, because it arbitrarily classifies counties, putting into one class all counties wherein at the date of the Act the court-house and jail were worth the sum of $35,000, and forever excluding from this class all counties coming within its description in the future, placing all such counties permanently in a separate class.

2. The constitutional inhibition against special legislation does not prevent classification, but such classification must be natural, not arbitrary; it must stand upon some reason, having regard to the character of the legislation of which it is a feature.

3. It is not the form, but the effect, of a statute which determines its special character.

4. An Act relating to all the objects to which it should relate, except one, is as much special legislation as if it had embraced only the object excluded.

5. It is purely a legislative question, subject to no review by the courts, whether in a given case a general or special law should be enacted under section 70 of article 2 of the State Constitution, which provides that "in all other cases where a general law can be made applicable no special law shall be enacted."

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

(December 5, 1891.)

APPEAL by plaintiffs from an order of the District Court passed at Chambers in Cass County and entered in the office of the clerk of the District Court for Traill County in favor of defendants in a suit brought to enjoin the removal of the county records and the offices of the county officers of Traill County from Caledonia to Hillsboro. *Reversed.*

The facts sufficiently appear in the opinion.

Messrs. **A. B. Levisee** and **Ball & Smith,** for appellants:

Unless the law clearly has a uniform operation it cannot be considered as a law of a general nature. The fact that there is a lack of uniform operation, the courts hold, makes the law special or local.

Scranton School Districts' App. 4 Cent. Rep.

NOTE.—For *note* on rendering statute constitutional by classification, see *Re* Washington St. (Pa.) 7 L. R. A. 193.

For *note* on legislative discretion as to applicability of general statute, see State v. Terre Haute (Ind.) *ante*, 566.

See also 23 L. R. A. 525; 33 L. R. A. 589.

311, 113 Pa. 176; *State* v. *Corington*, 29 Ohio St. 102-111; *Kelley* v. *State*, 6 Ohio St. 269-274; *Nichols* v. *Walter*, 37 Minn. 264; *State* v. *Somers Point*, 6 L. R. A. 57, 52 N. J. L. 32; *State* v. *Hudson County Bd. of Chosen Freeholders*, 9 Cent. Rep. 501, 50 N. J. L. 82; *McCarthy* v. *Com.* 1 Cent. Rep. 111, 110 Pa. 243.

The counties excepted, by reason of their having a court-house and jail exceeding in value the sum of $35,000, are only such counties as have buildings of that value now erected. Any number of counties not having, at the time of the passage and approval of the Act, a court-house and jail exceeding in value the sum of $35,000, might afterwards construct a court-house and jail exceeding that value, and still all of the provisions of the Act in question would apply to them, and under that Act the county seats in those counties might be removed. The exception of one county from the operation of an Act makes it local and special.

State v. *Hudson County Bd. of Chosen Freeholders, supra; Davis* v. *Clark*, 106 Pa. 384.

The question as to whether or not the classification is authorized by the Constitution is for the courts to determine.

Ayars' App. 122 Pa. 266.

The law could not have a uniform operation. It would result in a classification which is not based on any reason, and in counties in which precisely the same condition of affairs existed, being subject to different laws as to the re-location of county seats.

Marmet v. *State*, 9 West. Rep. 449, 45 Ohio St. 63; *Com.* v. *Potton*, 88 Pa. 258; *Morrison* v. *Bachert*, 3 Cent. Rep. 117, 112 Pa. 322; *State* v. *Mitchell*, 31 Ohio St. 592.

The basis of classification in the Act in question is unreasonable and no necessity therefor exists.

Ayars' App. 2 L. R. A. 577, 122 Pa. 266; *State* v. *Somers' Point*, 6 L. R. A. 57, 52 N. J. L. 32; *State* v. *Sloan*, 6 Cent. Rep. 346, 49 N. J. L. 356; *State* v. *Bloomfield* (N. J. L.) Nov. 1885. See *Clark* v. *Cape May*, 50 N. J. L. 558; *McCarthy* v. *Com.* (Pa.) Oct. 5, 1885; *Nichols* v. *Walter*, 37 Minn. 264; *State* v. *Hammer*, 42 N. J. L. 439.

If local results are or may be produced by a piece of legislation it offends against the constitutional prohibition of special legislation and is void.

Scranton School District's App. 4 Cent. Rep. 311, 113 Pa. 176.

Messrs. **F. W. Ames** and **J. F. Selby**, for respondents:

The Legislature may classify persons and subjects, for the purpose of legislation, and enact laws applicable specially to such classes, and while the laws thus enacted operate uniformly upon all members of the class, they are not vulnerable to the constitutional inhibition under consideration.

Vermont L. & T. Co. v. *Whithed* (N. Dak.) July 14, 1891.

It is not fatal to the classification, that the individuals of the class were, are and ever will be the only ones composing that class.

State v. *Spaude* (Minn.) July 28, 1887; *Nichols* v. *Walter*, 37 Minn. 264.

An Act applying the like rule to all counties under the like circumstances is general and not local.

State Bd. of Freeholders of Somerset County v. *Board of Chosen Freeholders of Hunterdon County*, 52 N. J. L. 512.

Under the Constitution of New York state, it has been held by the court of appeals that an Act applying only to fifty-eight counties out of sixty counties in the State was general and not local or special legislation, and was constitutional.

People v. *Newburgh & S. P. Road Co.* 86 N. Y. 1.

The Act of 1890 is general in its form, operating upon classes of counties therein designated and stands with the general Act regulating the removal of county seats *in pari materia*, and must be so construed.

See *Vermont L. & T. Co.* v. *Whithed* (N. Dak.) July 14, 1891.

Messrs. **Joslin & Ryan** and **Carmody & Leslie** also for respondents.

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

The plaintiffs, as taxpayers of Traill County, in this State, instituted this action against the members of the board of county commissioners and the other officers of that county to secure an injunction perpetually restraining them, their successors in office, clerks, deputies, agents, and servants, from removing, or attempting to remove, the books, papers, records, etc., belonging at the county-seat of such county, from such county-seat at Caledonia to the city of Hillsboro, in said county, and from locating or establishing, or attempting to locate or establish, the respective offices of such county, or any of the same, at such city of Hillsboro, under and in pursuance of the votes cast at a certain election held for that purpose under the provisions of chapter 56 of the Laws of 1890. It is undisputed that at this election all the requirements of this statute were fully complied with. In fact no question upon this appeal is presented, expect the single one of the constitutionality of this Act. By it a radical change in the manner of relocating county-seats was made. Before its enactment, section 565, Comp. Laws, gave the rule. It required a petition of two thirds of the qualified voters of the county as a condition precedent to the ordering and holding of an election, and two thirds of the votes actually cast at such election were essential to choice. The Act of 1890 requires a petition signed by only one third of the qualified voters of such county, as shown by the vote cast at the last preceding election for state officers holden in such county, to compel the ordering of an election to relocate the county-seat, and three fifths of the votes actually cast will transfer the county-seat to the place having such three fifths vote. The county-seat in Traill County before the election under this statute was located at Caledonia. The proceedings taken under the Act were regular, and the vote in favor of a relocation at Hillsboro was sufficient to work a relocation of the county-seat at that place, if the law in question is valid.

It is undisputed that the proceedings were not efficacious to transfer the county-seat, under section 565, Comp. Laws; the petition,

not being signed by two thirds of the qualified voters, and the vote in favor of Hillsboro not being equal to two thirds of the votes cast. The sole inquiry in this appeal, therefore, is respecting the constitutionality of chapter 56 of the Laws of 1890. It is challenged as unconstitutional because of its alleged conflict with section 69 of article 2 of the State Constitution, which provides that "the Legislative Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: . . . (3) Locating or changing county-seats." The provision of chapter 56 which it is claimed renders that Act obnoxious to this constitutional inhibition is the proviso which reads as follows: "Provided, that nothing in this Act shall permit the removal to or locating of the county-seat of any county at a place not located upon a line of railroad, nor wherein the court-house and jail now erected exceed in value the sum of $35,000." It is undisputed that some of the counties of the State fall within the proviso, and that some of them fall without it, and within the regulation of the Act. It is therefore apparent that by this proviso the Legislature has classified counties for the purpose of determining under what law a relocation of the county-seat can be obtained. The proviso excepts from the provision of chapter 56, counties with respect to which the circumstances are peculiar. These counties are either left under the provisions of section 565 of the Complied Laws, or there is no statutory rule regulating or permitting the relocation of county-seats therein. Whichever of these two views we take, these counties are placed in a separate class by themselves; and the question which naturally suggests itself is whether this particular classification can be sustained under the authorities and the spirit of the constitutional prohibition against special legislation. This section of the Constitution must have a reasonable construction. To say that no classification can be made under such an article would make it one of the most pernicious provisions ever embodied in the fundamental law of a State. It would paralyze the legislative will. It would beget a worse evil than unlimited special legislation,—the grouping together without homogeneity of the most incongruous objects under the scope of an all-embracing law. On the other hand, the classification may not be arbitrary. The Legislature cannot finally settle the boundaries to be drawn. Such a view of the organic law would bring upon this court the just reproach that it had suffered the Legislature to disregard a constitutional barrier by relegating to it the question where that barrier should be set up. See *State* v. *Newark*, 40 N. J. L. 71–80; *Ayars' App.* 2 L. R. A. 577, 122 Pa. 266. Where shall the line properly be traced? We believe that in testing this question these inquiries should be made: Would it be unjust to include the classes of objects or persons excluded? Would it be unnatural? Would such legislation be appropriate to them? Could it properly be made applicable? Is there any reasonable ground for excluding them? It is impossible, from the very nature of the case, to state with precision the true doctrine. But it is our opinion that every law is special which does not embrace every class of objects or persons within the reach of statutory law, with the single exception that the Legislature may exclude from the provisions of a statute such classes of objects or persons as are not similarly situated with those included therein, in respect to the nature of the legislation. The classification must be natural, not artificial. It must stand upon some reason, having regard to the character of the legislation.

We find in the adjudications no more felicitous statement of the true doctrine than that of *Chief Justice* Beasley in *State* v. *Hammer*, 42 N. J. L. 439: "But the true principle requires something more than a mere designation by such characteristics as will serve to classify; for the characteristics which thus serve as a basis for classification must be of such a nature as to mark the object so designated as peculiarly requiring exclusive legislation. There must be a substantial distinction, having reference to the subject matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will in some reasonable degree, at least, account for or justify the restriction of the legislation." The whole trend of the authorities is in this line. See *Nichols* v. *Walter*, 37 Minn. 264; *Ayars' App.* 2 L. R. A. 577, 122 Pa. 266; *People* v. *Central Pac. R. Co.* 83 Cal. 933; *Re Washington St.* 132 Pa. 257, 7 L. R. A. 193; *State* v. *Boyd*, 19 Nev. 43; *Closson* v. *Trenton*, 48 N. J. L. 438, 4 Cent. Rep. 83; *State* v. *Hudson County Bd. of Chosen Freeholders*, 50 N. J. L. 82, 9 Cent. Rep. 501; *Ledi Twp.* v. *State*, 51 N. J. L. 402, 6 L. R. A. 56; *Utsy* v. *Iliott*, 30 S. C. 360; *State* v. *Somers' Point*, 52 N. J. L. 32, 6 L. R. A. 57; *Clark* v. *Cape May* (N. J. Sup.) 14 Atl. Rep. 581; *Vermont L. T. Co.* v. *Whithed* (N. Dak.) 49 N. W. Rep. 318. This list might be greatly enlarged.

We are inclined to the view that under the authorities, had the Legislature not closed the door against accessions to the class of counties having a court-house and jail exceeding $35,000 in value, the classification would have been proper. But an arbitrary time is fixed after which no county coming within the same conditions which characterize the class can gain admittance to such class. "Provided, that nothing in this Act shall permit the removal to or relocation of the county-seat of any county . . . wherein the court-house and jail now erected exceed in value the sum of $35,000." This classification is not based upon natural reason, but upon the arbitrary fiat of the Legislature. While it may be true that the county-seat ought not to be so easily relocated in a county wherein the loss to the tax-payer will be greater by reason of the erection at the existing county-seat of expensive buildings as in the county where such loss will be comparatively trifling in amount, it is not reasonable that the mere time when such expensive buildings are constructed should at all

enter into the consideration of the matter. This law was approved March 7, 1890. So far as the value of improvements is concerned, it excepts only those counties wherein the court-house and jail now erected exceed in value the sum of $35,000. If the word "now" refers to the date of approval of the Act, all counties having a court-house and jail exceeding $35,000 in value on the 8th of March of that year, but not on the 7th; or if the word "now" refers to the date when the Act took effect *i. e.*, July 1st, all counties in which the court-house and jail worth more than $35,000 should be completely erected on July 2d instead of July 1st,—would nevertheless be subject to the provisions of the new law, although the natural reason can suggest no justification of such a distinction. If the danger of serious loss to the tax-payer by the removal of a county-seat from a place at which expensive buildings have been constructed affords reason for placing counties in which such a condition exists in a separate class, to be governed by more stringent legislation in this respect, there is no reason why a county in which for the first time such a condition exists on a later day should be excluded from this separate class, any more than a county in which this condition existed the day before. There is no natural reason for a classification of counties in which the same conditions exist based solely on and arbitrarily upon the period of time before or after which such conditions existed for the first time. Such a doctrine would lead inevitably to unlimited special legislation under the mere guise of classification. It would nullify the Constitution so far as it prohibited special legislation. The authorities are unanimous on the point. In *Com.* v. *Patton*, 88 Pa. 258, the court says: "Said Act makes no provision for the future, in which respect it differs from the Act of 1874, which in express terms provides for the future cities and the expanding growth of those now in existence. That is not classification which merely designates one county in the Commonwealth, and contains no provision by which any other county may, by reason of its increase of population in the future come within the class." In *State* v. *Donovan*, 20 Nev. 75, the court says: "All Acts or parts of Acts attempting to create a classification of counties or cities by a voting population which are confined in their operation to the existing state of facts at the time of their passage, or to any fixed date prior thereto, or which by any device or subterfuge exclude the other counties or cities from ever coming within their provisions, or based upon any classification which in relation to the subject embraced in the Act is purely illusory, or founded upon unreasonable, odious, or absurd distinctions, have always been held unconstitutional and void."

Nichols v. *Walter*, 37 Minn. 264, is peculiarly in point. The court said: "Recurring, to the law in question we find it divides the counties in two classes, the classification based upon an event in the past so that no county in one class can ever pass into the other class; and to those in one class is applied what we may call the majority rule, and to those in the other the three-fifths rule. Had the Act specified by name those counties in which one rule should apply, and those in which the other should apply, it would hardly be questioned that the legislation was special and not general and uniform, in its operation throughout the State. But the counties were, at the date of the Act, identified, and their status fixed for all time, by reference to the specified event, as fully as though the counties were named. There is nothing in the event which is the basis of classification which suggests any necessity or propriety for a different rule to be applied to the counties to be placed in the two classes. Why one county which had located its county-seat by a vote of its electors, twenty-five years or six months before the Act passed, should require a vote of three fifths of its electors to remove it, and the county which should so locate it three or six months after the Act passed, may again remove or locate it upon a mere majority vote is impossible to conceive, except that the Legislature has arbitrarily so provided. But in such matters the Legislature cannot arbitrarily so provide. The Act is unconstitutional and void." In *Marmet* v. *State*, 45 Ohio St. 63, 9 West. Rep. 449, the same doctrine is clearly stated and recognized: "The law is not a special Act. It is local and special as to the ends to be accomplished, but general in its terms and operations, applying to all cities of the first grade of the first class. It is not limited to such cities as may have been in that class and grade at the date of its enactment. At that time Cincinnati was the only city in the State answering to the description, but there is a possibility, not to say certainty, that other cities in the State will increase in population so that they will pass into this grade, and when that happens they will come within the provisions of this law. In this respect the law differs essentially from that in review in the case of *State* v. *Mitchell*, 31 Ohio St. 592. That law was made applicable only to cities of the second class having a population of 31,000 at the last federal census, and inasmuch as Columbus was the only city in the State having that population, and as the Act could apply only to that city and never to any other, and as it undertook to confer corporate powers, this court held it to be in conflict with section 1 of article 13, and therefore void. A like objection was found to exist against the Act under consideration in the case of *State* v. *Pugh*, 43 Ohio St. 98, 1 West. Rep. 36, and the distinction above indicated is made apparent with great clearness and force in the opinion rendered by the present chief justice." Without further quotation from opinions, we cite, as sustaining the same view, the following cases: *State* v. *Boyd*, 19 Nev. 43; *Woodard* v. *Brien*, 14 Lea, 520; *Morrison* v. *Bachert*, 112 Pa. 322, 3 Cent. Rep. 117; *State* v. *Covington*, 29 Ohio St. 102; *Devine* v. *Cook County Comrs.* 84 Ill. 592; *State* v. *Herrmann*, 75 Mo. 340; *State* v. *Mitchell*, 31 Ohio St. 607; *State* v. *Hunter*, 38 Kan. 578; *State Gaddis*, 44 N. J. L. 365; *State* v. *Hammer*, 42 N. J. L. 440.

It was urged that the mere fact that those counties in which there were such expensive buildings could never come within the law was insufficient to render the Act void; that they, under ordinary circumstances, would never descend into that class; and that the fact that destruction of such expensive improvements might possibly in the future bring them within the description of the class having inexpensive public buildings should not be considered, it being only a remote contingency. But the difficulty with this reasoning is that it ignores the fact that the counties having inexpensive buildings at the date of the passage of the Act can never, by the erection of expensive buildings or in any other manner, ascend into the expensive building class. They are kept forever within the particular class in which the Act finds them, notwithstanding the fact that in the future change of condition may bring them within the description of the other class. The boundary between these two classes was as permanently fixed when the Act was passed as if the counties had by name been placed within these two classes respectively. The line drawn by the Legislature is therefore purely arbitrary. It is one thing to assert that all except a single object will be forever kept from the class by circumstances, and another and entirely different thing to attempt to exclude all others by the very terms of the law. A law applicable to all the cities of the State of New York having not less than a million population may never embrace any other city. But, the classification being reasonable, it ought not to be prohibited because no other city may ever enter the class. But, when the Act in express terms prevents any further accession to the class it is apparent that the classification stands, not upon a reasonable ground based on difference in population, but is purely arbitrary. The Act might as well have expressly named the particular objects included, to the exclusion of all others. So far as this particular provision of the Constitution against special legislation is concerned it is immaterial that the Act is general in form. The question is always as to its effect. Any other doctrine would render nugatory the prohibition of the fundamental law against special legislation. Under the guise of statutes general in terms, special legislation, in effect, could be adopted with no inconvenience, and the evil to be extirpated would flourish unchecked. Statutes general in terms have been adjudged void as special legislation, because they could operate only upon a part of a class. The authorities are explicit upon this question: *People* v. *Central Pac. R. Co.* 83 Cal. 393; *Dundee Mortg. & T. Invest. Co.* v. *School Dist. No. 1*, 21 Fed. Rep. 151; *Miller* v. *Kister*, 68 Cal. 142; *Nichols* v. *Walter*, 37 Minn. 264; *Com.* v. *Patton*, 88 Pa. 258; *Devine* v. *Cook County Comrs.* 84 Ill. 592; *State* v. *Mitchell*, 31 Ohio St. 607.

Said the court in *Nichols* v. *Walter*: "These cases cited from many on the subject are sufficient to show that, in determining whether a law is general or special, courts will look not to its form or phraseology merely, but to its substance and necessary operation." In *Com.* v. *Patton*, 88 Pa. 258, an act general in form, but so worded that it could apply to only one county in the State, was before the court. It characterized this attempted evasion as "classification run mad." In *State* v. *Pugh*, 43 Ohio St. 98, 1 West. Rep. 36, the court says, at page 103, 43 Ohio St.: "It is not the form the statute is made to assume, but its operation and effect, which is to determine its constitutionality." It is no answer to the contention that an act is special legislation, to insist that only a single class is excluded. The exclusion of a single person or object which should be affected by a statute is fatal. All must be included or the law is not general. If one may be omitted, where shall this line be drawn? Here authority is in accord with principle. *Davis* v. *Clark*, 106 Pa. 385; *State* v. *Hudson County Bd. of Chosen Freeholders*, 50 N. J. L. 82, 9 Cent. Rep. 501; *State* v. *Camden City Council*, 50 N. J. L. 87, 9 Cent. Rep. 497; *Manning* v. *Klippel*, 9 Or. 367; *Miller* v. *Kister*, 68 Cal. 142, *Lodi Twp.* v. *State*, 51 N. J. L. 402, 6 L. R. A. 56. In this last case the court said: "The rule is that in any classification for the purpose of a general law all must be included and made subject to it, and none omitted that stand upon the same footing regarding the subject of legislation. To omit one so circumstanced is as fatal a defect as to include but one of a number." In *Davis* v. *Clark*, 106 Pa. 384, the court said: "It was not then a general Act applicable to every part of the Commonwealth. It did apply to a great number of counties, but there is no dividing line between a local and a general statute. It must be one or the other. If it apply to the whole State, it is general. If to a part only, it is local. As a legal principle, it is as effectually local when it applies to sixty-five counties out of the sixty-seven as if it applied to one county only. The exclusion of a single county from the operation of the Act makes it local." To same effect is *State* v. *Mullica Twp.* 51 N. J. L. 412. The case of *People* v. *Newburgh & S. Pl. Road Co.*, 86 N. Y. 1, is cited as holding a contrary doctrine. We do not so construe that decision. But we would have no hesitation in declaring that doctrine unsound if it adjudged an act to be not special, so far as the constitutional inhibition against special legislation is concerned, because it related to all except two counties in the State, where there was no reason for classification. If an Act is not special because it relates to all except a single county in a State, without any reason for the classification, then the Legislature can accomplish indirectly what it is beyond their power to bring about by direct steps. Whenever it is desired to introduce a new rule as to a single county, a general law can be passed establishing that rule in all the counties, and then another law can be enacted re-establishing the old rule in all counties except the one singled out to be governed by the new rule. The first law would be clearly general, and, under what it is claimed is the New York doctrine, the second Act could not be assailed

as special legislation. This would, indeed, be an ingenious mode of neutralizing the constitutional prohibition against special legislation. We would not give it our sanction, however it might be buttressed by authority.

Can the proviso be stricken out and the Act sustained without it? If, in striking out the proviso, the effect is to extend the provisions of the law over counties having expensive buildings, the legislative will is disregarded. If, on the other hand, it is said that the law will reach no further after the provision is eliminated than with the proviso undisturbed, then the Act is special legislation, because it is too restricted in its operation. To include such counties is to defy the will of the Legislature as expressed in their statute; to exclude them is to defy the will of the people as expressed in their fundamental law. Here again the voice of reason and the voice of authority are one. *Nichols* v. *Walter*, 37 Minn. 264; *Delaware Bay & C. M. R. Co.* v. *Markley* (N. J. Err. & App.) 16 Atl. Rep. 436; *State* v. *Sauk County Suprs.* 62 Wis. 376–379. Said the court in the last case: "It was argued by the counsel for the appellant that although the proviso in the Act of 1881 is invalid it does not vitiate the whole Act, and that the residue may be upheld as a valid law. The rule is in such cases that unless the void part was the compensation for or inducement to the valid portion, so that the whole Act, taken together, warrants the belief that the Legislature would not have enacted the valid portions alone, such portions will be operative; otherwise not. . . . In the present case there is no room for the application of this rule, for the reason that the Legislature has not enacted that the statute should extend to Grant County, but has expressed a contrary intention. By no possible construction can the statute be held to be operative in Grant County, and it is essential to its validity that it be operative in that as well as in every other county of the State."

It was urged in the appellants' brief that the Act was repugnant to section 70 of article 2 of the State Constitution, providing that "in all other cases where a general law can be made applicable, no special law shall be enacted." The point appears to have been abandoned on the oral argument, but we will notice it. There are two conclusive answers to this position. In the first place it applies only to cases other than those previously enumerated in section 69, and this section embraces all laws locating or changing county-seats. The second answer is that the question whether a general law can be made applicable is purely a legislative question, and the decision of the law-making power in this respect is subject to no review. *Evansville* v. *State*, 118 Ind. 426, 4 L. R. A. 93; *Wiley* v. *Bluffton*, 111 Ind. 152, 9 West. Rep. 681; *Brown* v. *Denver*, 7 Colo. 305; *People* v. *McFadden*, 81 Cal. 489; *Richman* v. *Muscatine County Suprs.* 77 Iowa, 513; *Owners of Lands* v. *People*, 113 Ill. 296; *State* v. *Boone County Ct.* 50 Mo. 317; *McGill* v. *State*, 34 Ohio St. 247; *State* v. *Hitchcock*, 1 Kan. 178.

There is much force in the position that the Act in question is a law of a general nature, within the meaning of section 11 of article 1 of the Constitution, providing that all laws of a general nature shall have a uniform operation. *Vermont L. & T. Co.* v. *Whithed* (N. Dak.) 49 N. W. Rep. 318; *People* v. *Central Pac. R. Co.* 43 Cal. 398–432. But see *State* v. *Shearer*, 46 Ohio St. 275. That the law is not uniform in its operation, within the meaning of the Constitution, naturally follows from the arbitrary nature of the classification it attempts to make. See cases cited in *Vermont L. & T. Co.* v. *Whithed* (N. Dak.) 49 N. W. Rep. 318–320.

The judgment and order of the District Court are reversed, and that court is directed to enter judgment in favor of the plaintiffs upon the demurrer for the relief demanded in the complaint.

All concur.

ON REHEARING.

Per Curiam:

This is a motion to modify the order for judgment heretofore entered in the above-entitled action. The motion came on for a hearing at a regular term of this court held at the city of Fargo, on the 12th day of January, A. D. 1892, and before the *remittitur* herein is transmitted to the court below. After hearing counsel for the respective parties, and upon consideration, it is adjudged that the original order for judgment herein be and the same is modified so as to read as follows: *first*, the order of the district court sustaining defendants' demurrer to the complaint and the order of the district court dissolving the temporary injunction herein are respectively and in all things reversed; *second*, the defendants and respondents herein are permitted to make application to the district court for leave to plead over and make answer to the complaint, and the district court, in the exercise of its discretion, will permit an answer to be interposed, if it shall appear to the satisfaction of said court that the application is made in good faith, and not for the purpose of delay, and that a verified answer can be served which will embody a good defense on the merits.

NEW YORK COURT OF APPEALS (2d Div.).

Eliza Jane MOORE, *Appt.*,
v.
NEW YORK ELEVATED R. CO. *et al.*, *Respts.*

(.....N. Y.....)

1. **The loss of privacy of premises used as a dwelling, caused by the construction in a street in front of them of an elevated railroad** and station, whereby employés and passengers can look into the windows, is an element of damages so far as it depreciates the rental value of the premises.

2. **A judgment for defendant will be reversed** for excluding from the consideration of the jury an element which might have entitled plaintiff to nominal damages at least, although it is difficult to say how the jury could, under the evidence, have determined the amount of damages attributable thereto.

(January 26, 1892.)

APPEAL by plaintiff from a judgment of the General Term of the Court of Common Pleas for the City and County of New York affirming a judgment of a trial term in favor of defendants in an action brought to recover damages for reduction of the rental value of premises in which plaintiff had a life estate because of the alleged wrongful construction and operation of defendants' railroad in the street in front of them. *Reversed.*

The facts are stated in the opinion.

Messrs. **Charles E. Whitehead** and **Stanley W. Dexter,** for appellant:

All of the annoyances from the railroad—as noise, vibration, and loss of privacy—should have been considered.

Drucker v. *Manhattan R. Co.* 8 Cent. Rep. 66, 106 N. Y. 162; *Lahr* v. *Metropolitan Elev. R. Co.* 6 Cent. Rep. 371, 104 N. Y. 295; *Kane* v. *New York Elevated R. Co.* 11 L. R. A. 640, 125 N. Y. 186.

Loss of privacy is material in this class of suits.

Buccleugh v. *Metropolitan Board of Works,* L. R. 5 H. L. Cas. 418; *Baltimore & P. R. Co.* v. *Fifth Baptist Church,* 108 U. S. 317, 27 L. ed. 739.

Interference with privacy by the collection of crowds is a nuisance.

Bostock v. *North Staffordshire R. Co.* 5 De G. & S. 584; *Walker* v. *Brewster,* L. R. 5 Eq. 25; *Inchbald* v. *Robinson,* L. R. 4 Ch. App. 388; *Rex* v. *Moore,* 3 Barn. & Ad. 184.

In cases of misdirection by the court the inquiry is not whether the jury were actually misled by the instructions given, but whether the instructions were calculated to mislead them.

Thompson, Charging the Jury, p. 168; *Benham* v. *Cary,* 11 Wend. 83; *Erben* v. *Lorillard,* 19 N. Y. 299.

Under any aspect of the case the plaintiff was entitled to nominal damages; and the right to the street easements being in question a new trial will be granted, as a property right is affected.

Hyatt v. *Wood,* 3 Johns. 239; *Herrick* v. *Storer,* 5 Wend. 580; *McConihe* v. *New York & E. R. Co.* 20 N. Y. 495; *Dean* v. *Metropolitan R. Co.* 119 N. Y. 540; *Mortimer* v. *Manhattan R. Co.* 29 N. Y. S. R. 262.

The invasion in this case of plaintiff's life estate in the premises and the impairment of her easements in Greenwich and Franklin streets, is a trespass upon her freehold, and she is entitled, on the uncontradicted evidence, to at least nominal damages, which would carry costs.

Kelly v. *New York & M. B. R. Co.* 81 N. Y. 233; *Bruen* v. *Manhattan R. Co.* 39 N. Y. S. R. 86; *Jones* v. *Metropolitan Elev. R. Co.* 39 N. Y. S. R. 177; *Dinehart* v. *Wells,* 2 Barb. 432; *Horton* v. *Jordan,* 32 N. Y. S. R. 920; *Crowell* v. *Smith,* 35 Hun, 182.

Messrs. **Julien T. Davies** and **Brainard Tolles,** for respondents:

A verdict for defendant will not be set aside as against evidence, merely because plaintiff was entitled to nominal damages.

Rundell v. *Butler,* 10 Wend. 119; *Ellsler* v. *Brooks,* 22 Jones & S. 73; *Reading* v. *Gray,* 5 Jones & S. 79; *Brantingham* v. *Fay,* 1 Johns. Cas. 255; *Hyatt* v. *Wood,* 3 Johns. 239; *Derendorf* v. *Wert,* 42 Barb. 230; *Jennings* v. *Loring,* 5 Ind. 250.

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

The plaintiff, life-tenant of a house and lot at the northeast corner of Greenwich and Franklin streets, in the city of New York, brought this action to recover damages alleged to have been suffered by her by the maintenance and operation of the New York Elevated Railroad (of which the Manhattan Railway Company was the lessee) in Greenwich Street in front of her premises, and the erection and maintenance of a station for passengers to go onto and depart from the cars, which station was near to the plaintiff's house in front on Greenwich Street, and on Franklin Street, into which it extended. The plaintiff gave evidence tending to prove some disturbance of her easements of light, air, and access by the railroad and its use. She also gave some evidence of noise produced by it, and of the loss of privacy in the use of the third story of the building. It appeared that the rental value of the plaintiff's premises had depreciated since the railroad was constructed; and evidence on the part of the defendant was to the effect that in that neighborhood the depreciation of rents was occasioned by the removal of the business stand of the Long Island farmers from there to Gansvoort market, thus diverting the trade incident to that traffic from the former to the latter place. The court submitted to the jury the question whether the rental value of the plaintiff's premises had been diminished by deprivation of light, air, and access through the maintenance and operation of the road, and directed them to exclude from their con-

NOTE.—The novelty of the point presented in the above case concerning the loss of privacy, while rendering it interesting and valuable, gives small opportunity for annotation.

sideration the elements of noise, vibration, and the loss of privacy, for which they could allow no damages. The plaintiff's exceptions were: *first*, to the portion of the charge directing the jury to exclude noise and vibration from consideration; and, *second*, to the like instruction as to the loss of privacy. As there was no evidence of any vibration, the first exception was too broad to raise the question in its application to the noise resulting from the operation of the road. *Haggart* v. *Morgan*, 5 N. Y. 422, 55 Am. Dec. 350; *Groat* v. *Gile*, 51 N. Y. 431. And the question arises upon the exclusion of the subject of the loss of privacy from the consideration of the jury. It seems well established that the theory upon which an action at law may be supported by an abutting owner against the defendants is that they are in such sense trespassers or wrong-doers as to be liable to such owners for all the injuries resulting proximately from the wrongful act of maintaining and operating their elevated road. *Lahr* v. *Metropolitan Elev. R. Co.* 104 N. Y. 269, 6 Cent. Rep. 371; *Drucker* v. *Manhattan R. Co.* 106 N. Y. 157, 8 Cent. Rep. 66; *Kane* v. *New York Elev. R. Co.* 125 N. Y. 164, 186, 11 L. R. A. 640. In the latter case, and in the more recent one of *American Bank-Note Co.* v. *New York Elev. R. Co.*, 129 N. Y. 252, it was held that, while such relation of trespasser continued, the defendants were liable to the abutting owner for the damages occasioned to him by the noise of operating the road. This liability of the defendants is not that for which the remedy is by action in the nature of that formerly known as "trespass *quare clausum*," but rather in the nature of that known at common law as an "action on the case." *Kernochan* v. *New York Elev. R. Co.* 128 N. Y. 559. The continued invasion of the privacy of the occupant of a building very likely would have the effect to reduce the rental value of it for some purposes. The first floor of the plaintiff's building was occupied as a grocery or liquor store, and the two above were occupied by persons as places of abode. But, so far as appears, only two rooms are exposed or subject to the loss of privacy. Those rooms are on the third floor, and have one window in front on Greenwich Street and two on the Franklin Street side. The opportunity, by means of the windows, to look into the rooms, is from the station platform on both streets. The evidence on the subject was mainly given by a person who had occupied those rooms, and was to the effect that the looking in the windows by the passengers and employés was very annoying; that they did it from the station platform; and that they interfered with the privacy of the rooms, by looking in when standing on the platform and when coming down the stairs along the building. It may be seen that this exposure of the rooms, and the occupants within them, to the observation of persons at all times of the day, would be detrimental to them as dwelling-places. While it is true that the observation taken by the patrons and employés of the defendants is not the act of the latter, the defendants have furnished the means and opportunity for those persons to invade the privacy of these rooms by looking into them through the windows, and it is by the invitation and procurement of the defendants, for the purpose of the business of the road, that people are at the station and on its platform. No reason appears why the defendants should not be responsible for the consequences of the loss of privacy thus occasioned so far as it depreciated the rental value of the rooms in the plaintiff's building. Those consequences detrimental to the rooms are the rational result of the maintenance of the road and the station, and are reasonably attributable to that cause.

In *Buccleuch* v. *Metropolitan Board of Works*, L. R. 5 H. L. 418, the plaintiff, under lease from the crown, occupied certain premises known as the "Marlagn House," the garden of which extended to the Thames, where it was protected from the river by a wall, through which was a door and a causeway leading to the water. The defendants, under the Thames Embankment Act, constructed a roadway in front of the premises, and higher than the garden. It was there held that the loss of the use of the river frontage, and the consequent loss of privacy, increase of dust, and noise occasioned by the erection of the embankment road-way, were subjects to be considered in estimating the damages to be awarded to the plaintiff. In the present case, although the loss of privacy was properly an element for the consideration of the jury, the question arises whether the plaintiff was prejudiced by the exclusion of it from their attention. There was no evidence specifically applicable to damages resulting from loss of privacy, but the diminished rental upon which the plaintiff sought to recover mainly had relation to the entire building, and was charged to have been produced by the causes which the maintenance and operation of the road furnished. This included the interference with the easements of light, air and access, as well as the consequences of noise and loss of privacy. But the latter, so far as appears, was applicable only to a couple of rooms on the third floor. It is difficult to see how the jury could, by any rule of apportionment, have determined upon the evidence the loss of rental for that cause, if they had been disposed to have given damages for the loss of privacy. They may however, have given the plaintiff nominal damages for that cause, if it had not been excluded from their consideration; and, as the plaintiff may have been prejudiced by the misdirection of the court, the error cannot be disregarded on review. *Herrick* v. *Stover*, 5 Wend. 580.

These views lead to the conclusion that *the judgment should be reversed*, and a new trial granted, costs to abide event.

All concur.

INDIANA SUPREME COURT.

LOUISVILLE, NEW ALBANY & CHICAGO R. CO., *Appt.*,
v.
Moses CREEK, Admr., etc., of Matilda E. McClintic, Deceased.

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

1. **A motion for judgment, which says, "The defendant files motion for judgment** on the answers to interrogatories notwithstanding the general verdict for plaintiff," is sufficient in form to present the question.

2. **The negligence of a husband will not, merely because of the marital relation, be imputed** to his wife, who is injured while riding with him.

(January 7, 1892.)

APPEAL by defendant from a judgment of the Circuit Court for Carroll County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. **E. C. Field** and **C. C. Matson**, for appellant:

If an adult, in full possession of his faculties, is injured in broad daylight by a collision with a train at a public crossing with which he is familiar, the fault is prima facie his own, regardless of whether any signals are sounded, or the speed fast or slow. And unless he proves that he was free from fault himself, the action fails.

Cincinnati, H. & I. R. Co. v. *Butler*, 1 West. Rep. 110, 103 Ind. 31; *Indiana, B. & W. R. Co.* v. *Greene*, 3 West. Rep. 883, 106 Ind. 279; *Bellefontaine R. Co.* v. *Hunter*, 33 Ind. 333; *Toledo, W. & W. R. Co.* v. *Shuckman*, 50 Ind. 42; *St. Louis & S. E. R. Co.* v. *Mathias*, 50 Ind. 65; *Louisville & N. R. Co.* v. *Orr*, 84 Ind. 50; *Indiana, B. & W. R. Co.* v. *Hammock*, 12 West. Rep. 298, 113 Ind. 1.

Such a person must always approach a railway crossing under the apprehension that a train is liable to come at any moment; and carefully and diligently use his senses of sight and hearing to ascertain whether a train is coming before going on the track; and injury, when the use of either of said faculties would have given sufficient warning to enable the party to avoid the danger, conclusively proves negligence.

Bellefontaine R. Co. v. *Hunter*, 33 Ind. 367; *Indiana, B. & W. R. Co.* v. *Hammock*, *supra*; *Terre Haute & I. R. Co.* v. *Clark*, 73 Ind. 168; *Cincinnati, H. & I. R. Co.* v. *Butler*, 1 West.

NOTE.—*Imputing contributory negligence of driver of private vehicle to his wife, who is injured while riding with him.*

In a New York decision to the effect that the negligence of the driver of a carriage is not imputable to his wife, who is injured by the overthrow of the carriage while riding with him, caused by a heap of dirt in the street, the court, after quoting from another case in which one person has been riding with another on invitation, said the same reasoning applied and made no attempt to distinguish between a wife and any other person injured in such circumstances. Platz v. Cohoes, 24 Hun, 101.

So a decision of the circuit court of the United States in Ohio denied that contributory negligence of a husband can be imputed to his wife while riding with him, who is injured by the upsetting of their buggy caused by dogs chasing their horse. Shaw v. Craft, 37 Fed. Rep. 317.

The same was held where she was injured by running against a pole located in the highway while riding with her husband. Sheffield v. Central U. Teleph. Co. 36 Fed. Rep. 164.

And a Texas case decides that, although the negligence of a driver in attempting to cross a railway track is not imputable to his wife while riding with him, she will be held to the duty of exercising ordinary care. Galveston, H. & S. A. R. Co. v. Kutac, 72 Tex. 643.

No reference is made in this case to a prior decision, that a wife is chargeable with the negligence of her husband, with whom she is riding behind an ox team approaching a railroad crossing. Gulf C. & S. F. R. Co. v. Greenlee, 62 Tex. 344. In this earlier case the court did not discuss the relation of the parties, or base the decision upon it.

Again, in a Wisconsin case which held that a wife injured because of a defective street while riding with her husband is chargeable with his contributory negligence, no distinction was made between a wife and other persons riding with the driver. Prideaux v. Mineral Point, 43 Wis. 513, 28 Am. Rep. 558.

In a similar case in Vermont the decision was the same, and the court says: "She was under the care of her husband, who had the custody of her person and was responsible for her safety; and any want of ordinary care on his part is attributable to her in the same degree as if she were wholly acting for herself." But the court also says: "There is nothing in the marital relation which will change the situation of the wife in respect to her husband's negligence under such circumstances," and declares that the same consequences would have followed if the relation had been that of parent and child, master and servant, or if she had been an entire stranger carried as a passenger gratuitously. Carlisle v. Sheldon, 38 Vt. 440.

A husband's knowledge of the vicious character of a horse driven by him, and which became frightened and ran away, is the knowledge of his wife, who is injured thereby while riding with him. Huntoon v. Trumbull, 2 McCrary, 314.

This declaration was made without any discussion of the point in a charge to a jury, and would seem to be about the same as an imputation to her of the husband's negligence; but the relationship was not mentioned as an element in the case; and the court also said that the viciousness of the horse, whether known to either of them or not, if it actually contributed to the runaway, would defeat any liability for leaving machinery in the street by which the horse was frightened. *Ibid.*

A case very similar in facts, but clearly distinguishable and not fairly to be regarded as in conflict with the main case, decides that where the right to damages for injury to the wife while riding with her husband is community property, and she cannot sue alone for such injuries, the contributory negligence of the husband will bar their joint right of action for negligence of a third person. McFadden v. Santa Ana, O. & T. St. R. Co. 11 L. R. A. 252, 87 Cal. 464.

14 L. R. A.

See also 20 L. R. A. 42.

Rep. 110, 103 Ind. 31; *Indiana, B. & W. R. Co.* v. *Greene*, 3 West. Rep. 883, 106 Ind. 279; *St. Louis & S. E. R. Co.* v. *Matthias*, 50 Ind. 65; *Toledo, W. & W. R. Co.* v. *Shuckman*, 50 Ind. 42; *Pittsburgh, C. & St. L. R. Co.* v. *Martin*, 82 Ind. 485; *Indianapolis & C. R. Co.* v. *McClure*, 26 Ind. 370.

If anything at the time obstructs the sight or sound, making it peculiarly dangerous, such a person must approach the crossing with a degree of caution much above that which would be required if there were no intervening obstacles to the view or hearing, using "the most rigid prudence and extraordinary caution" before going on the track where a train may come.

Cincinnati, H. & I. R. Co. v. *Butler*, 1 West. Rep. 110, 103 Ind. 35; *Indiana, B. & W. R. Co.* v. *Greene*, 3 West. Rep. 883, 106 Ind. 282, 283, and cases cited *infra*.

When it appears on the undisputed facts, as matter of common knowledge and experience, that such a person was not in the exercise of such care at the time he was struck on such a crossing by a passing train, as matter of law the verdict must fall.

