LAWYERS' REPORTS, ANNOTATED.

BOOK XVI.

ALL CURRENT CASES
OF
GENERAL VALUE AND IMPORTANCE
DECIDED IN
THE UNITED STATES, STATE AND TERRITORIAL COURTS,
WITH FULL ANNOTATION
BY
BURDETT A. RICH, EDITOR,
AND
HENRY P. FARNHAM, ASSISTANT EDITOR.

AIDED BY THE PUBLISHERS' EDITORIAL STAFF AND, PARTICULARLY IN SELECTION, BY THE REPORTERS AND JUDGES OF EACH COURT.

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OF ALL

CASES REPORTED IN LAWYERS' REPORTS, ANNOTATED,

BOOK 16,

NOT OFFICIALLY REPORTED WHEN THIS BOOK WENT TO PRESS.

(To be "tipped in" in front of regular table, used as a book mark or as data for marking each case. Like tables will be furnished for subsequent volumes as fast as possible.

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LAWYERS' REPORTS,

ANNOTATED.

NEW YORK COURT OF APPEALS.

Mary CLEMANS, *Respt.*,
v.
SUPREME ASSEMBLY ROYAL SOCIETY OF GOOD FELLOWS, *Appt.*

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

1. A false warranty by an applicant for life insurance that he has not been rejected by any other company avoids a contract of which it becomes a part, although he believed it to be true while the agent of the insurer knew it to be false, having received and forwarded the former application and been notified of its rejection, if the agent did not fraudulently conceal the fact from the applicant.

2. The New York court of appeals cannot draw the inference of fraud in the

NOTE.—*Effect of knowledge by insurer's agent of falsity of statements in application.*

In general.

The views taken of such knowledge are not entirely harmonious, that of the courts of some of the Eastern states being in general less liberal toward the insured.

The knowledge of the insurer's agent of the falsity of the representations made by the insured in his application is immaterial. Vose v. Eagle L. & H. Ins. Co. 6 Cush. 42.

In McCoy v. Metropolitan L. Ins. Co., 133 Mass. 82, the court says: "In an action at law in this Commonwealth on such a policy, to recover the amount of the insurance, the application is considered as a part of the contract, and if in fact the representations in it are in a material respect untrue, the action cannot be maintained; and oral testimony cannot be received to show either that the company when it issued the policy knew that the representations were untrue, or that the untrue representations were inserted in the application by the agent employed by the company to solicit the insurance without the knowledge of the applicant who had orally stated the truth to the agent,"—citing numerous Massachusetts cases.

In an action on a policy parol evidence is inadmissible to show that the provision by which the insurer seeks to avoid it was introduced by the agent of the insurer by mistake and contrary to the intention of the parties, the insured having accepted it without objection. Holmes v. Charlestown Mut. F. Ins. Co. 10 Met. 211, 43 Am. Dec. 428.

The mistake of the applicant in stating the condition of his title is not cured by the fact that the agent of the insurer drew up the application from statements made by the insured. Lowell v. Middlesex Mut. F. Ins. Co. 8 Cush. 127.

The court said: "It behooves the assured to see for himself, or get a skillful and trustworthy agent to act for him, and not to sign any paper which is not in fact substantially true, when his important rights, indeed all the benefits of the contract, are dependent upon it."

Where a policy is voidable by the insurer by reason of a false representation in the application inserted by the insurer's agent without the knowledge of the insured, the insured cannot escape payment of a premium note while the policy is still recognized as valid by the insurer, unless he offered to surrender the policy within a reasonable time after discovering its voidability. Plympton v. Dunn, 148 Mass. 523. In this case a year and a half was held not a reasonable time.

Parol evidence of knowledge on the part of the agent of the insurer of the falsity of a warranty by the insured is inadmissible to raise an estoppel against the insurer to set up the breach of warranty. Franklin F. Ins. Co. v. Martin, 40 N. J. L. 568, 29 Am. Rep. 271.

An agent of the insurer whose authority is limited to receiving and transmitting applications, who prepares an application for the assured, is for that purpose the agent of the insured who must bear the responsibility for errors made by him in the application. Wilson v. Conway F. Ins. Co. 4 R. I. 141.

Where the agent of the insurer, whose authority was limited to receiving and forwarding applications, receiving, countersigning and delivering policies and collecting premiums, fraudulently and falsely recorded the answers of an applicant, without the latter's knowledge, the policy issued thereon is not binding on the company. Ryan v. World Mut. L. Ins. Co. 41 Conn. 168, 19 Am. Rep. 490.

If the agent of the insurer and the insured collusively insert false statements in the application, the knowledge of the agent of such falsity in no way estops the insurer to take advantage of it. United States Nat. L. Ins. Co. v. Minch, 53 N. Y. 144.

Knowledge by the agent of the insurer of the falsity of a warranty entered into by the insured will not relieve the latter from the consequences of the breach. Jennings v. Chenango County Mut. Ins. Co. 2 Denio, 75; Chase v. Hamilton Ins. Co. 20 N. Y. 52; Galbraith v. Arlington Mut. L. Ins. Co. 12 Bush, 29; State Mut. F. Ins. Co. v. Arthur, 30 Pa. 315; Barteau v. Phœnix Mut. L. Ins. Co. 67 N. Y. 595.

The mere fact that the agent of the insured knew the actual facts does not affect the insurer's right to assert the breach of warranty if the facts are not correctly stated by the insured in his application. Kenyon v. Knights Templars & M. Mut. Aid Asso. 122 N. Y. 247.

An insurance agent's knowledge of the falsity of warranties in an application which he helps to prepare will not prevent them from avoiding the policy. Sullivan v. Metropolitan L. Ins. Co. 36 N. Y. S. R. 38.

See also 22 L. R. A. 319; 24 L. R. A. 197; 25 L. R. A. 637; 26 L. R. A. 171; 36 L. R. A. 374.

first instance for the purpose of supporting a judgment which does not proceed upon that ground, even though there is evidence which would permit such inference, if there is also evidence negativing its existence.

(March 15, 1892.)

APPEAL by defendant from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of a Special Term for Dutchess County in favor of plaintiff in an action brought to recover the amount alleged to be due upon a certificate of life insurance. *Reversed.*

The case sufficiently appears in the opinion.

Mr. **S. M. Lindsley,** for appellant:

The application to defendant warrants that every statement made therein and to the medical examiner is strictly true.

The terms of the application clearly bring it within the accepted definition of warranty as applied to insurance contracts.

Alexander, Life Ins. 51; *Ripley* v. *Ætna Ins. Co.* 30 N. Y. 157, 86 Am. Dec. 362; May, Ins. § 156; 5 Lawson, Rights, Rem. & Pr. § 2051; *Barteau* v. *Phœnix Mut. L. Ins. Co.* 67 N. Y. 595; *Foot* v. *Ætna L. Ins. Co.* 61 N. Y. 571; *Cushman* v. *United States L. Ins. Co.* 63 N. Y. 407.

Durnin warranted that he had never been rejected on an application for life insurance. That was false.

This constituted a breach of warranty, which avoided the contract and bars recovery.

Where the application states material facts falsely to the knowledge of the insured, the mere fact that *the agent who prepared it knew* by personal observation the truth, does not prevent the insurer from setting up the false representations to defeat the insurance. Pottsville Mut. F. Ins. Co. v. Fromm, 100 Pa. 347.

In Brown v. Cattaraugus County Mut. Ins. Co., 18 N. Y. 385, Strong, *J.*, who wrote the opinion, maintained that parol evidence was inadmissible to create an estoppel by showing that the agent of the insurer was responsible for the false statements in the application and the consequent breach of warranty, but the judgment of the court was put on other grounds.

In Plumb v. Cattaraugus County Mut. Ins. Co., 18 N. Y. 392, 72 Am. Dec. 52, the court at the same term by a majority of one (Johnson, *Ch. J.*, Denio and Strong, *JJ.*, dissenting), held such evidence was admissible and that *the insurer was estopped to set* up the breach of warranty for which the agent was responsible. Followed in Rowley v. Empire Ins. Co. 36 N. Y. 550, and in the later cases after some hesitation.

In Waterbury v. Dakota F. & M. Ins. Co., 6 Dak. 468, it is said to be too well settled to be now questioned that if at the time of issuing the policy the company or its agents know the falsity of a representation by the applicant the company is estopped from asserting such falsity in order to escape liability.

The insurer is estopped to deny the correctness of representations in the application which his agent with full knowledge of the facts has induced the insured to make. Mutual Ben. L. Ins. Co. v. Daviess, 87 Ky. 541.

An insurance company *is estopped from taking* advantage of the falsity of an answer in an application for insurance, where, at the time of the issue of the policy, it personally or through its *agent has knowledge of the facts* which the question answered is intended to elicit. Dwelling-House Ins. Co. v. Brodie, 4 L. R. A. 458, 52 Ark. 11; Dunbar v. Phœnix Ins. Co. 72 Wis. 492; Menk v. Home Ins. Co. 76 Cal. 50; Continental Ins. Co. v. Pearce, 39 Kan. 396, 7 Am. St. Rep. 557; Pickels v. Phœnix Ins. Co. 119 Ind. 291; Phœnix Ins. Co. v. Copeland, 86 Ala. 551; Western Assur. Co. v. Rector, 85 Ky. 294.

Knowledge by the insurer's agent of the falsity of a material statement by the applicant estops the insurer to set up such falsity to avoid payment of the policy. Miller v. Mutual Ben. L. Ins. Co. 31 Iowa, 216, 7 Am. Rep. 122.

Where a policy-writing agent, with knowledge of the facts subsequently relied on to defeat a recovery, prepares an application satisfactory to *himself, and acts on his own knowledge in taking* the risk, the insured can recover in the absence of collusion or fraud. Richards v. Washington F. & M. Ins. Co. 60 Mich. 420; Germania F. Ins. Co. v. Hick, 23 Ill. App. 381.

If the agent of the insurer relies upon his own knowledge in filling up the application without consulting the applicant a mistake of the agent will not avoid the policy. Parker v. Amazon Ins. Co. 34 Wis. 363; Mechler v. Phœnix Ins. Co. 38 Wis. 665.

Where the insurer's agent assumed the entire preparation of the application which the applicant signed without knowing its contents, the company cannot set up the breach of warranty arising from the incorrectness of answers for which the agent was responsible. Temmink v. Metropolitan L. Ins. Co. 72 Mich. 388; Dunbar v. Phœnix Ins. Co. Id. 492.