Wheelwright v. *Boston & A. R. Co.* 135 Mass. 229; *Tully* v. *Fitchburg R.* 134 Mass. 500; *Woodard* v. *New York, L. E. & W. R. Co.* 9 Cent. Rep. 293, 106 N. Y. 369; *Pennsylvania R. Co.* v. *Righter*, 42 N. J. L. 180; *Schofield* v. *Chicago, M. & St. P. R. Co.* 114 U. S. 615, 29 L. ed. 224; *Pzolla* v. *Michigan Cent. R. Co.* 54 Mich. 273.

The question of imputed negligence on the precise facts of this case has not been adjudicated in Indiana, so far as we have been able to find. Adjudications upon the analogous relation of parent and child and guardian and ward have been passed upon, and the doctrine of imputed negligence ably declared, and we see no logic or reason for declaring a different doctrine between husband and wife.

See *Indianapolis* v. *Emmelman*, 6 West. Rep. 566, 108 Ind. 533; *Pittsburgh, Ft. W. & C. R. Co.* v. *Vining*, 27 Ind. 514.

The precise question was directly presented and passed upon in the case of *Joliet* v. *Seward*, 86 Ill. 402, 29 Am. Rep. 35. In this case the city requested the trial court to instruct the jury as follows: "If the injury to plaintiff was caused by the negligence of her husband, in whose care she was, she could not recover."

The instruction was refused.

On appeal, the Supreme Court says: "The instruction contains a correct principle of law, and if there was sufficient evidence on which to base it, and we are inclined to think there was, it ought to have been given. Plaintiff had placed herself in the care of her husband and submitted her personal safety to his keeping."

See also *Huntoon* v. *Trumbull*, 2 McCrary, 315; *Peck* v. *New York & N. H. & H. R. Co.* 50 Conn. 379; *Carlisle* v. *Sheldon*, 38 Vt. 440; Shearm. & Redf. Neg. 46; *Yahn* v. *Ottumwa*, 60 Iowa, 429; *Tuffree* v. *State Center*, 57 Iowa, 538.

It is therefore urged first, that the Supreme Court of Indiana has wisely declared the doctrine of imputable negligence where the relation of parents and child or guardian and ward prevails.

It is the only legitimate outgrowth of that relationship. The relationship makes the father and guardian the protector of the child and ward. The obligation of the husband to care for and protect his wife is even stronger than the obligation which compels him, both in morals and law, to care for and protect his child. The decisions of sister states are in accord with each other and with the rule, so far as announced in Indiana.

There is a class of cases adjudicated in Indiana, which are not in point on the facts of this case, which hold that the negligence of a driver, who is a mere third party, will not be imputed to the passenger.

Brannen v. *Kokomo G. & J. Gravel R. Co.* 14 West. Rep. 837, 115 Ind. 115; *Albion* v. *Hetrick*, 90 Ind. 545; *Knightstown* v. *Musgrove*, 116 Ind. 121.

There is only one case which, at first blush, seems to declare a different rule.

Hoag v. *New York Cent. & H. R. R. Co.* 111 N. Y. 199.

Mr. **John H. Gould,** for appellee:

The paper filed was no motion at all. It merely announces that the appellant "files motion;" but where is it? And for whom is judgment asked? No question was presented by such a paper.

Toledo, W. & W. R. Co. v. *Croft*, 62 Ind. 395; *Salander* v. *Lockwood*, 66 Ind. 285.

The appellant contends that if the deceased was free from fault, the husband was not, and that his negligence must be imputed to the deceased. Such is not the law in this State.

Terre Haute & I. R. Co. v. *McMurray*, 93 Ind. 358; *Michigan City* v. *Boeckling*, 122 Ind. 39.

The doctrine of *Thorogood* v. *Bryan*, 8 C. B. 115, is completely exploded both in England and America.

The Bernina, L. R. 12 Prob. Div. 58.

The courts of Wisconsin, Iowa, Vermont, and Connecticut still adhere to the exploded doctrine of *Thorogood* v. *Bryan*, 8 C. B. 115.

30 Cent. L. J. 50.

In all the other States, where the question has been considered, the principle has been pronounced wholly indefensible.

Counsel for the appellant urge that there is some mysterious element in the marriage relation that requires the court to impute the assumed negligence of the husband to the wife. This is not true. The appellant's position is without foundation, without following *Thorogood* v. *Bryan*, 8 C. B. 115, and the rule urged by the appellant has never been held to be the law except where that case is followed.

Platz v. *Cohoes*, 89 N. Y. 219; *Hoag* v. *New York Cent. & H. R. R. Co.* 111 N. Y. 199; *Davis* v. *Guarnieri*, 13 West. Rep. 438, 45 Ohio St. 470.

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

Suit by the appellee, as administrator of the estate of Matilda McClintic, who was killed on a highway crossing by one of the appellant's locomotive engines.

The complaint charges, in substance, that

the decedent's death was caused by the actionable negligence of the appellant in this,—that appellant had allowed a hedge, together with trees, bushes, and weeds to grow along the line of its track and adjacent to said crossing, to such height and so densely that for a long distance all view of the track was cut off from persons on the highway; that the same obstructions, together with buildings erected along and near its track, tended to deaden and cut off the sound of approaching trains; that employés of appellant, in charge of and operating said locomotive engine and drawing a train of cars, ran the same upon and over said crossing at a speed of thirty miles an hour, without having given the signals required by statute; that the decedent, with her husband was traveling along said highway in a buggy; that they were at the time passing over said crossing, using due care and guilty of no negligence, and were struck by said locomotive, and decedent was killed. Verdict for the appellee. With the verdict the jury returned answers to forty-six interrogatories propounded by the appellant. The appellant moved for a judgment on the answers to interrogatories notwithstanding the general verdict. This motion was overruled and this ruling presents the only question in the record. The appellee contends that the motion was fatally defective and does not raise the question argued. The record entry of the motion is as follows:

Comes now the defendant, and moves the court for a judgment upon the answers of the jury to the interrogatories submitted notwithstanding the general verdict, which motion is in these words:

State of Indiana } ss:
Carroll County, }

In the Carroll Circuit Court, May Term, 1889.

Creek, Admr. McClintic,
vs.
L. N. A. & C. Ry. Co.

The defendant files motion for judgment on the answers to interrogatories, notwithstanding the general verdict for plaintiff.

This motion was in writing and was signed by counsel for the appellant. Counsel for the appellee say: "We submit that it is no motion at all. It merely announces that the appellee files motion, but where is it? And for whom is judgment asked? No question was presented by such a paper. Besides, as the appellant did not move for a judgment in its favor, it is not injured by the court's ruling."

The motion is certainly lacking in formality and in certainty. Rules of practice and procedure are necessary for the orderly conduct of litigation, and as aids in the administration of justice. It is no hardship to require of litigants substantial conformity to reasonable rules. It is possible, however, by an over rigid and strict enforcement of the rules of practice, to make them hindrances to the doing of justice, rather than aids. When a substantial controversy in fact exists between parties, which is so presented that the court can apply the law and adjust their rights, it would not be in accordance with the spirit of an enlightened jurisprudence to refuse to do so merely because of some slight informality, or a failure by one party to comply strictly with the rules of practice, in matters where the informality or omission will not work injustice or impose any hardship upon the opposite party. Thus applied, most beneficent rules might often serve as intrenchments for injustice.

In our opinion, notwithstanding the informality and lack of precision and certainty in the motion, it is sufficient as a motion by the appellee for a judgment in its favor, and it is our duty to consider the questions thus presented.

The motion for a judgment *non obstanti* is based upon the grounds: (1) that the answers to interrogatories show that the appellee's decedent was guilty of contributory negligence; (2) that if this is not true, they do show that the husband of the decedent, with whom she was riding at the time she was killed, was guilty of negligence, and that his negligence should be imputed to her, and precludes a recovery by her administrator.

A motion for a judgment on special findings, notwithstanding the general verdict, should only be sustained when the special findings and the general verdict cannot be reconciled with each other, under any supposable state of facts provable under the issues. *Stevens* v. *Logansport*, 76 Ind. 498; *Pittsburgh, C. & St. L. R. Co.* v. *Martin*, 82 Ind. 476; *Higgins* v. *Kendall*, 73 Ind. 522; *Louthain* v. *Miller*, 85 Ind. 161; *Amidon* v. *Gaff*, 24 Ind. 128; *Shoner* v. *Pennsylvania Co.* (Ind.) 28 N. E. Rep. 616; *Poseyville* v. *Lewis*, 126 Ind. 81; *Cincinnati, H. & I. R. Co.* v. *Clifford*, 113 Ind. 460, 13 West. Rep. 384.

The court will not presume anything in aid of the special findings, but will make every reasonable presumption in favor of the general verdict. *Pittsburgh, C. & St. L. R. Co.* v. *Martin, supra; Shoner* v. *Pennsylvania Co. supra; Poseyville* v. *Lewis, supra*, and cases cited.

As above stated, the special findings were forty-six in number. They were also long, and no good purpose would be subserved by incorporating them into this opinion. After a careful examination, we are of the opinion that no specific fact is found which would justify us in disregarding the general finding that she was free from contributory negligence, necessarily embraced in the general verdict.

The principal argument of appellant's counsel is directed to the question of imputed negligence. Their position is, that because of the relations existing between husband and wife, and because of his duty to care for and protect her, if a wife places herself in her husband's care, by riding in a conveyance driven or controlled by him, and he is guilty of negligence in the control or management of the conveyance, his negligence is her negligence. If she is at the same time hurt by the negligence of another, being herself entirely free from fault, yet if the husband's negligence contributes to her injury, his negligence will be imputed to her, and she cannot recover.

We cannot sanction this doctrine. It was expressly repudiated by this court in the case of *Miller* v. *Louisville, N. A. & C. R. Co.* 128 Ind. 97.

There are cases where the negligence of one person will be imputed to another; but, as stated in the case last cited, the extreme doctrine has never been sanctioned by this court. See also *Michigan City* v. *Boeckling*, 122 Ind. 39.

The extent to which the doctrine of imputable negligence is recognized in this State is thus stated by Mitchell, *J.*, in *Knightstown* v. *Musgrove*, 116 Ind. 121, 124: "Before the concurrent negligence of a third person can be interposed to shield another, whose neglect of duty has occasioned an injury to one who was without personal fault, it must appear that the person injured and the one whose negligence contributed to the injury sustained such a relation to each other, in respect to the matter then in progress, as that in contemplation of law the negligent act of the third person was, upon the principles of agency or co-operation in a common or joint enterprise, the act of the person injured. Until such agency or identity of interest or purpose appears, there is no sound principle upon which it can be held that one who is himself blameless, and is yet injured by the concurrent wrong of two persons, shall not have his remedy against one who neglected a positive duty which the law imposed upon him."

The court in the same case further says: "When one accepts the invitation of another to ride in his carriage, thereby becoming in effect his comparatively passive guest, without any authority to direct or control the conduct or movements of the driver, or without reason to suspect his prudence or competency to drive in a careful and skillful manner, there is no reason why the want of care of the latter should be imputed to the former, so as to deprive him of the right to compensation from one whose neglect of duty has resulted in his injury."

We can see no good reason why the foregoing statement does not apply to a wife riding with her husband, with as much reason as to a stranger riding with him; nor why she may not be in such case a mere passive guest, without authority to direct or control his movements, and without reason to suspect his prudence or his skill. A husband and wife may undoubtedly sustain such relations to each other in a given case that the negligence of one will be imputed to the other. The mere existence of the marital relation, however, will not have that effect. In our opinion, there would no more reason or justice in a rule that would in cases of this character inflict upon a wife the consequences of her husband's negligence, solely and alone because of that relationship, than to hold her accountable at the bar of Eternal Justice for his sins because she was his wife.

In the case at bar the complaint contains the following averment: "· · · her said husband driving said horse and managing and controlling said horse and buggy, the said Matilda having no control of her said husband, and no control or management of said horse and buggy."

In aid of the general verdict it will be presumed that this averment was sustained by the evidence. It is unnecessary to express any opinion as to the effect of the special findings in showing negligence on the part of the husband. As the case comes to us, it is not material whether he was negligent or not.

Judgment affirmed, with costs.

NEBRASKA SUPREME COURT.

Nettie E. DAVIS, Admx., etc., of Daniel C. Davis, Deceased, *Plff. in Err.*,
v.
Alanson E. HOUGHTELIN *et al.*

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

***A master is liable to third persons** for damages resulting from the negligence of his servants, only when the latter is acting within the scope of his employment.

(December 18, 1891.)

ERROR to the District Court for Jefferson County to review a judgment in favor of defendant in an action brought to recover damages for wrongfully causing the death of plaintiff's decedent. *Affirmed.*

*Head note by NORVAL, J.

The facts are stated in the opinion.

Mr. **John Saxon** for plaintiff in error.

Messrs. **W. O. Hambel** and **Marquett, Deweese & Hall** for defendants in error.

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

This is a proceeding in error to reverse the judgment of the District Court of Jefferson County, sustaining a general demurrer to the petition of the plaintiff, and dismissing the action. The petition alleges: "(1) That she is administratrix of the estate of Daniel C. Davis, deceased, duly appointed according to law. (2) That the defendants are partners in trade, doing business as such at Fairbury, in said county, under the firm name and style of Houghtelin & McDowell. (3) That on or

NOTE.—*Liability of master for assaults by servants.*

The doctrine of the earlier cases was that the master was not liable for the willful wrongful act of his servant, "but the better and more modern rule clearly is that the mere nature of the act is not the only criterion, but that the most important test is whether the act was done in the course of the employment." Mechem, Agency, § 741, p. 580; Isaacs v. Third Ave. R. Co. 47 N. Y. 122, 7 Am. Rep. 418.

Where a servant willfully whipped up his master's horses as he saw a small boy about to climb into the wagon, throwing the latter down and injuring him, the master cannot be held liable. Wright v. Wilcox, 19 Wend. 343, 32 Am. Dec. 507.

For a willful and malicious assault by defendant's overseer upon the plaintiff's slave temporarily employed by the defendant, which was not necessary in executing defendant's orders, the latter is not liable. McCoy v. McKowen, 26 Miss. 487, 59 Am. Dec. 264.

A railroad company is not liable for an assault committed by its flagman stationed at a highway crossing, where he went outside of the limits of the highway and indulged in an altercation upon the company's right of way from which the assault resulted. Illinois Cent. R. Co. v. Ross, 31 Ill. App. 170.

A master sending his servant to take possession of furniture forfeited to him by nonpayment of the price is liable for a willful assault by the servant committed in getting the property. Levi v. Brooks, 121 Mass. 501.

Instructions to an employé not to commit an assault when sending him to get an organ which is in the possession of another, knowing that the errand is likely to excite indignation and resistance, will not relieve the employer from liability for a wrongful assault by the employé while engaged in the business of seizing and carrying away the organ. McClung v. Dearborne, 8 L. R. A. 204, 134 Pa. 396.

A railroad company which by force took possession of a line of road in the peaceable possession and control of another company is liable to an employé of the latter company for an assault upon him by its servants in thus taking possession. Denver & R. G. R. Co. v. Harris, 122 U. S. 597, 30 L. ed. 1146.

Where a trespasser, with the assistance of his servant, was maintaining his entry and possession by force, he is liable for an assault by the servant upon the owner committed in effecting their common purpose, notwithstanding previous directions to the servant not to commit an assault. Barden v. Felch, 109 Mass. 154.

A landlord, who places a writ for the removal of a tenant in the hands of an officer, is not liable for an assault committed by the officer in executing the writ. Sutherland v. Ingalls, 6 West. Rep. 389, 63 Mich. 620.

A drayman sent by a purchaser to get some goods from defendants' warehouse objected to receiving certain damaged packages and was assaulted by an employé of the defendants sent to superintend the delivery of the goods. It was held that the defendants were not liable for such assault, as the employé was acting outside of the scope of his authority. Meehan v Morewood, 52 Hun, 566.

Plaintiff went into defendant's store to purchase an ulster, and having tried on one, defendant's floor-walker approached and accused him of being a spy from a rival store, and directed the saleswoman to take the garment off the plaintiff. Held, that an assault was committed for which the defendant was liable. Geraty v. Stern, 30 Hun, 426.

A canal company is not liable for an assault by its lock keeper upon a boatman passing through the lock, committed under the pretext that he had not paid his toll, none having been demanded of him. Ware v. Barataria & L. Canal Co. 15 La. 169.

The mate of a steamer suspecting plaintiff, who was a roustabout on that boat, of tampering with some whiskey on board, threw a missile and struck plaintiff in the eye. Held, that as it was no part of the mate's duty to act as watchman of the merchandise, the owners of the boat were not liable. Dyer v. Rieley, 28 La. Ann. 6.

A packet company is not liable to a "rouster" employed to assist in unloading freight under the direction of the mate of a boat, for the blows struck by the mate, arising out of a dispute, because the mate required the "rouster" to work faster. Smith v. Memphis & A. C. Packet Co. (Tenn.) June 5, 1886.

Where the conductor of a railway train stops his train and pursues a boy with a pistol into his father's house, seizes the boy and carries him off on the train, the railway company is not liable, unless it authorizes or ratifies such acts. Gilliam v. South & N. A. R. Co. 70 Ala. 268.

A railway company is not liable for injuries received by a bystander, whom the engineer by threats of personal violence has compelled to uncouple cars. New Orleans, J. & G. N. R. Co. v. Harrison, 48 Miss. 112.

By carrier's servants upon passengers.

Assaults committed by the carrier's servants while ejecting either passengers or trespassers from its carriages and premises are not included in this note. The liability for such assaults will be treated in a future note.

See also 15 L. R. A. 475; 17 L. R. A. 228; 20 L. R. A. 350; 22 L. R. A. 72; 24 L. R. A. 483; 26 L. R. A. 220; 29 L. R. A. 465, 729; 30 L. R. A. 297; 31 L. R. A. 390; 32 L. R. A. 792; 39 L. R. A. 784; 40 L. R. A. 483; 43 L. R. A. 84.

about the 28th day of March, A. D. 1888, said defendants were in the possession of certain premises at Fairbury, in said county, whereon they were engaged in the business of feeding cattle and hogs, and had, upon said premises, a quantity of feed and provender for said cattle and hogs; and plaintiff says defendants also kept and employed, in and about their said business, a certain servant and agent, one Allen Ireland, by name, for the purpose of guarding said feed, and whose business it was, in the due course of his employment by said defendants, to seize and detain persons who might be found disturbing such feed so provided by defendants. (4) That on said day the said Daniel C. Davis, then in full health and life, had occasion to go and be upon said premises of said defendants, and she says that while so there the said defendants, by their servant and agent, Ireland, who was then and there present, and acting for said defendants in the due course of his employment as aforesaid, and pursuant to his instructions and orders, attempted to seize and detain, without any lawful process or warrant, the said Daniel C. Davis, deceased; and plaintiff avers that said defendants and their said servant so negligently, carelessly, and unlawfully managed their said business and attempt that the said Daniel C. Davis was then and there shot through his heart with a bullet from a pistol then and there negligently, carelessly, and unlawfully had and held in the hands of defendants' said servant, said Ireland, and said Daniel C. Davis was then and thereby instantly killed. (5) Plaintiff avers that the death of said Daniel C. Davis, as aforesaid, was caused by the wrongful and unlawful act, neglect,

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1. *During transportation.*

a. Generally.

Because of the contractual relation between a carrier and its passengers the former is liable for every unjustifiable assault upon the latter by its servants in charge of their transportation. Louisville & N. R. Co. v. Whitman, 79 Ala. 328; Sherley v. Billings, 8 Bush, 147, 8 Am. Rep. 451; Wabash R. Co. v. Savage, 8 West. Rep. 238, 110 Ind. 156; St. Louis, A. & C. R. Co. v. Dalby, 19 Ill. 353; Goddard v. Grand Trunk R. Co. 57 Me. 202, 2 Am. Rep. 39; Conger v. St. Paul, M. & M. R. Co. 45 Minn. 207; Ricketts v. Chesapeake & O. R. Co. 7 L. R. A. 354, 33 W. Va. 433; Stewart v. Brooklyn C. R. Co. 90 N. Y. 588, 43 Am. Rep. 185.

The last case practically overrules Isaacs v. Third Ave. R. Co., 47 N. Y. 122, 7 Am. Rep. 413, which held that the street-car company was not liable for the act of the conductor in pushing from the platform while the car was in motion a passenger who wished to alight on the ground; that it was without the scope of his authority.

In Stewart v. Brooklyn C. R. Co., *supra*, the court says that it was not called to the mind of the court in the Isaacs Case that the liability of the master is different where the master owes a duty to the person wronged by the servant.

A brakeman who kicks a person as the latter is attempting to board a moving train renders the company liable for the injuries resulting from his act. Molloy v. New York Cent. R. Co. 10 Daly, 453.

A railroad company cannot be made liable for an assault upon a passenger by mere evidence that the assailant carried a lettered lantern and wore a badge and a lettered cap, it not appearing that he was in any way connected with the operation of the train. Sachrowitz v. Atchison, T. & S. F. R. Co. 37 Kan. 212.

The drenching of a passenger with water, either negligently or willfully, is a breach of the carrier's duty to carry safely, and it is immaterial, upon the question of the company's liability, whether it resulted from the fault of the brakeman or conductor, or of both of them. Terre Haute & I. R. Co. v. Jackson, 81 Ind. 19.

A person desiring to become a passenger upon a freight train, entered the caboose and the conductor insolently refused to carry him, and struck him with his lantern. Held, that the railroad company was liable. Western & A. R. Co. v. Turner, 72 Ga. 292, 53 Am. Rep. 842.

A railroad company is liable for wanton conduct of its conductor in embracing and kissing a female passenger against her will. Craker v. Chicago & N. W. R. Co. 36 Wis. 657.

A street-railway company is liable for an assault by a driver upon a passenger, committed for the purpose of procuring him to pay his fare, which the latter claimed to have once paid. Malecek v. Tower Grove R. Co. 57 Mo. 17.

Where a railway conductor, to enforce the payment of fare, wrests from a passenger her parasol, the company is liable for assault and battery. Ramsden v. Boston & A. R. Co. 104 Mass. 117, 6 Am. Rep. 200.

Where a passenger on a street-car by mistake put too much fare in the box and was reimbursing himself by collecting fares from incoming passengers, and the driver removed him from the car for so doing, the driver is guilty of an assault for which the railroad company is liable. Corbett v. Twenty-Third St. R. Co. 42 Hun, 587.

Carriers of passengers by water are under the same liability as those by land for assaults by their servants. Block v. Bannerman, 10 La. Ann. 1; R. R. Springer Transp. Co. v. Smith, 16 Lea, 498.

In Nieto v. Clark, 1 Cliff. 145, Clifford, J., says, that passengers on shipboard contract "for protection against personal rudeness from all those in charge of the vessel and every wanton interference with their persons." This case was, however, an action by a steward for being discharged in a foreign port, on account of a charge against him by a lady passenger of attempting to commit a rape upon her.

In Pendleton v. Kinsley, 3 Cliff. 416, the plaintiff offered to purchase a ticket for his passage upon defendant's steamboat when he embarked, but the clerk refused to change the bill which he offered in payment, and later, upon refusal to pay his fare, the clerk assaulted plaintiff and removed him to another part of the boat. It was held that, although the plaintiff could have been removed from the boat for his refusal to pay, yet the carrier was liable for the assault upon him while he was permitted to remain.

b. Effect of passenger's misbehavior.

Where a passenger by his own misbehavior, while being transported, provokes a personal encounter between himself and one of the carrier's employés, the carrier is not liable. Scott v. Central Park, N. & E. R. R. Co. 53 Hun, 414.

Where the steward and waiters of a steamboat were treating with rudeness a relative of a passenger, and the latter interfered by a proper remark, and was assaulted by them, their employer is liable. Bryant v. Rich, 106 Mass. 180, 8 Am. Rep. 311.

A railway passenger, having lost his watch, accused a brakeman of having taken it, and thereupon the brakeman struck him. Held, that the railroad company was liable for the assault. Chicago, & E. R. Co. v. Flexman, 103 Ill. 546, 42 Am. Rep. 53.

Where, a passenger and a brakeman having had

See also 31 L. R. A. 551; 38 L. R. A. 427.

and default of said defendants, and without any just or sufficient cause, provocation, or fault on the part of the said decedent; that they, said defendants, knowingly and intentionally employed said Ireland for the purpose of assaulting and attempting to detain, without process or warrant, persons who might go upon their said premises as aforesaid; and that they well knew that their said servant, Ireland, was so armed with said pistol in their said employment, and was likely to so negligently, carelessly, and unlawfully use the same in and about their said business and employment, and that great personal injury and damage, or loss of life, was liable to ensue thereby and therefrom, yet they, said defendants, notwithstanding, did not and would not prevent and forbid their said servant, but did carelessly, negligently, and unlawfully permit him in the premises, contrary to their duty in that case. (6) Plaintiff further states that said Daniel C. Davis, deceased, left surviving him his widow, this plaintiff, and the following named children, his next of kin and heirs, to wit: Albert L. Davis, aged 17 years; Georgie Davis, aged 14 years; May Davis, aged 12 years; Ella Davis, aged 10 years; Stella Davis, aged 8 years; and Emory Davis, aged 2 years,—all residents of the same county; and she says that they have sustained damages by reason of the wrongful act, neglect, and default of defendants, as aforesaid, in the sum of five thousand ($5,000) dollars."

This is an action to recover damages for the killing of plaintiff's intestate by one Allen Ireland, who, it is alleged, was at the time in the defendants' employ. The general principle that a master is liable for injuries to third per-

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an altercation and a personal encounter over the removal of the passenger's dog from the car, the brakeman afterwards assaulted the passenger with a poker, the railroad company is liable for the injuries so inflicted. Hanson v. European & N. A. R. Co. 62 Me. 84, 16 Am. Rep. 404.

A railroad company is liable for an assault by its conductor upon a passenger on its train, notwithstanding opprobrious language was used by the passenger to the conductor (Coggins v. Chicago & A. R. Co. 18 Ill. App. 630; and for an assault by one of its employés upon a person who has entered a car to become a passenger, although without a ticket. Illinois Cent. R. Co. v. Sheehan, 29 Ill. App. 90.

A street-railway company is liable for the act of a driver of a car in wrongfully throwing a passenger off from the front platform, the former having been angered because the passenger rang up the conductor. Lyons v. Broadway & S. A. R. Co. 32 N. Y. S. R. 232.

c. Insults, threats, obscene language.

A street railway company is liable to a passenger for insults and defamation inflicted upon him by the driver of the car. Lafitte v. New Orleans City & L. R. Co. (La.) 12 L. R. A. 337.

A railroad company is not liable to a passenger because the conductor used insulting language to him in a dispute arising between them over the failure of the train to stop at the station for which the conductor had taken the passenger's ticket. Parker v. Erie R. Co. 5 Hun, 57.

A railroad company is liable for the abusive language used by its servant in the scope of his employment to a passenger whom he has falsely caused to be imprisoned. Palmeri v. Manhattan Elev. R. Co. 39 N. Y. S. R. 23.

A ship-owner is liable to a female passenger for ill treatment by the master, consisting of habitual obscenity, immodest conduct and confinement to her cabin by threats of personal injury and of refusal to give her proper food. Chamberlain v. Chandler, 3 Mason, 242; Keene v. Lizardi, 5 La. 431, 6 La. 315.

Where a brakeman refused to allow a passenger to pass out of one car into the next while the train was in motion, there being no rule of the company forbidding such passing, the railroad company is liable for opprobrious language and an assault by the brakeman during an altercation arising out of such refusal. Atlanta & W. P. R. Co. v. Condor, 75 Ga. 51.

2. At stations; before and after transportation.

A carrier is not responsible for a personal assault by its servant upon a passenger after the latter's removal from the carriage has been effected. Eads v. Metropolitan R. Co. 43 Mo. App. 536.

A street-railway company is liable to a passenger for a battery by a conductor committed first on the car and repeated shortly afterwards at the office of the superintendent, whither the passenger had gone to make complaint to the superintendent. Savannah St. & R. R. Co. v. Bryan (Ga.) Nov. 21, 1890.

A passenger on a street-car, having been insulted by the driver, replied that he should report him, and left the car, to proceed a short distance forward to the company's offices and stables, where the car would stop to change horses, but without telling the driver of his intention to resume his journey on the car. The driver before reaching the stables, left his car and assaulted the plaintiff. Held, that the plaintiff had ceased to occupy the relation of a passenger, and that the company was not liable. Central R. Co. v. Peacock, 69 Md. 257.

A street-railway company is liable for an assault by its driver upon a passenger after the latter had left the car, on account of insults by the driver, where the assault was a direct continuance of the abuse begun on the car. Wise v. Covington & C. St. R. Co. (Ky.) 13 Ky. L. Rep. 110.

Where the conductor of a train called a passenger outside the car at an intermediate station and assaulted him, the railroad company was held liable. Peeples v. Brunswick & A. R. Co. 69 Ga. 281.

A railroad company is liable for assaults by its employés upon persons upon its premises for the purpose of getting baggage checked, as well as upon passengers on its cars. Gasway v. Atlanta & W. P. R. Co. 58 Ga. 216.

Where an intending passenger, by importuning a baggageman to check his baggage, and by violent language, provoked a personal quarrel, during which the baggageman struck him, the carrier is not liable for such assault. Little Miami R. Co. v. Wetmore, 19 Ohio St. 110.

Where the ticket agent of a carrier failed and refused to return the proper change to the purchaser of a ticket, and when the latter importuned him for the same came out and assaulted him, the carrier is liable. Fick v. Chicago & N. W. R. Co. 68 Wis. 469.

For an assault committed by its servants at a station upon an intending passenger, arising out of the production of his ticket, after which it was the duty of the servant to look, the company is liable. Smith v. South Eastern R. Co. 39 L. J. C. P. 349.

A railroad company is liable for the act of its porter in pulling a passenger out of a carriage under the erroneous impression that he was embarking on the wrong train, it being part of the porter's duty to see that the passengers take the right trains. Bayley v. Manchester, S. & L. R. Co. L. R. 7 C. P. 415, affirmed L. R. 8 C. P. 148.

Where a brakeman stationed to prevent passen-

sons resulting from the negligence of the servant while in the line of his employment is familiar. It is equally well settled that a master is not responsible for the willful and tortious act of his servant committed outside of the scope of his employment. *Miller* v. *Burlington & M. R. Co.* 8 Neb. 219; *Tuller* v. *Voght*, 13 Ill. 277; *Oxford* v. *Peter*, 28 Ill. 434; *Moir* v. *Hopkins*, 16 Ill. 313, 63 Am. Dec. 312; *De Camp* v. *Mississippi & M. R. Co.* 12 Iowa, 348; *Cooke* v. *Illinois Cent. R. Co.* 30 Iowa, 203; *Carter* v. *Louisville, N. A. & C. R. Co.* 98 Ind. 552; *Noblesville & E. Gravel Road Co.* v. *Gause*, 76 Ind. 142; *Meehan* v. *Morewood*, 52 Hun, 566; *Laffite* v. *New Orleans City & L. R. Co.* (La.) 12 L. R. A. 337; *Fraser* v. *Freeman*, 43 N. Y. 566; Cooley, Torts, 533 *et seq.*

The sufficiency of the petition, therefore, depends upon whether it charges that the act of killing Davis was done in the prosecution of the defendant's business, and within the range of the servant's employment. The third paragraph of the petition charges that Allen Ireland was employed by the defendants to guard certain feed belonging to them upon their premises, and to seize and detain persons who might be found disturbing such feed. This is the only allegation of fact in the entire pleading relating to the nature and scope of Ireland's employment. As to the act of killing, it is averred, in effect, that the deceased had occasion to be upon defendants' premises, and while so there said Ireland, in attempting to seize and detain said Davis, negligently, carelessly, and unlawfully shot and killed him. There is no allegation that Davis was molesting the feed, or attempting so to do, or that it was any part of Ireland's duty to seize and arrest persons who happened to be upon the premises, except those who were there for a specified purpose. It is obvious that the averment in the fourth paragraph of the petition,

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gers from entering the cars without tickets, seized, struck and thrust from the car one attempting to enter without a ticket, the brakeman and the company are jointly or severally liable for the assault. Priest v. Hudson River R. Co. 40 How. Pr. 456.

In McKinley v. Chicago & N. W. R. Co., 44 Iowa, 314, a brakeman stationed at the door of a car to prevent gentlemen unaccompanied by ladies to enter, willfully and criminally assaulted a gentleman who attempted to enter alone. It was held that the company was liable.

The carrier is liable for a willful assault by its servant upon a person, who having been refused a ticket for alleged intoxication is leaving the station, it being a question for the jury whether the servant was acting within the scope of his employment. McKernan v. Manhattan R. Co. 22 Jones & S. 354.

By servants of sleeping and palace car companies.

A railway company is liable to a passenger for an assault upon him by a porter of a sleeping car of the train, committed by the porter while in the discharge of his duties. Dwinelle v. New York Cent. & H. R. R. Co. 8 L. R. A. 224, 120 N. Y. 117.

The railway company is liable for a willful assault by the porter of a palace car upon a passenger of one of the common coaches, who entered the palace car and asked permission to use the wash basin therein. Williams v. Pullman P. Car Co. 40 La. Ann. 417.

But the palace-car company is not liable for such assault. Williams v. Pullman P. Car Co. 40 La. Ann. 87.

A sleeping-car company is liable for an indecent assault by the porter of its car upon a female passenger occupying a berth therein. Campbell v. Pullman P. Car Co. 42 Fed. Rep. 484.

A passenger on a palace car has no right of action against the palace-car company for rudeness of its porter toward him which resulted from his own unreasonable and angry demands. Pullman Palace Car Co. v. Ehrman, 65 Miss. 383.

Where assault results in death.

A person engaged in stealing a ride on a freight train, and having been suspected of breaking into a car, was shot and killed by a brakeman. It was held that the railway company was not liable to his personal representative for such killing, whether the shooting was willfully or maliciously done, as the one killed was running away and refused to stop when halted. Candiff v. Louisville, N. O. & T. R. Co. 42 La. Ann. 477.

A railway company is civilly liable under § 3033 of the Code for a homicide committed by its station agent in a fit of mania, where it employed him with knowledge that he was subject to homicidal mania at intervals. Christian v. Columbus & R. R. Co. 79 Ga. 460.

Where a passenger was assaulted by a servant of the carrier and received injuries from which he died, his administrator can recover from the carrier for the physical and mental suffering of his intestate from the time of the assault up to his death. Winnegar v. Central Pass. R. Co. 85 Ky. 547.

Where the landlord and his servant unlawfully attempted to enter the demised premises against the resistance of the tenant, and the servant of his own motion shot the tenant, in a civil action for damages for the death so caused, it is error to refuse to charge the jury that the master is not liable if the servant fired the shot with the premeditated design to effect the death of the tenant. Fraser v. Freeman, 43 N. Y. 566.

Allen, J., in the last case says: "By the refusal to charge as requested, the judge held the defendant liable for the willful and malicious, as well as criminal, act of M. (the servant). There was no qualification or limitation of the responsibility of the defendant for the acts of his agents; but he was declared chargeable for everything that was done by them, whether in the course of the employment and at the instigation of the defendant, or of their own volition, to effect their own purpose, or to gratify their own malice. The law does not charge a master for the malicious act of the servant." See Vanderbilt v. Richmond T. Co. 2 N. Y. 479, 51 Am. Dec. 315; Croft v. Alison, 4 Barn. & Ald. 590.

Remedy in rem.

Under the Illinois Act of Feb. 16, 1867, providing that steamboats navigating the rivers within and bordering upon that State are liable in an action *in rem* "for any damage or injury done by the captain or mate or other officer thereof, or by any person under the order or sanction of either of them to any person who may be a passenger or hand on such steamboat," it was held that an action of trespass could be maintained against the steamboat for an assault and battery by the mate of the boat upon the passenger while such boat was navigating a river within or bordering upon that State. Loy v. The F. X. Aubury, 28 Ill. 412, 81 Am. Dec. 292.

Under a similar Ohio statute it is held that an action cannot be maintained against the boat for an assault committed thereon without the State of Ohio. The Champion v. Jantzen, 16 Ohio, 91.

J. G. G.*

that Ireland "was acting for said defendants in the due course of his employment as aforesaid, and, pursuant to his instructions and orders, attempted to seize and detain," is a mere conclusion, and not a statement of any fact, showing that the attempted seizure and detention of Davis was within the range and authority of Ireland's duties. Likewise the allegation in the fifth paragraph, that Davis' death "was caused by the wrongful and unlawful act, neglect, and default of said defendants," is the statement of a conclusion of law, which the demurrer does not admit. It is only facts that are well pleaded which are confessed by general demurrer. So far as the allegations in the petition are concerned, or the legitimate inferences to be drawn therefrom, Ireland's employment was exclusively in guarding and protecting the feed, and the wrong charged was something which his agency did not contemplate, and which he could not lawfully do in the name of the defendants. His business no more contemplated the seizure of a person who was upon the defendants' premises for a lawful purpose than it did the arrest and detention of a person lawfully passing along the public highway near the property, and in neither case would the defendants be liable for the act. The test of a master's liability is not whether a given act was done during the existence of the servant's employment, but whether it was committed in the prosecution of the master's business. As was well said by Mitchell, *J.*, in the course of his opinion in *Morier* v. *St. Paul, M. & M. R. Co.*, 31 Minn. 351: "Beyond the scope of his employment, the servant is as much a stranger to his master as any third person. The master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment. A master is not responsible for any act or omission of his servant which is not connected with the business in which he serves him, and does not happen in the course of his employment; and in determining whether a particular act is done in the course of the servant's employment, it is proper first to inquire whether the servant was at the time engaged in serving his master. If the act be done while the servant is at liberty from the service, and pursuing his own ends exclusively, the master is not responsible. If the servant was, at the time when the injury was inflicted, acting for himself, and his own master *pro tempore*, the master is not liable. If the servant step aside from his master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended. Such, variously expressed, is the uniform doctrine laid down by all authorities." *Golden* v. *Newbrand*, 52 Iowa, 59, was where a servant employed to guard a brewery shot and killed a person who had been damaging the property, but was retreating when shot. It was decided that the killing was not done in the line of the servant's duty, and that the master was not liable therefor. To the same effect is *Candiff* v. *Louisville, N. O. & T. R. Co.* 42 La. Ann. 477.

The fair construction of the language of the petition shows that the killing of Davis was the willful and intentional act of Ireland, committed outside of the course of his employment, and for which the defendants are not responsible. We are of the opinion that the petition fails to state a cause of action, and the demurrer was properly sustained.

The judgment is affirmed.

The other Judges concur.

PENNSYLVANIA SUPREME COURT.

Thomas L. LONG, *Appt.*,
v.
PENNSYLVANIA R. CO.

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

1. **Negligence is not presumed in case of loss of property in the hands of a carrier,** by a flood which is so unprecedented as to be properly considered an act of God or inevitable accident.
2. **The Johnstown flood of 1889, which was of such extraordinary character that a party was not bound to anticipate** or provide against it, and which came with such suddenness and power that escape from it was impossible, was an inevitable accident or act of God in respect to the loss of baggage on a railroad train, where the utmost care was exercised by the agents and employés of the carrier to escape the dangers of which they had knowledge or reasonable ground of apprehension.

(February 1, 1892.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas, No. 4, for Philadelphia County, in favor of defendant in an action brought to recover the value of certain trunks and their contents which were delivered to defendant for transportation but never received back from it. *Affirmed.*

The facts are stated in the opinion.

Mr. **D. Webster Dougherty,** for appellant:

The train remained in the place where the flood struck it for five hours and a half before the flood came.

It was developed by the cross-examination of defendant's own witnesses that the dam seventy or eighty feet high, 400 feet wide at the narrowest point, a half a mile at the widest and two miles in length, was known to the defendant's officials to be breaking nearly four hours before the train was destroyed. That the train was in the direct course of the flood when the final break would take place, and that it could have been moved beyond Johnstown to a place of safety, and, further, that all these facts were known to the yard-master at Conemaugh, in whose care the train then was,

NOTE.—For *note* on act of God as an excuse for a carrier's failure to perform its contract, see Blythe v. Denver & R. G. R. Co. (Colo.) 11 L. R. A. 615.

See also 20 L. R. A. 360; 35 L. R. A. 356; 39 L. R. A. 431; 44 L. R. A. 557.

for over two hours before the destruction of the train.

Defendant's testimony failed to establish that the breaking of the dam and the consequent flood was the "act of God."

A common carrier is a virtual insurer against all risks of loss or injury, save those by the act of God and the public enemy.

Schouler, Bailm. 386.

Even if the breaking of the dam was the "act of God," the defendant cannot be released from responsibility if it failed to exercise the care and skill required under the extraordinary circumstances with which it was confronted.

When a common carrier discovers itself in peril by inevitable accident, the law requires it to exercise extraordinary care, skill and foresight. In great danger, great care is the ordinary care of prudent men.

Morrison v. *Davis*, 20 Pa. 177, 57 Am. Dec. 695.

If the carrier show cause which the law admits to be sufficiently serious to be called inevitable, the law demands that he shall complete his excuse by showing that in the midst of the danger he exerted all the skill and care he could to avoid it.

Hays v. *Kennedy*, 41 Pa. 384, 80 Am. Dec. 627.

It was purely a question for the jury to say whether the defendant had established the necessary facts to its satisfaction.

Pennsylvania R. Co. v. *Miller*, 87 Pa. 399; *Pennsylvania R. Co.* v. *Weiss*, 87 Pa. 447; *Spear* v. *Philadelphia, W. & B. R. Co.* 11 Cent. Rep. 643, 119 Pa. 61; *Kelly* v. *McGehee*, 137 Pa. 443.

Mr. **David W. Sellers**, for appellee:

The carrier is not liable for loss or damage caused by the act of God. The act of God is natural necessity. Accidents produced by physical causes which are irresistible, as, for example, winds and storms or a sudden gust of wind, by lightning, inundations, or earthquake, sudden death or illness, are occasioned by the act of God, and the carrier is excused.

Chitty, Common Carriers, p. 36; *Coggs* v. *Bernard*, 2 Ld. Raym. 909, 1 Smith, Lead. Cas. 5th Am. ed. pp. 315–318, *note*.

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

This is what, under the practice prior to 1887, would have been called an "action of trover." It is brought to recover the value of two trunks and their contents, delivered to the defendant Company in Cincinnati for transportation to Washington. When the plaintiff presented his baggage checks at the defendant's station in Washington, and asked for his trunks, they were not delivered. This action was then brought. The course of the trial is shown by the opening paragraph in the printed argument of the appellant. It is as follows: "It was conceded by the defendant that plaintiff's goods were duly received by it, to be forwarded from Cincinnati to Washington; and it was conceded by the plaintiff that the goods were on the day express, which was destroyed by the flood from the South Fork dam, at Conemaugh, on May 31st, 1889." It only remained for the plaintiff to show the value of his goods in order to complete his case. For the defendant it was necessary to supplement the admission by proof showing that the flood was of such extraordinary character that it was not bound to anticipate or provide against it; and that it came with such suddenness and power that escape from it was impossible. Several witnesses were called by the defendant for this purpose. They repeated the story of the great rain-storm that preceded the bursting of the South Fork dam; of the rapidly rising river, spreading beyond its banks, and inundating portions of the city of Johnstown; of landslides and other difficulties that beset the movement of trains; of the running of the ill-fated day express into the yard at Conemaugh for safety, and to await orders; and then of the appalling wall of water that came moving down the narrow valley, sweeping away whatever was in its path, trees and dwellings, mills and factories, engines and cars, with a fury that was absolutely resistless. The officers and agents of the defendant at Pittsburgh and at Johnstown and Conemaugh, on whom the movement of trains depended, were called, and testified to the precautions taken to guard against accident to the trains under their control. They told of the information that came to them, of the dangers they knew to exist, and those they apprehended as probable, and what efforts they made to escape them and secure safety for their passengers, their employés, and the freight with which their cars were laden. It was not denied on the trial, and it could not be upon the evidence before us, that these officers and agents did what they fully believed was the best thing to do, as they understood the situation. Not a witness was called by the plaintiff to testify to any act or omission by the defendant's agents or employés from which want of care could be incurred, but the case was left where the testimony of the defendant's witnesses left it. There was, then, no question of credibility to be settled, and no conflict in the evidence. The case depended on the effect of the admissions and the uncontroverted testimony. The defendant admitted the contract to carry, and the receipt of the goods, and excused the non-delivery by showing their destruction in a flood of such unprecedented character as it could neither be expected to foresee nor provide against. This made a complete defense, and it was proper for the judge to say so; and, as no single fact in the series was controverted, it was right for him to direct the verdict.

But the able counsel for the plaintiff insists that in this case there was a legal presumption of negligence in the carrier that took the question to the jury under the authority of *Spear* v. *Philadelphia, W. & B. R. Co.*, 119 Pa. 61, 11 Cent. Rep. 643, and kindred cases. We do not think so. Spear was a passenger on board the defendant's boat. After the carriage actually began, an explosion took place on the boat, by which he was injured. The plaintiff proved the happening of the accident to the boat, and the injury to Spear in consequence of it, and rested. This raised a legal presumption of negligence that entitled the plaintiff to recover. The *onus* was then on the defendant to show affirmatively that the explosion was

not due to its want of care in any particular. The case fell within the rule laid down in *Laing* v. *Colder*, 8 Pa. 482, 49 Am. Dec. 533, which is as follows: "The mere happening of an injurious accident to a passenger while in the hands of a carrier will raise a presumption, prima facie, of negligence, and cast the *onus* of showing that it did not exist on the carrier." This presumption, it will be noticed, arises not out of the character of the carrier, but out of the nature of the accident. The injurious accident must be connected with the appliances for transportation, which are provided by the carrier, are under its exclusive care and control, and whose condition it is bound to know. If, therefore, the accident complained of happens before the plaintiff has committed himself into the hands of the carrier, the rule does not apply, but the negligence alleged must be proved as in ordinary cases. *Hayman* v. *Pennsylvania R. Co.* 118 Pa. 508, 10 Cent. Rep. 835. Nor will the fact that the plaintiff has put himself into the hands of the carrier be sufficient to raise the legal presumption of negligence, unless the accident from which he suffers is connected with the appliances of transportation. *Pennsylvania R. Co.* v. *MacKinney*, 124 Pa. 462, 2 L. R. A. 820. In the case just cited MacKinney was a passenger on board one of defendant's trains, which was moving at a high rate of speed. A piece of coal came through the open window of the car near which he sat, and struck him in the face. There was no failure of, or accident to, any of the appliances of transportation, but an injury to an individual passenger from an independent and unrelated cause; and we held that the rule of *Laing* v. *Colder* did not apply.

The same principle controls this case. The accident by which plaintiff's baggage was lost was not due to the failure of any of the appliances of transportation, but to an independent cause,—the flood,—which involved the car and the baggage it contained in a common ruin. The flood was, as to the defendant, an inevitable accident, properly described as "*actus Dei*." In such a case, negligence is not presumed, but must be proved, as any other fact necessary to the plaintiff's recovery. In this case, when the contract to carry was shown, it became the duty of the carrier to excuse its non-performance. The loss of the trunks by the flood from the South Fork dam was admitted. This accounted for their non-delivery, and it was only necessary to show the character of the flood, and that the loss of the train was not due to want of care on its part in the management of its business, in order to make a complete defense. Let us see what the defendant's evidence does show. It shows, first, that the damages apprehended by the servants and employés of the defendant were those naturally resulting from the continued and heavy rainfall. It shows, next, constant telegraphic communication between those charged with directing the movement of trains and local agents and trainmen along the line, and the exercise of great care in the management and movement of trains in the valley of the Conemaugh, in order to avoid the damages known to exist or likely to be encountered. In the third place, it shows the care exercised over this particular train, and that it was moved into the yard at Conemaugh because that was a place of absolute safety from any flood that there was reason to anticipate, and was a convenient place at which to reach it with orders. Finally, it shows that while the train was thus carefully disposed of, and safe from any known danger, it was suddenly overwhelmed by the deluge from the broken dam, and destroyed so utterly that no vestige of the car or the baggage has since been found. This made a defense that meets the requirement of the rule as to the burden of proof resting on a carrier in every particular. It shows the loss, by inevitable accident, of the trunks sued for; and it shows that the loss was not made possible by the negligence of the defendant, but happened in spite of the utmost care exercised by agents and employés to escape the dangers it knew to exist or had reasonable ground to apprehend. It may be possible for us, looking back coolly and in the clear light of history on that terrible catastrophe, to see how property and life might have been saved if men on the ground had realized the awful magnitude of the impending calamity. It was not realized. The inhabitants of the populous valley sat in their homes, or went about their business, while the deluge was approaching. So swift was its approach that the horseman running to warn the city was overtaken and swallowed up; and the flood fell unannounced, and swept the day express and the city of Johnstown before it. What was done on that day must be considered in the light of what was then known, and what, from such knowledge, it was reasonable to apprehend. So considered, the defense was complete. There was no question of fact for a jury to decide, and it was exactly right for the learned judge to tell them so, and to direct their verdict. *Moore* v. *Philadelphia, W. & B. R. Co.* 108 Pa. 349; *Delaware, L. & W. R. Co.* v. *Cadow*, 120 Pa. 559, 12 Cent. Rep. 725; *Pennsylvania R. Co.* v. *Bell*, 122 Pa. 58.

The assignments of error are not sustained, and *the judgment is affirmed.*

William A. VALLO

v.

UNITED STATES EXPRESS CO., *Appt.*

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

1. **The negligent throwing of a trunk from an express delivery wagon in a highway** which so suddenly puts a passer-by in peril that he falls over another small trunk lying on the sidewalk and is injured, is the proximate cause of his injury.

2. **Peril so suddenly precipitated upon a person as to leave no time for voluntary action** precludes the question of his

NOTE.—For *notes* on "proximate cause," see Smethurst v. Independent Cong. Church Proprs. (Mass.) 2 L. R. A. 695; Erickson v. St. Paul & D. R. Co. (Minn.) 5 L. R. A. 736; Louisville, N. A. & C. R. Co. v. Lucas (Ind.) 6 L. R. A. 194; Read v. Nichols (N. Y.) 7 L. R. A. 130; Smith v. Kanawha County Ct. (W. Va.) 8 L. R. A. 82; Hunnewell v. Duxbury (Mass.) 13 L. R. A. 733. See also *note* to Smithwick v. Hall & U. Co. (Conn.) 12 L. R. A. 279.

See also 21 L. R. A. 316.

contributory negligence, although he did not choose the best way of escape from the danger.

(*Parson*, Ch. J., *dissents.*)

(February 15, 1892.)

APPEAL by defendant from a judgment of the Court of Common Pleas, No. 2, for Philadelphia County, in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

Plaintiff, a man about sixty-five years of age and blind in one eye, while passing along Chestnut Street in Philadelphia between 8 and 10 P. M. of July 6, 1889, arrived in front of defendant's office at a time when a wagon was being loaded or unloaded in front of it. An iron express safe stood upon the sidewalk and plaintiff by stumbling over it received the injuries complained of.

The facts further appear in the opinion.

Mr. **John F. Keator,** for appellant:

The negligence complained of was not the proximate cause of the injury.

West Mahanoy Twp. v. *Watson*, 8 Cent. Rep. 543, 116 Pa. 344; *South Side Pass. R. Co.* v. *Trich*, 10 Cent. Rep. 367, 117 Pa. 390.

The plaintiff's injury was solely the result of his own negligence.

Plaintiff, in attempting to fasten a responsibility upon the defendants, says: "There were five or six trunks scattered all over the pavement and a dozen piled up at the curb." If this were actually the case it was the grossest carelessness for him not to observe such a patent obstruction and pass around.

Barnes v. *Showdon*, 11 Cent. Rep. 635, 119 Pa. 56; *Crescent Twp.* v. *Anderson*, 114 Pa. 643; *Pittsburgh S. R. Co.* v. *Taylor*, 104 Pa. 306.

The injury resulted from plaintiffs defective sight.

The incapacity of the person injured imposes on him the duty of exercising, for his own protection, that degree of care for his own safety that will, as far as possible, compensate for his impaired sense of hearing, or of sight, or other disability.

Patterson, Railway Acc. Law, 78; Thomp. Neg. 430; *Purl* v. *St. Louis, K. C. & N. R. Co.* 72 Mo. 168; *Zimmerman* v. *Hannibal & St. J. R. Co.* 71 Mo. 476, 2 Am. & Eng. R. Cas. 191; 4 Am. & Eng. Encyclop. Law, 80, title *Contributory Negligence*, pl. 35; *Delaware, L. & W. R. Co.* v. *Cadow*, 12 Cent. Rep. 725, 120 Pa. 559.

The defendant used the sidewalk only a reasonable time.

When the facts are undisputed, what is reasonable time is for the court.

Leaming v. *Wise*, 73 Pa. 173; *Morgan* v. *McKee*, 77 Pa. 228; *Davis* v. *Stuard*, 99 Pa. 295.

The use of the sidewalk was reasonable.

Palmer v. *Silverthorn*, 32 Pa. 65; Wood, Nuisances, § 259; *Welsh* v. *Wilson*, 2 Cent. Rep. 749, 101 N. Y. 254, 54 Am. Rep. 698.

The plaintiff was bound to engage medical aid and attention for such a length of time as his injuries made necessary, and cannot recover damages for injuries which he might have avoided by the use of reasonable diligence in effecting a cure.

Owens v. *Baltimore & O. R. Co.* 1 L. R. A. 75, 35 Fed. Rep. 715.

Messrs. **Francis C. Adler** and **John F. Lewis,** for appellee:

The streets and sidewalks were for the use and benefit of all conditions of people; a person may walk or drive in the darkness of the night relying upon the belief that the street or the walk is in a safe condition. He walks by a faith justified by law and if his faith is unfounded and he suffers an injury, the party in fault must respond in damages. So one whose sight is dimmed by age, or is impaired from other causes, or a nearsighted person, is entitled to the same rights, and may act upon the same assumption.

Davenport v. *Ruckman*, 37 N. Y. 573.

Negligence is not imputed to persons who are blind.

Shearm. & Redf. Neg. § 88; *Sleeper* v. *Sandown*, 53 N. H. 244.

Whether the plaintiff was guilty of contributory negligence, by reason of defective eyesight, was properly left to the jury.

Pennsylvania R. Co. v. *Werner*, 89 Pa. 61.

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

The right of occupants of places of business upon a public street to use the sidewalk in front of their premises in receiving and sending out merchandise is not questioned. But the law imposes upon such persons, as it does upon all others using the sidewalk for any other lawful purpose, the duty to exercise their right with a due regard to the safety of pedestrians, or, as was in substance said by the learned trial judge, in a reasonable manner. *Com.* v. *Passmore*, 1 Serg. & R. 219; *Welsh* v. *Wilson*, 101 N. Y. 254, 2 Cent. Rep. 749, 54 Am. Rep. 698. What is a reasonable manner must always depend upon the circumstances. It might and doubtless would be unsafe to leave such an obstruction as was described in this case unguarded for a single moment upon a sidewalk near a railway station, thronged by people rushing to and from trains, while no inconvenience might be apprehended from leaving the same obstruction several hours upon a less frequented street. Hence it is impossible to lay down any precise rule as to the length of time a person may allow his property to remain upon a highway without incurring the charge of negligence. But the negligence of the defendant, if any existed, consisted not alone in leaving a trunk or small iron safe upon the sidewalk five minutes, more or less. If the plaintiff be believed, he was passing along one of the principal thoroughfares of the city of Philadelphia, in the evening of July 6, 1889, between the center of the sidewalk and the curb; and when he came opposite the defendant's premises its servants suddenly pitched a trunk out of its delivery wagon towards him. To avoid being struck by the flying trunk, he moved towards the center of the sidewalk, "keeping his eye upon the trunk while it was coming," and in so doing fell over another trunk, and thereby sustained the injuries for which he seeks compensation. Whether the trunk was suddenly and without warning thrown out of the delivery wagon, at such time and in such manner as to imperil the plaintiff was a controverted question of fact, which could be determined only

by the jury. If it was so thrown, the defendant was clearly guilty of negligence, for no man may innocently hurl a projectile across a highway upon which people are constantly passing. It is, however, contended that, inasmuch as the plaintiff escaped injury from the trunk thus recklessly thrown from the wagon, the negligence of the defendant is at most only the remote cause of the injury. This contention raises the question whether the plaintiff was so suddenly put in peril as to leave no time for consideration of the way of escape, and whether, under the circumstances, it was natural and probable that he would instinctively retreat in the direction of the obstruction placed by the defendant upon the sidewalk, and, having his eye fixed upon the danger from which he was fleeing, fall over that obstruction. If such was the natural and probable course of events, the negligent throwing of the trunk was the proximate cause of the injury. *Pittsburgh S. R. Co.* v. *Taylor*, 104 Pa. 306. But whether that natural and continuous sequence of events which is necessary to fix responsibility for an injury upon the author of a negligent act has been proved, is ordinarily a question for a jury (*Milwaukee & St. P. R. Co.* v. *Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Ehrgott* v. *New York*, 96 N. Y. 264, 48 Am. Rep. 622), and there is nothing in this case to make it an exception to the general rule. Assuming, as we must, that the jury found that by reason of the sequence of events already mentioned the negligent throwing of the trunk was the proximate cause of the plaintiff's injury, the question of contributory negligence is necessarily eliminated. That finding involves not only the negligence of the defendant, but a consequent peril so suddenly precipitated upon the plaintiff as to leave no time for voluntary action. Under such circumstances, it is believed, no person has ever been held guilty of contributory negligence because he did not choose the best way of escape from the impending danger. On the contrary, the principle to be extracted from numerous cases in this and other States is that when a person has been put in sudden peril by the negligent act of another, and in an instinctive effort to escape from that peril falls upon another, it is immaterial whether, under different circumstances, he might and ought to have seen and avoided the latter danger. This being the settled law, it is difficult to understand why greater circumspection in the presence of a danger that could not be anticipated should be required of a man having but one eye than from the less unfortunate.

By its sixth point the defendant requested the court below to charge the jury that the plaintiff was unqualifiedly bound to engage medical aid and attention for such length of time as his injuries made necessary. To have so charged would have been manifest error. It would have required the plaintiff to have exercised greater care in mitigating the consequences of an injury already inflicted than the law requires in the first instance to avoid the injury. The utmost the defendant could with propriety have asked was that, if a man of ordinary prudence would, under the like circumstances, have engaged medical aid and attention more promptly than the plaintiff did, his delay in that regard should be taken into consideration, and no compensation allowed for any damages that might have been so averted. But, as no such instruction was asked, we are not called upon to express an opinion as to whether it ought to have been given. The fifth assignment of error was not pressed. As to the sixth and seventh assignments, it is enough to say that the only remedy for an excessive verdict is a motion for a new trial, and that the refusal of such trial is not assignable as error.

The judgment is affirmed.

Paxson, *Ch. J.*, dissenting:

I am of opinion that the plaintiff was negligent, and that the defendant was not. The case was this: The defendant's employés were unloading an express wagon in front of its office on Chestnut Street. The plaintiff alleges that one of the men was about to throw a trunk upon the pavement, but there is no allegation that he was struck or in danger of being struck by it. While watching this operation he stumbled over a small express safe, lying on the pavement. This occurred in the full blaze of an electric light. This accident was, in my opinion, plainly the result of his own negligence, and fully justified the remark of a person who was passing at the time, "That man would fall over a house." For the reasons thus briefly stated I dissent from this judgment.

OREGON SUPREME COURT.

L. D. BROWN, *Respt.*,
v.
John BIGNE *et al.*, *Appts.*

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

A fair bona fide agreement by a layman to supply funds to carry on a pending suit in consideration of a share in the property if recovered, is not *per se* void either on the ground of champerty or public policy.

(November 17, 1891.)

APPEAL by defendants from a decree of the Circuit Court for Multnomah County

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NOTE—*Champertous contracts of laymen.*

In view of the marked tendency of the courts and Legislatures of the various States to curtail the doctrine of champerty, caution may well be used in relying upon decisions as authoritative, especially earlier English and American decisions.

For the prosecution of suits.

In an article on "champerty" in 19 Alb. L. J. 469, it is said: "There seems to be a difference between a layman and a lawyer as the champertor. To constitute the offense on the part of a layman, he must contribute in money to the expenses; but

in favor of plaintiff in an action brought to enforce specific performance of a contract to give plaintiff a share of certain property recovered in a law-suit in consideration of his advancing funds to carry on the suit. *Affirmed.*

Statement by **Bean**, *J.*:

This is a suit to specifically enforce a written contract entered into between plaintiff and defendant Bigne in April, 1887. The facts are these: In April, 1881, one Pierre Manciet died in the city of Portland, largely indebted, but possessed of a large estate, consisting chiefly of real property, the legal title of which stood in his name, but of which Bigne claimed a one-half interest as a partner of Manciet. By his will he appointed his widow and Bigne executors thereof. They undertook the management of the estate, but shortly thereafter the widow died, leaving Bigne sole executor. He continued to act as such executor for five or six years, but no attempt was made to adjust his alleged partnership interest until February, 1887, when he presented to the county court for allowance a claim against the estate for $27,373.02 for money alleged to have been overdrawn by Manciet, and also a claim to be the owner of an undivided one half of all the property mentioned in the inventory, except certain furniture belonging to the widow. The Manciet heirs contested this claim, claiming that he was not and never had been, a partner of their ancestor, and was not entitled to any interest whatever in the estate. In this state of affairs, Bigne being heavily indebted, and without means, except his interest in the partnership estate, sought the assistance of plaintiff to enable him to prosecute his claims, and, if possible, realize something from the partnership estate. After considerable negotiation, the contract in suit was finally entered into, whereby, in consideration of the sum of $6,000 to be advanced by plaintiff as might be required to carry on the litigation with the Manciet heirs, and establish Bigne's interest in the estate, Bigne sold, assigned and transferred to plaintiff an undivided one-half interest in and to all his right, title and interest in the property, real, personal or mixed, as fully and particularly set forth and described in the inventory of the estate, and also an undivided half of any claim he might be able to establish

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the lawyer is held to contribute by his services."

To make out champerty by a layman, the alleged champertor must have undertaken to bear the expense of carrying on the suit. Vimont v. Chicago & N. W. R. Co. 69 Iowa, 226.

In Gilman v. Jones, 4 L. R. A. 113, 87 Ala. 691, it is said: "We may safely say that the whole doctrine of maintenance has been modified in recent times so as to confine it to strangers who, having no valuable interest in a suit, pragmatically interfere in it for the improper purpose of stirring up litigation and strife, and champerty, which is a species of maintenance attended with a bargain for a part or the whole of the thing in dispute, does not exist in the absence of this characteristic of maintenance."

Where a party has no interest, legal or equitable, and no claim or expectancy, remote or contingent, in a suit, an agreement to carry it on at his own expense, in consideration of some bargain to have part of the thing in dispute, or some profit out of it, is champertous and illegal. Williams v. Fowle, 132 Mass. 385; Belding v. Smythe, 138 Mass. 530; Lancy v. Harvender, 6 New Eng. Rep. 267, 146 Mass. 615.

An agreement by an agent to prosecute suits and to accept for his services a percentage of the amount recovered, but to receive only his expenses if unsuccessful, is void for champerty. Lathrop v. Amherst Bank, 9 Met. 489; Ackert v. Barker, 131 Mass. 436.

An agreement by a layman to render services to a litigant in his suit, in consideration of receiving a part of the recovery in a suit is void for champerty. Munday v. Whissenhunt, 90 N. C. 458.

An agreement by which a party is to have a portion of the avails of a suit, in consideration of furnishing evidence to sustain it, is void for champerty. Stanley v. Jones, 7 Bing. 369.

A contract by which distributees, pending a contest of the decedent's will, convey their interest, in consideration of money received, and of being indemnified against the expenses of the contest, to a stranger, is champertous and void. Poe v. Davis, 29 Ala. 676.

An assignment of a claim, in consideration that the assignee, who was not a lawyer, shall prosecute and collect it at his own expense and reimburse himself out of the proceeds and receive a portion thereof as compensation, is champertous, and a release from the assignor after notice to the debtor of the assignment will bar a recovery thereon. Weakly v. Hall, 13 Ohio, 167, 42 Am. Dec. 194.

There is no champerty in an agreement to allow the bona fide purchaser of an estate to recover for rent due, or injuries done to it previously to the purchase. Williams v. Protheroe, 5 Bing. 309.

An agreement by the owner that a bailee of his horse, who has settled with him for the injuries to the horse while in his possession, may, for the latter's benefit, prosecute an action in the former's name against the persons responsible for causing such injuries, is not champertous. Rindge v. Coleraine, 11 Gray, 157.

Where the purchaser of a horse claimed damages from his vendor for fraud in the trade, sold the horse and agreed with his vendee to prosecute an action at the latter's expense for such damages for the latter's benefit, if upon being defeated he pays the costs, he cannot recover them from his vendee under the agreement, because it is champertous. Wheeler v. Pounds, 24 Ala. 472.

A promise to indemnify a nominal plaintiff against costs, if he will allow an action to be brought in his name cannot be avoided on the ground of champerty. Knight v. Sawin, 6 Me. 361.

A court of equity will not give effect to an agreement by which a layman, with no interest or relationship, is to receive a share of the proceeds of a suit, in consideration of carrying on its prosecution. Gilbert v. Holmes, 64 Ill. 548.

For the defense of suits.

A contract by a layman to attend to the defense of a suit for which he is to receive, in case of success, a sum of money and part of the land in controversy, is void for champerty. Brown v. Beauchamp, 5 T. B. Mon. 413, 17 Am. Dec. 81.

An agreement between a mortgagor and his vendee to resist the foreclosure of the mortgage, and share the expenses and the fruits, if successful, is not champertous. Allen v. Frazee, 85 Ind. 283.

Contemplated litigation as an element.

An agreement is not void for champerty, unless litigation is pending or contemplated. Stotsenburg v. Marks, 79 Ind. 133.

A purchase of chattels in possession of the vendor, with knowledge of an outstanding claim against them, does not amount to champerty. Dunbar v. McFall, 9 Humph. 505.

against the estate of Manciet. After this contract was made, Bigne's claim was vigorously litigated, finally resulting in a decree of this court, establishing his right as a partner to one half of certain real estate in and near Portland, and his claim against the private estate of Manciet for $9,530.87, and against the partnership estate for $7,890.81. The individual and partnership estates then proceeded rapidly to a final settlement, and the real estate having appreciated largely in value, and exceeding greatly the partnership debts, Bigne sought to repudiate his agreement, and hence this suit. The defendants Bigne and Clossett, who are appellants here, claim as a defense that the agreement sued on is champertous and void.

Mr. **James Gleason** for appellants.
Mr. **Thomas N. Strong** for respondent.

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

The only question in this case is whether the contract between plaintiff and Bigne is champertous and void. The solution of this question depends upon how far the ancient doctrine of champerty and maintenance is to be recognized in this State. It is conceded at the outset that the contract in suit was honestly and fairly made, and that Brown acted in entire good faith in the matter. No advantage was sought or taken of Bigne. He was fully informed as to the extent, amount and value of the property claimed by him, and it was at his earnest solicitation that Brown made the contract. When he was without means or credit to prosecute his claims, and sore pressed by the Manciet heirs, who sought to exclude him from his share in the estate, he applied to Brown for aid in the struggle, who thereupon in good faith entered into the contract, and advanced the money to enable him to prosecute his claim, upon no other security for its repayment than the assignment of a one-half interest in the property in litigation. Under these circumstances, the defense of Bigne may be considered anything but meritorious. Under the ancient doctrine of champerty, the contract in suit is clearly void, for that offense was defined to be a bargain with a plaintiff or defendant to divide the land or other matter in suit between them, if they prevailed, whereupon the champertor was to carry on the suit

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Where an overdue promissory note and the accrued interest are sold for the face of the note, an understanding that the amount paid shall be refunded in case the note prove uncollectible, is not champertous. Taylor v. Gilman, 58 N. H. 417.

A bona fide assignee of a judgment is not affected by the champertous purchase of the judgment by his immediate assignor. Cooke v. Poole, 25 S. C. 536.

A contract between a physician and a patient who has a claim for injuries against a railroad company, by which the former is to negotiate with the company and have for his services a proportionate share of the amount received from the company, is void. Thomas v. Caulkett, 57 Mich. 392, 58 Am. Rep. 369.

In Coquillard v. Bearss, 21 Ind. 479, it was held that although a layman by agreeing to prosecute a claim before a legislative body at his own expense for a share thereof was not criminally guilty of champerty, the contract was nevertheless void as against public policy.

In Jones v. Blacklidge, 9 Kan. 562, it was said that a contract to prosecute and collect a claim against the United States for a percentage of the amount is champertous, but the principal ground upon which the contract was held void in that case was that it was in contravention of the federal statute.

Effect of interest; relationship.

Where the alleged champertor has an interest in the subject matter of the litigation, any contract for the prosecution of the same is valid. Call v. Calef, 13 Met. 362.

Where several creditors having levied executions on their debtors' land, agreed that one should prosecute a suit for the benefit of all to obtain possession, the agreement is not champertous. Frost v. Paine, 12 Me. 111.

It seems that an agreement between two to purchase assignable property on joint account, one of them to pay for it and the other to bear the expenses of needful litigation, and both to share equally in the net proceeds, is not champertous. Reed v. Janes, 84 Ga. 380.

An agreement by the surety on a note to foreclose a mortgage given to indemnify him and to deed the premises to the holder of the note, upon its surrender, is not champertous. Cooley v. Osborne, 50 Iowa, 526.

In Williams v. Fowle, 132 Mass. 385, defendants accepted a deed of land, subject to a mortgage, which they agreed to pay, and an action was brought against them on the note secured by the mortgage in the name of their grantees, for the benefit of the holder of the mortgage, under an agreement by which the plaintiffs, who were the makers of the mortgage, were to receive a portion of the recovery without being liable for the expenses. It was held that the plaintiffs had an interest in the suit, and that the agreement was not champertous.

A contract between a father and his son, made during the pendency of a suit against the father, whereby the son agrees to defend the suit for the father, in consideration of receiving a part of the property in controversy, is void for champerty. Barnes v. Strong, 54 N. C. 100.

An agreement between a person and his brother-in-law by which the former is to pay a portion of the expenses of certain suits to be brought by the latter, in consideration of a share of the recovery, is not champertous. Phallhimer v. Brinckerhoff, 3 Cow. 623, 15 Am. Dec. 309.

In Hutley v. Hutley, L. R. 8 Q. B. 112, plaintiff and defendant made a contract by which the plaintiff was to take steps to set aside the will of defendant's brother, who was also plaintiff's cousin, in consideration that the plaintiff should receive the share of the property received by the defendant, in case of success. It was held that the contract was not purged of its champertous quality by the relationship of the parties.

Where a person claiming title to land held adversely, executed a power of attorney to her son-in-law to bring suits for the land, in her name, but for his own benefit, the agreement is valid. Gilleland v. Failing, 5 Denio, 306.

A bond executed by a stepson of one lessor of the plaintiff in an ejectment suit to another lessor to indemnify the latter against the costs of such suit, is not champertous, it appearing that the obligee refused to allow his name to be used without such indemnity. Campbell v. Jones, 4 Wend. 306.

J. G. G.

at his own expense. 4 Bl. Com. 135. Some of the authorities omit from their definition the statement that the champertor is to carry on the suit at his own expense, and confine it simply to an agreement to aid a suit, and then divide the thing recovered. 1 Hawk. P. C. chap. 84, § 1; Co. Litt. 368*b*.

The doctrine of champerty and maintenance, the gist of which is the same, differing only in the mode of compensation, arose from causes peculiar to the state of society in which it was established. The most potent reason for their suppression was an apprehension that justice itself would be endangered by these practices. The doctrine was established "to repress the practices of many who, when they thought they had title or right to any land, for the furtherance of their pretended right conveyed their interest, or some part thereof, to great persons, and with their countenance did oppress the possessors. The power of great men, to whom rights of action were transferred in order to obtain support and favor in suits brought to assert these rights, the confederacies which were thus formed, and the oppression which followed from the influence of great men in such cases, are themes of complaint in the early books of English law." *Slyeright* v. *Pages*, 1 Leon. 167. Blackstone speaks of these offenses as perverting the process of the law into an engine of oppression. 4 Bl. Com. 135.

So great was the evil of rich and powerful barons buying up claims, and, by means of their exalted and influential positions, overawing the courts, and thus securing unjust and unmerited judgments, and oppressing those against whom their anger was directed, that it became necessary, in an early day in England, to enact statutes to prevent such practices, and to invoke in all its rigor the doctrine against champerty and maintenance. The common-law rule prohibiting the assignment of choses in action, and the sale and transfer of land held adversely, was a branch of this same doctrine, and arose from the same causes. *Lord* Coke says: "Nothing in action, entry or re-entry can be granted over, for so, under color thereof, pretended titles might be granted to great men, whereby right might be trodden down and the weak oppressed." And Buller, *J.*, in *Master* v. *Miller*, 4 T. R. 320, says: "It is laid down in our old books that, for avoiding maintenance, a chose in action cannot be assigned." But he adds: "The good sense of that rule seems to me very questionable, and in early as well as modern times it has been so explained away that it remains at most only an objection to the form of the action." Under the circumstances above indicated, to allow rich and powerful persons to buy up claims, or to assist in the litigation with money to enable the plaintiff or defendant to prosecute or defend his cause of action or defense, was undoubtedly dangerous to the liberty of the subject, and sound public policy forbade it. With the advance of time came the change of circumstances, and in modern times, since England has enjoyed a pure and firm administration of justice, even in that country the rigor of the common law against champerty and maintenance has been very much softened; so that now not only the assignability of choses in action is generally recognized in that country, but it is said there is no rule of law which prohibits the purchase of the subject matter of a pending lawsuit, although accompanied with an agreement to indemnify the vendor against costs and expenses. *Knight* v. *Bowyer*, 2 De G. & J. 421. Nor is a contract to support a pending litigation, in consideration of having a stipulated part of the money or thing recovered, *per se* void, as against public policy. *Coondoo* v. *Mookerjee*, L. R. 2 App. Cas. 186. In this country, where no aristocracy or privileged class elevated above the mass of the people has ever existed, and the administration of justice has been alike impartial to all without regard to rank or station, the reason for the ancient doctrine of champerty and maintenance does not exist, and hence has not found favor in the United States. *Roberts* v. *Cooper*, 61 U. S. 20 How. 467, 15 L. ed. 969; *Thallhimer* v. *Brinckerhoff*, 3 Cow. 643, 15 Am. Dec. 309. In some of the states the whole doctrine is regarded as entirely obsolete. *Matheson* v. *Fitch*, 22 Cal. 86; *Bentinck* v. *Franklin & G. C. Co.* 38 Tex. 458. But the doctrine, in a more or less modified form, is generally recognized in a great majority of the states of the Union, and contracts which come within the mischief to be guarded against in the administration of justice are held to come within the rule. *Lathrop* v. *Amherst Bank*, 9 Met. 489; *Gilbert* v. *Hawes*, 64 Ill. 548; *Barker* v. *Barker*, 14 Wis. 142; *Lafferty* v. *Jelley*, 22 Ind. 471; *Holloway* v. *Love*, 7 Port. (Ala.) 488; *Weakly* v. *Hall*, 13 Ohio, 167, 42 Am. Dec. 194; *Barkus* v. *Byron*, 4 Mich. 535; *note* to *Thallhimer* v. *Brinckerhoff*, 15 Am. Dec. 319.

To meet the changed condition of society and administration of justice, the rule has been much modified, so that, upon modern construction, the doctrine of champerty and maintenance, as regards a layman, is confined to cases where a man, for the purpose of stirring up strife and litigation, encourages others either to bring actions or to make defenses which they have no right to make, or otherwise would not make; such interference is considered as having a tendency to pervert the course of justice. *Dorrein* v. *Smith*, 35 Vt. 69; *Findon* v. *Parker*, 11 Mees. & W. 675; *Stanley* v. *Jones*, 7 Bing. 369. The gist of the offense consists in the officious intermeddling in another suit, and contracts not within the mischief to be guarded against should not be held to come within the rule. It may now be stated as a general rule that a man may sell the whole or part of a thing in action, as well as the whole or part of a thing in possession. The right of disposition is involved in the very idea of property. With few exceptions, not material here, whatever a man may own he may sell; and whatever a man may lawfully sell another man may lawfully buy; and, whenever a man has bought anything in the nature of property, he is entitled to all the remedies the law may afford, to enable him to possess and enjoy it. It follows that there is now no rule of law which prohibits the purchase of anything otherwise capable of assignment, merely because it may become the subject of a lawsuit. From this it logically follows that the purchase of a right, which is the subject matter of a pending

lawsuit by one standing in no fiduciary relation, is not unlawful, unless it is made for the mere purpose or desire of perpetuating strife and litigation; nor can it make any difference, on principle or authority, that the consideration for the purchase is to be used in conducting the litigation and paying the expenses thereof. A fair bona fide agreement, by a layman, to supply funds to carry on a pending suit, in consideration of having a share in the property if recovered, it seems to us, ought not to be regarded as *per se* void, either on the grounds of champerty, as now understood, or of public policy. Indeed, it may sometimes be in furtherance of justice and right that a suitor who has a just title to property, and no means except the property itself, should be assisted in that way. The doctrine of champerty is directed against speculation in lawsuits, and to repress the gambling propensity of buying up doubtful claims. It is not, nor never was intended, to prevent persons from charging the subject matter of the suit in order to obtain the means of prosecuting it. 1 Addison, Cont. 392; *Stotsenburg* v. *Marks*, 79 Ind. 193. But agreements of the kind above suggested should be carefully watched and closely scrutinized, when called in question, and if found to have been made, not with a bona fide object of assisting a claim believed to be just, but for the purpose of injuring and oppressing others by aiding in unrighteous suits, or for the purpose of gambling in litigation, or to be so extortionate or unconscionable as to be inequitable against the party, effect ought not to be given to them. Courts administering justice according to the broad principles of equity and good conscience, as they are bound to do, will consider whether the transaction is merely the bona fide acquisition of an interest in the subject of litigation, or whether it is an unfair or illegitimate transaction, gotten up for the purpose merely of spoil or speculation. The doctrine of champerty, to the extent that furnishing aid in a suit under an agreement to divide the thing recovered is *per se* void, we think ought not to prevail, when such aid is furnished by a layman; but when such contracts are made for the purpose of stirring up strife and litigation, harassing others, inducing suits to be begun which otherwise would not be commenced, or for speculation, they come within the analogy and principles of that doctrine, and should not be enforced. *Gilbert* v. *Holmes*, 64 Ill. 548; *The Mohawk*, 75 U. S. 8 Wall. 153, 19 L. ed. 406; *Boardman* v. *Thompson*, 25 Iowa, 487.

Applying these principles to the case in hand, we find that the contract between plaintiff and defendants was entered into in entire good faith, and with no intention on the part of plaintiff of officially intermeddling in the controversy between Bigne and the Manciet heirs, but only at Bigne's earnest solicitation, to enable him to obtain means to prosecute his claim. The contract was not unconscionable or unjust, but fairly entered into. Bigne had no means except the property in litigation, and the taking by plaintiff of an assignment of a one-half interest therein, as a consideration for the money advanced by him, violated no principle of law or public policy, so far as we can see from this record. What was said by Thayer, *J.*, in relation to the doctrine of champerty, in *Dahms* v. *Sears*, 13 Or. 47, is in regard to contracts between attorney and client, and has no application here. The relation of attorney and client between Brown and Bigne did not exist, and this opinion is confined to the case before us.

The decree of the court below is therefore affirmed.

NORTH CAROLINA SUPREME COURT.

O. Elizabeth CLARK, Admx., etc., of James M. Clark, Deceased,
v.
WILMINGTON & WELDON R. CO., *Appt.*

(.....N. C.....)

(December 15, 1891.)

1. Reckless exposure to danger in getting upon a railroad trestle in advance of a train will not relieve the railroad company from liability for running the person down on the trestle if the train could have been stopped or the speed diminished in time to prevent it after discovering his peril, although the engineer by a miscalculation judged that the man would be able to get across the trestle before he was overtaken.

2. Negligence in getting into peril is not the proximate cause of an injury which could still have been avoided by proper care of the other party.

(Clark and Davis, JJ., dissent.)

APPEAL by defendant from a judgment of the Supreme Court for Johnston County in favor of plaintiff in an action brought to recover damages for personal injuries resulting in death and alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Aycock & Daniels and W. C. Munroe,** for appellant:

In *McAdoo* v. *Richmond & D. R. Co.*, 105 N. C. 140, this court says: "A railroad has a right to the use of its track, and its servants are justified in assuming that a human being who has the use of all his senses will step off the track before a train reaches him."

In the absence of knowledge the engineer might assume that the plaintiff was a man of ordinary intelligence.

Baily v. *Richmond & D. R. Co.* 106 N. C. 307.

NOTE.—In addition to the discussion of the question of a railroad company's duty to trespassers on its track, which appears in the above opinions, see also *notes* to Cincinnati, I. St. L. & C. R. Co. v. Cooper (Ind.) 6 L. R. A. 241, and Toomey v. Southern Pac. R. Co. (Cal.) 10 L. R. A. 132.

See also 24 L. R. A. 226.

It is not negligence in an engineer to act, in the absence of specific information, on the presumption that a man who is apparently awake, and is moving, is in full possession of all his senses and faculties.

Deans v. *Wilmington & W. R. Co.* 107 N. C. 691.

The plaintiff cannot recover if he is guilty of contributory negligence, that is concurring negligence, notwithstanding the accident may have been avoided by the exercise of ordinary care.

Gunter v. *Wicker*, 85 N. C. 310; *Doggett* v. *Richmond & D. R. Co.* 78 N. C. 305; *Troy* v. *Cape Fear & Y. V. R. Co.* 99 N. C. 298.

When the injury arises neither from malice, design, nor wanton and gross neglect, but simply the neglect of ordinary care, and the parties are mutually in fault, the negligence of both being the immediate and proximate cause of the injury, a recovery is denied.

Rigler v. *Charlotte, C. & A. R. Co.* 94 N. C. 604.

In that case plaintiff attempted to drive across the track in front of an oncoming train, and the court said: "The attempt to cross the road under the circumstances not only showed a want of due care on the part of the plaintiff, but reckless conduct, that amounted to gross negligence; and though he was in no fault in the backing of the horse on the track, if he had not attempted to cross in the face of the impending danger, the accident would not have happened, so we are of the opinion his contributory negligence was the cause of his injury, and that being so, it can make no difference whether negligence is imputable to the defendant or not."

See also *Forbes* v. *Atlantic & N. C. R. Co.* 76 N. C. 454; *Farmer* v. *Wilmington & W. R. Co.* 88 N. C. 564; *McAdoo* v. *Richmond & D. R. Co.* 105 N. C. 140; *Deans* v. *Wilmington & W. R. Co.* 107 N. C. 686.

Plaintiff might have by the exercise of ordinary care avoided the accident, and therefore he cannot recover.

Turrentine v. *Richmond & D. R. Co.* 92 N. C. 638; *Walker* v. *Reidsville*, 96 N. C. 382; *Meredith* v. *Cranberry Coal & I. Co.* 99 N. C. 576.

Messrs. **Pou & Pou** for appellee.

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

The main question presented by the statement of the case on appeal and ably and elaborately argued by the counsel on both sides was whether in any phase of the testimony the court should have permitted the jury to pass upon the issues involving the question of defendant's negligence. The plaintiff contends that there was ample evidence to warrant the findings of the jury, in response to the first issue, that his intestate was killed by the negligent running of the defendant's train; and, in response to the third issue, that, notwithstanding the negligence of his intestate, the injury might have been avoided by the exercise of proper care and prudence on the part of the defendant Company's engineer. The defendant assigned as error the failure of the court to instruct the jury that there was not sufficient evidence to justify an affirmative response to said issues. So that, if a collocation of detached portions of the testimony would prima facie tend to show that the engineer was negligent, and that by such precaution as a man of ordinary prudence would have taken he could have prevented the collision, it was the duty of the court to submit the issues to the jury, and they were justified, in the exercise of their exercise of their exclusive right, in responding to them as they did. *Sheridan* v. *Brooklyn City & N. R. Co.* 36 N. Y. 39, 93 Am. Dec. 490; *Kenyon* v. *New York Cent. & H. R. R. Co.* 5 Hun, 481. The engineer, according to the testimony of all the witnesses, could see the trestle on which the intestate was killed for a mile before he reached it. George Ricks, a witness for the defendant, deposed that the train approached from the north. Jackson Lassiter, a witness for the plaintiff, testified that there was a mile-post at the north end of the trestle, and that the engineer going south could tell that a man was on the trestle when his engine was four or five hundred yards distant from it; that the plaintiff's intestate was stricken by the engine near the south end of the trestle, which was 125 feet long, and thrown about 25 yards south of it, and down an embankment; that the train could have been stopped within 150 yards; and that the witness looked when the danger signal was given, and the train was then 450 yards from the trestle; but the witness, looking at it, could see no diminution of its speed when it reached the trestle, just as the witness Moore stated that he could see no "slack up" of the train till it reached the trestle. Ervin Ricks, deposing in behalf of the defendant, could not say that the train "slowed up" any before it struck him, though he could see its approach distinctly, and that the plaintiff's intestate was running in the middle of the track when he first saw him, just after the whistle blew. The defendant's engineer testified that when the signal was given, at a distance of 100 yards, the plaintiff's intestate acknowledged it by stopping and looking back at the engine; that he was still north of the trestle, had not reached it, but turned, and went towards the trestle, still on the outside of the track, and when the engine was 50 yards north of the trestle he stepped upon the track at or near the north end of it for the first time; that he then applied the brakes, but struck deceased 10 or 12 feet from the north end. The defendant's fireman thought the train was not stopped for 200 to 250 yards beyond where Clark was stricken, while he thought the alarm was given 100 yards north of the trestle. The intestate began to run, according to Rick's statement, along the middle of the track on the trestle when the signal was blown. There was testimony to the effect that the frame of the trestle was from 8 to 11 feet above the ground, and that a very active man might have escaped injury by jumping upon a cap.