If *the agent of the insurer with knowledge of* the facts incorrectly states them in the application the insurer is estopped to deny their correctness. American Ins. Co. v. Lutfrell, 89 Ill. 314; New England F. & M. Ins. Co. v. Schettler, 38 Ill. 166; Atlantic Ins. Co. v. Wright, 22 Ill. 462; Commercial Ins. Co. v. Ives, 56 Ill. 402; Germania F. Ins. Co. v. McKee, 94 Ill. 494; Eggleston v. Council Bluffs Ins. Co. 65 Iowa, 308; Sullivan v. Phenix Ins. Co. of Brooklyn, 34 Kan. 170; Hartford Ins. Co. v. Haas, 2 L. R. A. 64, 87 Ky. 531; Williamson v. New Orleans Ins. Asso. 84 Ala. 106; Crescent Ins. Co. v. Camp. 71 Tex. 503; Western Assur. Co. v. Stoddard, 88 Ala. 666.

The insured is not affected by an overestimate of the value of the property by the agent of the insurer who drew the application in which he took no fraudulent part. Cumberland Valley Mut. Prot. Co. v. Schell, 29 Pa. 31.

Where the agent, seeing the property, inserts a value in the application not given by the insured, who signs the application without reading it and *without knowing* the valuation inserted therein, and was induced to do so by an act on the part of the company, the company is estopped from denying the correctness of such valuation. Wheaton v. North British & M. Ins. Co. 76 Cal. 415.

Where the insured premises were thoroughly examined by the insurer's agent the insurer cannot plead fraudulent concealment. Michael v. Nashville Mut. Ins. Co. 10 La. Ann. 737.

In Cotten v. Fidelity & C. Co., 41 Fed. Rep. 506, it was held that a general warranty against bodily infirmity in an application did not extend to near-sightedness when the applicant wore spectacles which the agent of the insurer saw.

Where insurance has been had upon an application representing the insured as free from bodily infirmity, which is contested because of deafness, *the insured may show that the insurer's agent* knew of such deafness before and while soliciting such insurance from conversations with him. Follett v. United States Mut. Acc. Asso. 12 L. R. A. 315, 107 N. C. 240.

Where a physician acting as agent for the company, in examining an applicant for life insurance

Dwight v. *Germania L. Ins. Co.* 4 Cent. Rep. 529, 103 N. Y. 341, 57 Am. Rep. 729.

Plaintiff cannot escape the effect of the warranty, upon the claim that Durnin did not know the Prudential Company had rejected him.

He is presumed to have read his application and to know its contents.

New York L. Ins. Co. v. *Fletcher*, 117 U. S. 519, 29 L. ed. 934.

He warranted that no company had rejected him, and whether he knew that the statement in his warranty was untrue was clearly immaterial.

Bliss, Life Ins. 2d ed. § 38; *Duckett* v. *Williams*, 2 Cromp. & M. 348, 4 Tyr. 240; *Brisbane* v. *Parsons*, 33 N. Y. 332; *First Nat. Bank of Ballston Spa* v. *North America Ins. Co.* 50 N. Y. 45; *Fitch* v. *American P. L. Ins. Co.* 59 N. Y. 557, 17 Am. Rep. 372; *Foot* v. *Ætna L. Ins. Co.* 61 N. Y. 571; *Cushman* v. *United States L. Ins. Co.* 63 N. Y. 409; *Baker* v. *Home L. Ins. Co.* 64 N. Y. 649; *Powers* v. *North Eastern Mut. L. Asso.* 50 Vt. 630; *Continental L. Ins. Co.* v. *Yung*, 12 West. Rep. 715, 113 Ind. 159; *Connecticut Mut. L. Ins. Co.* v. *Union Trust Co.* 112 U. S. 250, 28 L. ed. 708; *Equitable L. Ins. Co.* v. *Hazlewood*, 7 L. R. A. 217, 75 Tex. 338, 16 Am. St. Rep. 898.

Knowledge of the agent of the company of the falsity of the warranty would not relieve the insured or his representatives from the consequences of a breach.

Barteau v. *Phœnix Mut. L. Ins. Co.* 67 N. Y.

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assumes to write out the answers to the questions upon his own knowledge of the facts, rather than from *the answers given by the* applicant, the answers as given by him are conclusive on the company. Pudritzky v. Supreme Lodge K. of H. 75 Mich. 428.

Where the *soliciting agent, having* personal knowledge of the situation and ownership of the property, fills up the application, statements therein as to title and the distance of the property from other buildings are statements of the company, not of the insured. Thomas v. Hartford F. Ins. Co. 2 West. Rep. 527, 20 Mo. App. 150.

The knowledge of a soliciting agent who wrote out an application for insurance, of facts concerning the title, which he fails to disclose to the company, is constructive notice to the company, which cannot avoid liability on the ground of misrepresentation, although the policy provides that the application *is* a warranty, and that any false representation therein shall render the policy void. Reynolds v. Iowa & N. Ins. Co. 80 Iowa, 563.

The knowledge of an agent, before the issuance of an insurance policy, of the truth as to the ownership of the insured property and litigation concerning it, will prevent a defense on the ground of misrepresentations as to those matters in the application. Western Assur. Co. *v. Stoddard*, 88 Ala. 606; German Ins. Co. v. Churchill, 26 Ill. App. 206; American C. Ins. Co. v. Brown, 29 Ill. App. 602.

Where payment of a policy is resisted because of a breach of a warranty that the building did not *stand* on leased ground, parol evidence is admissible to show that the agent of the insurer knew that the premises were leased, and if such knowledge is established the insurer is estopped to set up the breach of warranty. Manhattan F. Ins. Co. v. Weill, 23 Gratt. 389, 26 Am. Rep. 364; Germania F. Ins. Co. v. Hick, 125 Ill. 361.