The jury were not bound to find that the whole of the testimony of any witness was true; and it is immaterial whether they thought any given one was mistaken as to his recollection or observation of some matters and accurate as to other facts, or was false in part and credible as to other statements. Any one of several theories arising out of the evidence may

have been adopted by the jury. They may have concluded that Lassiter was to be believed when he stated that Clark was killed at the south end of the trestle, after the engine had traversed its whole length, and not near the north end, as the engineer stated; and that theory may have been strengthened by finding it to be true that the intestate was thrown up into the air, and at the same time received such an impetus forward as to land his body 25 yards further at the side of the embankment. They had a right to conclude from the evidence, which we have stated, that deceased was on the trestle in the middle of the track when the whistle blew and the bell rang, and they had testimony sufficient to warrant the belief that at that very moment the engine was 450 yards from the trestle, and could have been stopped in 150 yards. The jury were justified in concluding as a fact that the engineer did not, as a witness testified, perceptibly slacken his speed in the least till he struck Clark; and this theory would be sustained by defendant's own testimony (that of the fireman Jones), that the train ran on 200 to 250 yards after striking him before it was fully stopped, while it could have been brought to a stand-still within 150 yards (according to the evidence of Lassiter, which the jury had a right certainly to believe), as they had a right to fix a lower estimate as the true one. If the foregoing is a fair summary of the facts that the jury might have found as a part of a special verdict, then we may assume for our present purpose that any theory arising out of it is a true embodiment of their findings. Suppose the engineer saw the plaintiff's intestate, after looking back in acknowledgment of the danger signal, rushing along the middle of a trestle 125 feet long, with no means of escape till he should reach the south end of it, except by jumping 11 feet (the height on the south side), to the ground, or the display of unusual activity by jumping upon a cap, and that he ran his engine 300 yards while Clark was still running along the center of the track on the trestle. He could have stopped it within the remaining 150 yards, if not sooner, before even reaching the north end of the trestle; but, when there was no longer any doubt that intestate was fully committed to risking his life in the effort to cross because of his persistent movement south on the track, while the engine advanced 300 yards after the signal was given, the engineer rushed recklessly onward without the slightest diminution of speed. But if, by any calculation as to the relative progress of two bodies in motion on the same road, the jury concluded that the train was nearer to the trestle when the alarm was given, there is no possible method by which we can legitimately tell whether they fixed that distance at 450, 150, 100, or 50 yards. If it was 150 yards, and Lassiter was to be believed, then the engineer could (after the deceased made his purpose apparent by looking at the engine and then moving forward), have stopped at the very northern extremity; or if they thought 100 yards was the distance, as the engineer testified, the engine would have been brought down to a slow pace, and within nine yards of a full stop, when it came in contact with intestate, so that the force of the collision might not have been sufficient to do him serious injury, if he was stricken at the south end of the trestle. Suppose the jury believed that the estimate of the distance by the engineer, who thought he blew 100 yards and put on the brakes 50 yards from the north end was correct, then he could have stopped in 150 yards, the force of the engine would have been greatly reduced after the use of all appliances for 100 yards, and it might have been considered by them but a fair inference that the blow would not have been fatal, if harmful at all, when the collision should come, had the engineer used every effort to stop consistent with safety, immediately on giving the alarm. If he could have stopped the engine in less than 100 yards, he might have saved intestate's life, whether he put on brakes at 50 or 100 yards. For we must bear in mind also that it was decided in *Deans* v. *Wilmington & W. R. Co.*, 107 N. C. 686, that the jury were not bound to adopt the estimate of the witnesses or to hear expert testimony as to the distance within which an engine might be stopped, but could determine that question, as one addressed to their common sense, for themselves. By fixing that distance at more or less than 150 yards,—the estimate of the conductor being that it would require 400 to 500 yards,—and varying the finding as to speed from 30 to 50 miles per hour, according to the conflicting testimony, an infinite number of combinations might have been made by the jury as to the different questions of distance and speed and force, giving rise to endless inferences from them.

It was in evidence that deceased was lame, but was running in the middle of the track on the trestle. It was the province of the jury to say where he was, whether entirely north of the trestle, on the trestle, or at what point on it, when the whistle blew. We are not justified in conjecturing as to their findings of evidential facts, when the witnesses left a margin in distances between 150 and 450, and the jury were at liberty to go even below the minimum mentioned by Lassiter. The jury were justified in concluding that the speed of the engine had not been abated in the least, though a frightened human being had been chased by an engine along a trestle from which the engineer ought to have known he could not escape without peril to life or limb, until he was tossed like a ball into the air, and thrown forward for 25 yards, where his mangled corpse tumbled off the embankment. The evidence of the fireman that the train was not stopped till it had gone 200 to 250 yards south of the trestle may have been considered by the jury as corroborative of the other witness, who said that the speed was not perceptibly diminished. That would depend upon their estimate of the time and distance requisite for stopping the train; and in settling that question the jury very probably first determined what the speed was, whether 30, 35, 40, or 50 miles per hour, according to the varying opinions of witnesses, and possibly whether it was true that the train was running down grade, as stated by a witness. They could believe or discredit the whole or a part of the testimony of any witness, and we have no right to assume what their finding was. If there was no conceivable view of the testimony

in which the defendant's servants might have saved the life that was lost (despite the admitted negligence of the plaintiff, and after it was apparent to the servant, sitting upon his engine, that the plaintiff had carelessly put his person in jeopardy) by simply using the appliances at his command, and without peril to the persons and property in his charge, the court would have been justified in withdrawing the case from the jury, but not otherwise. The engineer knew or ought to have known that the mile-post marked the end of the trestle, and when he saw that the plaintiff's intestate, after turning and looking at the approaching train, was still persisting in his perilous purpose of crossing the trestle in its front, he should have resolved all doubt in favor of human life, and forthwith have reversed his engine, and put on the brakes. We may assume that he did neither, as there is abundant testimony to have warranted the jury in so believing. At this supreme moment the law and the common instincts of humanity would condemn his rushing recklessly onward for no better reason than that the deceased might jump 11 feet to the ground without injury, or by a display of unusual agility might place himself upon a cap.

It is settled law in this State that where an engineer sees that a human being is on the track at a point where he can stop off at his pleasure, and without delay, he can assume that he is in full possession of his senses and faculties, without information to the contrary, and will step aside before the engine can overtake him. But where it is apparent to an engineer, who is keeping a proper outlook, that a man is lying prone upon the track, or his team is delayed in moving a wagon over a crossing, it has been declared that the engineer, having reason to believe that life or property will be imperiled by going on without diminishing his speed, is negligent if he fails to use all the means at his command, consistent with the safety of the passengers and property in his charge, to stop his train and avoid coming in contact with the person so exposed. *Deans* v. *Wilmington & W. R. Co.* 107 N. C. 686; *Bullock* v. *Wilmington & W. R. Co.* 105 N. C. 180. The same rule prevails where the engineer knows or ought to know that a human being has passed a mile-post which marks the end of a trestle nearest to him, and can see that the person, despite his signal, persists in running along the track, from which he cannot step aside, and from which he can escape instantly only by a perilous jump or unusual activity. The law expects him, when he sees a man still lying motionless, after he has given the alarm signal, to take precaution against the possibility of his being drunk; or, where one does not move his team at a crossing under similar circumstances, to act upon the idea that the wagon is fastened in some way. While as a general rule the engineer "would have a right to assume that a person walking upon the track was in possession of ordinary sight and hearing, yet, where the conduct of the traveler is such as to excite a doubt of this, the engineer is bound to use greater caution," and to stop the train, if necessary to secure his safety. 2 Shearm. & Redf. Neg. §§ 483, 484; Wharton, Neg. § 301; *Pennsylvania R. Co.* v. *Weber*, 76 Pa. 157, 18 Am. Rep. 407.

In *Cook* v. *Central R. & Bkg. Co.*, 67 Ala. 533, it was held error to refuse to charge that if defendant's agents did see, or by the exercise of proper care could have seen, plaintiff's intestate upon said bridge or trestle in time to have stopped said train before it reached him, and that they failed to stop, the defendant was liable. We may add to this rule, as applicable to our case, that the defendant was also liable, if its servants, under such circumstances, could have so diminished the speed of the engine before the collision occurred as possibly to have saved the life of intestate. The plaintiff was unquestionably negligent, but his negligence was not the proximate cause of his death, if the defendant's servant could have prevented it, after the latter had reason to know of the peril, without danger to persons or property in his charge. 2 Shearm. & Redf. Neg. § 484, (p. 298,) *note 1*. The principle laid down in the Alabama case which we have cited must necessarily prevail in every State where the doctrine of *Gunter* v. *Wicker*, 85 N. C. 312, is established. Where the courts hold, as in Kansas, that one who walks upon a bridge constituting a part of the track of a railway is a trespasser, and that the engineer is not bound to keep a lookout for such an intruder, and if he is killed while on a bridge or trestle, the company is only liable for willful negligence, it follows that they always refuse to sanction the doctrine so fully settled by this court. Hence it was found necessary to overrule *Herring* v. *Wilmington & R. R. Co.* 32 N. C. 402, in *Deans* v. *Wilmington & W. R. Co.* 107 N. C. 686.

The true test of the engineer's duty is involved in the question whether he has reasonable ground to believe, with all the knowledge of the surroundings which due diligence requires of him, that the life of a fellow man is in peril, and that the danger to his person can only be averted by stopping or reducing the speed of the train. When an engineer sees a man persistently putting himself in peril on a trestle or bridge, so that he can no more get off the track than one who is lying on it in an apparent stupor, except by exposing himself to danger, why is it not reasonable in him to act instantly on the natural inference that one whose conduct is so extraordinary is either drunk or bereft of reason from sudden terror? *Cook* v. *Central R. & Bkg. Co. supra;* Wharton, Neg. § 301. Greater caution is expected of a company in all cases where for any cause it is apparent that one is not apprised of his danger. *Tanner* v. *Louisville & N. R. Co.* 60 Ala. 621, 640. Though plaintiff's intestate was negligent in going upon the trestle when he knew, or might have known, before the alarm was given, that a train was approaching, his admitted fault would not excuse the subsequent carelessness of the engineer in inflicting an injury upon him that could have been avoided. One wrong no more justifies another in law than in morals. *Needham* v. *San Francisco & S. J. R. Co.* 37 Cal. 409. Because one carelessly exposes his life on account either of drunkenness or deliberate folly, he does not thereby become an outlaw, so as

to give railroad companies the right to run their through trains in reckless disregard of his safety. There is no presumption that a child or a man apparently drunk will get out of the way. When intestate acted like a drunken man, and made no effort to leave the trestle, the engineer should have stopped the train. 2 Wood, Railway Law, 1268, and *note 1; Kenyon* v. *New York Cent. & H. R. R. Co.* 5 Hun, 481; *Sheridan* v. *Brooklyn City & N. R. Co.* 36 N. Y. 39, 93 Am. Dec. 490. Persons in great peril are not expected to exercise the presence of mind and care that would ordinarily be characteristic of a prudent man. The law makes allowance for their excitement and leaves the circumstances of their conduct to the jury. *Buel* v. *New York Cent. R. Co.* 31 N. Y. 314, 88 Am. Dec. 271; *Galena & C. U. R. Co.* v. *Yarwood*, 17 Ill. 509; Wharton, Neg. § 304.

The jury doubtless thought that the conduct of the deceased, after the engineer saw him on the track, was such that the latter had reason to believe that he was drunk. In corroboration of this theory he had, according to the testimony, two bottles of spirituous liquor upon his person, just as Deans was found with a bottle and a broken glass at his side. According to the views of the testimony which we have presented as the possible and legitimate theories adopted by the jury, there was almost, if not quite, as cogent reason for the conclusion on the part of the jury in our case as in *Deans' Case* that a person who acted so unnaturally and carelessly must have been drunk. It was unquestionably negligence to get drunk and lie down upon the track, as it was to go upon it in full view of an approaching train. But in the one case, as in the other, it was the province of the jury, not of the court, to determine whether the engineer had reason to believe that a man was so situated that he could not, without peril, get off the track in time to escape the train, moving as it was, or was so much intoxicated that he could not or would not attempt to escape, and, whether, after he could have discovered the situation, the engineer might, by exercising ordinary care, have avoided the fatal injury. *Cook* v. *Central R. & Bkg. Co. supra.* Instinct would prompt a man under such circumstances to try to save his life, and in the absence of all evidence, the presumption is that he has exercised due care. *Pennsylvania R. Co.* v. *Weber*, 76 Pa. 157, 18 Am. Rep. 407. In the case of *Deans* v. *Wilmington & W. R. Co.*, it was declared to be the province of the jury to determine which of two natural inferences should be drawn from an admitted state of facts. In our case there are not only different inferences directly deducible from the evidence, but there is contradictory testimony, giving rise necessarily to different conclusions of law, according to the possible findings of the jury. *Detroit & M. R. Co.* v. *Van Steinburg*, 17 Mich. 99. We cannot follow counsel in the line of argument adopted, and say that, because the court held in the case referred to, that without expert testimony the jury could exercise their own common sense, and determine within what space an engineer might stop his train, we can go a bow-shot further here, and declare that the court may judicially determine what would be the relative progress of the two bodies moving upon the same track,—the train, whose speed was estimated by various witnesses at 30 to 50 miles per hour, and a man, who was said to be lame, but whose velocity was not even guessed at by any witness. The difficulty would be enhanced by the fact, to which we have adverted, that the jury had the exclusive right to say within what distance the train could be stopped; and an essential factor would be wanting, if anyone outside of the jury should undertake the problem. If, moreover, the case at bar does not present a number both of conflicts in evidence of the various witnesses and of diverse inferences deducible from different views of the evidence, leading to conclusions of law modified according to the inference drawn, it would seem difficult to conceive of one that does. The court cannot, for the want of ascertained *data*, work out the problem so as to reach a special verdict. The engineer, when his train was rushing on at such a speed, and a human being was placing himself in imminent peril of life, was not warranted in making a calculation in his head of this intricate problem. It is now manifest that, if he refused to slacken his speed in the least, (as we must assume on the demurrer to the evidence he did,) and acted upon a hurried calculation as to the rapidity with which the intestate was moving, he made a fatal mistake. The man is dead, and the engine killed him. So that the figures, contrary to the maxim, were false. If the jury believed that the engineer could by ordinary care, after seeing the situation of deceased, have diminished the force of the collision so as to bruise instead of killing him, their verdict ought not to be disturbed.

It is due to the counsel who discussed the doctrine of proximate and remote cause with so much subtility to state briefly the reason why a court, where the principle announced in *Davies* v. *Mann*, 10 Mees. & W. 546, and first adopted by this court in *Gunter* v. *Wicker*, prevails, cannot concur in his line of reasoning. It has been generally conceded that from the stand-point which is occupied by this court the rule of *causa causans* has been more happily and succinctly stated by *Judge* Cooley in his work on Torts than by any other writer. He says, (pages 70, 71:) "If the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause, and not to that which was more remote." 4 Am. & Eng. Encyclop. Law, p. 25, *note 3*, with authorities cited; *Isbell* v. *New York & N. H. R. Co.* 27 Conn. 404.

Applying the principle to the facts of our case, it is manifest that, though plaintiff's intestate was negligent in going upon a trestle when he ought to have known that a train was approaching, he would not have been killed if the engineer had stopped the train before it came in contact with him. If, then, there was any evidence that warranted the finding of the jury in response to the third issue, —which meant that the death was due to the negligence of the engineer in failing to stop or diminish the speed of the train,—it would follow that the court must hold as law that the negligence of the defendant was the proximate

cause of the injury. The authorities do not sustain the position assumed by counsel. It makes no difference how short an interval occurs between the negligent act of the plaintiff and that of the defendant, if the latter had time to discover the danger and avert it by the exercise of ordinary care. 4 Am. & Eng. Encyclop. Law, p. 27; *Needham* v. *San Francisco & St. J. R. Co. supra; Trow* v. *Vermont Cent. R. Co.* 24 Vt. 494.

The illustration of concurrent negligence given by *Judge* Cooley outlines still more clearly the distinction which we have attempted to draw. It is the case of two persons, who in concert block up a street. "Neither of the culpable parties can excuse himself by showing the wrong of the other, for the injury is a natural and proximate result of his own act." There are two divergent lines of authority upon this subject, but the position assumed by counsel for the defendant finds no support in the decisions of those courts that have, like this, adhered closely to the doctrine of *Davies* v. *Mann*, 10 Mees. & W. 545. The negligence of the plaintiff in our case consisted in going upon the trestle when an approaching train was in sight, as it could have been seen a mile. But if, after he went upon the track, the defendant company's servant could have discovered his danger in time to avert it without jeopardy to the persons or property on defendant's train, and neglected to do so, the negligence of the two was not concurrent nor contemporaneous. That of the defendant was so far subsequent to the plaintiff's act—wrongful act—as to give time to the servant of the former to have discovered the danger, and averted the injury by the proper use of the means at his command. 2 Thomp. Neg. 1157; Wharton, Neg. §§ 343, 346, 388.

It was not error in the court to recapitulate fairly such contentions of counsel as illustrated the bearing of the evidence upon the issues. It is often helpful, if not necessary, for the court to do so, in order that they may understand how to apply the law to the testimony.

There is no error.

Clark, J., dissenting:

In this case there can be no question that the plaintiff was guilty of negligence. The exception taken by the defendant below is, in purport and effect, that there was no evidence sufficient to go to the jury that, notwithstanding plaintiff's negligence, the injury "might have been avoided by the exercise of reasonable care and prudence on the part of the defendant." Taking the plaintiff's evidence in every respect to be true, this exception of defendant should be sustained. By that evidence the plaintiff was walking on a trestle a little after the regular schedule time of the passenger train, and at a point where he could see the train for a mile. The trestle was 125 feet long. The engineer sounded the whistle 450 or 500 yards from the north end of the trestle going south, and about 2 P. M. in the day-time, the train moving at the rate of 30 to 35 miles an hour. When the engineer sees a man, not known by him to be deaf, drunk, or insane, walking on the track, he has ground to believe that on sounding the whistle the man will get off the track in time. He is not compelled to slacken the speed of the train on that account. This has been often decided, and lately in *McAdoo* v. *Richmond & D. R. Co.* 105 N. C. 140, and *Meredith* v. *Richmond & D. R. Co.* 108 N. C. 616. It cannot with reason be contended that in this case this short trestle should have caused the engineer to slacken his speed; for, aside from the difficulty of an engineer moving at that speed being able to locate a man on any specified 125 feet of the track, there was but 125 feet—*i. e.*, 41⅔ yards—of the trestle, and by plaintiff's evidence the deceased was 5 or 6 yards on the trestle when the whistle blew. If the engineer did not know the man was on the trestle, he had reasonable ground to believe he would not go on it after the signal. If he is held responsible for the knowledge that the man was on the trestle, he had reasonable ground to believe that the man would turn back the 6 yards he had traversed; and he must also be credited with the knowledge that, if the man persisted in attempting to cross while the engine, moving 30 or 35 miles an hour, was running more than a quarter of a mile, (456 yards,) a man could traverse the remaining 36 yards of the trestle who was walking at one thirteenth of that speed, or under 3 miles an hour. It was not unreasonable in the engineer to suppose that a man who would attempt to cross a trestle in front of a passenger train would at least move as rapidly as three miles an hour, when an ordinary walk is more rapid. This is not like *Burton* v. *Wilmington & W. R. Co.*, 82 N. C. 504, 84 N. C. 192, where the deceased was a deaf man, and the engineer knew him; nor like *Deans' Case, supra*, where the man was drunk and helpless on the track; nor like *Manly's Case*, 74 N. C. 655, where the injured parties were children; nor like *Troy's Case*, 99 N. C. 298, where the accident was in the night-time, in a populous town, and the train moving at an unusual hour, no headlight used, and no signal being given; nor like those cases where the train was passing out of regular time, and no signal was sounded; nor like live-stock cases,—*Carlton* v. *Wilmington & W. R. Co.* 104 N. C. 365, and the like; nor those in which stress is laid on the fact that stock, unlike human beings, have not intelligence enough to get off the track. Here the train was on nearly regular schedule time. There was no evidence that the man was drunk, or that the engineer had reason to think he was. It was in broad day-light (2 P. M.). The signal was sounded in ample time, and the engineer was not wanting in due care in supposing that after the signal the man would not go on the trestle, or, if there, he would get off, as he had time to do. We do not advert to plaintiff's evidence that he might have escaped by getting on the end of one of the several large sills in the trestle, nor that the deceased could have let himself down to the ground,—only some eight feet below. Still less do we advert to the evidence offered for the defendant. But, taking the plaintiff's evidence alone, the shortness of the trestle, and the signal given in such ample time, it is clear there was no evidence to go to the jury that there was negligence in not stopping or slackening up a train under these circumstances. If the trestle had been a long one, or very high, a different case entirely would be presented. But here it was only a

little over 40 yards long and 8 feet high. With the slightest regard to prudence the man might and should have gotten off in ample time. If, as is probable from plaintiff's evidence, the plaintiff deliberately walked or recklessly rushed on the trestle after the signal sounded, or walked slower than a man ordinarily does, that was a piece of folly or fool-hardiness that the engineer might well be excused for not anticipating. Railroads are expected to guard against every avoidable injury, and even to prevent injury to a plaintiff from the consequences of his own negligence, if by reasonable care they can avoid it; but the traveling public and the railroads have rights also, and the latter should not be held liable for damages in presuming, under the circumstances of this case, that the plaintiff, after the signal given, either would not go on the trestle, or, if there, would get off, as he had full time to do. There is no evidence tending to show that the engineer knew or had any reason to suppose that the man was drunk, nor is it shown even that in fact he was drunk. It is almost certain that the deceased ran upon the trestle after the whistle sounded, (for, if on it at that time, he would have cleared it at an ordinary walk before the engine could have reached it at the speed stated by plaintiff's witness, of 30 or 35 miles an hour;) and, if this is so, it is not shown how close the engine then was to him, and that the engineer could then have stopped his train in time to avoid striking him. Yet the burden of showing this was on the plaintiff. If deceased was on the trestle when the whistle blew, the engineer knew he had ample time to cross so short a trestle before the engine could reach it. If he went on it after the whistle blew, it is not shown when, nor that the engineer could then have stopped the train in time. In *Deans* v. *Wilmington & W. R. Co.*, *supra*, it is said: "We have reiterated the principle that where an engineer sees a human being walking along or across the track in front of his engine he has a right to assume without further information that he is a reasonable person, and will step out of the way of harm before the engine reaches him. *McAdoo* v. *Richmond & D. R. Co.* 105 N. C. 153; *Daily* v. *Richmond & D. R. Co.* 106 N. C. 301; *Parker* v. *Wilmington & W. R. Co.* 86 N. C. 221." The same rule is again laid down in *Meredith* v. *Richmond & D. R. Co.* 108 N. C. 616.

These cases should be decisive of the one before us. Here, from the shortness of the trestle, the distance at which the train could be seen, and the length of time the signal was given, "the engineer had the right to assume that the person would step out of harm's way before the engine reached him." To lay down the principle that where an engineer sees a man apparently sober on a short and low trestle, the full length of which he knows the man at an ordinary gait can cross after the signal is sounded, he must nevertheless stop or slacken his speed, or that, if he sees a man walking near such trestle, he must do likewise for fear that he may rush upon the trestle, and try to beat the train across, is a rule that is hardly consistent with the decisions above cited nor consonant with the right of way of the railroad to the use of its own track. Should the man nevertheless be so fool-hardy—as was probably the case here—as to run upon the trestle after the signal was given, the engineer, in the interest of human life, should stop the train if time is given him to do so; but the burden of showing that he could do so is on the plaintiff. Upon the plaintiff's evidence in this case his intestate was guilty of gross negligence, and there was no evidence sufficient to go to the jury that the defendant by the exercise of reasonable care and prudence could have avoided the unfortunate consequences of the intestate's recklessness. The engineer knew that the intestate, if on the trestle, had ample time to get off after the whistle sounded, and reason to suppose that he would do so; and he was not called on to anticipate that the intestate would rush upon the trestle when the engine was so close at hand that it does not appear it could have been stopped in time to avoid the accident.

Davis, J., concurred in the foregoing dissenting opinion.

Rehearing denied.

CALIFORNIA SUPREME COURT.

Re BONDS OF THE MADERA IRRIGATION DISTRICT.

APPEAL OF Henry MILLER *et al.*

APPEAL OF James B. HAGGIN.

APPEAL OF George D. BLISS.

APPEAL OF CALIFORNIA PASTORAL & AGRICULTURAL CO.

APPEAL OF SIERRA VISTA VINEYARD CO.

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

1. A state legislature has power to provide for the irrigation of arid lands in a particular section of the State in the absence of a constitutional provision depriving it thereof.

2. Neither the fact that some of the property within a district formed for the irrigation, by means of taxation, of arid lands within its borders will receive no benefit therefrom, nor that all the property which will be benefited is not included within the taxing district, will render proceedings for the formation of the district unlawful.

3. A constitutional prohibition against special laws creating municipal corporations will not prevent a general law for municipal corporations of a particular species or character, even if in the nature of things such corporations can find occasion for their organization in a portion of the State only.

4. It is not an unconstitutional delega-

NOTE.—*Necessity of special benefit to sustain assessments for local improvements.*

The doctrine declared in the main case, following Lent v. Tillson, 72 Cal. 428, that the expenses for a local improvement may be assessed without regard to benefits, or at least that the benefit is not

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See also 15 L. R. A. 624; 17 L. R. A. 135; 22 L. R. A. 713; 24 L. R. A. 355; 26 L. R. A. 311, 614; 30 L. R. A. 84, 225; 33 L. R. A. 589; 34 L. R. A. 725; 42 L. R. A. 636; 45 L. R. A. 289; 47 L. R. A. 537.

tion of legislative power to create a municipal corporation to provide that such a corporation shall not be created under a general law without an affirmative vote of those who are to be affected by its creation.

5. A constitutional provision for the incorporation, organization and classification of cities and towns does not apply to other municipal corporations where the Constitution provides for "county, city, town or other public municipal corporations."

6. No provision for a hearing of the landowners is necessary prior to the organization of an irrigation district which is a public corporation created by vote of the electors at an election called by the board of supervisors on a petition of freeholders.

7. Due process of law does not entitle a landowner to a hearing before creation of an irrigation district including his property, although it is for the purpose of making public improvements for which his land will be assessed. It is sufficient that he be allowed a hearing at any time before the assessment becomes final.

8. Assessments according to the value of the land, and not according to the amount of benefits received by each parcel to pay for a public improvement in an irrigation district, are not unconstitutional unless by force of an express constitutional provision, as such assessments are included in the inherent power of taxation, which is not limited to the benefits received.

9. Land not at all benefited by the public improvement of an irrigation district in which it is included does not have on that account a constitutional exemption from assessment.

10. The determination by a board of supervisors as to the sufficiency of an informal but not invalid bond presented with a petition for the creation of an irrigation district is conclusive.

11. The description of the boundaries in a petition for establishment of an irrigation district is not insufficient because the course of the boundary which is given has not actually been surveyed on the ground, or because a part of the description is made by reference to an official map or a land-mark designated upon such map.

12. The fact that those who have no interest in the lands affected may by their votes make the necessary majority in favor of creating an irrigation district, or even that the owners of the land may be nonresidents and have no voice in the matter, does not make invalid a statute which authorizes the creation of such a district by a two-thirds vote of the electors at an election ordered by the board of supervisors on a petition of fifty freeholders or a majority of those owning lands in the proposed district.

13. Recitals in proceedings of the board of supervisors are not competent evidence that a petition for the establishment of an irrigation district was presented to the board, where the question arises in a direct proceeding to establish the validity of the organization of such district.

14. Where a statute prescribes the form for the issuance of bonds by an irriga-

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the source of the power, is supported by very few authorities.

Most cases on the subject declare that local assessments for public improvements can be constitutional only when the improvements clearly confer special benefits on the properties assessed, and only to the extent of those benefits. Hammett v. Philadelphia, 65 Pa. 146, 3 Am. Rep. 615; Lee v. Ruggles, 62 Ill. 427; Chicago v. Larned, 34 Ill. 279; Excelsior Planting & Mfg. Co. v. Green, 39 La. Ann. 455; Tide Water Co. v. Coster, 18 N. J. Eq. 518, 90 Am. Dec. 634; *Re* Drainage of Lands, 35 N. J. L. 497; Illinois Cent. R. Co. v. Bloomington, 76 Ill. 447; Crawford v. People, 82 Ill. 557; *Re* Fourth Ave. 3 Wend. 452; *Re* Albany Street, 11 Wend. 149, 25 Am. Dec. 618; Gilmore v. Hentig, 33 Kan. 174; Thomas v. Gain, 35 Mich. 155, 24 Am. Rep. 535; Allegheny City v. Western Pennsylvania R. Co. 138 Pa. 375; Washington Ave. 69 Pa. 352, 8 Am. Rep. 255.

Such an assessment is imposed and collected as an equivalent for the benefit. Bridgeport v. New York & N. H. R. Co. 36 Conn. 255, 4 Am. Rep. 63.

When an assessment for a sewer is levied by an arbitrary standard which requires the burden to be laid upon lands far from the sewer and only slightly benefited equally with those fronting upon it and greatly benefited, it is not legally possible that the apportionment can be just or equal or in proportion to benefits, and it must therefore be held unconstitutional. Thomas v. Gain, *supra*.

When the court can declare as matter of law that no benefit to certain property can arise from a public improvement, the Legislature is powerless to impose such a burden. Allegheny City v. Western Pennsylvania R. Co. 138 Pa. 375.

The potentiality of receiving a benefit from a sewer is the thing to be charged with the tax for the sewer. Wright v. Boston, 9 Cush. 233.

A lotowner cannot be compelled to pay the cost of a street improvement by a change of grade which will greatly impair the value of his property, and which ought not to be made at all without compensating him for the damage. Louisville v. Louisville Rolling Mill Co. 3 Bush, 416, 96 Am. Dec. 243.

The assessment of property located on a street which is already well paved with cobble stones in the style universally in use in the city, to improve the street for a public drive or carriage-way, is unconstitutional because the improvement is not for the benefit of the abutting property but for the benefit of the public. Hammett v. Philadelphia, 65 Pa. 146, 3 Am. Rep. 615.

The expense of grading, macadamizing and improving a public highway, which will constitute an improvement for the general public benefit, cannot be charged by the Legislature on the owners of farm lands lying within one mile of the highway. *Re* Washington Ave. 69 Pa. 352, 8 Am. Rep. 255.

But in Iowa it is declared that local assessments are not based on benefits, but on the simple ground that the object is public, and that the system of taxing abutting lots secures such a just and fair distribution of the burden as to be within the rule requiring uniformity of taxation. Warren v. Henly, 31 Iowa, 31; Morrison v. Hershire, 32 Iowa, 271.

In Wisconsin also the theory of benefits is denied, and the power to impose such burdens placed on a constitutional recognition of the power to make assessments as distinguished from taxation. Weeks v. Milwaukee, 10 Wis. 242.

Benefit to property is not the only consideration to be regarded in apportioning among cities and towns the expense of a system of sewage disposal; but there are many elements to be considered, some of which are the exigencies or special need of such improvements; the area to be accommodated; the present or probable population and wealth; the value of the land and its adaptability for homes and other uses. *Re* Kingman (Mass.) 12 L. R. A. 417.

tion district the court should confine its confirmation of an order of the board of supervisors for the issuance of bonds to the portion thereof which designates the amount to be issued and leave the form to be governed by the statute.

15. A judgment confirming the proceedings for establishing an irrigation district cannot include an order that all persons shall be forever debarred and precluded from denying the validity of the proceedings.

On Rehearing.

16. Constitution, art. 11, § 18, which prohibits certain specified public corporations from incurring indebtedness without the assent of two thirds of the qualified electors thereof, does not apply to an irrigation district.

17. An incorporated town may lawfully be included within the boundaries of an irrigation district.

(December 12, 1891.)

APPEAL by landowners from a judgment of the Superior Court for Fresno County in favor of complainants in a proceeding brought to procure the confirmation of the organization of an irrigation district and of the proceedings for the issuance and sale of certain bonds to raise money for the purposes of the district. *Reversed.*

The facts are fully stated in the opinion.

Mr. **E. W. McKinstry,** with *Messrs.* **R. E. Houghton** and **E. W. Magraw,** for appellants, Henry Miller *et al.*:

I. No evidence was given herein in the court below that the petition to the board of supervisors was signed by "fifty or a majority of the freeholders within the proposed district."

The second section of the Act of 1887 provides, that "whenever" a certain petition (accompanied by a bond), signed by fifty or a majority of the freeholders, shall be presented to the board of supervisors, the board shall hear the same, and may make such changes in the proposed boundaries as they may deem proper, and "establish and define such boundaries, etc."

The fact that the petition was or was not sufficient in form; that it was or was not signed by those required by the statute to sign it, each was an independent fact, which the supervisors could not determine, except for their own guidance.

Mulligan v. *Smith*, 59 Cal. 239.

Prior to the Codes, every Act necessary to the exercise of the authority had to be averred, as well as proved.

Davis v. *Vese*, 6 Car. & P. 167; 2 Cowen & Hill's *notes*, 207.

The rule remains that no intendments or presumptions will be made in favor of the authority or jurisdiction of inferior courts or officers proceeding under statutory powers, but every fact necessary to justify the exercise of the jurisdiction or authority must be proved.

Note 221, of Cowen & Hill's Notes on Phillips; *People* v. *Recorder of Albany*, 6 Hill, 429; *Hill* v. *Stocking*, Id. 314; *Doughty* v. *Hope*, 1 N. Y. 79; *Kennedy* v. *Newman*, 1 Sandf. 187;

This is a case quite different from that of an ordinary assessment; and even in this case it is not clear that benefits direct and indirect either to property or property owners should not be regarded as the basis of the power to impose the burden.

A statute authorizing an assessment upon lands reclaimed of a just proportion of the contract price for reclaiming them by drainage is unconstitutional because the expense to be levied on the land is not limited to the extent of benefits conferred. Tide Water Co. v. Coster, 18 N. J. Eq. 518, 90 Am. Dec. 634.

A tax on a railroad company for altering or widening a street used by its track cannot be sustained on the ground of special benefits, but is a clear exercise of the taxing power for a public purpose, and is therefore void where the charter of the company exempts its property from taxation. State v. Newark, 37 N. J. L. 185.

An assessment on lots abutting on one side of a street of all or part of the expense of widening the street by taking a strip off from lands on the other side was held unconstitutional in South Carolina, but the decision is apparently based on an entire denial of the power, which is now thoroughly established to assess property specially benefited for local improvements. State v. Charleston City Council, 12 Rich. L. 702.

The Legislature cannot authorize a municipal corporation to tax for its own local purposes lands which lie beyond the corporate limits. Wells v. Weston, 22 Mo. 384.

Legislative discretion as to rule of apportionment.

If no direct and invidious discrimination in favor of certain persons to the prejudice of others be made, it is not a valid objection to a mode of charging the expense of a public improvement upon the property benefited that to some extent inequalities may arise. All that is required is that the charges shall be apportioned in some just and reasonable mode according to the benefit received. Hagar v. Reclamation Dist. 111 U. S. 701, 28 L. ed. 569.

The mode in which assessments are made by the Legislature is subject to review in the courts only when it is made in excess of legislative authority. Sheley v. Detroit, 45 Mich. 431.

The Legislature is the exclusive judge of the question whether or not premises situated in a district charged with the expense of a public improvement will be benefited thereby. Litchfield v. Vernon, 41 N. Y. 123. Compare Thomas v. Lain, 35 Mich. 155, 24 Am. Rep. 555; Allegheny City v. Western Pennsylvania R. Co. 138 Pa. 375, and other cases *supra*.

So under authority of the Legislature to make "all manner of wholesome laws" a statute providing for the apportionment of the expense of making a public highway of a township and bridges between towns and counties is not unconstitutional because no rule of apportionment is adopted as to the share of the counties. Hingham & Q. B. & Turnp. Corp. v. Norfolk County, 6 Allen, 353, as explained in *Re* Kingman (Mass.) 12 L. R. A. 417.

A statute authorizing the expense of drains to be "equitably and ratably assessed" on property within a territory benefited is not invalid because it does not require them to be assessed according to the benefits which each estate may receive. Springfield v. Gay, 12 Allen, 612.

Where assessments for public improvements have been levied in a constitutional way an individual is not entitled as a matter of right to have the question of the degree of benefit to his property decided by a court. Workmen v. Worcester, 118 Mass. 168; Keith v. Boston, 120 Mass. 108.

The assessment of benefits for a sewer which is based on the value of the land alone without

Bennett v. *New York*, Id. 435; *Bailey* v. *Delaplaine*, Id. 11; *Varick* v. *Tallman*, 2 Barb. 113; *Dike* v. *Lewis*, Id. 344; *Fulton* v. *Heaton*, 1 Barb. 552; *Sharpe* v. *Speir*, 4 Hill, 76; *Re Faulkner*, Id. 598; *Ex parte Robinson*, 21 Wend. 672; *Ex parte Haynes*, 18 Wend. 611; *Dyckman* v. *New York* (*Croton Water Case*), 5 N. Y. 434; *Wooster* v. *Parsons*, 1 Kirby, 27; *Maples* v. *Wightman*, 4 Conn. 376, 10 Am. Dec. 149.

The board of supervisors had no power to determine that the petition to them was signed by "fifty or a majority of the freeholders," so that their determination should bind anyone. *Sharpe* v. *Speir* and *Mulligan* v. *Smith*, *supra*; *Kahn* v. *San Francisco Board of Supvs.* 79 Cal. 388.

II. The orders or records of the board of supervisors (or other alleged officers), were not prima facie evidence that the petition to the supervisors was signed by fifty or a majority of the freeholders, as required by the Act of 1887.

At page 465 of his work on Taxation, *Judge* Cooley says: "A common requirement is that the improvements shall be asked for or assented to by a majority or some other proportion of those who would be taxed. The want of a compliance with this requirement is fatal in any stage of the proceedings. And any decision or certificate of the proper authorities that the required consent or application had been made would not be conclusive, but might be disproved."

This is very far from a statement that such a decision or certificate would be prima facie evidence, nor does any one of the cases cited by Cooley so hold. *Henderson* v. *Baltimore*, 8 Md. 360; *Mulligan* v. *Smith*, 59 Cal. 239; *Barber* v. *Winslow*, 12 Wend. 102; *Hubbell* v. *Ames*, 15 Wend. 372; *Jenks* v. *Stebbins*, 11 Johns. 224; *Sharpe* v. *Speir*, 4 Hill, 76.

The rule, applicable to this class of cases, is laid down in Blackwell on Tax Titles, p. 39: "When a special power is delegated by statute to particular persons, or to an inferior tribunal, affecting the property of individuals against their will, the course prescribed by law must be strictly pursued. . . . If the law has not been strictly complied with the proceeding is a nullity, and the adjudication gives it no additional authority."

In an action brought to collect an assessment, or, in an action like the present, to obtain a decree that all the proceedings, connected with the formation of a district and the issuing of bonds, were regular and valid, it becomes necessary for the plaintiffs to prove, step by step, that the statute was complied with.

Keane v. *Cannovan*, 21 Cal. 299, 82 Am. Dec. 738; *Williams* v. *Peyton*, 17 U. S. 4 Wheat. 78, 4 L. ed. 518; *Varick* v. *Tallman*, 2 Barb. 113; *Los Angeles* v. *Los Angeles City W. W. Co.* 49 Cal. 642; *Blanchard* v. *Beideman*, 18 Cal. 261; *Gately* v. *Leiston*, 63 Cal. 365.

All statutory modes of devesting titles must be strictly pursued. He who relies for a title upon an extraordinary mode of acquisition, given him, not by the will of the owner, express or implied, but against his will, and by mandate of the law, must show a strict compliance with the statutory rules from which his title accrues.

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buildings must be based on their value at the time of making the improvement, and an ordinance allowing the assessment of each lot at the time when a drain therefrom enters the sewer is void because unreasonable and unequal. Boston v. Shaw, 1 Met 130.

A sewer assessment is not invalid as to a lot on which a large portion is lower than the bottom of the sewer where there is a probability that the time may come when the sewer will be needed for that lot and the lot may be graded so as to derive as much advantage from the sewer as others. Downer v. Boston, 7 Cush. 277.

The relative benefit which each estate on the line of a sewer may receive cannot be considered in determining the assessment which must be made under a statute requiring the assessments to be made according to the value of the land exclusive of buildings. Snow v. Fitchburg, 136 Mass. 183.

A classification of lands for drainage assessments into three classes, placing those lands most benefited in the first class and those least benefited in the third class, with a maximum rate of taxation in each class, making an arbitrary difference of ten cents per acre between each class and the one next to it, is unconstitutional because a tax assessed upon such a basis would not be in accordance with the special benefits to each tract. Lee v. Ruggles, 62 Ill. 427.

Charging burden of street improvement on abutting lot directly.

The whole burden of a street improvement in front of a lot cannot be constitutionally charged on that lot because this is not basing the expense upon the basis of benefits. Illinois Cent. R. Co. v. Bloomington, 76 Ill. 447; St. John v. East St. Louis, 50 Ill. 92.

On this question the judges of the Supreme Court of Michigan were equally divided. Woodbridge v. Detroit, 8 Mich. 274.

Thus an assessment upon every lot for the expense of grading in front of it, whatever may be the depth or kind of excavation or the height of the filling, is invalid because it totally disregards the well established doctrine that the assessment shall not exceed the benefits. State v. Jersey City, 37 N. J. L. 123.

So in a Territory it is held that charging the cost of grading a street in front of each lot upon that particular lot is in violation of U. S. Rev. Stat., § 1924, providing that taxes shall be equal and uniform, and that the assessments shall be according to the value of the property. Seattle v. Yesler, 1 Wash. Ter. 572.

But in Iowa, where the courts deny that assessments for such improvements are based on benefits, a statute compelling lotowners to pay the cost of street improvements in front of their lots is held not to be unconstitutional. Warren v. Henly, 31 Iowa, 31.

In Wisconsin also every lotowner may be made to improve the street in front of his lot, not on the theory of benefits or under a constitutional rule of uniformity of taxation, but under a constitutional recognization of the power of assessments as distinguished from regular taxation. Weeks v. Milwaukee, 10 Wis. 242.

But that the expense of maintaining a sidewalk may be charged on the premises in front of which it is constructed has been decided in many cases, some of which do not expressly declare the reason for their decision but many of which put it on the

Curran v. *Shattuck*, 24 Cal. 427; *Stanford* v. *Worn*, 27 Cal. 171; *Stockton* v. *Whitmore*, 50 Cal. 556; *Chicago & A. R. Co.* v. *Smith*, 78 Ill. 97; *Mitchell* v. *Illinois & St. L. R. Co.* 68 Ill. 288; *Chicago* v. *Rock Island R. Co.* 20 Ill. 290; Wells, Jurisd. 155.

The plaintiffs failed to prove their case, and a new trial should have been granted.

Sharpe v. *Speir*, *supra*; *Litchfield* v. *Vernon*, 41 N. Y. 135; *Pittsburg* v. *Walter*, 69 Pa. 365.

It is for the plaintiffs to prove that the events had occurred which authorized officers clothed with conditional powers to exercise them.

Damp v. *Dane*, 29 Wis. 419; *Litchfield* v. *Vernon*, *supra*.

III. Even if the rule would be otherwise in an action by a bondholder (which we deny), it would still be necessary for the plaintiffs, in this extraordinary and special proceeding, to prove that the petition to the supervisors was actually signed by fifty or a majority of the freeholders, within the proposed district.

When in a special proceeding the power of an officer, board or tribunal depends on a petition or writing of a certain form, or containing certain statements, and there is no petition, or it does not comply with the prescribed form or contain the statements required, the officer, board or tribunal gets no power to proceed.

Harrington v. *People*, 6 Barb. 607; *People* v. *Spencer*, 55 N. Y. 1; *People* v. *Smith*, Id. 135; *Craig* v. *Andes*, 93 N. Y. 405; *Jolley* v. *Foltz*, 34 Cal. 321.

VII. The petition contains no sufficient description of the boundaries of the proposed district. The description must be certain of itself, and not such as to require evidence *aliunde* to render it certain.

Keane v. *Cannovan*, 21 Cal. 302, 82 Am. Dec. 738.

A description sufficient between man and man will not answer in proceedings to collect a tax.

Blackwell, Tax Titles, 152. See also *People* v. *Mahoney*, 55 Cal. 286; *People* v. *DeLaGuerra*, 24 Cal. 73; *Crosby* v. *Dowd*, 61 Cal. 557.

Where the law requires jurisdictional conditions to appear in the record of an inferior board or tribunal, they must appear in the record.

Latham v. *Edgerton*, 9 Cow. 229; *White* v. *Haven*, 5 Johns. 351.

If the law requires a petition showing certain facts, and the petition does not state facts as required, the board, officers or tribunal has no jurisdiction, and its attempted action is void.

People v. *Spencer*, *People* v. *Smith*, *Harrington* v. *People* and *Jolley* v. *Foltz*, *supra*; *Levy* v. *Yolo Co. Super. Ct.* 66 Cal. 292; *Craig* v. *Andes*, *Litchfield* v. *Vernon*, *Pittsburg* v. *Walter* and *Damp* v. *Dane*, *supra*; *Rex* v. *Croke*, 1 Cowp. 26.

XIV. The Act of 1887 is unconstitutional and void. It violates the Constitution of the United States and of the State.

(*a*.) The statute attempts to authorize the assessment and taking of private property for a private purpose.

(*b*.) If a district formed under the Act of 1887 is a corporation, it is a private and not a public corporation.

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ground that the improvement may be ordered as a police regulation. State v. Newark, 37 N. J. L. 416; Macon v. Patty, 57 Miss. 378, 34 Am. Rep. 451; Sands v. Richmond, 31 Gratt. 571, 31 Am. Rep. 742; Lowell v. Hadley, 8 Met. 180; Paxson v. Sweet, 13 N. J. L. 196; Hudler v. Golden, 36 N. Y. 446; Buffalo City Cement Co. v. Buffalo, 46 N. Y. 503; Franklin v. Maberry, 6 Hump. 368; Whyte v. Nashville, 2 Swan, 364; Washington v. Nashville, 1 Swan, 177; Bonsall v. Labanon, 19 Ohio, 418; Palmer v. Way, 6 Colo. 109; O'Leary v. Sloo, 7 La. Ann. 25; Hydes v. Joyes, 4 Bush, 464, 96 Am. Dec. 311.

On the other hand, in Illinois the court has so far repudiated the doctrine that the police power authorizes the charge to lotowners of the expense of sidewalks in front of their lots that, in conflict with decisions elsewhere, it denies the validity of an ordinance to compel owners to remove the snow from sidewalks in front of their premises. Gridley v. Bloomington, 88 Ill. 554, 30 Am. Rep. 566.

Under a constitutional provision that the General Assembly may vest in the corporate authority of cities power to make local improvements by special assessment or by special taxation of contiguous property or otherwise, the cost of a sidewalk ordered to be built in front of one lot only may be charged upon it. White v. People, 94 Ill. 604.

In such a case whether or not the special tax exceeds the actual benefit to the lot is immaterial. It may be supposed to be based on a presumed equivalent. White v. People, 94 Ill. 604.

Owners of property cannot be made personally liable for special assessments for local improvements as these must be based on the benefits to the property. Craw v. Tolono, 96 Ill. 255, 36 Am. Rep. 143; Gaffney v. Gough, 38 Cal. 104; Taylor v. Palmer, 31 Cal. 240.

The same rule as to personal liability applies to sidewalks. Virginia v. Hall, 96 Ill. 278.

This note does not purport to include questions as to the various modes of assessment of benefits, such as by frontage or valuation, but only the question of the true basis of assessments.

Courts have repeatedly declared that taking a man's property under the guise of taxation may constitute confiscation. There is much reason in holding that the true basis of all taxation is the benefit to the tax-payer. In the case of ordinary taxation the expenditure of the money is made in so many ways and for so many purposes that no direct connection can be traced between the payment and the benefit. The rules for apportionment of such burdens must necessarily be imperfect and work unequally in many particular cases, but when it can be seen that the rule established by the Legislature is necessarily unjust in principle, as for instance, an imposition upon one county of the whole tax for the expenses of another county or of a city in a distant part of the State, it would seem to be a clear case of unconstitutional legislation. So in the case of special assessments it would seem that the true rule of decision for the courts is to uphold any rule of assessments made by the Legislature, although it may, as a matter of fact, impose a burden in some cases upon property not benefited, except when it is clear that the rule does not attempt to make a just division of the burden according to benefits, and does not approximately secure that result, but to condemn a rule of assessment which is on its face or necessarily unjust in principle because it imposes a burden for the public benefit upon those not benefited, or, on the other hand, imposes the whole of such a burden on a limited portion of those equally benefited. R. A. R.

(*e.*) The statute is unconstitutional because it attempts to authorize the assessment and taking of private property without reference to actual benefits.

(*d.*) Because the apportionment provided for is unequal and unjust.

(*e.*) The statute is unconstitutional because it authorizes the taking of private property without due process of law.

(*f.*) Because it attempts to authorize the assessment and sale of private property to pay for a future, uncertain and contingent improvement.

(*g.*) Because it attempts to delegate judicial powers to the board of supervisors.

(*h.*) Because it attempts to delegate to the supervisors, directors and electors legislative powers, including the power to levy taxes.

(*i.*) It grants special privileges to a certain class, and discriminates in favor of a particular industry.

(*j.*) The proceedings for the levy and collection of the assessments are repugnant to the Constitution.

(*k.*) The Act is violative of the Constitution of the State, in that it is special legislation.

XVII. This proceeding is not *in rem*. If the statute provides for any judgment, it is purely a judgment *in personam* and not *in rem*. But no court can enter such a judgment without personal service of process.

Cooley, Const. Lim. 6th ed. 496, 497; *Pennoyer* v. *Neff*, 95 U. S. 722, 24 L. ed. 568; *Belcher* v. *Chambers*, 53 Cal. 635; *Denny* v. *Ashley*, 12 Colo. 165; *Webster* v. *Reid*, 52 U.S. 11 How. 437, 13 L. ed. 761; *Pana* v. *Bowler*, 107 U. S. 529, 27 L. ed. 424.

Mr. **Octave G. Du Py** for appellant James B. Haggin.

Messrs. **Pillsbury & Blanding** for appellant Sierra Vista Vineyard Co.

Messrs. **Page & Ells** for appellant California Pastoral and Agricultural Co.

Messrs. **Mesick, Maxwell & Phelan** for appellant George D. Bliss.

Messrs. **Hinds & Merriam, Craig & Meredith** and **C. C. Wright,** for respondent:

The appellants contend that the Act is unconstitutional. In *Turlock Irrigation Dist.* v. *Williams*, 76 Cal. 360, it will be seen that counsel there raised all the points, and the court disposed of all those worthy of consideration.

In this arid country, that must remain a desert without the use of water for irrigation, if anything is a rightful subject of legislation it is the ownership of water, and use and appropriation of the waters of the running streams for irrigation and domestic use.

Stowell v. *Johnson* (Utah) April 2, 1891.

The Legislature is the sole judge of the necessity for the exercise of the power of appropriation to public use.

Talbot v. *Hudson*, 16 Gray, 417; Cooley, Const. Law, 336.

It is not necessary that their determination of the necessity be directly expressed. The courts will infer that determination from the act itself.

Re Wellington, 16 Pick. 87, 26 Am. Dec. 631.

A State Constitution is not a grant, but a restriction of power, and the Legislature has all power not expressly and clearly forbidden.

Thorpe v. *Rutland & B. R. Co.* 27 Vt. 140, 62 Am. Dec. 625; *Hagar* v. *Yolo County Supvs.* 47 Cal. 222; *People* v. *Rogers*, 13 Cal. 160.

Section 18 of art. 11, which prohibits the incurring of indebtedness in certain cases beyond certain limits, cannot be made to apply to a quasi public corporation, organized for the benefit of all the lands and of all the inhabitants of the district, and whose money is raised by assessments upon the lands of the district, benefited and to be benefited by the waters to be carried upon such lands by the use of the moneys derived from such assessments.

Cooley, Taxn. 2d ed. 207, 606; Dillon, Mun. Corp. §§ 755, 758, 778.

The proceeding is *in rem.*, and its object is to establish the validity of the bonds as against the irrigation district, and all persons interested in the district.

Modesto Irrigation Dist. v. *Tregea*, 88 Cal. 334.

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

The board of directors of the Madera Irrigation District, on the 25th of May, 1889, filed in the Superior Court of the County of Fresno, in pursuance of the Act of March 16, 1889, (Stat. 1889, p. 212,) a petition for the confirmation by that court of their proceedings for the issue and sale of certain bonds of said district, amounting to $850,000. In their petition they alleged that "said Madera Irrigation District was duly organized under the laws of the State of California, and especially under the provisions of the Act approved March 7, 1887," (Stat. 1887, p. 29;) and set forth the various steps taken by them in reference to the issue and sale of the bonds, and prayed "that the proceedings aforesaid for the issue and sale of the bonds of said District may be examined, approved, and confirmed by said court, and for all and any legal and equitable relief which may be provided by law, and which the court shall deem meet." Notice was thereupon given by order of the court that the hearing of said petition would be had July 5, 1889; and prior to that day the appellants herein filed answers thereto, showing that they were owners of lands within the district to be affected by said bonds, and specifically denying the allegations in said petition. At the hearing upon the issues presented by the answers of the appellants the court rendered its judgment in favor of the petitioners, and approved and confirmed "the legality and the validity of each and all of the proceedings for the organization of said Madera Irrigation District," and further adjudged and decreed that "each and all of the proceedings taken to secure and provide for and authorizing the issue and sale of bonds of said District in the sum of $850,000, and affecting the legality and validity of said bonds, up to and including the resolution and orders of the board of directors of said District, made March 13, 1889, authorizing the issuance and sale of said bonds, be, and the same are hereby, approved and confirmed." From this judgment an appeal has been taken directly upon the judgment roll, bringing here the proceedings at the trial of the issues by a bill of exceptions.

In presenting their appeal, the appellants have contended that the Act of March 7, 1887, under which the proceedings for the organization of the district were had, is unconstitutional, for the reason that it is in its nature beyond the power of the Legislature to enact, and also by reason of the provisions therein contained for the organization of the district, and the mode provided for assessments upon the lands in said district, with which to meet the bonds authorized by the Act. It is also contended by them that, at the hearing of the proceedings in the court below, the petitioners did not establish by competent evidence that there had been such compliance with the requirements of the Act as would constitute a district, or give any authority to provide for the issuance of the bonds in question, and that the evidence upon which the court made its findings was improperly admitted and considered by it. The constitutionality of the Act in question was passed upon by this court and affirmed in the case of *Turlock Irrigation Dist.* v. *Williams*, 76 Cal. 360, and also in the case of *Central Irrigation Dist.* v. *De Lappe*, 79 Cal. 351; but, inasmuch as counsel have made elaborate arguments herein in review of the conclusion reached in those cases, we have again examined the question in the light of these arguments, and in affirming those decisions we present the reasons upon which we again hold the Act to be constitutional more at length than was presented in the former opinions.

1. That the Legislature is vested with the whole of the legislative power of the State, and that it has authority to deal with any subject within the scope of civil government, except in so far as it is restrained by the provisions of the Constitution, and that it is the sole tribunal to determine as well the expediency as the details of all legislation within its power, are principles so familiar as hardly to need mention. The declaration in article 4, § 1, of the Constitution, "The legislative power of this State shall be vested in a senate and assembly, which shall be designated the 'Legislature of the State of California,'" comprehends the exercise of all the sovereign authority of the State in matters which are properly the subject of legislation; and it is incumbent upon anyone who will challenge an Act of the Legislature as being invalid to show either that such Act is without the province of legislation, or that the particular subject-matter of that Act has been by the Constitution either by express provision or by necessary implication, withdrawn by the people from the consideration of the Legislature. The presumption which attends every Act of the Legislature is that it is within its power, and he who would except it from the power must point out the particular provision of the Constitution by which the exception is made, or demonstrate that it is palpably excluded from any consideration whatever by that body.

In providing for the welfare of the State and its several parts, the Legislature may pass laws affecting the people of the entire State, or, when not restrained by constitutional provisions, affecting only limited portions of the State. It may make special laws *relating only to special districts, or it may* legislate directly upon local districts, or it may intrust such legislation to subordinate bodies of a public character. It may create municipal organizations or agencies within the several counties, or it may avail itself of *the county or other municipal organizations* for the purposes of such legislation, or it may create new districts embracing more than one county, or parts of several counties, and may delegate to such organizations a part of its legislative power to be exercised *within the boundaries of said organized districts*, and may vest them with certain powers of local legislation, in respect to which the parties interested may be supposed more competent to judge of their needs than the central authority. "The members of the two houses are the constitutional agents of the public will in every district or locality of the State, and they may therefore so arrange the powers to be given and executed therein as convenience, the efficiency of administration, and the public good may seem to require, by committing some functions to local jurisdictions already established, or by establishing local jurisdictions for that express purpose." *People* v. *Salomon*, 51 Ill. 50.

"If from exceptional causes the public good requires that legislation, either permanent or temporary, be directed towards any particular locality, whether consisting of one county or several counties, it is within the discretion of the Legislature to apply such legislation as in its judgment the exigency of the case may require, and it is the sole judge of the existence of such causes. The representatives of the whole people, convened in the two branches of the Legislature, are, subject to the exceptions which have been mentioned, the organs of the public will in every district or locality of the State. It follows that it falls to the Legislature to arrange and distribute the administrative functions, committing such portions as it may deem suitable to local jurisdictions, and retaining other portions to be exercised by officers appointed by the central power, and changing the arrangement from time to time, as convenience, the efficacy of administration, and the public good may seem to require." *People* v. *Draper*, 15 N. Y. 544.

In providing for the public welfare, or in enacting laws which in the judgment of the Legislature may be expedient or necessary, that body must determine whether or not the measure proposed is for some public purpose. We do not mean by this that the declaration of the Legislature that an Act proposed by it will be for the public good will of necessity preclude an investigation therein, or that such declaration will be conclusive when the Act itself is palpably otherwise. *Consolidated C. Co.* v. *Central Pac. R. Co.* 51 Cal. 269. Acts may be passed by that body which will, by their very terms, or the nature of their provisions, show that their purpose is private, rather than public. Such are the acts that were involved in the cases of *Citizens Sav. & L. Asso.* v. *Topeka*, 87 U. S. 20 Wall. 664, 22 L. ed. 461; *Allen* v. *Jay*, 60 Me. 124, 11 Am. Rep. 185; *Lowell* v.

Boston, 111 Mass. 454, 15 Am. Rep. 39; *State* v. *Osawkee Twp.* 14 Kan. 419, 19 Am. Rep. 99; *People* v. *Parks*, 58 Cal. 624. But if the subject matter of the legislation be of such a nature that there is any doubt of its character, or if by any possibility the legislation may be for the welfare of the public, the will of the Legislature must prevail over the doubts of the court. *Stockton & V. R. Co.* v. *Stockton*, 41 Cal. 147. It may be more difficult to define in advance the line of separation between a purpose which is private and one which is public than to determine whether in the individual case the Act is for a public or a private purpose, and as was said by *Mr. Justice* Miller in *Davidson* v. *New Orleans*, 96 U. S. 104, 24 L. ed. 619, it is wiser to proceed "by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require." Whenever it is apparent from the scope of the Act that its object is for the benefit of the public, and that the means by which the benefit is to be attained are of a public character, the Act will be upheld, even though incidental advantages may accrue to individuals beyond those enjoyed by the general public. We have recently held that an appropriation by the Legislature of $300,000 for the World's Fair Columbian Exposition at Chicago (*Daggett* v. *Colgan* (Cal.) *ante*, 474,) is to be sustained as a legitimate appropriation of the public moneys of the State, upon the ground that it is one of the objects of government to promote the public welfare of the State, and to provide for the material prosperity of its people, and that it is for the Legislature to determine the manner and the extent to which it will exercise this function of government, and that its determination upon that point is limited by its own discretion and beyond the interference of courts. The same rules of construction must be applied to the exercise of legislative authority in authorizing an expenditure for a local improvement. Such authorization is a legislative declaration that the expenditure is for a public purpose, and for the welfare of the public, and its action is not to be disregarded by the courts upon an assumption by them that such legislation is unwise, or that it may be injurious to some of the individuals who are affected by it. In determining whether any particular measure is for the public advantage it is not necessary to show that the entire body of the State is directly affected thereby, but it is sufficient that that portion of the State within the district provided for by the Act shall be benefited thereby. The State is made up of its parts, and those parts have such a reciprocal influence upon each other that any advantage which accrues to one of them is felt more or less by all of the others. A Legislature that should refrain from all legislation that did not equally affect all parts of the State would signally fail in providing for the welfare of the public. In a State as diversified in character as is California, it is impossible that the same legislation should be applicable to each of its parts. Different provisions are as essential for those portions whose physical characteristics are different as are needed in the provisions which are made for the government of town and country. Those portions of the State which are subject to overflow, and those which require drainage, as well as those which for the purpose of development require irrigation, fall equally within the purview of the Legislature, and its authority to legislate for the benefit of the entire State, or for the individual district. The power of the Legislature to adapt its laws to the peculiar wants of each of these districts rests upon the same principle, viz., that it is acting for the public good in its capacity as the representative of the entire State. Under this principle levee districts have been organized directly by the Legislature itself, and their organization has been authorized by the Legislature through the board of supervisors of the county in which the district is situated. Stat. 1867-68, p. 316. Such legislation was upheld in *Dean* v. *Davis*, 51 Cal. 406. Under the same principle reclamation districts have been organized and their creation upheld as a legitimate exercise of legislative power. In passing upon this question in *Hagar* v. *Yolo County Suprs.*, 47 Cal. 233, the supreme court said: "The power of the Legislature to compel local improvements which in its judgment will promote the health of the people and advance the public good is unquestionable. In the exercise of this power it may abate nuisances, construct and repair highways, open canals for irrigating arid districts, and perform many other similar acts for the public good, and all at the expense of those who are to be chiefly and more immediately benefited by the improvements;" and, in answer to the suggestion that such was merely a local improvement, the court said: "But we need not rest our decision upon the narrow ground that this is strictly a local improvement. On the contrary, the reclamation of the vast bodies of swamp and overflowed land in this State may justly be regarded as a public improvement of great magnitude and of the utmost importance to the community. If left wholly to individual enterprise, it probably would never be accomplished, and in inaugurating so great a work the Legislature has pursued substantially the same system adopted in other states for the reclamation of similar lands, to wit, by dividing the territory to be reclaimed into districts, and assessing the cost of the improvement on the lands to be benefited;" and refer in support of the opinion to the acts of different states in which similar improvements had been authorized.

The reasons given in that case are fully as potent in support of the authority exercised in the matter of an irrigation district; and, notwithstanding it is urged by counsel for appellants that the authority for reclaiming overflowed lands is to be upheld only as a sanitary measure, it will be seen that that is not the only ground upon which the court based its decision. Nor do we think that it rests upon that ground alone. In our opinion, a more liberal construction should be given to the authority under which such a district is established. Certainly these grounds are not the basis of the authority

for the creation of a levee district; that rests, not upon any sanitary ground but upon the ground of protection to the parties who would be affected by the overflow. *Williams* v. *Cammack*, 27 Miss. 222, 61 Am. Dec. 508; *Wallace* v. *Shelton*, 14 La. Ann. 503. Upon this subject Mr. Cooley says: "But where any considerable tract of land owned by different persons is in a condition precluding cultivation by reason of excessive moisture which drains would relieve, it may well be said that the public have such an interest in the improvement and the consequent advancement of the general interest of the locality as will justify the levy of assessments upon the owners for drainage purposes. Such a case would seem to stand upon the same solid ground with assessments for levee purposes, which have for their object to protect lands from falling into a like condition of uselessness." Cooley, Taxn. p. 617.

We have not been cited to the statute of any other State which provides for irrigating arid lands, or to any authority in which the power of the Legislature over the subject is discussed, but we have no hesitation in saying that the principles upon which the decisions to which we have referred were made are applicable to sustain the legislative authority in making provision for such irrigation. Whether the reclamation of the land be from excessive moisture to a condition suitable for cultivation, or from excessive aridity to the same condition, the right of the Legislature to authorize such reclamation must be upheld upon the same principle, viz., the welfare of the public, and particularly of that portion of the public within the district affected by the means adopted for such reclamation. Whatever tends to an increased prosperity of one portion of the State, or to promote its material development is for the advantage of the entire State; and the right of the Legislature to make provision for developing the productive capacity of the State, or for increasing facilities for the cultivation of its soil according to the requirements of the different portions thereof, is upheld by its power to act for the benefit of the people in affording them the right of "acquiring, possessing, and protecting the property" which is guaranteed to them by the Constitution. The local improvement contemplated by such legislation is for the benefit and general welfare of all persons interested in the lands within the district, and is a local public improvement. This principle is not contravened by the fact that it may even operate injuriously upon some of the individuals or proprietors of land within the district, or by the fact that there may be some who for personal motives may wish to resist the improvement. Such result is only a sacrifice which the individual makes to the general good in compensation for the advantages enjoyed by virtue of the social compact. All laws of this character are upheld upon the same principle as is the creation of a district for the purpose of any other local improvement, such as the opening of a highway, or of a street, or of a public park. The Legislature, to which has been confided the matter, has determined that it will be for the public good that such street or park be opened, and it has imposed the burden of such opening upon the property within a limited district. In each of such instances the land taxed for the improvement may not be the only land that will be benefited. Although land adjacent to the district may be incidentally benefited, that is no reason for taxing such land, nor is it any objection to the proceeding that some of the property within the district will not receive any benefit, or that the improvement will more specifically benefit those who have procured its creation. "It has never been deemed essential that the entire community, or any considerable portion of it, should directly enjoy or participate in an improvement or enterprise, in order to constitute a public use, within the meaning of these words as used in the Constitution. Such an interpretation would greatly narrow and cripple the authority of the Legislature, so as to deprive it of the power of exerting a material and beneficial influence on the welfare and prosperity of the State. In a broad and comprehensive view, such as has been heretofore taken of the construction of this clause of the Declaration of Rights, everything which tends to enlarge the resources, increase the industrial energies, and promote the productive power of any considerable number of the inhabitants of a section of the State, or which leads to the growth of towns and the creation of new sources for the employment of private capital and labor, indirectly contributes to the general welfare and to the prosperity of the whole community." *Talbot* v. *Hudson*, 16 Gray, 425.

The means by which the Legislature may exercise this power are left to its own discretion, except as it may be limited by the Constitution. If in the exercise of its care for the public welfare, it finds that a specific district of the State needs legislation that is inapplicable to other parts of the State, it may, in the absence of constitutional restrictions, legislate directly for that district, or, if it be the case that similar legislation be required for other portions of the State, it may provide for adapting such legislation to those portions at the will of the people in such districts, as was done in the reclamation and levee laws already referred to. It may, too, by general laws authorize the inhabitants of any district, under such restrictions, and with such preliminary steps as it may deem proper, to organize themselves into a public corporation for the purpose of exercising those governmental duties, upon the same principle as it authorizes the incorporation of any municipal corporation under general laws. The Constitution of California has been framed with the principle of investing separate subdivisions of the State with local government, and especially authorizes the Legislature to confer the power of local legislation upon such subdivisions within the State as may be organized under its authority. The Legislature is itself forbidden to interfere in any manner, except by general laws, with the power of local legislation intrusted to such organizations,

nor can it delegate to any but public corporations the power to perform any municipal functions whatever, or vest in any but the corporate authority of a municipal corporation the power to assess and collect taxes for any municipal purpose. But, although the Legislature is prevented from passing any special or local law which shall be applicable to only a particular portion or district of the State its power of legislation for the public good in that portion of the State has not been destroyed. It still retains the full power of legislation confered upon it in the Constitution, but is required to exercise such power in the mode prescribed in that instrument. It may pass general laws which from their nature will be capable of enforcement in only particular portions of the State; or it may by other general laws authorize the organization of municipal corporations, which, from the nature of the functions intrusted to them, can find occasion for organization only in certain portions of the State, and it may by such general laws provide for the organization of such and as many species of municipal corporations as in its judgment are demanded by the welfare of the State, and the "protection, security, and benefit of the people," for which government is instituted, and which has been by the people confided to it. Const. art. 1, § 2. The provision in article 11, § 6, of the Constitution, "Corporations for municipal purposes shall not be created by special laws," does not imply that the Legislature must by any general law provide a plan in which shall be prescribed the mode under which all municipal corporations must be organized, and the powers that they can exercise. The provision in article 12, § 1, that private corporations "may be formed under general laws, but shall not be created by special act," although more explicit, and under the declaration of the Constitution itself, (art. 1, § 22,) "mandatory" rather than permissive, requiring that they must be formed under general laws, has never been construed as requiring that all private corporations must be formed under the same general law, or limited to the exercise of the same powers. On the contrary, the form of organization, as well as the powers to be exercised, have been by legislation adapted to the character of the corporation to be organized. All corporations of the same class are required to be organized in the same manner, but the nature of the organization does not permit, nor does the Constitution require, that corporations of different classes shall be organized in the same manner, or provided with the same powers. Hence the provisions that have been made by the Legislature for the organization and powers of railroad, insurance, religious, mining, and other business corporations have been adapted to their respective character and needs. With greater propriety has it been left to the Legislature to provide the mode of organization and the powers to be exercised by different species of municipal corporations. Such corporations are but the agents or representatives of the State in the particular locality in which they exist. They are organized for the purpose of carrying out the purposes of the Legislature in its desire to provide for the general welfare of the State and in the accomplishment of which legislative convenience or constitutional requirements have made them essential. Although in this State the Legislature is required to provide such agencies under general laws, it is authorized, under its general power of legislation, to invest such corporations, when created, with the same powers which without such restriction it could itself have exercised; and in providing for such organizations it need confer upon them only such powers as in its judgment are proper to be exercised by them in the discharge of the particular functions of government which may be conferred upon them. Being the representatives of the Legislature in the various localities of the State, the requirements for organization, as well as the powers to be exercised, vary with the character of the purpose for which they may be created. Hence the general laws which the Legislature may enact for the organization of public corporations may be as numerous as the objects for which such corporations may be created. For each of these objects the law is the same but there would be a manifest impropriety in requiring that the organization of a levee district or an irrigation district should be conducted in the same manner as the organization of a corporation for the management of a public park, or the control of the school department. Whether the districts to which such general laws are applicable, or in which the people thereof may avail themselves of the privilege conferred, be many or few, is immaterial. Even if there be but a single district to which the law is applicable at the time of its enactment, the Legislature would be justified under its legislative power to pass general laws in making such provision for that district. Whenever a special district of the State requires special legislation therefor, it is competent for the Legislature by general law to authorize the organization of such district into a public corporation, with such powers of government as it may choose to confer upon it. It is not necessary that such public corporation should be vested with all governmental powers, but the Legislature may clothe it with such as in its judgment are proper to be exercised within and for the benefit of such district. Being created for the purpose of discharging only one public purpose, it is not requisite that it have power not necessary therefor, or which would be appropriate to a corporation organized for some other purpose. Neither is it requisite that such corporation should have legislative or judicial powers conferred upon it. It may be organized for the mere purpose of exercising executive and administrative functions, with the added power of making such prudential rules and regulations as may be necessary for the exercise of the particular functions intrusted to its charge. The powers committed to a public corporation organized for the administration of a public park, or for the government of a levee district, or for

the control of the police department, need be only such as are peculiarly appropriate to such organizations.

It is contended that the Act is unconstitutional for the reason that it is a delegation of the legislative power to create a corporation. If by this is meant that only the Legislature can create such corporation, the answer is that the Constitution prohibits such action. If it is meant that because the corporation is not "created" until the voters of the district have accepted the terms of the Act the answer is that such proceeding is in direct accord with the principles of the Constitution. Having the power to create municipal corporations, but being prohibited from creating them by special laws, the only mode in which such corporations could be created under a general law would be by some act on the part of the district or community seeking incorporation, indicative of its determination to accept its terms. As the Constitution has not limited or prescribed the character of such general law, its character and details are within the discretionary power of the Legislature. We know of no more appropriate mode of such indication than the affirmative vote of those who are to be affected by the acceptance of the terms of the Act. The municipal corporations which may be thus created are not limited to cities and towns. The Constitution makes provision in various places for municipal corporations other than cities and towns. Article 11, §§ 9, 10, 12, 16. In each of these sections provision is made with reference to the government or officers of "county, city, town, or other public or municipal corporation;" thus clearly indicating that there may be municipal corporations other than those of a town or city, and, consequently, that the provisions with reference to the incorporation of cities and towns found in section 6 of the same article are not controlling in the organization of other municipal corporations, and that while the Constitution carefully provides for the "incorporation, organization and classification" of cities and towns, it makes no similar provision for other municipal corporations but very properly leaves such action to the discretion of the Legislature. Inasmuch as there is no restriction upon the power of the Legislature to authorize the formation of such corporations for any public purpose whatever, and as when organized they are but mere agencies of the state in local government, without any powers except such as the Legislature may confer upon them, and are at all times subject to a revocation of such power. It was evidently the purpose of the framers of the Constitution to leave in the hands of the Legislature full discretion in reference to their organization.

In the present case the Legislature has chosen to authorize the creation of a public corporation, in the manner and with the forms specified in the Act under discussion. For this purpose it has provided that a petition of fifty freeholders, or a majority of the freeholders owning lands within a proposed district susceptible of one mode of irrigation, shall be presented to the board of supervisors of the county within which such lands are situate; and that the board of supervisors shall, upon the hearing of such petition, after notice thereof, determine whether or not it will take steps to organize an irrigation district; and that upon such determination an election shall be ordered, at which, if two thirds of the electors within the district shall vote in favor of such organization, the district shall thereupon be organized, and its management confided to a board of directors chosen by the electors of that district. It is objected to this that it is placing in the hands of those not interested the power of imposing a burden upon the owners of the land, who may be a small minority of the electors within that district, or who may even be nonresidents of the district. This, however, is a matter which was addressed purely to the discretion of the Legislature. Whether such a petition should be made by the owners of a fixed proportion of the land, as was required in the reclamation law, or whether there should be any qualification to the petitioners, or whether there should be any limit to the expenses which they were authorized to incur for the purposes of the improvement, are questions which were solely for the consideration of the Legislature. It is not for this department of the government to question the policy or the prudence of a co-ordinate branch. If those who are affected by its proceedings feel that it has not given them sufficient protection or placed sufficient safe guards around the institution of the corporation, they must seek redress from that body. We can only act upon the law as it has been enacted. It must be observed, however, that this petition has no binding operation, but is merely the initiatory step which gives to the board of supervisors a jurisdiction to act upon the expediency or policy of authorizing the creation of the district. That body is the representative of the county, and has been chosen by its electors for the express purpose of legislation upon local subjects, and may naturally be supposed to have the interests of the entire county, as well as of each of its parts, in charge, and to be acquainted with its needs and requirements. The Legislature has not, however, intrusted that body with the final determination of the question, but has authorized it to submit the question to a vote of the electors of the district, and it is only when these electors have determined by a vote of two thirds of their number in favor thereof that the district can be created as a political body. The objection that this vote may be carried by a majority of those who have no interest in the lands affected thereby is but an incident, and not of the essence of the matter. It is no more than exists in every popular vote which involves the creation of a municipal debt or the adoption of a municipal organization. The fact that the owners of the lands are nonresidents within the district, and not allowed a voice in the proceedings, is of the same character. Property qualification for voting, either in amount or character, is expressly forbidden by article 1, § 24, of the Constitution, which declares: "No property quali-

fication shall ever be required for any person to vote or hold office;" and, however much nonresidents may be affected by the acts and vote of the community, only those who are inhabitants of the district can, by the Constitution, be permitted to vote at any election. Art. 2, § 1.

That an irrigation district organized under the Act in question becomes a public corporation, is evident from an examination of the mode of its organization, the purpose for which it is organized, and the powers conferred upon it. It can be organized only at the instance of the board of supervisors of the county,—the legislative body of one of the constitutional subdivisions of the State; its organization can be affected only upon the vote of the qualified electors within its boundaries; its officers are chosen under the sanction and with the formalities required at all public elections in th State,—the officers of such election being required to act under the sanction of an oath, and being authorized to administer oaths when required for the purpose of conducting the election; and the officers when elected being required to execute official bonds to the State of California approved by a judge of the superior court. The district officers thus become public officers of the State. When organized, the district can acquire, either by purchase or condemnation, all property necessary for the construction of its works, and may construct thereon canals, and other irrigation improvements; and all the property so acquired is to be held by the district in trust, and is dedicated for the use and purposes set forth in the Act, and is declared to be a public use, subject to the regulation and control of the State. For the purpose of meeting the cost of acquiring this property, the district is authorized, upon the vote of a majority of its electors, to issue its bonds; and these bonds, and the interest thereon, are to be paid by revenues derived under the power of taxation, and for which all the real property in the district is to be assessed. Under this power of taxation, one of the highest attributes of sovereignty, the title of the delinquent owner to the real estate assessed may be devested by sale, and power is conferred upon the board of directors to establish equitable by-laws, rules, and regulations for the distribution and use of water among the owners of said lands, and generally to perform all such acts as shall be necessary to fully carry out the purpose of the act. Here are found the essential elements of a public corporation, none of which pertain to a private corporation. The property held by the corporation is in trust for the public, and subject to the control of the State. Its officers are public officers chosen by the electors of the district, and invested with public duties. Its object is for the good of the public and to promote the prosperity and welfare of the public. "Where a corporation is composed exclusively of officers of the government, having no personal interest in it, or with its concerns, and only acting as organs of the State in effecting a great public improvement it is a public corporation." Ang. & A. Corp. § 32. "A municipal corporation proper is created mainly for the interest, advantage, and convenience of the locality of its people. The primary idea is an agency to regulate and administer the interior concerns of the locality in matters peculiar to the place incorporated, and not common to the State or people at large." 15 Am. & Eng. Encyclop. Law, p. 954. "Public corporations are such as are created for the discharge of public duties in the administration of civil government." Lawson, Rights, Rem. & Pr. 332.

The constitutionality of the Act in question is further assailed upon the ground that it makes no provision for a hearing from the owners of the land prior to the organization of the district. But the steps provided for the organization of the district are only for the creation of a public corporation, to be invested with certain political duties which it is to exercise in behalf of the State. *Dean* v. *Davis*, 51 Cal. 406. It has never been held that the inhabitants of a district are entitled to notice and hearing upon a proposition to submit such question to a popular vote. In the absence of constitutional restriction, it would be competent for the Legislature to create such public corporation, even against the will of the inhabitants. It has as much power to create the district in accordance with the will of a majority of such inhabitants. It must be observed that such proceeding does not affect the property of anyone within the district, and that he is not by virtue thereof deprived of any property. Such result does not arise until after delinquency on his part in the payment of an assessment that may be levied upon his property, and before that time he has opportunity to be heard as to the correctness of the valuation which is placed upon his property, and made the basis of his assessment. He does not, it is true, have any opportunity to be heard, otherwise than by his vote, in determining the amount of bonds to be issued, or the rate of assessment with which they are to be paid; but in this particular he is in the same condition as is the inhabitant of any municipal organization which incurs a bonded indebtedness or levies a tax for its payment. His property is not taken from him without due process of law, if he is allowed a hearing at any time before the lien of the assessment thereon becomes final. *People* v. *Smith*, 21 N. Y. 595; *Gilmore* v. *Hentig*, 33 Kan. 170; *Hagar* v. *Reclamation Dist.* 111 U. S. 701, 28 L. ed. 569; *Davies* v. *Los Angeles*, 86 Cal. 46.

It is also objected that the mode provided for the payment of the bonds is unconstitutional, in that it provides for an assessment upon the real property within the district according to its value, and not according to the benefit which each particular parcel of land may derive from the improvement. The power of the Legislature in matters of taxation is unlimited except as restricted by constitutional provisions. This is one of the attributes of sovereignty which the people have placed in its hands; and they have intrusted its exercise to its discretion, either in the manner or to the extent to which it is to be applied. All taxation has its source in

the necessities of organized society, and is limited by such necessity and can be exercised only by some demand for the public use or welfare. And whether the tax be by direct imposition for revenue or by assessment for a local improvement, it is based upon the theory that it is in return for the benefit received by the person who pays the tax, or by the property which is assessed. For the purpose of apportioning this benefit, the Legislature may determine in advance what property will be benefited, by designating the district within which it is to be collected, as well as the property upon which it is to be imposed, or it may appoint a commission or delegate to a subordinate agency the power to ascertain the extent of this benefit. It may itself declare that the entire State is benefited, and authorize the burden to be borne by a public tax, or it may declare that all or a portion of the property within a limited region is benefited, either according to its value or in proportion to its actual benefit, to be specifically ascertained by actual determination of officers appointed therefor. Upon the power of the Legislature over the subject of taxation, as well as the modes in which and the objects upon which it may be exercised, we know of nothing that has been written in any opinion since that of *Judge* Ruggles in *People* v. *Brooklyn*, 4 N. Y. 419, which is not either an amplification of the views therein expressed, or an adaptation of them to the particular subject under discussion. In the exhaustive opinion of *Mr. Justice* Sawyer in *Emery* v. *San Francisco Gas Co.*, 28 Cal. 345, the principles declared in that opinion were applied to the case then before the court wherein this power of taxation was shown to be the foundation for upholding the right of assessment in a manner different from the *ad valorem* principle. The controversy upon this subject has almost invariably been against the "front-foot" rule, and in favor of the *ad valorem* principle; and in nearly every State, unless it be New Jersey, the principle has been maintained that it is within the power of the Legislature to adopt whichever rule it may select. In *Burnett* v. *Sacramento*, 12 Cal. 76, the charter of Sacramento provided that the expense of a local improvement should be assessed upon the adjacent property according to its value, and upon this point the supreme court, speaking through *Judge* Field, said: "The law in question avoids the injustice of general taxation for local purposes, and lays the burden upon the recipients of the benefit. It apportions the tax according to the assessed cash value of the adjacent property which is as near an approximation to an equitable rule as can well be established. No rule could be adopted which would work absolute equality. An approximation to it is all that can be attained. The power of apportionment, like the power of taxation, is exclusively in the Legislature. The Constitution contains no inhibition to the tax, and prescribes no rule of apportionment. Security against the abuse of the power rests in the wisdom and justice of the members of the Legislature, and they are responsible to their constituents." Assessments for local improvements according to the value of the property assessed have been upheld in *Dorner* v. *Boston*, 7 Cush. 277; *Snow* v. *Fitchburg*, 136 Mass. 183; *Gillmore* v. *Hontig*, 33 Kan. 174; *Strawbridge* v. *Portland*, 8 Or. 82; *Creighton* v. *Scott*, 14 Ohio St. 438; *Lockwood* v. *St. Louis*, 24 Mo. 20.

It is, however, for the Legislature to determine how the apportionment shall be made, and, while it is held that an apportionment of the expenses for a local improvement is to be made according to the benefits received by the property assessed, yet the power to make such apportionment rests upon the general power of taxation, and the apportionment itself does not depend upon the fact of local benefit in any other sense than that all taxes are supposed to be based upon the benefit received by the tax-payer. As was said by *Mr. Justice* Temple, in *Lent* v. *Tillson*, 72 Cal. 428: "The main practical difference between assessment for a local improvement and general taxation seems to be that in general taxation it is difficult and generally impossible for the court to say that the purpose of the tax is not a public purpose, or that no benefit will result to the tax-payer, while in local assessments it is more often easy to see that the improvement will not be a special benefit. Still, the benefit is not the source of the power. That is inherent in the government, and is only limited by express or implied limitations found in the Constitution, or by its own nature and purposes, and within these limits the Legislature is the sole judge of when and to what extent the power shall be used;" and again: "The power being in the Legislature, the limitations upon it must be found in the Constitution, either in express provisions or by implication, and there exists the same presumption that the law is within legislative power that applies to any other statute; that is, the law will not be declared unconstitutional unless it plainly appears to be so." 72 Cal. 430. *Mr.* Cooley says, in his treatise on Taxation (page 622): "The power to determine when a special assessment shall be made, and on what basis it shall be apportioned, is wisely confined to the Legislature and could not, without the introduction of some new principle in representative government, be placed elsewhere." And in *Hagar* v. *Yolo County*, *Supvrs.*, *supra*, the court said: "It is equally clear that those clauses which provide that taxation shall be equal and uniform throughout the State and which prescribe the mode of assessment, and the persons by whom it shall be made, and that all property shall be taxed, have no application to assessments levied for local improvements." In accordance with this principle, various modes of apportionment for the expenses of local improvements have been upheld. We have already seen that they have been upheld when made in accordance with the value of the property, as well as when made in proportion to the frontage of the lots. The Legislature has also itself designated the district which will be benefited by the improvement, as was done in the Dupont-Street Improvement, (Stat.