If the agent of the insurer knew at the time of issuing the policy *that the* building stood on leased ground, but did not so state in the policy, the insurer cannot escape liability under a clause avoiding the policy if such fact is not stated therein. Brothers v. California Ins. Co. 3 N. Y. Supp. 89; Van Schoick v. Niagara F. Ins. Co. 68 N. Y. 434.

Where an agent, having power to effect insurance without consulting the home office, was fully apprised of the ignorance of the person *insured*, who was an illiterate German woman unable to read or write the English language, and knew all about the nature and extent of her title, a policy issued by him on her property will not be void because *she* is not the absolute and unconditioned owner, although it contained a stipulation that it should be void in that event. Hartford F. Ins. Co. v. Haas, 2 L. R. A. 64, 87 Ky. 531.

Where an *agent sent* his clerk to solicit a risk and take an application, and the clerk knew that there was other insurance on the property, but the agent, ignorant of the other insurance, issued a policy thereon, and collected the *premium, it was* held that the company was bound by the knowledge of the agent's clerk, who, for the purpose of that policy, must be regarded as the company's soliciting agent. Laws 1880, chap. 211, § 1; Bennett v. Council Bluffs Ins. Co. 70 Iowa, 600.

Where the insurer is seeking to escape liability because other insurance in excess of that named in the policy has been taken, it may be shown by parol that the amount taken was really assented to but that a different amount was expressed by the mistake of the insurer's agent, and the insurer is estopped to insist upon the forfeiture due to the blunder of *his agent*. *Greene* v. *Equitable F. & M. Ins. Co.* 11 R. I. 434.

The knowledge of the agent of the misrepresentations upon which the insurance was procured must be pleaded in reply if it *is intended to rely* thereon to defeat the defense based on such misrepresentations. Texas Mut. L. Ins. Co. v. Davidge, 51 Tex. 244.

Knowledge of agent acquired in other capacity.

In Supreme Council of A. L. of H. v. Green, 71 Md. 263, a member of a benefit society falsely represented that the beneficiary named by him was *his* niece. It was held that the society was not estopped to avail itself of the false representation by hearsay information of the officer of the society who witnessed the application, but was not *charged with the duty* of ascertaining the qualifications of beneficiaries, that the beneficiary was not the applicant's niece but of which he had no personal knowledge.

Knowledge *by the insurer's* medical examiner, obtained while not acting for the insurer, that the physical condition of the applicant is different than the latter warrants in his application and policy will not estop the insurer to take *advantage of the* breach of warranty. Foot v. Ætna L. Ins. Co. 61 N. Y. 571.

Where an agent, in transacting business not connected with his agency, acquires knowledge which might affect a policy subsequently issued by him as agent, evidence of such knowledge cannot be given against the company, where it was acquired so long before the issuance of the policy as not to justify an inference that he had it in mind and acted upon it in issuing the policy. Stennett v. Pennsylvania F. Ins. Co. 68 Iowa, 674.

Agent's perversion of information by the insured.

In Maine an application drawn by the insurer's agent is by statute made conclusive upon the insurer but not upon the insured, although signed by the latter. Caston v. Monmouth Mut. F. Ins. Co. 54 Me. 170; Emery v. Piscataqua F. & M. Ins. Co. 52 Me. 322.

Where the insurer's agent in writing out the ap-

595. See also *Ripley* v. *Ætna Ins. Co.* 30 N. Y. 136, 86 Am. Dec. 362; *Jennings* v. *Chenango County Mut. Ins. Co.* 2 Denio, 75; *Foot* v. *Ætna L. Ins. Co.* 61 N. Y. 571; *McCollum* v. *Mutual L. Ins. Co.* 55 Hun, 103; *Sullivan* v. *Metropolitan L. Ins. Co.* 36 N. Y. S. R. 38; Cooke, Life Ins. p. 37; *Kenyon* v. *Knights Templars & M. Mut. Aid Asso.* 122 N. Y. 257.

If Jacobs caused false answers to be given, he was guilty of fraudulently and collusively procuring the false warranty and the defendant is not bound.

Eilenberger v. *Protective Mut. F. Ins. Co.* 89 Pa. 464; *Smith* v. *Cash Mut. F. Ins. Co.* 24 Pa. 320; *New York L. Ins. Co.* v. *Fletcher*, 117 U. S. 519, 29 L. ed. 934; *Ryan* v. *World Mut. L. Ins. Co.* 41 Conn. 168, 19 Am. Rep. 490; Bacon, Ben. Soc. § 159; Alexander, Life Ins. 54; *United States Nat. L. Ins. Co.* v. *Minch*, 53 N. Y. 144; Cooke, Life Ins. p. 40.

Durnin's statement that he had never been rejected by any life insurance company, etc., was material.

Edington v. *Ætna L. Ins. Co.* 77 N. Y. 564, 1 Cent. Rep. 524, 100 N. Y. 536; Bacon, Ben. Soc. § 218; *London Assurance* v. *Mansel*, L. R. 11 Ch. Div. 363.

Where a specific question is asked, and the applicant makes an untruthful answer, the policy is avoided, whether the answers are warranties or representations, because the parties may by their contract make material a fact that would otherwise be immaterial.