1875-76, p. 433) and as has been provided in the general Act for street improvements, where the entire frontage of the block is the district upon which the assessment is to be made. *Diggins* v. *Brown*, 76 Cal. 318. Assessments have also been upheld when made by commissioners appointed to make specific assessments upon the several parcels of land, (*Pacific Bridge Co.* v. *Kirkham*, 64 Cal. 519), or when made according to the area of the land affected by the improvement (*Keese* v. *Denver*, 10 Colo 123). The Legislature has itself levied a specific tax upon each acre of land within a district created by itself, (*Egyptian Levee Co.* v. *Hardin*, 27 Mo. 495; *Williams* v. *Cammack*, 27 Miss. 209, 61 Am. Dec. 508; *Alcorn* v. *Hamer*, 38 Miss. 652,) and has authorized such tax to be levied by the district, (*Wallace* v. *Shelton*, 14 La. Ann. 503;) and has authorized a fixed uniform rate for each sewer upon the estimated cost of all the sewers within the district (*Leominster* v. *Conant*, 193 Mass. 384).

It is not necessary to show that property within the district may be actually benefited by the local improvement, and, even if it positively appear that no benefit is received, such property is not thereby exempted from bearing its portion of the assessment, nor is the Act unconstitutional because it provides that such property shall be assessed. Property that is exempt from taxation has always been held subject to the burdens of assessment for local improvements, and property within a district that is not susceptible of receiving any immediate benefit from the improvement is nevertheless so indirectly benefited thereby that it must bear a portion of the burden. If within the limits of a levee district a parcel of land should be so situated as not to require the protection of the levee, that would be no reason for excluding it from its share of the expense, or, if within the limits of a drainage district there should chance to be found a cliff, that would be no reason for exempting it from assessment. The objection that the Legislature has no authority to confer upon the supervisors of a county the right to create a corporation whose district shall embrace a portion of the territory of another county does not arise in the present case.

It is not contended that any portion of the Madera Irrigation District lies outside of the County of Fresno.

2. One of the objections to the sufficiency of the proceedings taken by the supervisors in authorizing a vote by the electors for the purpose of determining whether the district should be organized is that the bond which accompanied the petition was so defective as to deprive the board of jurisdiction to authorize such election.

If it be conceded that the presentation to the board of a bond with the petition is a jurisdictional prerequisite to their consideration of the petition, we do not think that such element of jurisdiction was wanting in the present case. The bond which was presented, although informal, was not invalid, and was of binding obligation upon whose who had signed it. In such a case the determination of its sufficiency by the board of supervisors was as conclusive as their determination respecting the pecuniary responsibility of its signers, or the amount for which the bond should be given.

3. Other objections to the constitutionality of the Act, and the sufficiency of the proceedings in the organization of the District, have been presented by the appellants, but we think that they are covered by the views presented in the foregoing opinion. We do not think that the boundaries of the District, or of the election precincts, are so imperfectly described as to prevent the supervisors from acquiring jurisdiction for authorizing the organization of the District. The provision in the statute that the petition shall particularly set forth and describe the boundaries does not mean that they shall be set forth and described with more particularity than would be necessary in an Act of the Legislature creating a political district or a municipal corporation. If the course of a boundary is given, it is not necessary that such course shall have been actually surveyed upon the ground before the boundary can be said to be particularly described; and a reference to an official map, or to a landmark designated upon such map, is as definite as would be a reference to the land-mark itself. We cannot, from their description, say that the boundaries given in the petition are so indefinite that the District cannot be definitely located, or that they fail to embrace a distinct and definite territory. As illustrations of similar descriptions in Acts of the Legislature, we refer to the Act incorporating the city of Sacramento, (Stat. 1850, p. 70,) and the Act incorporating the city and county of San Francisco, (Stat. 1856, p. 146;) also the Act setting forth the boundaries of the county of San Benito, (Stat. 1873-74, p. 95). The case of *Crosby* v. *Dowd*, 61 Cal. 557, referred to by appellants, was expressly overruled in *De Sepulveda* v. *Baugh*, 74 Cal. 468. The boundaries of a municipal corporation are not construed with any more strictness than is required in the case of a private grant. This subject was fully considered in *Central Irrig. Dist.* v. *De Lappe*, *supra*.

4. By the Act of March 16, 1889, (Stat. 1889, p. 212,) under which these proceedings were instituted, it is provided in section 5 that, "upon the hearing of such special proceedings, the court shall have power and jurisdiction to examine and determine the legality and validity of, and approve and confirm each and all of, the proceedings for the organization of said district, under the provisions of said Act, from and including the petition for the organization of the district, and all other proceedings which may affect the legality or validity of said bonds, and the order for the sale and the sale thereof." It is also provided in section 2 that "the petition shall state the facts showing the proceedings had for the issue and sale of said bonds, and shall state generally that the irrigation district was duly organized, and that the first board of directors was duly elected, but the petition need not state the facts showing such organization, or the election of said first board of directors."

Section 4 of the Act provides: "The provisions of the Code of Civil Procedure respecting the answer to a verified complaint shall be applicable to an answer to said petition. . . . The rules of pleading and practice provided by the Code of Civil Procedure, which are not inconsistent with the provisions of this Act, are applicable to the special proceeding herein provided for." The petition in the present case states "that said Madera Irrigation District was duly organized under the laws of the State of California, and especially under the provisions" of the Act of March 7, 1887. The answers deny this allegation, and deny specifically that any of the steps required by the statute for the organization of the District were taken in reference thereto. In order that the court might determine the legality and validity of the proceedings, it was required by the Act in question to "examine" them. The Act provides that it "shall have power and jurisdiction to examine and determine the legality and validity of, and approve and confirm, each and all of the proceedings for the organization of said district;" and, unless it shall "examine" the proceedings, it would not have the power to "determine" their legality and validity. One step in the proceedings, and that which was the foundation of all others, and without which the whole superstructure of the corporation and its acts, culminating in the bonds sought to be validated, would have fallen, was that a petition should have been presented to the board of supervisors, signed by fifty or a majority of freeholders owning lands within the boundaries of the proposed district. It was necessary, therefore, for the petitioners herein to make proof to the court that such a petition had been presented to the board of supervisors. Instead, however, of making such proof, they introduced in evidence the record of the proceedings of the board of supervisors, which contained recitals that a petition had been presented to said board, and that, before hearing said petition, evidence to the satisfaction of the board was adduced by petitioners upon the question whether or not there were fifty petitioners whose genuine signatures appeared affixed to said petition, who were bona fide freeholders of lands within the proposed boundaries of said proposed irrigation district; whereupon the board, having announced that they are satisfied that there were fifty such freeholders, whose signatures appeared affixed to said petition, proceeded to hear said petition. The defendants objected to the introduction of this evidence upon the ground that no foundation had been laid therefor, and that it was irrelevant, immaterial, and incompetent to establish any issue before the court. The objections were overruled, and an exception taken by the defendants. The petitioners then offered in evidence a document purporting to be a petition, with the signatures of upwards of fifty names attached thereto. To the introduction of this document the defendants objected, upon the ground that its execution had not been shown, and that there was no evidence that the parties whose names appeared attached thereto were freeholders owning lands within the District. The court overruled the objection, to which the defendants excepted. In these rulings the court erred. There was no proof that the petition had been signed by either of the persons whose names were attached thereto, or that either of said persons was a freeholder, owning lands within the boundaries designated in the petition. Whether a petition had been presented to the board of supervisors of such a character as to give to that board jurisdiction to act in accordance with the provisions of the law in question was an issue before the court, to be determined by competent evidence. A declaration by the board of supervisors that such a petition had been presented, even though such declaration was spread upon their records, was not competent evidence in this proceeding, as it was only hearsay. No board or tribunal can obtain jurisdiction by its own recital that it has jurisdiction. It may be held that, when the question of such jurisdiction arises in some collateral proceeding, the act of the board in recognition of the sufficiency of the petition would be presumptive of such sufficiency, yet, when the very issue to be determined by the court is whether the petition was sufficient to give jurisdiction, such issue must be established by evidence as competent as that which is required to establish an issue in any other proceeding. In the absence of any statutory declaration respecting the character of the proof by which any fact may be established in a court of justice, it must be established in accordance with the common-law rules of evidence. It is sometimes provided by statute that in proceedings of this nature the act of the board of supervisors shall be prima facie evidence of the regularity of all proceedings prior to the making of the order, as was the case in *Damp* v. *Dane*, 29 Wis. 426; and also in *Re Kiernan*, 62 N. Y. 459. The effect of such provision is to throw the burden of proof upon those who would challenge the sufficiency of the petition. In all cases it is essential that there be proof of a sufficient petition, inasmuch as without it the board could acquire no jurisdiction to act, and its proceedings would be absolutely void. In the absence of such statutory provision, however, the burden of proving any affirmative allegation is upon him who makes it (Code Civ. Proc. § 1869,) and it must be established under the ordinary rules of evidence. The statute in the present case is silent with reference to the effect as evidence of the action of the board of supervisors upon the petition. We are not aware of any statute which gives to their action any effect as evidence, or which makes their records evidence of any fact other than the corporate act therein recorded. Their records can be competent evidence of only such matters as they are by statute authorized to make matters of record. The statute herein does not authorize the board of supervisors to enter upon their records the facts which give them jurisdiction to hear the petition, or any evidence of such facts; and the entry in their record of such facts, or of such evidence, does not give thereto any official sanction or right of recog-

nition more than any other memorandum that may have been made by their clerk. In *People* v. *Hagar*, 49 Cal. 232, when the question arose in a collateral proceeding, and it was contended that the certificate by the commissioners of a compliance by them with the requirements of the statute was evidence thereof, the court held otherwise, saying: "Whatever may have been the rule, if the statute had required the commissioners to state in their certificate to the assessment roll that they had jointly viewed and assessed the land, it is clear that the certificate can have no such conclusive effect, unless it was incumbent on the commissioners to certify that they acted jointly in viewing and assessing the land. But, as the statute does not require them to state that fact in the certificate, their having voluntarily done so was a superfluous act, and, instead of being conclusive of the fact that they acted jointly, was not even prima facie evidence of it."

It was held in *Dean* v. *Davis*, 51 Cal. 406, that in a collateral proceeding the regularity of the proceedings under which the district had been organized could not be questioned, under the rule that, being a *de facto* corporation, only the State could take advantage of any irregularity in its organization. In *Lent* v. *Tillson*, 72 Cal. 422, the court, however, questioned the power of the county court in that case to pass upon the questions upon which its jurisdiction depended, so as to conclude an inquiry, even upon a collateral attack; and in *Kahn* v. *San Francisco Board of Supvrs.*, 79 Cal. 400, the court said: "Nor should this jurisdiction be held to attach, whatever court may have ruled that the petition was signed by a majority, when in fact it was signed only by a minority, of the owners designated by the statute." The cases cited on behalf of the respondent in support of the action of the court below are all cases in which the question was presented in a collateral proceeding. In *Humboldt Co.* v. *Dinsmore*, 75 Cal. 604, it was admitted that the persons who signed the petition were freeholders. After jurisdiction has once been obtained, other proceedings subsequent thereto are movements within the jurisdiction, and can be questioned only by direct attack; but the fact of jurisdiction must be affirmatively shown whenever that is the issue to be determined. It is unnecessary, however, in the present case, to determine what would be the rule if the question should arise in a proceeding where the jurisdiction would be collaterally attacked. The question does not arise collaterally here. The corporation has itself come into court and challenged an examination into the regularity of its organization, and asks the court to examine "each and all of the proceedings for the organization of said district." Upon such a proceeding it becomes as necessary for it to establish such regularity, and to give evidence of each step therein, as fully as if its acts were under investigation upon a writ of review, or as if the State were by quo warranto questioning its right to exercise the franchise of a corporation. In such a case it is incumbent upon it to make proof of every step required by statute for assuming corporate powers. High, Extr. Legal Rem. 712, 716; *People* v. *Crawford*, 28 Mich. 88. Upon certiorari, though the inferior tribunal is required to certify only matters of record, yet, if the jurisdictional facts do not appear of record, it must certify "not only what is technically denominated the record, but such facts, or the evidence of them, as may be necessary to determine whatever question, as to the jurisdiction of the tribunal, may be involved." *Blair* v. *Hamilton*, 32 Cal. 52; *People* v. *San Francisco Fire Dept.* 14 Cal. 479; *Lowe* v. *Alexander*, 15 Cal. 300. The object of the Act in question, as was said in *Modesto Irrig. Dist.* v. *Tregea*, 88 Cal. 334, is for the purpose of affording to investors in the bonds the security of a judicial determination of their validity, and, in order that this may have the effect intended by the Legislature, it is not sufficient for the court to perform the mere perfunctory office of recording the determination of the board of supervisors that its proceedings in the organization of the district were regular. The court is not a *lit de justice* for the mere purpose of entering of record the rescripts of the board of supervisors, and giving to them the dignity of its own judgment. When the defendants controverted the allegations of the petition that the irrigation district was duly organized, it became necessary for the petitioners to establish at the trial the facts showing that it had been duly organized.

Section 456, Code Civil Proc., provides: "In pleading a judgment or other determination of a court, officer, or board it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading must establish on the trial the facts conferring jurisdiction." The provision in the Act in question that the rules of pleading and practice provided by the Code of Civil Procedure should be applicable to this proceeding made it incumbent upon the petitioner to establish the due organization of the district by evidence competent therefor. We are not aware of any decision in this State in which it has been held that the decision of an inferior board upon the question of its own jurisdiction was conclusive on a collateral attack, or even prima facie evidence of the fact in a direct proceeding. In *Litchfield* v. *Vernon*, 41 N. Y. 123, the Legislature had authorized a local improvement to be made "upon application of a majority of the owners of land in the district proposed to be assessed, and the sufficiency of an assessment therefor was afterwards contested in the courts. Upon the hearing in the court of appeals, that court used the following language: "This brings us to the only remaining question in the case, and that is whether there was any competent evidence authorizing a finding that a majority of the owners of land within the territory made subject to assessment made application to the common council, requesting them to make application to the supreme court for the appointment of three commissioners, as provided by the first section of

the Act of 1859. The Act itself is wholly silent as to how this essential fact shall be proved. The right of the common council to apply for the appointment of the commissioners lies at the foundation of the whole proceeding. Unless this right existed, all the proceedings in appointing the commissioners and subsequent thereto are void. This right depends upon the question whether a majority of the landowners petitioned the common council to proceed under the Act. In the absence of such petition the common council had no authority in the premises, and nothing could be done under the Act. The Act does not provide for the determination of this fact by the common council, nor by the special term upon the presentation of the petition for the appointment of the commissioners. The Act being silent as to what should be deemed proof of the fact that a majority of the landowners petitioned the common council, the plaintiff was bound to prove such fact by competent, common-law evidence. This could be done by proof showing who were the owners of the land at the time of the passage of the Act, and that a majority of such persons petitioned the common council, as required by the first section of the Act. Neither the application of the council to the court, nor the affidavit of the mayor accompanying such application, was evidence of this fact against the defendant. *Sharpe* v. *Speir*, 4 Hill, 76. There was no competent evidence of this fact given upon the trial, and the exception to the finding of this fact by the judge was well taken." In *Thorne* v. *West Chicago Park Comrs.*, 130 Ill. 594, the same question was presented. The statutes of Illinois provided that the board of park commissioners might take jurisdiction over certain streets, upon first obtaining the consent, in writing, of the owners of a majority of the frontage of the lots and lands abutting thereon; and also provided for a confirmation of any assessment made therefor by the circuit court, upon the application of the commissioners, after notice therefor to the lotowners. At the hearing of the application for confirmation of the assessment roll, returned by the commissioners in the above case, the commissioners offered a paper, purporting to be the petition, and consent of the abutting lotowners, and showed that such paper came from the files kept by the board of commissioners, and was the written consent acted upon by the board in adding the streets for the purpose contemplated. The court below, upon the objection to the competency of this evidence, held that this document made a prima facie case for the commissioners, and cast the burden upon the objectors, to show that it was not the written consent of the property owners, as it purported to be. Upon appeal, however, the supreme court reversed the action of the court below, saying: "We cannot concur in the holding of the trial court. As we have seen, the burden was on the park commissioners to show affirmatively the jurisdictional fact of consent by the owners of the required amount of frontage. The evidence in respect thereto was, we think, wholly insufficient. Waiving the matter of proving ownership by the persons purporting to sign the paper admitted in evidence, it is not shown that a sufficient number of such persons signed the consent to constitute consent by the owners of a majority of the abutting property. The only person introduced who testified generally to the execution of the writing testifies that he procured the signatures of most of the signers, but not all, and he does not testify, except in a few instances, either as to those he did or did not procure. The writing here offered is not signed by the objectors, and we are aware of no rule by which it was admissible in evidence against them, without proof of its execution, nor is the consent at all aided by the fact that the park commissioners acted upon the paper introduced in evidence. While the park commissioners must, in the first instance, pass upon the fact of consent by the owners of abutting property, and determine for themselves whether those owning a majority of the frontage of the property had consented to their appropriation of the street for the purposes contemplated by the Act, such determination can have no effect, when their jurisdiction is challenged in endeavoring to carry out the powers conferred by the statute. The power conferred upon the park board affects and impairs the right of the citizen, and may incumber his property without his consent, and may arbitrarily impose onerous burdens for which there is no relief or redress. The Legislature has interposed the safeguard of requiring the consent of the owners of more than one half of the property to be affected, upon the presumption, no doubt, that what will be of benefit to the greater portion will not unduly prejudice the lesser part; and, when the commissioners sought confirmation of their assessment upon appellant's property, under the power conferred by the statute, it was incumbent upon them to show compliance with the law by which alone they obtained jurisdiction to impose the burden. This they have not done." See also *Pittsburg* v. *Walter*, 69 Pa. 365.

5. The order for the issuance of the bonds is that $850,000 be issued, and that the said bonds shall be payable in installments, as follows: "At the expiration of eleven years, not less than five per cent of said bonds; at the expiration of twelve years, not less than six per cent of said bonds," etc. Section 15 of the Statute provides: "Said bonds shall be payable in gold coin of the United States, in installments, as follows, to wit: At the expiration of eleven years, not less than five per cent of said bonds; at the expiration of twelve years, not less than six per cent," etc. In *Central Irrigation Dist.* v. *De Lappe*, 79 Cal. 351, the form of the bond in connection with this provision of the statute was discussed. It was there held that the bonds to be issued should be in such form that each bond would be payable in installments of such percentage in each year as is designated in the statute, and that an order making that percentage of the entire issue of the bonds payable in the designated years would not be a compliance with the statute. In the present case, if 5 per cent of the $850,000 should be

payable at the expiration of eleven years, and the board of directors should not sell or dispose of more than that percentage of the entire issue of bonds, it would make the entire amount of outstanding bonds payable at the expiration of eleven years; whereas, the board of directors, under section 22 of the Act in question, are authorized, at the expiration of ten years after the issuing of said bonds, to levy an assessment for only 5 per cent of the principal of the whole amount of bonds then outstanding. This provision in the order does not, however, affect the substance of the order for the issuance of the bonds, but merely the form in which the bonds are to be issued, and does not itself invalidate the proceedings had by the district for the issuance of the bonds. The district voted for the issuance of bonds to the amount of $850,000, to be issued in accordance with the provisions of the statute. The manner in which those bonds were to be issued is prescribed by the statute, and can be followed by the board whenever their issuance becomes necessary. The court, however, instead of approving and confirming this order, should have limited its order of confirmation to that portion thereof which designated the amount of the bonds to be issued, leaving to the board itself the duty of preparing the bonds in the form required by the statute.

6. In its decree the court, after determining the legality and validity of the proceedings, added thereto the following: "And it is further ordered, adjudged, and decreed that all persons, and each and every person interested in the organization of said irrigation district, save and except the appellants herein, be forever debarred and precluded from disputing, denying, or disclaiming any fact or facts relating to the organization of the said district, or providing for and authorizing the issue and sale of the bonds of said district, which might by them have been denied, questioned, or disputed in this proceeding." This portion of its judgment was unauthorized. The statute does not confer upon the court any power or jurisdiction to do more than "examine and determine the legality and validity of, and approve and confirm," the proceedings had under said Act. What the effect of its determination and judgment may be is to be determined by the court in which it shall at any time hereafter be offered in evidence. The statute makes no provision for including therein an injunction against those who may not have seen fit to question its action in this proceeding, and against whom there has been no service, except by the publication of the notice directed by the court. If by virtue of such inaction on their part they should be hereafter precluded or estopped from questioning the sufficiency of the action of the court in this proceeding, that question must be determined by the court in which any attempt may be made to avoid the effect of the judgment herein.

For the error committed by the court in admitting evidence as hereinbefore stated the judgment is reversed.

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We concur: **McFarland, *J.*; Garoutte, *J.*; Sharpstein, *J.*, Paterson, *J.*; De Haven, *J.***

Beatty, *Ch. J.*:

Until the filing of the supplemental briefs in this case I had supposed that the constitutionality of the statute commonly known as the "Wright Act" had been definitely settled by the decision of this court in the case of *Turlock Irrigation Dist.* v. *Williams*, 76 Cal. 360, in which I was one of the counsel employed to defend the validity of the Act. I therefore sat at the hearing of this case with the expectation of participating in its decision, but on becoming aware of the fact that the constitutionality of the law was again seriously drawn in question upon all the grounds formerly taken, and upon several others, I concluded that, although I might not be disqualified in a strict sense in this particular case, I could not with perfect propriety take part in deciding it, and for that reason express no opinion.

A petition for rehearing was subsequently filed in response to which, on January 13, 1892, the following opinion was handed down:

Per Curiam:

In their petition for a rehearing appellants have called attention to the fact that in the opinion heretofore rendered the court has failed to pass upon two propositions urged by them in their appeal, and request that, if in the opinion of the court these propositions are untenable, it be so stated, in order that there may be no occasion for another appeal in which to present them for consideration. It does not follow from the fact that the propositions were not discussed in the former opinion that they were not fully considered. Because each proposition urged in the briefs of an appellant is not taken up and discussed *seriatim*, it does not follow that they have not all received due consideration. A due regard for the amount of business before the court and the time allowed for its disposition compels us to limit the opinions in the several cases to such principles and rules of law as will be a guide to the courts below in disposing of the case upon its return, and a rule of action for the citizens of the State in their subsequent transactions. The proposition again called to our notice by the appellants in their petition for a rehearing, that the Act in question is in violation of the provision of article 11, § 18, of the Constitution, prohibiting certain public corporations from incurring indebtedness "without the assent of two thirds of the qualified electors thereof, voting at an election to be held for that purpose," cannot be maintained. This prohibition in the Constitution is limited to the public corporations enumerated in that section, viz., "county, city, town, township, board of education, or school-district," and, under familiar rules of construction, cannot be extended to any other public corporation. Many of the sections of this article of the Constitu-

tion include in their provisions "any public or municipal corporation," (sections 10, 12, 16,) while the provisions, of section 19 are limited to a "city," and of section 11 to a "county, city, town, or township." In view of the fact that different provisions are made in the Constitution for different classes of public corporations, it must be held that the prohibition in section 19 is limited to the corporations which are therein designated. For such other corporations for municipal purposes as under the provisions of section 6 the Legislature might, by general laws, authorize to be incorporated, the Constitution has left to the Legislature power to provide the terms and conditions upon which an indebtedness may be created, as well as its amount. At the time that the Constitution was framed and adopted there were many other public corporations in the State, such as reclamation and irrigation districts, that had been organized for many years, and, if it had been the intention to subject all such corporations to the prohibition, we must conclude that express language therefor would have been inserted in the Constitution. The case of *Harshman* v. *Bates County*, 92 U. S. 569, 23 L. ed. 747, cited by the appellants, is inapplicable. The Constitution of Missouri had required the assent of two thirds of the qualified electors of a "county, city, or town" as a prerequisite to a subscription for building a railroad, and it was held that the Legislature could not confer authority upon a "township" to vote a credit for such subscription; that while counties, cities, and towns had a corporate character and organization, a township was only a geographical division of the county, and that the provision of the Constitution prohibiting a county from voting such credit could not be evaded by authorizing the several geographical subdivisions of the county to vote such credit.

The fact that the Town of Madera is included within the boundaries of the Madera Irrigation District neither renders the Act unconstitutional nor invalidates the organization of the District. This principle was discussed and was sustained in *Modesta Irrig. Dist.* v. *Tregea*, 88 Cal. 334. The objection that the land within a town or city cannot be benefited by a system of irrigation, and therefore cannot be taxed for such improvement, proceeds upon an erroneous view of the power of taxation. While the benefit to the land is assumed as the basis of the assessment, still, as was said in *Lent* v. *Tillson*, 72 Cal. 428, such benefit is not the source of the power. Even though the land is not susceptible of irrigation, yet it may be benefited by the improvement, and should bear its proportion of the burden upon the same principle that land in a city which can make no use of a sewer or other street improvement is nevertheless deemed to receive a benefit from its construction, and is required to pay a portion of its cost. The object of the Act is the improvement of the District as an entirety, and the extent of the District, as well as the lands to be included therein, has been left to be determined by the discretion of the board of supervisors. Whether they have properly or improperly exercised such discretion cannot be investigated by the courts. The Act cannot be declared unconstitutional by reason of any improper exercise of such discretion. Neither is it in violation of the Constitution to incorporate into such district a town or city that has been incorporated for other municipal purposes. A system of irrigation contemplated by the Act in question cannot be considered as a "municipal purpose," within the scope of the organization of a city or town, and there can be no conflict between a corporation organized under the Act to produce a system of irrigation with the district and the municipal incorporation of the town of Madera. A water supply for the two corporations is distinct and for different purposes. The liability of the inhabitants of the town of Madera for the bonded indebtedness of the Madera Irrigation District, as well as for that of their own municipality, does not impair the validity of the organization of the District. It is a liability of the same character as rests upon the inhabitants of any town for its proportion of all the indebtedness of the county within which it is situated.

Rehearing denied.

FLORIDA SUPREME COURT.

S. H. RAY, County Treasurer of Brevard County, *Appt.*,
v.
Thomas E. WILSON.

(.....Fla.....)

***1. Where a clerk of the circuit court is ex officio auditor of his county, and it is his official duty to audit all accounts** against the county in the manner prescribed by the statute, and to keep on file in his office the vouchers for all claims audited by him, and the law also provides that all accounts against a county shall be approved by the county commissioners before they should be audited by the clerk, warrants or orders in favor of third parties issued by the clerk under his seal of office directed to the county treasurer, and expressed upon their face to be "chargeable under head of county expenditures" or to be payable "out of

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

NOTE.—*Mandamus to compel payment of municipal debt by custodian of municipal funds.*

The rules for determining whether or not mandamus will lie to compel payment of money out of a municipal treasury are no different from those applicable in other cases. One of the rules most rigidly adhered to at common law was that the writ would never be issued if there was a plain, adequate, legal remedy. In all states where mandamus still retains its common-law form, unaltered

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See also 37 L. R. A. 540.

any money in the treasury appropriated for county purposes," are prima facie valid claims against the county.

2. Mandamus lies against a county treasurer to compel the payment of a valid warrant or order drawn on him as such treasurer, and for the payment of which he has the necessary funds applicable thereto.

3. Where an alternative writ of mandamus brought to compel the payment by a county treasurer of county warrants shows that warrants, regular upon their face, were issued by the proper officer, and for value received, and that the treasurer has the funds for their payment, it is not demurrable.

4. The fact that an ordinary action at law obtains against a county on a county warrant, does not constitute a specific and adequate remedy avoiding a mandamus for its payment in favor of the holder of such warrant against a county treasurer having the necessary funds for its payment.

5. A return to a sufficient alternative writ of mandamus must state all the facts relied upon by the respondent with such precision and certainty that the court may be fully advised of all the particulars necessary to enable it to pass upon the sufficiency of the return; and its statements cannot be supplemented by inference or intendment. A return that the warrants whose payment is sought are spurious, illegal and void is, being a mere conclusion of law, insufficient, as likewise is a return that the warrants were issued and are held without valuable consideration, such statement being made not as a positive averment of such fact, but as an inference or argument drawn from or based upon allegations which do not support the inference or argument.

6. Assuming an order by a board of county commissioners, duly entered upon its records, authorizing the issue of county warrants, to be necessary to the validity of warrants of which payment out of the county treasury is sought by mandamus, a return stating that no such order appears upon the records of the board is insufficient. It is not incompatible with the fact that such an order was duly made and entered upon the records, nor tantamount to an allegation that no such order was ever passed and entered.

7. An order of a board of county commissioners requiring that county warrants previously issued shall be presented for re-examination by the board, and providing that all such scrip not presented by a stated day shall be of no effect, or "repudiated," is, though published according to the terms of the order, no defense to the payment of warrants not presented.

8. The statement of a return to an alternative writ of mandamus should be positive, and not on information and belief.

9. The delay of the relator in instituting proceedings by mandamus should be taken advantage of by proper pleading in the trial court. It cannot be urged primarily in the appellate court.

(January Term, 1892.)

APPEAL by defendant from a judgment of the Circuit Court for Brevard County in favor of plaintiff in an action brought to compel

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by statutes either of their own or of sister states, a treasurer cannot be compelled to pay money if there is another adequate and specific remedy.

It has usually been held that if a suit would lie against the municipality on the warrant, or on the claim represented by the warrant, the treasurer would not be compelled by mandamus to pay it.

Thus a mandamus will not be granted to compel the town treasurer to pay the amount of an order drawn upon him by the selectmen in payment of a debt due for work done in altering a highway. If the debt for building the road is justly due from the town the creditor has a plain, adequate, and complete remedy at law by the ordinary process to enforce and collect his claim. Lexington v. Mulliken, 7 Gray, 280.

A claim for salary by an officer of the municipality may be enforced by suit like any other debt, and payment of it cannot be compelled by mandamus. People v. Thompson, 25 Barb. 73.

The practice of the federal courts is to require a judgment on the warrants as a foundation for a writ of mandamus. Jerome v. Rio Grande County Comrs. 18 Fed. Rep. 873.

Where a city charter provided that the clerk of the police court might pay persons entitled to costs in a criminal prosecution such costs as have of right accrued to them, the statute was held to be permissive and it was held that the city was liable for such fees and not the clerk, and that a mandamus would not issue to compel him to pay them. Colley v. Webster, 59 Conn. 361.

The tendency of the English courts has been to hold claimants to their remedy of attachment or indictment where the treasurer has refused to perform his legal duty of paying an order for money. Rex v. Surrey, 1 Chitty, 650; Rex v. Bristow, 6 T. R. 168.

In some American courts the remedy of suit on the official bond of the treasurer has been held to be adequate, and it has been held that for that reason mandamus will not lie to compel the treasurer to pay county warrants out of funds in his hands for that purpose. State v. Bridgman, 8 Kan. 458.

In Alabama it has been intimated that where a warrant though drawn by the proper officers is payable out of the general funds of the county a mandamus will not lie to compel its payment; but the party will be left to his remedy on the official bond of the officer or to his action on the case. Sessions v. Boykin, 73 Ala. 328.

There has been a tendency, however, in America, to hold that a personal remedy against the officer is not sufficient to defeat mandamus.

A right of action against the officer who ought to perform the duty can never be an answer to a motion for a mandamus to compel its performance. People v. Mead, 24 N. Y. 114.

The fact that an execution may be issued against the individual property of school trustees will not prevent the issuance of a mandamus to compel them to pay from the school funds in their possession a judgment which has been recovered against the district for teachers' salary. People v. Abbott, 45 Hun, 293.

In New York it was held that the claim that relator has a right of action against the town will not defeat an application for a writ of mandamus to compel payment of money which has been raised under a special statutory proceeding for the payment of interest on town bonds and placed at the disposal of commissioners appointed to pay it over to the bondholders.

The creditor cannot be compelled to undertake a suit against the town by the perversity of public officers. People v. Mead, 24 N. Y. 114.

But the decision in the principal case appears to

defendant as Treasurer of Brevard County to pay certain county warrants. *Affirmed.*

The facts are stated in the opinion.

Mr. **Minor S. Jones** for appellant.

Mr. **Thomas E. Wilson** appellee *in propria persona.*

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

This is an appeal from a judgment awarding a peremptory writ of mandamus requiring the appellant, the County Treasurer of Brevard County, to pay certain county scrip or warrants.

The warrants consist of two pieces, each of the denomination of $10, dated October 26, 1876, and purporting to have been issued in the office of the clerk of Brevard County, at Lake View, by John M. Lee, clerk of the circuit court of that county, and *ex officio* auditor, and sealed with the official seal of such clerk, and in favor of one William Shiver or order, and "chargeable under head of County Expenditures," and indorsed by Shiver; and of seven other pieces, six of which are for $20, and one for $10, drawn in favor of the relator, and dated May 2, 1876, at Lake View, in the above county, signed by John M. Lee, clerk of such court, and sealed as above indicated, and payable "out of any moneys in the treasury appropriated for county purposes." They are all drawn on the County Treasurer, and numbered as indicated in the alternative writ. The alternative writ alleges that these warrants were regularly issued for value received, and that the defendant has in his hands as such County Treasurer the necessary funds to pay them, and that they have been presented to him, as such treasurer, for payment, but have never been paid, and that defendant is such treasurer.

By the Constitution of 1868, as by the present revision thereof, the clerk of the circuit court was made clerk of the boards of county commissioners and *ex officio* auditor of the county. Section 19, art. 6, Const. 1868, and sec. 15, art. 5, Const. 1885. The Act of June 6, 1870, § 31 (p. 179, McClellan's Digest), provides that the clerks of the different counties shall audit all accounts against their respective counties in the same manner as prescribed for the comptroller to audit accounts against the State, and that they shall require the same evidence of the legality of claims against counties as is required to establish claims against the State; and he shall keep on file in his office vouchers for all claims audited by him. By the Act of February 16, 1872 (p. 316, McClellan's Digest), the county commissioners were given power to approve all accounts against the counties before the same should be audited by the clerk. The Legislature of 1877, §§ 12, 13 (pp. 317, 318, McClellan's Digest), being subsequent to the issue of these warrants, need not be considered.

The alternative writ was demurred to on four grounds, one of which was, that the relator had filed no cause of action; which ground was sustained and the others overruled; and the relator filing the cause of action, the defendant answered as required.

The writ states, in our judgment, a prima

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be the first to announce the sensible rule that a suit against the county, with the consequent delay and expense, is insufficient in case of a claimant who has an immediate right to money actually in the treasury of which he is deprived simply because of the officer's refusal to do his duty.

Rule where audit is conclusive.

In some states the board of supervisors of a county has been clothed by statute with the power of examining and allowing accounts chargeable to the county, and that method of collecting an account has been made exclusive. Martin v. Greene County Suprs. 29 N. Y. 647; Brady v. New York City & County Suprs. 10 N. Y. 260.

In Mississippi the boards of county commissioners are the tribunals in which claims against the county are passed upon, and no suit lies against the county. Carroll v. Tishamingo County Bd. of Police, 28 Miss. 38.

Where the claim is for a certain and ascertained amount the auditing and allowance of it by the town council is equivalent to a judgment at law. Kelly v. Wimberly, 61 Miss. 550.

In such states mandamus is the appropriate remedy to compel the county treasurer to pay when he refuses to pay a demand which the board of supervisors have legally audited and allowed or directed to be paid. People v. Edmonds, 19 Barb. 468.

The treasurer has no power to suspend or refuse payment of warrants properly drawn on him by the clerk in obedience to the orders of the board of supervisors, unless it is expressly given him by statute. Hendricks v. Johnson, 45 Miss. 644.

Under statutes which make every claim which is a county charge the subject of the jurisdiction of the board of supervisors and render that mode of enforcing it exclusive, mandamus will issue to compel the payment. People v. Haws, 21 How. Pr. 178.

Statutory changes permitting enforcement of ministerial duty.

Many of the states have enacted statutes which have changed the common-law rules in regard to mandamus to a greater or less extent so that in those states the question has resolved itself into little more than a mere inquiry as to whether or not the officer against whom the issuance of a writ is desired has a plain legal duty to perform which he may conveniently be compelled to do by mandamus. As illustrating those changes the Revised Statutes of Illinois, chap. 87, § 9, provide that the writ shall not be denied because the petitioner may have another specific legal remedy where such writ will afford a proper and sufficient remedy.

The Indiana statute authorizes the issuance of writs of mandamus to any "person to compel the performance of a duty resulting from any office, trust, or station." *Ex parte* Loy, 59 Ind. 235.

In states where such statutory changes have occurred, and in some others where the decisions of those states have been followed, the question of ministerial duty appears to be made the prominent one, and the writ is issued or withheld as such duty is made clearly to appear or otherwise.

As all duties of a statutory disbursing officer are generally if not universally specifically defined by statute, so that there can be no just ground for controversy as to when he will be bound to honor orders and when he will not, mandamus will generally issue to compel him to pay an order legally drawn on funds in his hands subject to the payment of such order. People v. Johnson, 100 Ill. 543, 39 Am. Rep. 63.

The court may issue a writ of mandamus to com-

facie case of pecuniary liability on the part of the county; or, in other words, sets up a sufficiently valid claim against the county to call for a defense. Under the above constitutional provision and the legislation of 1870, it is clearly an official duty of the clerk of the circuit court to audit all claims against the county, and these warrants issued by him under his hand and official seal are the usual and proper evidence then given a creditor of the auditing of his claims against the county, the vouchers for which are presumed to have been duly required by the clerk or auditor, and to have been filed by him in his office. County and city orders issued by the proper officers are prima facie binding and legal: such officers are presumed to have done their duty, and the orders constitute a prima facie cause of action, the impeachment of which must come from the defendant. Dillon, Mun. Corp. § 502; *Floyd County Comrs.* v. *Day*, 19 Ind. 450; *Leavenworth County Comrs.* v. *Keller*, 6 Kan. 510; *Clark* v. *Des Moines*, 19 Iowa, 199, 211; *Cheeney* v. *Brookfield*, 60 Mo. 53; *Connersville* v. *Connersville Hydraulic Co.* 86 Ind. 184. It is, in the absence of any showing to the contrary, to be presumed that the accounts upon which the warrants were issued were approved by the county commissioners under the Act of 1872 before the clerk audited them and issued the warrants sued on. It was not necessary to specify the consideration of the warrant in the writ. *Floyd County Comrs.* v. *Day, supra.* An alternative writ is not demurrable, if it states a prima facie case. *State* v. *Jacksonville*, 22 Fla. 21. This writ shows that the script was issued by the proper officer, and for value received, and that the treasurer has funds to pay it; and the judgment must be affirmed unless we find either that the relator has another specific and adequate remedy, or that the matters set up in the return are sufficient to bar a recovery in this proceeding. To these questions, in the order stated, we shall address ourselves.

In *Com.* v. *Johnson*, 2 Binn. 275, the decision was that mandamus lay to compel road supervisors to pay orders drawn on them in favor of surveyors by justices of the peace, under the provisions of a statute. "It is said," observes the opinion, "that the supervisors may be indicted for neglect of duty. But if they were indicted and convicted the orders might still be unpaid. It is said also that if they withhold payment without just cause they are liable to an action. Granting that they are, it must be brought against them in their private capacity, and there is no form of action against them, which, being carried to judgment, will authorize an execution to be levied

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pel a treasurer to perform his plain ministerial duty and pay a properly drawn county warrant, although there are other methods of procedure which could be taken for the collection of the demand. State v. Callaway County, 45 Mo. 228.

In Johnson v. Campbell, 39 Tex. 83, the court issued a mandate to compel the county treasurer to pay a voucher proved in the way provided by law on the ground that it was a mere ministerial duty the performance of which could be compelled by mandamus.

In Connersville v. Connersville Hydraulic Co., 86 Ind. 184, where the objection was taken to the maintenance of a suit on a city warrant that the remedy should be by mandamus, the court apparently admitted that mandamus would lie, but it held that resort need not be had to the extraordinary remedy, but that a suit would lie.

The remedy of mandamus against the treasurer rests upon the idea that he has control of the money and is charged with the ministerial duty of paying it out as directed by law. People v. Fogg, 11 Cal. 358.

Mandamus, and not assumpsit, is the proper remedy to compel payment of a valid order given by the highway commissioners on the township treasurer. Just v. Wise Twp. 42 Mich. 573.

Cases in which the writ may issue.

It is not always easy to determine the grounds upon which a writ has been allowed. The weight of authority favors the rule that if a suit will not lie against the municipality the mandamus may be awarded. Thus where the orders are drawn on a special fund the county cannot be sued in an ordinary action and so that remedy is unavailable. State v. Bollinger County Ct. 48 Mo. 475.

In Apgar v. School Dist. No. 4 of Chester Twp. 34 N. J. L. 310, the court says that none of the cases in which courts have refused to issue the writ present the case of money raised by taxation for a specific class of creditors, and in the hands of the officer charged with its payment, where the only step remaining to satisfy the creditor is the payment of money to him out of such fund.

Where a special fund is provided for by statute for the improvement of streets the treasurer in whose hands the fund is may be compelled by mandamus to pay warrants drawn upon the fund by the proper officers. Portland Stone-Ware Co. v. Taylor, 17 R. I. —.

Where a statute authorized the supervisors of the county to raise by a tax and pay to the judges of the court an additional compensation when the supervisors have fixed the amount and allowed an account presented by a justice for the compensation due him and directed the treasurer to pay the amount thereof, it is his duty to pay, and he may be compelled to do so by mandamus. In such case the claim does not create a debt against the county which can be recovered in an ordinary action. People v. Edmonds, 15 Barb. 529.

Where the Legislature directs the levying of a tax to pay a claim which the courts have adjudged to be uncollectible, and the municipality has levied the tax and received the money into its treasury, the comptroller may be compelled to apply the fund in satisfaction of the claim since an action against the city would prove unavailing. People v. Haws, 36 Barb. 59.

Where the law imposes the duty of taxing the fees of court officers on the court and gives no action against the county for them, nor any action on the treasurer's bond, if the treasurer refuses to pay an order of the court he may be compelled to do so by mandamus. Baker v. Johnson, 41 Me. 15.

There is also a class of cases in which a duty has been imposed by statute upon the officer in which the writ has been issued partly because the statute intended that remedy to be exclusive and partly on the ground of ministerial duty.

Where a particular method of raising money for a local public purpose is prescribed by statute, the party entitled to receive it has a right to the full and perfect execution of the power conferred which may be enforced by mandamus. People v. Mead, 24 N. Y. 114.