Bacon, Ben. Soc. § 212; see also § 218;

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plication fraudulently falsified the applicant's answers without the latter's knowledge, and forged the medical certificate, the insurer cannot escape liability to the insured after having had the benefits of the contract. McArthur v. Home L. Asso. 73 Iowa, 336.

Where the agent of the insurer suppressed the genuine application made by the insured and substituted a spurious one upon which the policy was issued, the insurer is nevertheless liable on the policy. Massachusetts L. Ins. Co. v. Eshelman, 30 Ohio St. 647.

Where the untrue statement in the application originated with the agent of the insurer and was unknown to the insured when he signed the application, the insurer is estopped to set up such false statement to defeat the policy. Union Mut. L. Ins. Co. v. Wilkinson, 80 U. S. 13 Wall. 222, 20 L. ed. 617; Lueders v. Hartford L. & A. Ins. Co. 12 Fed. Rep. 465; Eames v. Home Ins. Co. 94 U. S. 621, 24 L. ed. 298; New Jersey Mut. L. Ins. Co. v. Baker, 94 U. S. 610, 24 L. ed. 268; Continental L. Ins. Co. v. Chamberlain, 132 U. S. 304, 33 L. ed. 341.

Where the application which the insured signed contained an express limitation of the power of the agent to bind the company by anything not expressed therein, the insured is to be presumed to be aware of the limitation, and if he signs the application into which the agent has inserted different statements than the insured made, the latter is bound by the application. New York L. Ins. Co. v. Fletcher, 117 U. S. 519, 29 L. ed. 934.

If the insurer's agent after being informed fully as to the facts incorrectly states them in the application, the insurer is estopped to take advantage of the error to avoid liability on the policy. North American F. Ins. Co. v. Throop, 22 Mich. 146, 7 Am. Rep. 638; Planters Ins. Co. v. Myers, 55 Miss. 479, 30 Am. Rep. 521; Combs v. Hannibal, S. & I. Co. 43 Mo. 148, 97 Am. Dec. 383; Campbell v. Merchants & F. Mut. Ins. Co. 37 N. H. 35, 72 Am. Dec. 324; Clark v. Union Mut. F. Ins. Co. 40 N. H. 333, 77 Am. Dec. 721; Patten v. Merchants & F. Mut. F. Ins. Co. 40 N. H. 375; Hartford Protection Ins. Co. v. Harmer, 2 Ohio St. 452; Farmers Ins. Co. v. Williams, 39 Ohio St. 584; Eilenberger v. Protective Mut. F. Ins. Co. 89 Pa. 464; Swan v. Watertown F. Ins. Co. 96 Pa. 37; May v. Buckeye Mut. Ins. Co. 25 Wis. 291, 3 Am. Rep. 76; Ætna L. S. F. & T. Ins. Co. v. Olmstead, 21 Mich. 246, 4 Am. Rep. 483; Commercial Ins. Co. v. Spankneble, 52 Ill. 53, 4 Am. Rep. 582; Planters Ins. Co. v. Sorrels, 1 Baxt. 352, 25 Am. Rep. 780; Ring v. Windsor County Mut. F. Ins. Co. 51 Vt. 563; Schwarzbach v. Ohio Valley Prot. Union, 25 W. Va. 622, 663; Columbia Ins. Co. v. Cooper, 50 Pa. 331; Miner v. Phœnix Ins. Co. 27 Wis. 693, 9 Am. Rep. 479; American L. Ins. Co. v. Mahone, 88 U. S. 21 Wall. 152, 22 L. ed. 593; Bennett v. Agricultural Ins. Co. of Watertown, 8 Cent. Rep. 692, 106 N. Y. 243; Woodruff v. Imperial F. Ins. Co. 83 N. Y. 140; Pitney v. Glen's Falls Ins. Co. 65 N. Y. 6; O'Brien v. Home Ben. Soc. 117 N. Y. 310, affirming 51 Hun, 495; Commercial Union Assur. Co. v. Elliott (Pa.) 12 Cent. Rep. 668.

And this notwithstanding a stipulation that the solicitor shall be the agent of the applicant and not of the insurer. Miner v. Phœnix Ins. Co., Clark v. Union Mut. F. Ins. Co. and Hartford Protection Ins. Co. v. Harmer, *supra*; Beal v. Park F. Ins. Co. 16 Wis. 241, 82 Am. Dec. 719; Howard F. Ins. Co. v. Bruner, 23 Pa. 50; Hough v. City F. Ins. Co. 29 Conn. 10, 76 Am. Dec. 581; May v. Buckeye Mut. Ins. Co. and Columbia Ins. Co. v. Cooper, *supra*; Planters Mut. Ins. Co. v. Deford, 38 Md. 382. *Contra*, Kabok v. Phœnix Mut. L. Ins. Co. 21 N.Y. S. R. 203; Rohrbach v. Germania F. Ins. Co. 62 N. Y. 47, 20 Am. Rep. 451; Abbott v. Shawmut Mut. F. Ins. Co. 3 Allen, 213.

If the statements in the application relied upon as breaches of warranty are inserted by the agent of the insurer, without collusion or fraud on the part of the insured, the insurer is estopped to set up their error or falsity. Baker v. Home L. Ins. Co. 64 N. Y. 648; Miller v. Phœnix Mut. L. Ins. Co. 10 Cent. Rep. 38, 107 N. Y. 292; Mowry v. Rosendale, 74 N. Y. 360; Bentley v. Owego Mut. Ben. Asso. 5 N. Y. Supp. 223.

An insurance company cannot repudiate the fraud of its agent in inserting untrue answers in the application, and thus escape the obligation of its contract, merely because the assured accepted in good faith the act of the agent, without examination. Kister v. Lebanon Mut. Ins. Co. 5 L. R. A. 646, 128 Pa. 553; Rogers v. Phenix Ins. Co. 121 Ind. 570; Phœnix Ins. Co. v. Golden, 121 Ind. 524.

The insurer cannot take advantage of a breach of warranty arising out of the mistake of his agent acting within his authority and of which the insured was innocent. Susquehanna Mut. F. Ins. Co. v. Cusick, 109 Pa. 157; Menk v. Home M. Ins. Co. 76 Cal. 50.

An error or fraud on the part of an insurance agent who makes out an application, in inserting erroneous or untruthful statements, is chargeable to the insurer and will not defeat the policy. Johnson v. Dakota F. & M. Ins. Co. 1 N. Dak. 167; Phœnix Ins. Co. v. Stark, 120 Ind. 444; Rockford Ins. Co. v. Seyferth, 29 Ill. App. 513; Roberts v. State Ins. Co. 26 Mo. App. 92; State Ins. Co. v. Taylor, 14 Colo. 499, 20 Am. St. Rep. 281; Crouse v. Hartford F. Ins. Co. 79 Mich. 249.

Although it is provided in a policy of insurance that the statements in an application are warranties, and if any of them are false the policy shall be void, it is not forfeited if the company's own agent makes all the false statements contained in the application, and there was no fraud or attempt to deceive on the part of the assured. State Ins. Co. v. Gray, 44 Kan. 731; McComb v. Council Bluffs Ins. Co. (Iowa) June 2, 1891.

Phœnix Mut. L. Ins. Co. v. *Raddin*, 120 U. S. 183, 30 L. ed. 644; *Barteau* v. *Phœnix Mut. L. Ins. Co.* 67 N. Y. 595, citing Bunyan, Life Ins. p. 31; *Higbie* v. *Guardian Mut. L. Ins. Co.* 53 N. Y. 603; *Chase* v. *Hamilton Ins. Co.* 20 N. Y. 52.

Mr. **C. Morschauser,** for respondent:

Defendant's agent, having full knowledge of all the facts, and he being the one who misled Durnin, the defendant cannot now take advantage of it.

O'Brien v. *Home Ben. Society*, 117 N. Y. 310; *Miller* v. *Phœnix Mut. L. Ins. Co.* 10 Cent. Rep. 38, 107 N. Y. 292.

Per Curiam:

The uncontradicted evidence in this case clearly showed that the assured, just prior to June 20, 1887, applied for insurance, by means of a written application signed by him, to the Prudential Life Insurance Company of America, and on that date his application was rejected by that company. The learned court found that the assured made no false statements in his application for insurance to the company defendant. In such last-mentioned application he stated, in answer to questions asked therein, that he had applied to another insurance company for insurance, but had not been rejected. That this answer was false cannot be disputed, upon the uncontradicted evidence. The application, and the answers thereto, were part of the contract of insurance, and were made so by the certificate. The answer was a war-

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A misrepresentation of a material fact inserted by a soliciting agent, without the knowledge and contrary to the instructions of the applicant, in an application not read to or by him, although it contained a printed clause of which he did not know and to which his attention was not called, limiting the agent's powers,—does not invalidate the policy. Tubbs v. Dwelling-House Ins. Co. 84 Mich. 646.

An insurance company is estopped by answers falsely or improperly written by its agent or solicitor to questions contained in the application, without the knowledge of the applicant, where he made true answers to such questions, even though the application was signed by the applicant without knowing its contents. State Ins. Co. v. Gray, 44 Kan. 731.

False statements in the written application, which was wholly prepared and signed by the insurer's agent, to whom the insured made oral application stating the facts truly, are not available as a defense to the policy issued on such application. Baker v. Ohio Farmers Ins. Co. 14 West. Rep. 438, 70 Mich. 199.

A warranty by an insured that his answers to the medical examiner will be true is not a warranty that such answers will be written down correctly by the medical examiner. Equitable L. Assur. Soc. v. Hazelwood, 8 L. R. A. 217, 75 Tex. 338.

An applicant having correctly stated the date of his birth to the insurer's agent is not prejudiced by the agent's mistake in writing it in the application. McCall v. Phœnix Mut. L. Ins. Co. 9 W. Va. 237, 27 Am. Rep. 558; Simmons v. West Virginia Ins. Co. 8 W. Va. 474.

Where the insurer's medical examiner filled in blanks in the application differently than he was informed by the insured after the latter had signed it, the insurer is not relieved from liability on account of the breach of warranty so arising. Grattan v. Metropolitan L. Ins. Co. 80 N. Y. 281, 36 Am. Rep. 617.

Where the applicant for life insurance certifies that the answers written by the insurer's medical examiner are correct, but which he afterwards alleges were recorded differently by the examiner than they were given to him, such certificate is conclusive unless it appears that the answers were not written when the certificate was signed, or at least were not known to the insured when he made such signature. Grattan v. Metropolitan L. Ins. Co. 92 N. Y. 274, 44 Am. Rep. 372.