Where the statute requires the county treasurer holding money collected upon a tax levied to pay a judgment against the county to pay it over to the creditor on demand, if he refuses to perform his

on the treasury of the Northern Liberties. Now it was to this treasury that the surveyors had a right to look, when they acted under their commission from the governor." In *Baker* v. *Johnson*, 41 Me. 15, mandamus was granted to compel a county treasurer to pay the account of a sheriff for his services and those of his subordinates in attending court. His bills were audited and allowed by the presiding judge. Some objection was made that the judge did not in terms order the bills to be paid, yet it was conceded that they were allowed in the same manner as had ever been the practice in the county. In *Potts* v. *State*, 75 Ind. 336, a supervisor of highways had allowed a laborer for work done and given him an order on the trustee of the township for its payment, but the trustee, on demand of payment, refused to pay the order out of the moneys in his hand applicable to its payment, and a peremptory mandamus was granted on relation of the supervisor. In *State* v. *Gandy*, 12 Neb. 232, the writ, after describing the warrants and their assignment to the relator, stated in substance that the warrants were legally issued by the board of county commissioners, duly presented to, and audited and allowed by, the board when in session, and that they had been presented for payment and payment refused, and that there were, at the institution of the proceeding, sufficient funds in the treasury to pay the same after paying all prior warrants on that fund. These facts being conceded by the failure of the defendant to answer, a peremptory writ was awarded. See also *Johnson* v. *Campbell*, 39 Tex. 83; *Hendricks* v. *Johnson*, 45 Miss. 644; *Clayton* v. *McWilliams*, 49 Miss. 311; *State* v. *Callaway County*, 43 Mo. 228; *People* v. *Edmonds*, 15 Barb. 529, 19 Barb. 468; *People* v. *Haws*, 36 Barb. 59.

In *People* v. *Wendell*, 71 N. Y. 171, there was an application, primarily, for a peremptory mandamus requiring a county treasurer to pay a claim of the relator, which had been audited by the board of supervisors of the county. The papers used in opposing the motion showed quite clearly that a fraud had been perpetrated upon the board of supervisors in reference to a considerable portion of the claim, and it was also apparent that another portion of it was allowed without any authority or sanction of law. The order denying the application was affirmed. Recognizing it as a settled principle that a remedy by peremptory mandamus cannot be invoked unless there is a clear and unquestioned legal right, (*People* v. *Greene County Supvs.* 64 N. Y. 600,) it is yet observed by the court, subject, however, to the fact that in this case an alternative writ did not seem to be desired, that it is the duty

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duty he may be compelled to do so by mandamus. Brown v. Crego, 32 Iowa, 498.

Where the charter of a city makes it the duty of the treasurer to pay the interest of certain bonds when it falls due out of a fund provided for that purpose such payment is a duty specially enjoined by law upon the officer and may be enforced by mandamus. Meyer v. Porter, 65 Cal. 67.

Where a statute provided for the raising of a tax to pay interest on bonds and directed that the money should be received and paid to the bondholders by commissioners appointed for that purpose, the commissioners may be compelled by mandamus to pay over the money after it has been raised by levy of the tax. People v. Mead, 24 N. Y. 114.

Where a statute makes it the duty of the county treasurer to pay certain claims out of the fine and forfeiture fund, whenever it becomes sufficiently large, he may be compelled by mandamus to perform such duty. An action against him personally or on his official bond, while they might afford pecuniary compensation, would not compel the performance of such duty. Sessions v. Boykin, 78 Ala. 328.

Where a ditch commissioner has collected assessments for the construction of the ditch he may be compelled by mandamus to distribute to a contractor the amount due him for construction, since that is a duty imposed upon him by the law which provided for the construction of the ditch. Ingerman v. State, 128 Ind. 225.

Where a special fund is provided for the payment of a certain class of claims and a claim is duly audited and allowed by the proper tribunal and an order drawn upon the treasurer for its payment, the duty of the treasurer, unless he can show some error or fraud on account of which the court would withhold its order, is a ministerial duty to pay to the extent of the fund; to hold otherwise would enable the treasurer of his own motion to put the creditor to the delay and the district to the expense of a suit, and that, too, against its will and order. Portland Stone-Ware Co. v. Taylor, 17 R. I. —.

Where the statute authorizes justices of the peace to draw orders on the supervisors of roads to pay for work done on the highways the court held that mandamus is proper to compel the payment of orders, since there was no other way in which the money might be collected. An indictment of supervisors for neglect of duty would be ineffectual and no action could be brought which would authorize the levying of an execution on the township treasury. Com. v. Johnson, 2 Binn. 275.

But in Kansas it has been held that although the law directs the county commissioners to raise money by taxation to pay county bonds and the treasurer to pay it over to the bond-holders, mandamus will not lie to compel the treasurer to pay over the money, since a suit on his official bond will afford an adequate remedy, and afford an opportunity to test the validity of the bonds. State v. McCrillus, 4 Kan. 260.

If a judgment has been recovered on the claim there would seem to be no doubt in regard to the right to the writ, for although mandamus will lie against a city to compel payment of a judgment against it (Chicago v. Sansum, 87 Ill. 182; Olney v. Harvey, 50 Ill. 454, 99 Am. Dec. 530), yet if the money is actually in the treasury the simplest proceeding would seem to be to compel the treasurer to pay it over.

A school trustee may be compelled to apply funds of the district in his hands to the payment of a judgment recovered against the district for services as teacher. State v. Cooprider, 96 Ind. 279.

Mandamus will issue to compel payment from the treasury of interest on a judgment. Jerome v. Rio Grande County Comrs. 18 Fed. Rep. 873.

Mandamus will issue to compel payment of an order drawn for satisfaction of a judgment against a city. Bank of California v. Shaber, 55 Cal. 322.

In the following cases the writ has been held to be proper:

Mandamus may issue to compel a school assessor to pay a school order. Martin v. Tripp, 51 Mich. 184.

Mandamus may issue to compel payment of county warrants legally issued and for which there are funds in the treasurer's hands. State v. Gandy, 12 Neb. 232.

of the court in such cases to see that the rights of the relator are fully protected, and it is authorized to direct the issue of an alternative writ in cases where the facts relied upon by the relator are in dispute, or where the parties wish to review the case on appeal, or upon the suggestion of either party.

The above authorities hold that where the claim of the relator is one of a character whose payment the law imposes on the county or municipality, and it has been audited, and ordered to be paid by officers having the authority to audit it and order its payment, a county treasurer, or other paying officer, should not refuse to pay, if he has the money to pay it with, unless the claim is for some reason fraudulent. The duty to pay, where the paying officer has the funds to pay with, and the officers auditing and ordering payment have acted within the scope of their powers and there is no fraud attached to the claim, is merely ministerial, and mandamus will lie to compel its payment. It is true the right to this remedy was doubted, though not decided, in *People* v. *Lawrence*, 6 Hill, 244, but such right is affirmed in the later New York cases. If the claim is not one of a character payable by the county or municipality, or if the board auditing it and ordering its payment had no authority to do so, or if there is fraud, (or, it may be mistake, *Shirk* v. *Pulaski County*, 4 Dill. 209), neither of which conditions is pretended to exist here, the paying officer should refuse to pay it. It is true that in some cases the right to the writ is put on the ground that an ordinary action at law will not lie against the county or municipality on the claim. We fail to see that such an action against the county is a sufficent remedy. If the claim is lawful and has been audited and ordered paid by the proper authority, and the officer whose function it is to pay has been furnished with and has the public money for its payment, there is a palpable insufficiency in a remedy which would give him a personal judgment against the county or municipality, to be followed it may be by a mandamus to compel the levy of a tax to pay the same in case the money in the treasury should have been used, or there was not enough to pay the accrued interest, and all this too, simply because an officer whose duty it is to pay lawful claims sees fit to refuse to do his duty. The holder of such a claim has an immediate right to the money provided and held for his payment, and a remedy which imposes any of the delay indicated and its attendant expense, is entirely inadequate. A remedy which will avoid mandamus must be both specific and

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A township trustee cannot refuse to pay an order drawn on him by a supervisor of highways to pay for work done thereon where he has money in his hands applicable to its payment. Potts v. State, 75 Ind. 336.

Mandamus is the proper remedy to compel the treasurer to pay warrants surrendered for redemption as provided by law. Day v. Callow, 39 Cal. 593.

Where the law provides that court officers may present certificates of the clerk to the county treasurer, and receive pay for their services in case of the refusal of the treasurer to recognize and pay the amount called for by a certificate, he may be compelled to do so by mandamus. Huff v. Knapp, 5 N. Y. 65.

Where the treasurer has funds sufficient to pay warrants that have been duly drawn on him by the proper officers, which are applicable to the payment thereof, and such warrants were legal claims against the county, mandamus will issue to compel him to pay them. Bush v. Geisy, 16 Or. 355.

Where the common council had the right to appropriate a certain amount of the taxes to the erection of new schoolhouses in the municipality, until that amount was expended, the treasurer could not question its right to draw upon the funds in his hands. Pierce, B. & P. Mfg. Co. v. Bleckwenn, 16 N. Y. Supp. 768.

Where the treasurer of a school district having funds in his hands for that purpose refuses to pay an order issued in full compliance with the provisions of the law to contractors in satisfaction of claims for the erection of a schoolhouse, mandamus will lie to compel him to do so. Maher v. Allen (Neb.) July 1, 1891.

Defenses; irregular or insufficient audit or warrant.

To warrant the issuance of mandamus the claim must have been audited in the manner prescribed by law. People v. Board of Apportionment, 52 N. Y. 224.

Payment of warrants for school money cannot be compelled unless they are drawn in the manner required by law. State v. Bloom, 19 Neb. 562.

Mandamus will not issue to compel payment of warrants which have not been drawn in compliance with the requirements of law. People v. Klokke, 92 Ill. 134.

Where the law requires a claimant to procure an order from the board of supervisors allowing the claim before its payment by the treasurer, mandamus will not lie to compel the treasurer to pay in the absence of such order. Honea v. Monroe County Supvrs. 63 Miss. 171.

Where payment is to be made by warrants drawn by other officers the treasurer cannot be compelled to pay without a warrant. People v. Fogg, 11 Cal. 358.

A treasurer cannot be compelled to pay precinct bonds except upon warrants issued by the county commissioners. State v. Thorne, 9 Neb. 458.

Where the judgment of the auditing board is the foundation for the payment of the claim, and the law prescribes the manner in which such judgment shall be reached and recorded, payment of a warrant based upon a judgment which was a flagrant violation of the statutory provisions cannot be compelled. Honea v. Monroe County Supvrs. 63 Miss. 171.

A treasurer cannot be compelled by mandate to pay a claim where any duty is devolved on him except the mere ministerial act of making the payment. The validity of the claim and the amount due must have been definitely ascertained by a competent officer or tribunal whose decision while unappealed from is final and conclusive before payment can be enforced by mandate. State v. Snodgrass, 98 Ind. 550.

Where the amount to be paid is not definitely ascertained because of the difference in value between the current funds and the funds in which the order is payable the mandamus will not issue. Clayton v. McWilliams, 49 Miss. 319.

Payment in gold coin cannot be compelled where the only funds applicable to the payment of the claim consist of legal tender notes. People v. Cook, 39 Cal. 658.

Mandamus against the treasurer is not the proper remedy in the first instance to compel payment of a school teacher's wages. Wooldridge v. Gage, 68 Ill. 157.

Payment of a claim cannot be compelled unless it is presented in the form required by law. Hence,

adequate. *Baker* v. *Johnson*, *supra;* Tapping, Mandamus, 18, 19; High, Extr. Legal Rem. §§ 9, 15–17.

The contention that the relator has another sufficient legal remedy is answered by the authorities and observations set out above. This case is of course clearly distinguishable from those holding that a mandamus will not issue to compel the levy of a tax to pay a warrant or order of this character without putting it in judgment. *State* v. *Clay County*, 46 Mo. 231; *State* v. *Bollinger County Ct. Justices*, 48 Mo. 475; *State* v. *Pacific*, 61 Mo. 155; *Coy* v. *Lyons City Council*, 17 Iowa, 1; *Chase* v. *Morrison*, 40 Iowa, 620.

We are not called upon to notice the distinction made between cases where a warrant is payable expressly out of a particular fund, and those where it is not.

The return "charges" that the scrip is spurious, illegal and void, and was issued, and is held by relator without valuable consideration, such charge being made upon the basis of an allegation that "no order or resolution appears upon the records ordering or authorizing the clerk to issue or sign said scrip to relator," and of another allegation that on the first Monday in January, 1880, the board of county commissioners passed an order "that all Brevard County scrip issued between January 1, 1870, and January 1, 1880, be called in, and handed to the clerk of the board for the purpose of being examined by the board, and that all scrip found to be good should be re-stamped, and that all scrip not in, or before the board, by the first Monday of March, A. D. 1880, would be repudiated; and that such order should be published up to March 1, 1880, in the "Orange County Reporter," and also be posted at the several voting precincts of Brevard County. The cause of the adoption of this order is stated by the respondent, upon information and belief, to be that prior to the year 1880, a large amount of spurious scrip or orders upon the Treasurer of Brevard County had been placed in circulation, and had been and was being circulated and transferred by mere delivery, "that is to say, it appeared that scrip to a large amount had been issued without the sanction or order of the board of county commissioners of Brevard County, that this fact appears from the records of said county, the records of said county showing that no accounts for said scrip are filed, and no account is filed, and no account for said scrip was acted upon or approved by the board of county commissioners for said county, and that no such accounts were audited by the

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where the law requires the claim to be passed on by the board of county commissioners no writ can be issued until this has been done. State v. Fuller, 18 S. C. 250.

The fact that the persons ordering payment of the claim are *de facto* officers merely is not sufficient to justify the treasurer in refusing to comply with their order. State v. Philbrick, 6 Cent. Rep. 344, 49 N. J. L. 374.

The fact that the title to office of the *de facto* officer who signs a highway warrant is disputed will not prevent the issuance of a mandamus to compel payment of the order. School Dist. No. 8, of Tallmadge Twp. v. Root, 61 Mich. 373.

An order drawn by the acting board of directors of a school district must be honored by the treasurer. He cannot refuse payment by claiming that they were not the *de jure* officers and had no right to hire the teacher for the payment of whose salary the order was drawn. Case v. Wresler, 4 Ohio St. 561.

The mere fact that two commissioners out of a board of five had ceased to act will not justify the treasurer in refusing to pay orders drawn by the other three where the statute creating the board contained no provision for the filling of vacancies. People v. Palmer, 52 N. Y. 83.

Absence of funds.

Want of funds is a complete answer to an application for a mandamus to require the assessor of a school district to pay a warrant drawn on him in favor of a school teacher. People v. Frink, 32 Mich. 96.

The mandate will not compel payment of a larger amount than is in the treasurer's hands applicable to the claim. Day v. Callow, 39 Cal. 593.

Where the treasurer is by law directed to pay warrants in the order of their date mandamus will not issue to compel him to pay an order where he answers that there are older orders on the books which will more than exhaust the money in his hands. Mitchell v. Speer, 39 Ga. 56.

Where the money to the credit of the special fund out of which payment is desired was not legally placed there the mandamus will not issue. People v. East Saginaw, 49 Mich. 336.

Where the charter of the city authorizes a fund to be raised by an annual tax for the payment of the current expenses of administration not including payments on account of city bonds, a court cannot by mandamus require such fund to be appropriated to the payment of the bond. East St. Louis v. United States, 110 U. S. 321, 28 L. ed. 162.

Where a statute provides for the formation of a fund by the money paid for redemption from tax sales which shall be held in trust for the holders of the certificates, if the claim under a particular certificate is by mistake paid to the wrong person, who claims it as matter of right, mandamus will not issue in favor of the rightful claimant to compel the officer to pay him the amount, since the fund has been depleted by the prior payment. People v. O'Keefe, 1 Cent. Rep. 720, 100 N. Y. 572.

Mandamus should not issue to compel the treasurer to pay a claim where the funds out of which it was payable have been expended, although the expenditure may have been wrongful. Rice v. Walker, 44 Iowa, 458.

But in Williamsport v. Com. 90 Pa. 498, the court granted a mandamus to compel the city treasurer to pay over-due interest on city bonds, although the money in his hands for that purpose had been appropriated by the city council to other uses, it not appearing that the amount thus withdrawn from the treasury was absolutely needed for the ordinary expenses of the city.

So it has been held that the fact that the treasurer has through inadvertence or misapprehension of duty paid the fund to another, who has no claim upon or right to the fund, will not be a defense to an application for the writ. People v. Johnson, 100 Ill. 543, 39 Am. Rep. 63.

Fraud; illegality of claim.

If the subject matter of an account be within the jurisdiction of a board of supervisors, and they allow it, the county treasurer has no right to refuse payment on the ground that the allowance was too much or was made upon insufficient evidence. People v. Earle, 47 How. Pr. 458; People v. Lawrence, 6 Hill, 244.

But where supervisors exceed their jurisdiction by allowing a claim by a judge for expenses in

auditor of said board of county commissioners, and that said board of county commissioners never issued said scrip, or authorized the same to be issued;" and the purpose of the order is charged to have been "to protect the county from being defrauded by the payment of such fraudulent, spurious and illegal scrip."

The charge that the scrip is spurious, illegal and void, is a mere conclusion of law, and insufficient as a return (High, Extr. Legal Rem. § 472); and the charge that it was issued and is held without valuable consideration is also insufficient in law, it being made, not as an independent or positive averment of such fact, but as an inference, argument, or conclusion of law drawn from or based upon allegations which, as appears in the preceding paragraph of this opinion, in no wise support the inference, argument or conclusion; and for this reason the charge or averment is insufficient. High, Extr. Legal Rem. § 472. Unwarrantable inferences do not constitute of themselves a defense, whether the facts from which they are drawn be a defense or not. It is of course altogether immaterial that the relator may not hold these warrants for a valuable consideration, if it be that they were issued for one, and are otherwise legal. It is not properly denied that they were so issued, nor that they are so held.

The allegation that no order or resolution appears upon the records, meaning of course the records of the board of county commissioners, ordering or authorizing the clerk to issue or sign this scrip, "to relator," is an entirely insufficient defense to a recovery on the scrip issued to the relator directly, as it is to that issued to Shiver if we may ignore the words quoted, which confine the averment to that issued to the relator individually. If before the issue of the scrip the county commissioners by an order or resolution duly entered upon their records, if such entry was necessary (*Johnson* v. *Wakulla County*, 28 Fla. ——), or otherwise (if the entry was unnecessary), duly approved the accounts upon which it was issued, the fact that no such order or resolution appeared at the time of the application for the writ of mandamus, or at the time of the signing or filing of the return, is not fatal to the validity of the scrip. Its averment is not incompatible with the fact that such an order or resolution was legally passed and duly entered upon the records; nor is it tantamount to an allegation that no such order was ever passed or entered. The facts necessary to make it so

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defending himself in impeachment proceedings, which claim was not a county charge, the treasurer could not be compelled by mandamus to pay the warrant. People v. Lawrence, 6 Hill, 244.

Where the board of supervisors, in violation of its powers, increases the salary of a judge and then draws an order on the county treasurer for the payment of the increased salary, the treasurer may properly refuse to pay it. People v. Edmonds, 19 Barb. 468.

If the demand was not legally chargeable against the county it is a good defense. Keller v. Hyde, 20 Cal. 594.

So the treasurer will not be compelled to pay the warrant where the papers show on their face that a fraud was perpetrated upon the board of supervisors in reference to a considerable portion of the claim, and that another portion was allowed without any authority or sanction of law. People v. Wendell, 71 N. Y. 171.

Mere allegations of fraud and misrepresentations and lack of authority will not prevent the issuance of the writ. To have that effect facts must be stated from which such conclusions clearly appear. Hendricks v. Johnson, 45 Miss. 644.

Payment of claim for lighting the streets of a borough will not be compelled where there was no ordinance authorizing the expenditure and the chief executive had directed the treasurer not to pay the order because it was illegal and void and the validity of the claim was denied under oath. Com. v. Buchanan, 6 Kulp, 217.

Where, by reason of complication or of extraneous circumstances not specifically provided for by statute, a well-defined doubt arises either as to the right of the applicant to receive the fund or the duty of the officer to pay it out, mandamus is not the proper remedy. The right in such case being doubtful, the claimant must resort to his own appropriate remedies to determine it. People v. Johnson, 100 Ill. 543, 39 Am. Rep. 63.

The order is sufficiently doubtful to prevent the issuance of the writ where the commissioners were sued individually and drew the order to have the fees for defending the suit paid out of the county funds. Crawley v. Mershon, 61 Ga. 284.

Where a statute ordering a compulsory arbitration is of doubtful construction, and the legal right under it is not clear, and an award is made to which proper objections are stated, the party claiming its enforcement against the city must use the ordinary remedy of action on the award and is not entitled to a mandamus. State v. Jersey City Board of F. & T. 39 N. J. L. 629.

So where, for the purpose of determining the validity of claims for extra work done on the highways, the statute provides for the appointment of a referee and an examination of a claim by him, and directs that in case his report in favor of the claim is confirmed by the court the city shall pay it, the payment will not be enforced by mandamus, but the proper course is action upon the report of the referee. State v. Jersey City Board of Finance, 41 N. J. L. 135.

Wrong claimant.

The writ can only issue in favor of the one to whom the claim is payable. Hence where a justice of the peace drew an order for fees due to the prosecuting attorney, sheriff, witnesses, etc., he could not compel payment of them to himself. Cook v. Peacham, 50 Vt. 231.

The proper relator in mandamus to compel an officer to pay an order drawn on him is the holder of the order and not the person who drew it. State v. Haben, 22 Wis. 101.

Other defenses.

The treasurer cannot be compelled to pay a warrant not yet drawn. State v. Mound, 21 La. Ann. 352.

An unauthorized order of the county commissioners not to pay the warrant is not an answer to an application for the writ. Thomas v. Smith, 1 Mont. 21.

Mandamus will not issue to enable one creditor to get a preference over another by directing the treasurer to pay a claim out of funds not yet received by him. State v. Burbank, 22 La. Ann. 298.

Where the judgment of the auditing board is the foundation for the payment of the claim, and not the warrant, the absence of a seal from the warrant will not justify a refusal to pay it. Honea v. Monroe County Suprs. 63 Miss. 171. H. P. F.

should have been stated in the return. The rules governing returns in mandamus do not permit us to supplement their statement, by either inference, intendment, or otherwise; all of the facts relied upon by the respondent must be stated with such precision and certainty that the court may be fully advised of all the particulars necessary to enable it to pass upon the sufficiency of the return. *Polk County Comrs.* v. *Johnson*, 21 Fla. 578; *State* v. *Jacksonville*, 22 Fla. 21; High, Extr. Legal Rem. §§ 470, 472, 474.

An order or resolution like that passed by the board of county commissioners in January, 1880, is not a defense to the payment of an obligation of a county, nor will its publication, in accordance with directions contained in it, render it so. It is to be observed, however, that neither the return nor the entire record informs us that there was any publication of the order, or even that the relator had notice of it. County commissioners cannot impose on the holders of prior claims of this character against a county the presentation thereof for the mere purpose of an examination and indorsement, nor make it a condition of their validity or recognition. Their non-presentation under the resolution is of itself no bar to their recovery, nor to the proceedings now before us, and this, too, no matter how much other scrip may have been issued during the same period without being duly audited, or without the order, sanction or approval of the board of county commissioners or of other legal authority, and had been, and was being, circulated in the manner alleged, nor that the fact of such unauthorized issue appears from the records of the county. The statement made in the return, of the causes leading to the adoption of the resolution in question, fails to show that the particular scrip now sued upon was issued in the manner stated, and this scrip is consequently not affected by such statement. The infirmities of any other warrants or claims, whatever such infirmities may be, or however great is the quantity of such warrants or claims, cannot be extended by argument, inference, or intendment to these.

The return also charges, upon information and belief, that the scrip is not shown by the records of the county of Brevard to be genuine, and based in accordance with law and for a full and valuable consideration inuring to the county, and that hence it is spurious and fraudulent, and issued in total disregard of law and without valuable consideration. What has been said above upon practically similar allegations of this return is, upon the authorities there cited, applicable to this attempted defense and conclusive of its insufficiency.

Certain charges or allegations of the return are made on information and belief. We do not think this the proper form of averments in such pleadings (*State* v. *Sumter County Comrs.* 22 Fla. 1); but, as in the case just cited, do not hold the return insufficient merely on that ground.

The point, as to delay in instituting this proceeding, should have been made by the pleadings in the lower court. It, if apparently good, might have been satisfactorily answered there, had this course been pursued. *Logan* v. *Slade* (Fla.) 10 So. Rep. 25.

The peremptory writ commands the payment of the warrants, identifying them, and stating their aggregate amount, $150, as it is stated in the alternative writ. A reference to a master was neither necessary nor proper.

The judgment is affirmed.

TEXAS SUPREME COURT.

FORT WORTH & DENVER CITY R. CO., *Appt.*,
v.
John ROBERTSON, by Next Friend.

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

1. Leaving unfastened and insecure against accidents a turn-table which is situated in an open and accessible place where children are in the habit of going for amusement with the knowledge, actual or constructive, of defendant's servants is negligence which will render a railroad company liable for injuries received in consequence of it by a boy seven years old, while playing upon the turn-table.

2. Diminished capacity to perform

NOTE.—*Liability of railways for injuries to children trespassing on turn-table.*

When recognized.

The principle underlying liability in these cases is well stated by Ray in his work, "Negligence of Imposed Duties, Personal," p. 33. "If an act you are contemplating, right in itself, will likely cause someone to expose himself to danger, which he does not anticipate, it is your duty to take care that such exposure does not prove injurious to him. In determining the question whether the act will induce such exposure, it is your duty to consider the motives and impulses that induce action by others, who are likely to be influenced by your act. If men may be misled in their judgment by your act, you must take measures to warn them, or to avoid injuring them, by proper care. If children from their own childish instincts and curiosity may be led into danger, such care is due them also."

As a further reason why railroad companies should be held liable in these cases, it is suggested, in "Wood's Railway Law," p. 1292, that "railway companies do not hold their property by precisely the same tenure as an individual does: they are quasi public corporations and by a species of common consent which may be said to amount to a usage, people enter upon their tracks and grounds with nearly the same freedom that they do upon public grounds, and without feeling that they are trespassers. While this may not be done as a strict matter of legal right, yet it is idle to say that permitting such use, knowingly, and without objection, they nevertheless have the right to expose such quasi licensees to any species of danger they may choose to, particularly those not competent to judge of the danger, without incurring liability for the consequences."

14 L. R. A.

See also 17 L. R. A. 726; 18 L. R. A. 759; 21 L. R. A. 448; 23 L. R. A. 244; 26 L. R. A. 847; 27 L. R. A. 724; 32 L. R. A. 825; 34 L. R. A. 459; 39 L. R. A. 112; 41 L. R. A. 831; 44 L. R. A. 655; 46 L. R. A. 829.

manual labor, as distinguished from loss of earning power by any labor, manual or otherwise, may properly be considered by the jury in determining the damages to be awarded for a personal injury to a boy who has adopted no particular calling or trade for his life work.

3. Ten thousand dollars is not an excessive amount to be awarded as damages to a boy who by reason of defendant's negligence was compelled to remain in bed for five months suffering much pain, and lost one leg entirely, while the other was much weakened and rendered less useful.

(June 16, 1891.)

APPEAL by defendant from a judgment of the District Court for Wichita County in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are stated in the commissioners' opinion.

Mr. **J. M. O'Niell** for appellant.

Messrs. **G. G. Randell** and **W. W. Wilkins** for appellee.

Garrett, J., filed the following opinion:

This suit was brought by John Robertson, a minor, by next friend, against the Ft. Worth & Denver City Railway Company, to recover damages for personal injuries sustained by the plaintiff while playing on the turn-table of the defendant. Appellee was a boy seven years of age at the time of the accident, which occurred July 24, 1887, and is represented in this suit by G. G. Randall, as next friend. Upon trial by a jury, a verdict was returned in favor of the plaintiff for damages assessed at $10,000, and judgment was rendered by the court for that amount. Appellant relies upon three assignments of error for a reversal of the judgment below.

1. "The court erred in the third paragraph of its charge by submitting to them the question whether the defendant's agents and servants knew, or by the use of reasonable diligence might have known, that defendant's turn-table was situated in a public place where children were likely to go, and were in the habit of going, for the purpose of amusement, because there was no evidence that the turn-table was situated where children were likely to go; no evidence that children were in the habit of going there, and no evidence, if children were likely to go there, or were in the habit of going there, that defendant, its agents or servants, knew it." The charge complained of was as follows: "(3) If you find that defendant's turn-table was located in a public place where children were likely to go, and where they were in the habit of going, for the purpose of amusement; and if such turn-table was left unfastened and unguarded, was a dangerous piece of machinery; and if defendant's agents or servants knew, or by the use of reasonable diligence might have known, such facts; and if defendant's agents and servants left said turn-table unfastened and unguarded; and if the evidence shows that in so leaving

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The pioneer "turn-table case" was an action in the United States Circuit Court, District of Nebraska, to recover for personal injuries received by a child six years of age while playing upon the defendant's turn-table. Upon the first trial, which resulted in a disagreement of the jury, Dundy, J., charged the jury that "if the turn-table was a heavy and dangerous machine, and in a public place where children were in the habit of going to play upon it with the knowledge of defendant or its servants, then it would seem to me to be necessary to protect it in some way, either by fastening it or by enclosing the same; but if it was remote from places of public resort, or if the defendant or its servants had no knowledge of the boys going there to play upon it, so that no danger could be reasonably apprehended from it, even though it may have been in the open prairie, I do not think such diligence should be required of the defendant. So the degree of diligence in such a case would greatly depend upon the locality in which the turn-table might be found." Stout v. Sioux City & P. R. Co. 2 Dill. 294, 11 Am. L. Reg. N. S. 226.

Upon the second trial, Dillon, J., in charging the jury followed practically the charge given in the previous trial emphasizing *scienter* as an element of defendant's liability. He said, "If the defendant did know, or had reason to believe, under the circumstances of the case [that] the children of the place would resort to the turn-table to play; and if they did they would or might be injured, then, if it took no means to keep the children away, and no means to prevent accidents, it would be guilty of negligence, and would be answerable for damages caused to children by such negligence." Stout v. Sioux City & P. R. Co. 2 Dill. 294.

The submission of the question of defendant's negligence to the jury although there was no dispute as to the facts, and the charge given by the trial court, was approved by the Supreme Court of the United States on appeal (Sioux City & P. R. Co. v. Stout, 84 U. S. 17 Wall. 657, 21 L. ed. 745); and it was held that the company was liable, notwithstanding the child was technically a trespasser. There was an express disclaimer of any claim of contributory negligence in this case.

A railroad company, knowing that its turn-table was attractive, and when in motion dangerous to young children, and that many children resorted to it to play, was negligent in leaving the same unfastened and unguarded, so that it could be easily revolved, and is liable for injuries resulting from its neglect. Keffe v. Milwaukee & St. P. R. Co. 21 Minn. 207, 18 Am. Rep. 393.

The case of Nagel v. Missouri Pac. R. Co., 75 Mo. 653, involved almost the identical facts as the Stout Case, and the company was held liable, notwithstanding the fact that the turn-table was being revolved by other children, who were playing upon it at the time the injury occurred. So, too, Barrett v. Southern Pac. R. Co. 91 Cal. 296.

The Stout, Keffe and Nagel Cases were approved in Harriman v. Pittsburgh, C. & St. L. R. Co., 9 West. Rep. 438, 445, 45 Ohio St. 11, a case of injury to a child by a torpedo left exposed in its station yard. It is there said: "It will be found by an examination of the cases in which consideration is given to this subject that there is in reality no invitation; and it is implied from slight circumstances and generally from the fact that children following their inclinations go upon and into exposed and frequented objects and places."

The doctrine of Keffe v. Milwaukee & St. P. R. Co., is approved by the Supreme Court of Louisiana in Westerfield v. Levis, 43 La. Ann. —, not, however, a turn-table case.

A railroad company is liable for injuries received by a boy while playing upon its turn-table left without locks or fastenings or guards, situated less than half a mile from a populous city in an

the same unfastened and unguarded they were guilty of that want of care which a reasonably prudent person would have exercised under the same circumstances to prevent injury,—then they are guilty of negligence," etc. There was evidence showing that the turn-table was in the town of Wichita, near the railroad, and not far from the business portion of the town. It was in an open and uninclosed place, where people were in the habit of passing. There was nothing to prevent free access to the place. It was shown that children had frequently resorted there to play upon the turn-table, and that accidents had happened there before the plaintiff was injured. "The entry on such a place was not a trespass in a child which would deprive it of the right to recover for an injury resulting from the attempted use of a dangerous machine to which children would be attracted for sport or pastime, for it is the duty of every person to use due care to prevent injury to such persons, even from dangerous machinery upon the premises of the owner, if its character be such as to attract children to it for amusement." *Houston & T. C. R. Co.* v. *Simpson*, 60 Tex. 106. The turn-table was exposed and left unfastened, and was in a place convenient to the inhabited and business portions of the town, where children as well as others would be likely to go. It is not so much a matter of negligence that the place was public, as that the table was in a open and accessible place, and was left unfastened and insecure against accidents. The charge was more favorable to the defendant than it might have been, and was fully warranted by the evidence adduced at the trial.

2. It is further assigned as error that "the court erred in the fifth paragraph of his charge by instructing the jury that in estimating the damages they should take into consideration the plaintiff's diminished capacity to perform manual labor, thereby misleading them." In the paragraph of the charge complained of, the court instructed the jury as to the measure of damages, and informed them that they might take into consideration "the plaintiff's diminished capacity for performing manual labor after the age of twenty-one years, and the mental and physical pain and suffering caused by such injury." The complaint is that the jury should have been instructed to take into consideration the plaintiff's loss of future earning power, without distinguishing between manual and other labor. In this case, where the injuries were sustained by a boy seven years of age, who had adopted no pursuit in life or calling or trade, and seeks to recover for the loss of a leg, his diminished capacity to perform manual labor would naturally suggest itself as the principal element of damages. He is certainly entitled to recover for a diminished capacity to perform ordinary labor. People ordinarily earn their support by some avocation that requires the performance of manual labor. The ability to do manual labor is something within the common knowledge of everyone. It would have been more speculative for the jury to have taken into estimation what the plaintiff might be

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open prairie, where persons frequently pass and repass, and boys are accustomed to play. Kansas Cent. R. Co. v. Fitzsimmons, 22 Kan. 686, 31 Am. Rep. 203. The court said: "Now, everybody knowing the nature and instincts common to all boys must act accordingly. No person has a right to leave, even on his own land, dangerous machinery calculated to attract and entice boys to it, there to be injured, unless he first takes proper steps to guard against all danger, and any person who thus does leave dangerous machinery exposed, without first providing against all danger, is guilty of negligence. It is a violation of that beneficient maxim, *sic utere tuo ut alienum non lædas*. It is true that the boys in such cases are technically trespassers. But even trespassers have rights which cannot be ignored."

To the same effect are Evansich v. Gulf, C. & S. F. R. Co. 57 Tex. 123; Ferguson v. Columbus & R. R. Co. 77 Ga. 102, 75 Ga. 637; Ft. Worth & D. C. R. Co. v. Robertson (Tex.) June 16, 1891; Bridger v. Asheville & S. R. Co. 25 S. C. 24; Houston & T. C. R. Co. v. Simpson, 60 Tex. 106; Gulf, C. & S. F. R. Co. v. Styron, 66 Tex. 421; Atchison & N. R. Co. v. Bailey, 11 Neb. 333; Barrett v. Southern Pac. Co. 91 Cal. 296; Callahan v. Eel River & E. R. Co. (Cal.) Nov. 27, 1891.

It is not necessary to prove willful intention to inflict injury. Gulf, C. & S. F. R. Co. v. Styron, *supra*.

A railroad company leaving a turn-table unfastened is not relieved from liability for such want of care by the fact that the person who put it in motion causing an injury to a child was *sui juris*, and therefore also liable. Gulf, C. & S. F. R. Co. v. McWhirter, 77 Tex. 356.

Where repudiated.

In Frost v. Eastern R. Co., 4 New Eng. Rep. 527, 64 N. H. 220, it was held that a railroad company was not liable for the injury received by a boy seven years of age while playing upon its turn-table, on the ground that he was a trespasser to whom it owed no duty.

A railroad company owes a child trespassing on its premises no duty in respect to the condition of its turn-table; nor can any inducement or invitation to go upon its premises be implied from the fact that the situation and nature of the turn-table was conspicuous and therefore likely to attract children. Daniels v. New York & N. E. R. Co. (Mass.) 13 L. R. A. 248. The last two cases expressly repudiated the doctrine of the Stout and other preceding cases.

In McAlpin v. Powell, 70 N. Y. 126, 26 Am. Rep. 555, which was not a turn-table case, in commenting upon the Stout and Keffe Cases, the court said: "We are not now called to express an opinion as to the soundness of these decisions in such a case, and, while we are not prepared to uphold them, it is enough to say that the facts (of the case at bar) are by no means analogous."

Degree of security required.

A railroad company is not liable for injuries received by a boy while riding upon a turn-table turned round by his companions, which was situated in an isolated place, not near any public street, nor where the public were in the habit of passing, and which was fastened by a latch which prevented it being turned by accident, but was not locked, so as to render it impracticable for the boys to open or withdraw the latch and move the table. St. Louis, V. & T. H. R. Co. v. Bell, 81 Ill. 76.

In Kolsti v. Minneapolis & St. L. R. Co., 32 Minn. 133, it was held no error to charge that "the defendant was not required so to fasten or secure the turn-table in question that boys like the injured boy could not displace such fastenings and put the table in motion."

able to do in some mental pursuit, or clerical or sedentary avocation. The damages were to be ascertained by the jury as best they could from the exercise of their own judgment, common sense, and sound discretion and the evidence before them. Plaintiff had lost a leg; he was mutilated for life; and it was the duty of the jury to compensate him by a verdict for such damages as it might appear to them, under all the circumstances, he was entitled to. We consider the charge objected to as likely to have benefited the defendant rather than otherwise. It is a direct application of the evidence as to the injuries sustained to common life, with no room for speculation as to what the plaintiff might have been able to become and earn, but for the injuries he had received. If the defendant desired to have the additional element of damages suggested, submitted for the consideration of the jury, it might have requested a charge to that effect. We do not think there was error, if any, in the charge that was prejudicial to the defense.

3. It now remains for us to consider whether or not the verdict was excessive. Plaintiff's legs were both caught in between the irons and badly injured. His right leg was so lacerated and broken that it had to be amputated. The left leg was also badly lacerated as to the muscles, sinews, and flesh. It seemed to have been struck, and the bone scraped, and the muscles and ligaments around above the ankle lacerated. At one time there were symptoms of erysipelas in this leg, and at another time blood poisoning was threatened in the one that had been amputated. It was shown that the amputated leg would always be sensitive to the touch or any foreign substance. It was difficult to dress the wound, and the injuries were a severe shock to the boy's system. For a long time his physician thought he would not survive at all. His foot was swollen somewhat at the time of the trial. The left leg would be weaker by reason of the injury to it. It was probable that there would be neuralgic pains, rheumatism, and other ills, as the effects of the injury to the left leg, in after life, as these ills would attack the weaker part. It would be weaker and less useful. The injury to it was permanent, though he could use it. Plaintiff was hurt July 24, and remained in bed nearly all the time until Christmas, and suffered a great deal; in short, one leg was off, and the other weakened and impaired. In actions for personal injuries, and in cases, generally, where there is no fixed legal rule of compensation, the theory of the law is that the decision of the jury is conclusive, unless they have been misled, or their verdict has been influenced by corruption, passion, or prejudice. 3 Suth. Dam. 289.

It is not possible to measure with money the damages sustained by the plaintiff by reason of the pain and injury inflicted on him. He languished for five months in bed. He has lost one leg entirely, and the other is left in such a condition as to make it doubtful whether it will ever become sound and strong. The verdict was large, but not excessive. There was nothing whatever to show that the jury was actuated by passion, prejudice, or any other improper motive. *Galveston, H. & S. A. R. Co.* v. *Porfert*, 72 Tex. 353; *St. Louis & S. F. R. Co.* v. *McLain* (Tex.) 15 S. W. Rep. 793; *How-*

A railroad company is not liable for personal injuries to a boy who, with his companions, was moving a turn-table which was sufficiently secured to hold it in place, if the fastening had remained undisturbed by them. Bates v. Nashville, C. & St. L. R. Co. (Tenn.) March 1, 1891.

A railroad company is not relieved from liability for its negligence in not adopting more secure means to prevent a turn-table from being revolved by children likely to be attracted to it by the fact that its managing agent before the accident tied the table with a rope, so that it could not be revolved, unless it was cut or untied. The question whether it was negligent so to fasten it is for the jury. Ilwaco R. & Nav. Co. v. Hedrick, 1 Wash. 446.

That the defendant maintained its turn-table in the same way as other railroads is no defense. Bridger v. Asheville & S. R. Co. 25 S. C. 24.

While in the case of turn-tables, by playing with which children are injured, it is competent for a railroad company, in order to show that it exercised due care, to prove that it secured the turn-table in the way customary with all railroad companies, such proof is not conclusive that due care was exercised. If the means of fastening are so simple and easy of removal as to furnish no obstacle to children seeking to unfasten and move the turn-table the company does not fulfill the measure of care required of it. O'Malley v. St. Paul, M. & M. R. Co. 43 Minn. 289.

To the same effect is Barrett v. Southern Pac. Co. 91 Cal. 296.

Contributory negligence.

If parents of a child negligently permitted it to wander from home and go upon a turn-table, they cannot recover for his death caused by the negligence of the railroad company in not properly guarding it. Koons v. St. Louis & I. M. R. Co. 65 Mo. 592.

The plain inference from the opinion in this case is that the company would be liable in the absence of such contributory negligence. In this case it is said that the custom of other railroads in the management of turn-tables is immaterial.

A boy ten and one half years of age, who went upon a turn-table after having been repeatedly warned of the danger and knowing that he had no right to go there, is guilty of contributory negligence that will defeat a recovery for injuries received while playing upon it. Twist v. Winona & St. P. R. Co. 39 Minn. 164, 37 Am. & Eng. R. R. Cas. 336.

If a minor killed while playing upon a turn-table had no knowledge that playing upon the table was unsafe or dangerous, he is not guilty of contributory negligence, although he had sufficient intelligence to know that it was wrong to trespass upon the table. Union Pac. R. Co. v. Dunden, 37 Kan. 1.

In Union Pac. R. Co. v. Dunden, *supra*, recovery was had for the death of a boy eleven years old which resulted from the deceased playing with the defendant's unlocked and unguarded turn-table. The court said: "As to the question whether the deceased knew it was wrong to play upon a turn-table, an answer either way would not have affected the case. He might have known that it was wrong to trespass upon the property of the railroad company, and yet have had no knowledge that the use of the turn-table was dangerous. If the company had presented the question, whether the deceased knew that it was dangerous or unsafe to play upon the turn-table, a wholly different question would be before us for determination."