Where an assured correctly states to the soliciting agent all the circumstances under which property is owned or held by him, any error or neglect on the part either of the agent or company in stating the title or interest of the assured will not avoid the policy. Burson v. Philadelphia F. Asso. 136 Pa. 267, 20 Am. St. Rep. 919; Phœnix Ins. Co. v. Tucker, 92 Ill. 64, 34 Am. Rep. 106; Crescent Ins. Co. v. Camp, 71 Tex. 503.

An insurance company is estopped to deny representations as to the title to the insured property, made in the application, which were written therein by its agent after a full disclosure to him of the true state of the title. Tarbell v. Vermont Mut. F. Ins. Co. 63 Vt. 53.

An insurance company whose agent himself prepared an application with knowledge of the fact that the insured had only a title bond for his land, which was not paid for, cannot defeat an action on the policy on the ground that the application improperly states that the insured was the sole and undisputed owner of the property, and that it was unincumbered, where this was signed by the insured after making a full statement of the facts, in accordance with the agent's theory of his title. Key v. Des Moines Ins. Co. 77 Iowa, 174.

Where an agent applying to plaintiff, owner of a billiard hall and tables, unfamiliar with the English language, for insurance on the hall, was referred to a tenant, who signed the application, and the policy, conditioned that the interest of a third party in the hall or contents must be stated, did not state tenant's interest in the furniture in the hall, of which fact the agent had knowledge, plaintiff can recover to the extent of his interest, upon a loss by fire. Diebold v. Phœnix Ins. Co. 33 Fed. Rep. 807.

An agent of a mutual insurance company, authorized to issue a policy of insurance and consummate the contract, and who is informed by the applicant that a part of the property is on the right of way of a railroad company, and with his own hand fills in the blanks in the application for a policy, and, with knowledge of the condition of the property, writes "Yes" as an answer to the question: "Do you own the land in fee simple?"—thereby waives for the company the stipulation in the policy that it shall be void if any misrepresentation be made as to title or condition of the property. National Mut. F. Ins. Co. v. Barnes, 41 Kan. 161.

Where the insurer's agent although informed of any incumbrance by the applicant omits to mention it in the application which he prepares and which the applicant signs at his request, the insurer cannot take advantage of the breach of warranty so arising. Renier v. Dwelling-House Ins. Co. 74 Wis. 89; Crouse v. Hartford F. Ins. Co. 79 Mich. 249; Commercial Union Assur. Co. v. Elliott (Pa.) 12 Cent. Rep. 668.

Where insurer's agent falsely fills up blanks.

Where the agent of the insurer obtains the applicant's signature to a blank application and fills it up falsely without the knowledge of the insured, the insurer cannot defend because of such falsity. Brown v. Metropolitan L. Ins. Co. 8 West. Rep. 775, 65 Mich. 306.

An answer to an application for insurance, as to

ranty, and upon this evidence there was a breach thereof. *Foot* v. *Ætna L. Ins. Co.* 61 N. Y. 571; *Cushman* v. *United States Ins. Co.* 63 N. Y 404. It is not important that the party making the warranty really believed in its entire truth. If it be false, it avoids the contract. Nor does the mere knowledge of the agent of the company, at the time when it is made, that the warranty is false, prevent the defendant from setting up the breach as a defense to the action on the policy. *Ibid.*; *Barteau* v. *Phœnix Mut. L. Ins. Co.* 67 N. Y. 595. The finding of the learned trial judge that the application of the assured to the Prudential Life Insurance Company was withdrawn was not supported by any evidence, as we think, while the finding that the facts were within the personal knowledge of the agent Jacobs, who procured this insurance, furnishes no answer to this charge of breach of warranty. Mere knowledge of the falsity is not, as we have seen, enough to prevent the defense from being set up. There is, as we think, sufficient evidence in this case to permit a jury to find that the agent of the defendant fraudulently concealed from the assured the fact that he had been rejected by another company to which he had applied, through this same agent; and that such agent, while himself aware of the fact of such rejection, procured the assured to make application to this defendant through him, as agent of the company, and to innocently state that he had not been rejected by any other company, when the agent knew such statement was false. If such were the case, we think the defendant would not be entitled to set up the breach of a warranty which had been thus procured. The case, in such aspect, would much resemble that of *Plumb* v. *Cattaraugus County Mut. Ins. Co.* 18 N. Y. 392, 72 Am. Dec. 52. There is evidence on the part of the defendant which contradicts this theory, for the agent swears the assured was rejected June 20, and that within two weeks

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the applicant's age, filled in by the agent, who is told that the applicant is ignorant in the matter, is binding on the insurer. Keystone Mut. Ben. Asso. v. Jones, 72 Md. 363.

Where an agent, after a life insurance application had been signed, leaving blank the question as to the weekly wages of the applicant, without collusion with or knowledge of the applicant, fills in the blank with an untrue statement as to the applicant's weekly income, the company is not thereby relieved from liability under a warranty that the facts stated are true. Sawyer v. Equitable Acc. Ins. Co. 42 Fed. Rep. 30.

Where an insurance agent, acting within the general scope of his business, has examined an applicant upon questions contained in the blank application, and received true answers thereto, but omits certain answers, and the applicant signs the application under the agent's direction, the policy is not rendered null and void by such omissions although it contains a provision that any false representation or omission in the material facts from the application shall render it void. Kansas Prot. Union v. Gardner, 41 Kan. 397.