J. G. G.

14 L. R. A.

ard Oil Co. v. *Davis*, 76 Tex. 630; *Texas Pac. R. Co.* v. *Overheiser*, 76 Tex. 440; *Texas M. R. Co.* v. *Douglas*, 73 Tex. 333; *Gulf, C. & S. F. R. Co.* v. *Styron*, 66 Tex. 421, and other cases cited in 72 Tex. 353.

We conclude that there is no error for which the case ought to be reversed, and *we recommend that the judgment of the court below be affirmed.*

Adopted by Supreme Court, June 16, 1891.

OHIO SUPREME COURT.

PENNSYLVANIA CO., *Plff. in Err.*,
v.
Antonia LOMBARDO.

(.....Ohio.....)

***While a champertous agreement between a plaintiff and his attorney for the prosecution of a certain suit is against public policy** and void, it does not affect the right of the plaintiff to prosecute his action against the defendant in the suit for the prosecution of which the champertous agreement was made.

*Head note by the COURT.

(January 19, 1892.)

NOTE.—*Collateral champerty as a defense.*

A champertous contract for the prosecution of a cause of action is no defense, and the champerty can only be set up by a party thereto, when the champertous agreement is sought to be enforced. Boone v. Chiles, 35 U. S. 10 Pet. 219, 9 L. ed. 403; Burnes v. Scott, 117 U. S. 582, 29 L. ed. 992; Courtright v. Burnes, 13 Fed. Rep. 317, 3 McCrary, 60; Reed v. Janes, 84 Ga. 380; Robinson v. Beall, 26 Ga. 17; Torrence v. Shedd, 112 Ill. 496; Small v. Chicago, R. I. & P. R. Co. 55 Iowa, 582; Vimont v. Chicago & N. W. R. Co. 69 Iowa, 296; Allison v. Chicago & N. W. R. Co. 42 Iowa, 274; Fogerty v. Jordon, 2 Robt. 319; Hovey v. Hobson, 51 Me. 62; Brinley v. Whiting, 5 Pick. 348; Bent v. Priest, 1 West. Rep. 749, 86 Mo. 475; Pike v. Martindale, 6 West. Rep. 838, 91 Mo. 268; Million v. Ohnsorg, 10 Mo. App. 432; Taylor v. Gilman, 58 N. H. 417; Whitney v. Kirtland, 27 N. J. Eq. 338; Hart v. State, 120 Ind. 83; Hall v. Gird, 7 Hill, 586; Cooke v. Pool, 25 S. C. 503; McMullen v. Guest, 6 Tex. 275; Hilton v. Woods, L. R. 4 Eq. 432.

A plaintiff cannot reply that the defendant is making his defense under a champertous agreement to share the benefits of success with another. Allen v. Frazee, 85 Ind. 283.

Where a suit, which was being prosecuted under a champertous arrangement between the plaintiff and his attorney, was settled, the defendant agreeing to pay the plaintiff's attorney fee, the defendant admitting such promise, cannot escape payment of a reasonable fee, on account of such champertous contract. Hyatt v. Burlington, C. R. & N. R. Co. 68 Iowa, 682.

It is said in Atchison, T. & S. F. R. Co. v. Johnson, 29 Kan. 218, that no champertous contract between the plaintiff and her attorneys could have the effect to destroy her right to prosecute the action to judgment and to enforce such judgment against the defendant.

In this case a plaintiff having prosecuted her action to judgment under a champertous agreement with her attorneys, assigned to them a part of the judgment. The defendant, after the assignment and with notice thereof, settled with the plaintiff and procured a release of the entire judgment. In a proceeding by the attorneys to enforce their share of the judgment against the defendant, it was held that the defendant could take advantage of the champertous consideration for the assignment to defeat the attorneys' claim. *Contra*, Ross v. Chicago, R. I. & P. R. Co. 55 Iowa, 691.

In Rindge v. Inhabitants of Coleraine, 11 Gray, 157, it was objected by the defendants that the nominal plaintiff was prosecuting the action under a champertous agreement with the beneficial plaintiff. The court held the agreement not champertous, but did not question or affirm the right of the defendants to avail themselves of such an agreement, if it had actually been champertous.

This is also true of Williams v. Fowle, 132 Mass. 385.

The rule in Tennessee, Wisconsin, Indiana.

The rule in Tennessee established by statute is *sui generis*.

Section 1783 of the Statutes of Tennessee (1871, Thompson & Steger ed.) provides that "upon the fact of the champerty or other unlawful contract being satisfactorily disclosed to the court, where the suit may be depending, in either of the ways hereinafter mentioned, the suit shall be by the court dismissed." Act 1821, chap. 66, § 2.

In Webb v. Armstrong, 5 Humph. 379, it is said: "Before the statute, and since the statute, if it satisfactorily appear to the court in proof that the suit in its origin and progress is affected by champerty, it is a duty of the court not to permit itself to become the organ and instrument to consummate such agreements, but to repel the plaintiff and his suit."

A champertous agreement made by one of several joint plaintiffs, with authority to act for all, although made without the knowledge of the others, requires the suit of all to be dismissed. Vincent v. Ashley, 5 Humph. 593.

A vendor in a deed void for champerty may recover in ejectment, but if his vendee join with him in the suit, it must be dismissed. Saylor v. Stewart, 2 Heisk. 510.

Under the Tennessee statute the suit must be dismissed, whether the champertous contract is made by the plaintiff with an attorney or a layman. Weedon v. Wallace, Meigs (Tenn.) 236.

If there is champerty in the prosecution of a suit, it must be availed of before judgment. It is no ground for equity to restrain the collection of the judgment. Hunt v. Lyle, 8 Yerg. 142.

The cases of Barker v. Barker, 14 Wis. 131, and Allard v. Lamirande, 29 Wis. 502, observing only the Tennessee decisions, approved the rule of that State, evidently overlooking the peculiar statute under which they were rendered.

In Greenman v. Cohee, 61 Ind. 291, the objection was made for the first time on appeal that the action was being prosecuted under a champertous agreement between the plaintiff and his attorney. The court said: "This is not a matter of which a third party could take advantage." Upon a rehearing, the court said: "When such fact did appear, if it did clearly appear to the court, the court, perhaps, of its own motion, might have dismissed the action on the ground of public policy,"—citing Barker v. Barker, 14 Wis. 131; Webb v. Armstrong, 5 Humph. 379; Hunt v. Lyle, 8 Yerg. 142, the Wisconsin and Tennessee cases.

But it was held that the non-action of the court was not error, and that the question whether it would have been error to deny the motion to dismiss was not before the court. J. G. G.

See also 44 L. R. A. 285; 45 L. R. A. 110, 196.

ERROR to the Circuit Court for Mahoning County to review a judgment affirming a judgment of the Court of Common Pleas in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are stated in the opinion.

Messrs. **J. R. Carey** and **W. C. Boyle,** for plaintiff in error:

The punishment meted out to the champertor is the denial of relief under the illegal contract.

Key v. *Vattier*, 1 Ohio, 132; *Weakly* v. *Hall*, 13 Ohio, 167, 42 Am. Dec. 194; *Stewart* v. *Welch*, 41 Ohio St. 483.

We here raise a different, and, so far as this State is concerned, a new question.

Champerty was proved.

Champerty is a bargain with plaintiff or defendant to have part of the land or other thing sued for, if the party that undertakes it prevail therein, whereupon the champertor is to carry on the party's suit at his own expense.

4 Bl. Com. 135; *Key* v. *Vattier*, 1 Ohio, 132; *Weakly* v. *Hall*, 13 Ohio, 167, 42 Am. Dec. 194.

Plaintiff testifies that he came to see Jacobs about his law-suit; that the agreement made between them was that they were to divide equally what was recovered, and that Jacobs was to pay all expenses.

There are many authorities which hold that maintenance is not a necessary ingredient of the offense of champerty.

Scobey v. *Ross*, 13 Ind. 117; *Quigley* v. *Thompson*, 53 Ind. 317; *Thurston* v. *Percival*, 1 Pick. 415; *Byrd* v. *Odem*, 9 Ala. 755; *Lathrop* v. *Amherst Bank*, 9 Met. 489; *Backus* v. *Byron*, 4 Mich. 535; *Martin* v. *Clarke*, 8 R. I. 589, 5 Am. Rep. 586.

It was the duty of the court to dismiss the action.

Purity in the administration of justice requires that such acts be punished, whenever and however discovered.

Stewart v. *Welch*, 41 Ohio St. 483.

Where, in the course of the trial of an action, not founded upon a champertous contract, it incidentally appears that the action is being prosecuted by the plaintiff's attorney under a champertous contract, the court may at once dismiss the action.

Greenman v. *Cohee*, 61 Ind. 201; *Barker* v. *Barker*, 14 Wis. 142; *Allard* v. *Lamirande*, 29 Wis. 502; *Hunt* v. *Lyle*, 8 Yerg. 142. See also *Webb* v. *Armstrong*, 5 Humph. 379; *Morrison* v. *Deaderick*, 10 Humph. 342.

Messrs. **Frank Jacobs, W. S. Anderson** and **George F. Arrel** for defendant in error.

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

The action in the common pleas was brought by the plaintiff, Lombardo an employé of the Pennsylvania Company, to recover damages for an injury caused, as alleged, by the negligence of the company in operating its road. The defendant denied negligence on its part, and, for a further defense, set up a compromise and settlement of the claim made by it with the plaintiff. To the latter defense the plaintiff replied that it had been obtained by fraud, setting out the facts claimed to constitute the fraud. A trial was had, which resulted in a verdict and judgment for the plaintiff, which was reversed on error by the circuit court, and the case remanded for a new trial. At the second trial the defendant made no contest on the averments of the petition, but relied upon its plea of a settlement. The jury again found for the plaintiff, and assessed his damages at $1,500. A motion for a new trial was overruled, and judgment entered on the verdict, which, on error was affirmed by the circuit court. It appears from a bill of exceptions taken at the trial that during its progress it was developed by an examination of the plaintiff that the cause was being prosecuted by him under an agreement with his attorney whereby the latter was to have one half of the recovery as a compensation for his services, and that evidence was also offered by the defendant tending to prove that the attorney was to pay all costs and expenses, and that no settlement or compromise should be made by the plaintiff without his consent. Thereupon the defendant moved the court to dismiss the action on the ground that it was being prosecuted under a champertous agreement between the plaintiff and his attorney. The motion was overruled, and exception taken. Exceptions were also taken to the rulings of the court on the admission and rejection of testimony, and to certain parts of its charge, and its refusal to charge as requested; but, as the assignments based on these rulings are not relied on in argument, no further notice need be taken of them than to say they show no grounds for a reversal of the judgment.

The principal question argued to the court, and the one we propose to notice, is that raised by the motion to dismiss the action, on the ground that the evidence disclosed that the action was being prosecuted under a champertous contract between the plaintiff and his attorney. It seems well settled, by the previous decisions of this court, that a contract between the attorney and client, by which the former is to prosecute the action at his own expense, and receive for his compensation a part of the recovery, is against public policy, and cannot be enforced; and it seems that this would be the case in a contract by which the attorney is simply to receive a part, coupled with a stipulation that no compromise or settlement is to be made without his consent. *Key* v. *Vattier*, 1 Ohio, 132; *Weakly* v. *Hall*, 13 Ohio, 167, 42 Am. Dec. 194; and *Stewart* v. *Welch*, 41 Ohio St. 483. In all the cases in which the question has heretofore arisen in this State, an illegal or champertous agreement was sought to be enforced or relied on for relief. Thus in *Key* v. *Vattier* a recovery was sought for a breach of the covenants of a champertous agreement; in *Weakly* v. *Hall*, to a plea of release since the last continuance, the terms of such an agreement were interposed by a reply in avoidance of the plea; and in *Stewart* v. *Welch* the plaintiff's title to the chose and his right to maintain the action rested upon his agreement with the assignor, which the court found and held to be champertous. The plaintiff, Welch, was to prosecute the suit in his own name and at his own expense, and to account to the assignor for a definite part of the recovery. But, in the case under review,

the facts are wholly different in this regard. It is not based upon any agreement between the attorney and the client in regard to compensation of the attorney for his services. It was a suit to recover damages resulting to the plaintiff from the tort of the company, and the agreement between the plaintiff and his attorney was wholly extraneous to its prosecution and was in no way relied upon for relief. The question as now presented is a new one in this State, as counsel for the plaintiff in error is frank enough to admit. It is whether the courts should not merely defeat any claim based upon the illegal agreement, but should go further, and, by way of punishment, also defeat the right of the plaintiff to recover in the action touching the prosecution of which he has made a champertous agreement with his attorney. Some cases are cited in support of this view; but they are contrary to the greater weight of authority, and seem unsupported by satisfactory reasons. It would seem that the law, on grounds of public policy, goes quite far enough when it defeats any advantages that may be sought by an enforcement of the agreement, without visiting upon the plaintiff a forfeiture of his right of action in the suit for the prosecution of which the attorney was employed. This is in analogy to our law in regard to usurious contracts, which simply defeats the usurious agreement, without affecting the right of the usurer to recover the principal loaned, with interest at the legal rate; champerty, like usury, not being an offense punishable by indictment in this State. It is stated by the author of a well-written article on the subject, contained in 3 Am. & Eng. Encyclop. Law, 68, 86, that, "the better opinion would appear to be that the defense of champerty can only be set up when the champertous contract itself is sought to be enforced, and that the existence of a champertous agreement between the plaintiff and his attorney, or the fact that the plaintiff is prosecuting the case upon a contingent interest in the subject matter of the litigation dependent upon success, is no defense to the action against the defendant." An examination of the citations fully sustains the statement. In one of the cases cited (*Hilton* v. *Woods*, L. R. 4 Eq. 432), Malins, V. C., said: "I have carefully examined all the authorities referred to in support of this argument (that the agreement between the plaintiff and his attorney, being champertous, required the suit to be dismissed), and they clearly establish that whenever the right of the plaintiff, in respect of which he sues, is derived under a title founded on champerty or maintenance, his suit will, on that account, necessarily fail. But no authority was cited, nor have I met with any, which goes the length of deciding that, where a plaintiff has an original and good title to property, he becomes disqualified to sue for it by having entered into an improper bargain with his solicitor, as to the mode of remunerating him for his professional services in the suit, or otherwise." So that it is immaterial whether a champertous contract was shown by the evidence or not; for, admitting the agreement between Lombardo and his attorney to have been as claimed by counsel for the defendant, it was not sought in the action against the company to enforce it, or derive any benefit from it.

Judgment affirmed.

INDIANA SUPREME COURT.

Leah HAYNES, *Appt.*,
v.
Flora B. NOWLIN.

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

A married woman can maintain an action against one who wrongfully entices her husband from her and alienates his affections.

(December 8, 1891.)

APPEAL by plaintiff from a judgment of the Circuit Court for Dearborn County in favor of defendant in an action brought to recover damages for the enticement away of plaintiff's husband and the alienation of his affections from plaintiff. *Reversed.*

The facts are sufficiently stated in the opinion.

Messrs. **Holman & Holman** and **McMullen & Johnson** for appellant.

Messrs. **George M. Roberts, Charles W. Stapp, John K. Thompson** and **Givan & Givan,** for appellee:

The Kansas statute under which *Mehrhoff* v. *Mehrhoff*, 26 Fed. Rep. 13, was decided, provides that "a married woman may, while married, sue and be sued in the same manner as if she were unmarried.";

The provisions of the Ohio statute under which *Westlake* v. *Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397, was decided are that a married woman's "personal property growing out of any violation of her personal rights shall be her separate property, and under her sole control," and enables her to sue alone if the action concerns her separate property. These are both broader than our statute, which goes no further than to allow her, in her own name, to maintain an action for damages "for any injury to her person or character." A former statute of Ohio, under which the case of *Mulford* v. *Clevell*, 21 Ohio St. 191, holding that an action like the one at bar could not be maintained, was decided, allowed the wife to sue for "injury to her property or person."

The enticing away or seduction of the husband by acts directly operating upon him, if affording grounds for an action by the wife, does so, not by reason of a direct injury to the wife, but by reason of the effect produced, viz.: the deprivation of the wife of the support and *consortium*, which the "institution of marriage" compels him to accord her.

NOTE.—For recent authorities on this question, see Warren v. Warren, *ante*, 545, and *note*.

See also 26 L. R. A. 412; 27 L. R. A. 120, 685; 32 L. R. A. 623; 38 L. R. A. 242; 40 L. R. A. 549; 43 L. R. A. 114; 47 L. R. A. 310.

If this is true, it is equally true that any wrongful act towards the husband, such as unlawfully disabling him, or unlawfully or negligently taking his life, whereby the wife is deprived of his *consortium* and support, would furnish her the right to maintain an action, independent of section 284, which gives a right of action in case of death, in the cases there mentioned. Yet that such an action by a married woman can be maintained, independent of such statutory provision, has never been claimed.

Mobile L. Ins. Co. v. *Brame*, 95 U. S. 754, 24 L. ed. 580.

The Married Woman's Acts do not so far destroy the unity of husband and wife as that either can be convicted of the larceny of the other's separate goods.

Thomas v. *Thomas*, 51 Ill. 163.

Nor can a husband be guilty of arson in burning his wife's house.

Snyder v. *People*, 26 Mich. 106, 12 Am. Rep. 302.

Nor can a wife sue her husband for slander.

Freethy v. *Freethy*, 42 Barb. 461.

Nor in replevin.

Hobbs v. *Hobbs*, 70 Me. 281.

Nor in trover.

Owen v. *Owen*, 22 Iowa, 270.

That the unity of husband and wife still exists, is well shown in the cases of—

Barnett v. *Harshbarger*, 3 West. Rep. 750, 105 Ind. 410; *Harrell* v. *Harrell*, 117 Ind. 94; *Corcoran* v. *Corcoran*, 119 Ind. 138; *Simons* v. *Scott*, 53 Cal. 76.

The force and effect of a statute giving a right of action to a married woman for any "injury to person or character," has been considered in other states, and no such ideal construction has ever been given to the phrase quoted as is contended for here.

Van Arnam v. *Ayers*, 67 Barb. 544; *Calloway* v. *Laydon*, 47 Iowa, 456, 29 Am. Rep. 489; *Milford* v. *Cleveland*, 21 Ohio St. 191; *Duffies* v. *Duffies*, 8 L. R. A. 420, 76 Wis. 374; *Logan* v. *Logan*, 77 Ind. 558.

Mr. **John K. Thompson,** in a separate brief for appellee, argued:

In *Bennett* v. *Bennett*, 6 L. R. A. 553, 116 N. Y. 584, the court argues that "the cause of action for a personal injury to a married woman, whether committed before or after marriage, belonged to her at common law, or else it would not survive to her upon the death of her husband. If it was his it would either abate or pass to his personal representatives. On the other hand, if she dies as *Lord* Bacon said, the 'action dies with her.'

"Bacon, Abr. *Baron & Feme*, K.

"Unless the right was hers, subject only to the disability to sue without her husband joined, why should it cease upon her death? Why should it not survive to the husband, if the right itself is his? So, in the case of an absolute divorce, such rights of action remain the property of the wife.

"*Legg* v. *Legg*, 8 Mass. 99; *Lodge* v. *Hamilton*, 2 Serg. & R. 491.

"If the injury was to the wife only, the action was brought in the name of both husband and wife, and was, in effect, her action. If the injury was in part to her and in part to him, for the former both joined, for the latter he sued alone.

"*Johnson* v. *Dicken*, 25 Mo. 580; *Hooper* v. *Huskell*, 56 Me. 251; *Laughlin* v. *Eaton*, 54 Me. 156."

In which it seems to us are contained latent assumptions the equivalent of assuming the proposition sought to be established, which proposition is "that at common law the wife held a right of action for enticement of her husband."

The first proposition in the quotation assumes that enticement of the husband is a direct personal injury to the wife resting on the same basis with slander of the wife or assault and battery, etc., of the wife. If this is not so the authorities on which it is predicated are not applicable, for all of them are cases where the wrong was to the wife direct, and not resulting.

The husband's right of action for enticement of the wife or other wrong to the wife personally counted "*per quod*," and such action if it did exist to the wife for enticement or other wrong to her husband personally, necessarily counted "*per quod*," and in either case the action would not be maintained by the one sustaining the personal wrong and injury, but by the one sustaining special damage, resulting from a personal wrong to another. For the resulting special damage to him the husband sued alone and the wife could not be joined; for the direct wrong and injury to the wife personally the husband joined with her in the suit, and no suit was maintained by both husband and wife counting "*per quod*," for special damages resulting from injury to either from a wrong to the other. In all cases in which the husband joined with the wife in a suit for damages it was necessary to allege that the injury was done to the wife, and these are the cases where the action survived to the wife.

14 Am. & Eng. Encyclop. Law, p. 659, § 8, *note 9;* p. 650, and *note.*

In suits for his special damages the husband sues alone.

1 Starkie, Slander & Libel, *348–354; 2 Starkie, Ev. *536; 2 Kent, Com. *180; 1 Tidd, Pr. *9; *Hyatt* v. *Cochran*, 85 Ind. 231.

In these relative injuries, notice is only taken of the wrong done to the superior of the parties related, by the breach and dissolution of either the relation itself or at least the advantages accruing therefrom; while the loss of the inferior by such injuries is totally unregarded. One reason for which may be this: that the inferior hath no kind of property in the company, care, or assistance of the superior, as the superior is held to have in those of the inferior; and therefore the inferior can suffer no loss or injury. The wife cannot recover damages for beating her husband, for she hath no separate interest in anything during her coverture.

3 Chitty's Bl. Com. *142, 143.

No action for injury to the person survived the death of the person injured, at common law.

Kearney v. *Boston & W. R. Corp.* 9 Cush. 108; *Mann* v. *Boston & W. R. Corp.* 9 Cush. 108; *Hollenbeck* v. *Berkshire R. Co.* 9 Cush. 478.

The wife could not sue for special damages resulting from the loss of her husband's society and services.

Schouler, Dom. Rel. 110.

It was not allowed to the husband to join

his wife in suit for a personal wrong to himself or for special resulting damages.

1 Starkie, Slander & Libel, *348; *Ebersoll* v. *Krug*, 3 Binn. 555; *Beach* v. *Ranney*, 2 Hill, 309; *Beach* v. *Beach*, Id. 260, 38 Am. Dec. 584; *Hart* v. *Crow*, 7 Blackf. 351; *Long* v. *Morrison*, 14 Ind. 595, 77 Am. Dec. 72; 9 Am. & Eng. Encyclop. Law, p. 832, § 20, and *notes*, p. 836, § 23, and *notes*; *Southworth* v. *Packard*, 7 Mass. 95; 2 Hilliard, Torts, pp. 500–505, 511–517, 519, § 13.

It is manifest, therefore, that reasoning from these well-sustained rules, the argument quoted assumes one at least of these two propositions, viz.: that the action "*per quod*" etc., for damages resulting from a wrong against another personally survived to the one immediately receiving the injury, or that no distinction existed between the former action and the class of actions in the prosecution of which the husband joined the wife, alleging her to be the meritorious cause, which survived to the wife. But the former position is "*felo de se*," for in the action "*per quod*" etc., the immediately wronged party had no interest and held only an interest in another and different right of action, which also shows an existing distinction and the latter proposition untrue. This the last proposition quoted from the opinion fully affirms on authority, as do all of the authorities.

But one right of action could arise from a personal injury to a married man and that right was to him. Enticement of a married man without his consent or by fraud and deception is a personal injury to him. Therefore the wife could have no right of action therefor. Only one right of action arose to recover damages resulting from an injury to a third person, which right was to the superior of that person.

Because for direct wrongs to the wife she held the right of action which during coverture could be prosecuted, the husband joining her, and that on becoming discovert she could sue alone, it will not do to say *ergo* the wife held a right of action for an alleged resulting injury; for in that is contained the latent assumption that her right was the same as though the wrong was against her personally.

At the common law the husband was the superior and had the right to the services and society of the wife, esteemed valuable property rights, but the wife being inferior never had such recognized right to the service and society of the husband.

See *Logan* v. *Logan*, 77 Ind. 558.

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

The question which this record presents arises upon the ruling of the trial court sustaining a demurrer to the appellant's complaint. The question which requires our consideration and judgment is this: Can a married woman maintain an action against one who wrongfully entices her husband from her, and alienates his affections? It was the boast of the common law that "there is no right without a remedy," and in the main this boast was not an idle one, but was made good by the vindication of legal rights in almost all instances where the right was appropriately presented for judicial consideration and determination. Some of the courts, however, sacrificed the principle outlined in the maxim to the demands of fancied consistency, and surrendered a clear and strong right to a barren technical rule, for they held that a wife could not maintain an action for the loss of the society, support, and affections of her husband. The fiction that the *baron* and *feme* were one person so far swayed the judgments of some of the courts as to carry them from a sound fundamental principle, and cause them to declare a doctrine revolting to every right-thinking person's sense of justice, and contrary to the foundation principles of natural right. We say that some of the cases did this, for not all gave the doctrine we refer to support; but, on the contrary, denied it, by holding that the wife might have a right of action against the wrong-doer who took her husband from her. To those cases we shall presently refer. The principle outlined in the maxim quoted requires that, even where the common law as it now exists prevails, it should be held that a wife may have an action against the wrong-doer who deprives her of the society, support, and affections of her husband. If there is any such thing as legal truth and legal right, a wronged wife may have her action in such a case as this, for in all the long category of human rights there is no clearer right than that of the wife to her husband's support, society, and affection. An invasion of that right is a flagrant wrong, and it would be a stinging and bitter reproach to the law if there were no remedy. The virtue of elasticity which has been so often ascribed to the common law (and generally very justly) is nowhere more clearly or beneficially manifested than it is in relation to the rights of married women. Long since the doctrine of feudal times, which gave so many, and such comprehensive rights to the *baron*, and so few, and such narrow ones, to the *feme*, has given way before the enlightened thought of better ages and less barbarous times. One who should now, either in England or America, attempt to secure an enforcement of the old rules which placed the wife in such abject subjection to the husband, and stripped her of so many rights which belong, in natural justice, to a rational human being, would find a stern denial. It is beyond controversy that without the aid of statutory enactments the harsh, unreasonable rules of the old common law have fallen before the spirit of enlightened reason and true progress. The doctrine that the wife could not maintain an action against one who deprived her of her husband violates the old maxim that "reason is the life of the law," for there can be no reason in a rule which gives the stronger a right of action for an injury and denies it to the weaker. If the stronger may maintain an action, the greater the reason why the weak may do so. If the *baron* may recover from one who entices away the *feme*, surely the same reason that supports the rule giving the former a right of action must give a like right to the latter. The reason is the same, but the degree is not, for the reason intensifies in power when invoked by the

injured wife. The decisions which denied the wronged wife a right of action broke the line of consistency and marred the symmetry of the law. We have spoken of the decisions under the common law, but we do not feel called upon to discuss them at length; that has been ably done by the courts which have given the subject consideration. *Bennett* v. *Bennett*, 116 N. Y. 584, 6 L. R. A. 553; *Lynch* v. *Knight*, 9 H. L. Cas. 577; *Breiman* v. *Paasch*, 7 Abb. N. C. 249; *Baker* v. *Baker*, 16 Abb. N. C. 293; *Jaynes* v. *Jaynes*, 39 Hun, 40; *Warner* v. *Miller*, 17 Abb. N. C. 221; *Churchill* v. *Lewis*, Id. 226; *Foot* v. *Card*, 58 Conn. 1, 6 L. R. A. 829.

The decisions to which we have referred, and the authorities they adduce, prove beyond debate that even at common law the right of action for a personal wrong was in the wife. We assume, therefore, that the right of action for a wrong suffered by the wife was in her, and not in the husband. Any other conclusion is, indeed, logically inconceivable.

As the right of action for a personal injury was always in the wife, she is, of necessity, the real party in interest; and upon reason and principle she ought always to have been held to be the party entitled to prosecute the action for the invasion of that right. That it was not so held was owing to the power of the legal fiction that she and her husband were one, for from this fiction comes the stiff, unreasonable rule that in all actions she must join her husband. Equity however, never gave full recognition to this technical doctrine. Our statute, years ago, gave the wife a right to sue alone, and thus—adopting the chancery doctrine and abrogating that of the common law—broke down the only position upon which it could with the slightest plausibility be asserted that she could not sue one who wrongfully took her husband from her, since upon the ground that she could not sue alone was rested the doctrine denying her a right to sue one who enticed away her husband. It was never asserted by the better-considered cases nor by the abler text-writers that she did not herself possess the substantive right upon which the cause of action was founded. The reason that she could not maintain such an action was not that she was not the source of the substantive right, but that there was no remedy available to her for the vindication of the right. When the statute supplied the remedy by breaking down the barrier which stood between her and a recovery, it clothed her with full right to enforce her just and meritorious cause of action. We know that in the case of *Logan* v. *Logan*, 77 Ind. 558, a different doctrine was declared, but that decision was by a divided court, and the question was not fully considered; not a single authority was there adduced, nor is there any consistent line of reasoning. We should be strongly inclined to deny the soundness of that decision if it were necessary to do so, but it is not necessary that we should overrule it, for, since the cause of action there declared invalid arose, radical changes have been made by statute. The rights as well as the obligations of married women have been greatly enlarged. In many cases it has been affirmed of married women that under the present statute "ability is the rule and disability the exception." *Rosa* v. *Prather*, 103 Ind. 191, 1 West. Rep. 267; *Arnold* v. *Engleman*, 103 Ind. 512–514, 1 West. Rep. 482; *McLead* v. *Aetna L. Ins. Co.* 107 Ind. 394, 5 West. Rep. 633; *Indianapolis* v. *Patterson*, 112 Ind. 344, 11 West. Rep. 839; *Bennett* v. *Mattingly*, 110 Ind. 197, 9 West. Rep. 282; *Strong* v. *Makeever*, 102 Ind. 578, 3 West. Rep. 346, and 102 Ind. 587, 3 West. Rep. 351; *Lane* v. *Schlemmer*, 114 Ind. 296–301, 12 West. Rep. 922; *Phelps* v. *Smith*, 116 Ind. 387–402; *Young* v. *McFadden*, 125 Ind. 254; *Miller* v. *Shields*, 124 Ind. 166, 8 L. R. A. 406. It seems to us very clear that, in view of the fact that true principle requires that a married woman should have a remedy for the vindication of a violated right, and that her rights and obligations have been so greatly increased and enlarged by the enabling statutes, she may have redress against one who wrongfully takes her husband from her. Every radical, express change in the law carries with it corresponding and incidental changes. These incidental changes are inseparable from the essential express changes, and are wrought by the Legislature. No part of the law can be expressly changed without causing incidental changes. To hold otherwise would be to frustrate the legislative purpose and break the law into isolated parts and disjointed fragments. It must follow from this doctrine that, when the statutes gave a married woman the right to sue alone, and changed her status so as to invest her with the general property rights of a citizen and impose upon her almost the same obligations as those resting upon all citizens free from disability, they clothed her with the right to appeal to the courts to redress the wrong inflicted by one who tortiously wrested from her the support, society, and affections of the husband. In adjudging, as we do, that this action can be maintained, we believe that we build on solid principle, and we know that we are sustained by able courts. The authorities already adduced give our conclusion support, and to them we add: *Searer* v. *Adams* (N. H.) 19 Atl. Rep. 776; *Mehrhoff* v. *Mehrhoff*, 26 Fed. Rep. 13; *Westlake* v. *Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397; *Postlewaite* v. *Postlewaite*, 1 Ind. App. 473. See also *Duffies* v. *Duffies*, 76 Wis. 374, 8 L. R. A. 420.

The views of the text-writers are in harmony with our conclusion. Mr. Bigelow says: "To entice away or corrupt the mind and affections of one's consort is a civil wrong, for which the offender is liable to the injured husband or wife." Bigelow, Torts, 153. *Judge* Cooley says: "We see no reason why such an action should not be supported where, by statute, the wife is allowed for her own benefit to sue for personal wrongs suffered by her." Cooley, Torts, 228, *note*. Mr. Bishop clearly and strongly states the rule. He says: "Within the principles which constitute the law of seduction, one who wrongfully entices away a husband, whereby the wife is deprived of his society,

and especially also of his protection and support, inflicts on her a wrong in its nature actionable. We have seen that by the common-law rules, which forbid the wife to sue for a tort except by joining the husband as co-plaintiff, she is practically without an available remedy. But under the modern statutes, as they are shaped in many of our states, she can hold property at law, bring suits to secure it, and maintain actions for tort in her own name, without any interference from her husband, so that, where a statute of this sort prevails, she has her action against the seducer of her husband, who has thus wrongfully deprived her of his society and care." 1 Bishop, Mar. & Div. § 1358.

Judgment reversed.

NEW YORK COURT OF APPEALS.

John J. MULLIGAN, *Respt.*,
v.
NEW YORK & ROCKAWAY BEACH R. CO. *et al.*, *Appts.*

(.....N. Y.....)

1. A railroad ticket agent who takes a bill believing it to be counterfeit in payment for tickets, and immediately procures the arrest of the person from whom he takes it, is not acting within the scope of his business so as to make the railroad company liable for false imprisonment although the arrest was wrongful and the bill proves to be a good one.

2. An agent whose sole duty is to sell tickets from the window of the ticket office of a railway station is not charged with the protection of passengers waiting for trains nor intrusted with the execution of the transportation contract within the rule which renders the carrier liable for willful misconduct of its servants engaged in performing a duty which the carrier owes the passenger, so as to charge the carrier with liability for the wrongful arrest of a waiting passenger by direction of the agent.

(*Earl and Finch, JJ., dissent.*)

(January 20, 1892.)

APPEAL by defendants from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of the Kings County Circuit in favor of plaintiff in an action brought to recover damages for a false imprisonment alleged to have been caused by defendant's servant. *Reversed.*

Statement by **O'Brien, J.:**

The material facts of this case are substantially as follows: On the afternoon of the 10th

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NOTE.—*Liability of master for false arrest, imprisonment, or malicious prosecution by servant.*

General rule.

Although there are conflicting decisions, the better rule seems to be that if the action is instituted or prosecuted by the agent, while engaged in the course of his employment, and within the scope of his authority, the principal is liable, even though it were done without his knowledge or consent, or contrary to his instructions. Mechem, Agency, § 741, p. 582.

Can corporations be liable for malicious prosecution?

Corporations must act by agents. There seems to have been some hesitation in some of the earlier cases to impute the malice of the agents to the corporations.

In McLellan v. Cumberland Bank, 24 Me. 566, it was said: "It may well be doubted if such corporations can be implicated, by the acts of their servants, in transactions in which malice would have to be found, in order to sustain an action against them therefor. But this case does not render it necessary that we should enter further into the consideration of this point."

It was decided that corporations could not be liable in an action for malicious prosecution, in Childs v. Bank of Missouri, 17 Mo. 213; Gillett v. Missouri Valley R. Co. 55 Mo. 315, and Owsley v. Montgomery & W. P. R. Co. 37 Ala. 560. The two Missouri cases are overruled by Boogher v. Life Asso. of America, 75 Mo. 319, 42 Am. Rep. 413, which expressly overruled the Gillett Case as being in conflict with the overwhelming weight of authority.

It is also said in the Boogher Case that the case of Owsley v. Montgomery & W. P. R. Co. 37 Ala. 560, is in effect overruled by the case of South & North Ala. R. Co. v. Chappell, 61 Ala. 529.

In Copley v. Grover & B. Sewing Mach. Co., 2 Woods, 494, Bruce, J., in the southern district of Alabama refused to follow Owsley v. Montgomery & W. P. R. Co., 37 Ala. 560, and held that the better and modern doctrine is that a corporation is liable for malicious prosecution and other wrongful and tortious conduct of its agents and employés the same as natural persons.

A corporation is liable for the malicious prosecution conducted by its agents, the same as if it was a natural person. Williams v. Planters Ins. Co. 57 Miss. 759, 34 Am. Rep. 494; Vance v. Erie R. Co. 32 N. J. L. 334; Iron Mountain Bank v. Mercantile Bank, 4 Mo. App. 505.

In civil cases.

A client is liable for an improper arrest on a *ca. sa.* procured by his attorney or the latter's managing clerk, although no order was given to that effect. Shattuck v. Bill, 2 New Eng. Rep. 159, 142 Mass. 56; Collett v. Foster, 2 Hurlst. & N. 356.

A judgment creditor is not liable for false imprisonment by reason of the debtor's arrest by an officer on account of his refusal to pay the illegal fees demanded by the officer for service of a capias execution. Small v. Brunfield (N. H.) July 20, 1890.

The malice of an agent in suing out an attachment in his principal's name will not be imputed to his principal so as to render the latter liable. Wallace v. Finberg, 46 Tex. 35.

If in the progress of a cause, the complainants' counsel without probable cause and through malice procured a writ of *ne exeat* under which the defendant was imprisoned, the complainants are not liable to the defendant in an action for false imprisonment, unless they authorized or ratified their

See also 14 L. R. A. 798; 15 L. R. A. 475; 16 L. R. A. 136; 19 L. R. A. 824; 24 L. R. A. 656; 27 L. R. A. 63; 28 L. R. A. 688; 29 L. R. A. 465; 31 L. R. A. 702; 40 L. R. A. 473; 44 L. R. A. 673.

of July, 1888, the plaintiff, accompanied by a friend, went to defendant's station at East New York, and purchased tickets for passage to Rockaway Beach and back. He gave the station agent a five-dollar bill, and received back the tickets and his change, with which he passed out to the platform, and he waited there for the train. In about ten minutes the ticket agent, accompained by two policemen, came out on the platform and pointed out to the policemen the plaintiff and his friend, and said, in substance, that they had passed a counterfeit five-dollar bill upon him, and he directed the police officer to arrest the two men. The policeman told the ticket agent that he believed that there must be some mistake, as he knew the plaintiff and his friend to be reputable business men, and could not believe that they had committed the crime. The agent, however, said that they had passed the counterfeit bill upon him, and that he could not be mistaken and he ended by insisting that the policeman should arrest the plaintiff and his friend, which was accordingly done. The plaintiff and his friend were taken through the street to the police station, in custody, a distance of a mile. On arriving at the police station the five-dollar bill which the plaintiff had given to the ticket agent was sent to a neighboring bank, and was there pronounced good. The police sergeant sent for the ticket agent, and after he came, the facts were explained to him, and he said he was sorry for what he had done, and wanted plaintiff and his friend to excuse him, after which plaintiff and his friend were discharged. They had been detained an hour or so at the police station. Subsequently plaintiff commenced this action to recover damages for the assault upon him, and his arrest and he recovered a verdict.

Mr. **E. B. Hinsdale** for appellants.

Mr. **Charles J. Patterson,** for respondent:

The plaintiff having purchased a ticket and passed upon the defendant's platform to wait for the train had become a passenger and as such was entitled to be protected against unlawful injuries from defendant's employés.

Carpenter v. *Boston & A. R. Co.* 97 N. Y. 494, 49 Am. Rep. 540.

Defendant's employés were bound to protect the plaintiff as far as practicable from unlawful injuries from any source, and *a fortiori* were obliged to refrain from inflicting such injuries themselves.

Stewart v. *Brooklyn & C. R. Co.* 90 N. Y. 588, 43 Am. Rep. 185. See also *Mallach* v. *Ridley*, 6 N. Y. S. R. 651, overruling in effect 43 Hun, 336.

Where an employé of a railroad causes an unlawful arrest and detention of a passenger the company is liable.

Lynch v. *Metropolitan Elev. R. Co.* 90 N. Y. 75, 43 Am. Rep. 141; *White* v. *Twenty-Third St. R. Co.* 20 N. Y. Week. Dig. 510; *Hamel* v. *New York & N. Y. Ferry Co.* 25 N. Y. S. R. 153. See 125 N. Y. 707.

The evidence shows that under some circumstances the agent could direct an arrest, and if he violated his instructions in doing so in a particular case this would afford no defense.

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counsel's action. Burnap v Albert, Taney's C. C. Dec. 244.

Fire Asso. of Phila. v. Fleming, 78 Ga. 733, was an action for malicious arrest and false imprisonment. It was held error to refuse to charge "that the act of a servant in the line of his duty alone binds a principal. Directions of an attorney to stop a witness about to leave the city do not justify an arrest, and such action, if had, was not in the line of duty of such servant or attorney so as to bind his client."

A corporation is liable for wrongfully, maliciously, and without just cause suing out an attachment. Western News Co. v Wilmarth, 33 Kan. 510.

An action on the case will lie against a bank for an attachment procured for it by its cashier without sufficient cause and maliciously. Wheless v. Second Nat. Bank, 1 Baxt. 468.

Goodspeed v. East Haddam Bank, 22 Conn. 530, 58 Am. Dec. 439, was an action brought under "an act to prevent vexatious" suits, but which the court says is subject to the same general principles as are actions on the case for malicious prosecution at common law. It was there held that a corporation was liable for a malicious suit commenced by attachment without probable cause by the authority of the board of directors.

Municipal corporations.

A municipal corporation cannot be made liable for the malicious prosecution of a civil suit to collect a valid tax. Brown v. Cape Girardeau, 7 West. Rep. 152, 90 Mo. 377.

A town is not liable for an arrest and imprisonment procured by its collector for nonpayment of a tax illegally included in his warrant but abated before the collector caused the arrest; nor does it ratify his action by paying his fees for commitment and the jailor's charges. Perley v. Georgetown, 7 Gray, 464.

A municipal corporation is not liable for an unlawful arrest and imprisonment by its officers in an attempt to enforce a void ordinance, although done *colore officii*. Warley v. Columbia, 4 West. Rep. 340, 88 Mo. 106.

By servants employed for police duty.

A depot company is liable for an improper arrest made by one in its employ, performing private police duty. Union Depot & R. Co. v. Smith (Colo.) July 3, 1891.

A principal who selects an agent to detect and arrest offenders is responsible for the acts of the agent committed within the general scope of his employment, although the agent may have violated instructions and arrested an innocent person. Pennsylvania Co. v. Weddle, 100 Ind. 138; Harris v. Louisville, N. O. & T. R. Co. 35 Fed. Rep. 116.

A railroad company is liable for an unlawful arrest and imprisonment by one employed by it to detect, arrest and prosecute persons unlawfully obstructing its tracks. Evansville & T. H. R. Co. v. McKee, 99 Ind. 519, 50 Am. Rep. 102.

An express company's agent employed to pursue and cause the arrest of a person who has stolen its property, will render the company liable for the unlawful arrest made by him. American Exp. Co. v. Patterson, 73 Ind. 430.

A market company is not liable for a false arrest of a person on its premises, made by its employé, who had no authority from the company to make the arrest, but who made it in his capacity as a special officer of the metropolitan police force, although paid only by the company. Wells v. Washington Market Co. 19 Wash. Law. Rep. 52.

In Clark v. Starin, 47 Hun, 345, defendant's son acting as general manager of defendant's pleasure