Where the agent of the insurer inserts in blanks in the application after the applicant has signed it untrue answers the insurer is estopped to set up such false representations to defeat the insurance. Phœnix Ins. Co. v. Allen, 7 West. Rep. 407, 109 Ind. 273.

So, too, where the agent unknown to the applicant wrote down the latter's answers incorrectly. Stone v. Hawkeye Ins. Co. 68 Iowa, 737, 56 Am. Rep. 870.

When falsity is due to misconstruction of facts by agent.

The insurer is estopped to deny the answers in an application framed by his agent without collusion or fraud by the applicant, or to give such answers a different interpretation than that adopted by the agent. Bushaw v. Woman's Mut. Ins. & A. Co. 28 N. Y. S. R. 524.

The applicant is not responsible if the answers given are misconstrued or recorded incorrectly by the agent of the insurer. Kansas Prot. Union v. Gardner, 41 Kan. 397; Alabama Gold L. Ins. Co. v. Garner, 77 Ala. 210.

Where the applicant states all the facts and the agent puts his own construction on them the insurer is estopped to question the correctness of that construction. Langdon v. Union Mut. L. Ins. Co. 14 Fed. Rep. 272; Continental L. Ins. Co. v. Thoena, 26 Ill. App. 495.

The insured may show by parol that he disclosed the facts truly to the agent of the insurer and that the false statements in the application on account of which it is sought to avoid the policy were due to the misconstruction of the facts by the agent. Hough v. City F. Ins. Co. 29 Conn. 10, 76 Am. Dec. 581.

The agent of the insurer having upon a statement of facts by the applicant suggested the answer to the interrogatory as formally made in the application without asking for the more full or particular statement, the insurer cannot object that the answer is not such as might or should have been made. Higgins v. Phœnix Mut. L. Ins. Co. 74 N. Y. 6.

A former rejection of the insured on his application to a legion of honor is not a breach of a warranty that he had never applied for insurance in any other company, when the agent told him that a legion of honor was not an insurance company. Equitable L. Assur. Soc. v. Hazlewood, 7 L. R. A. 217, 75 Tex. 338.

Where the agent writes in the application that the applicant has no other insurance, although the applicant told him that he had certificates of membership in co-operative companies, which the agent said were not considered insurance by him, the company is bound by the agent's interpretation, and estopped from asserting the contrary. Continental L. Ins. Co. v. Chamberlain, 132 U. S. 304, 33 L. ed. 341.

Where a policy contains a notice on its back that no agent has power to bind the company by receiving any representations or information not contained in the application, an expression of opinion of an agent, that insurance in an aid and accident association is not called for by any question as to other insurance, cannot justify a false answer that the applicant has no other insurance. McCollum v. Mutual L. Ins. Co. 55 Hun, 103.

A false conclusion by the agent of the insurer as to the true state of the title of the applicant after being truly informed of all the facts cannot be taken advantage of by the insurer. Key v. Des Moines Ins. Co. 77 Iowa, 174.

Knowledge of the assured of a misrepresentation in the application, inserted by the soliciting agent with the assurance that it will make no difference, will not avoid the policy, there being no fraudulent purpose on the part of the assured. Reynolds v. Iowa & N. Ins. Co. 80 Iowa, 563; Wright v. Northwestern Mut. L. Ins. Co. (Ky.) 12 Ky. L. Rep. 850. J. G. G.

thereof he so informed the assured, and returned him the premium. What the trial court states in one of the findings in this case we think amounts to merely a statement of knowledge of the agent as to the falsity of the warranty when it was made. This is not a defense. There is no finding of fraud, and there is evidence in the case which, if believed, shows there was none. We cannot draw the inference of fraud in the first instance for the purpose of supporting a judgment, even where there is evidence which would permit the inference, because there is also evidence which, if believed, negatives its existence, and the judgment does not proceed upon the ground of fraud. There is no evidence that the answers to the application were truly made and erroneously taken down by the agent of the company, and hence it does not come within the O'Brien and other kindred cases. *O'Brien* v. *Home Ben. Society*, 117 N. Y. 310.

We must reverse this judgment, and grant a new trial; costs to abide the event.

All concur.

TEXAS SUPREME COURT.

J. D. McCARN, *Appt.*,
v.
INTERNATIONAL & GREAT NORTHERN R. CO.

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

An initial carrier may protect itself by contract against liability for loss not occurring on its own line whether the shipment be wholly within one state or be interstate.

(April 15, 1892.)

APPEAL by plaintiff from a judgment of the District Court for Bexar County in favor of defendant in an action brought to recover damages for injuries to cattle which had been delivered to defendant for transportation. *Affirmed.*

The facts are stated in the opinion.

Mr. **Edward Dwyer,** for appellant:

The railroad company had authority and power to contract beyond its own line.

Hutchinson, Carr. § 151, pp. 116, 117, and authorities cited.

After a through contract is entered into, as the one referred to in above assignments, the succeeding or connecting carriers then become the agents of the receiving carrier.

Hutchinson, Carr. § 273, and authorities cited.

The railroad company, having contracted to transport the cattle beyond its own line to the place of destination, as in this case it did, it could not exempt itself from liability caused by negligence of connecting carriers by a clause to that effect in the same contract, for the reason that by so doing the carrier limits its liability for negligence, and any such provision is inconsistent and against public policy and void.

Lawson, Carriers, § 235; Whittaker's Smith, Neg. pp. 289, 290; 2 Redfield, Railways, p. 144: 2 Beach, Railways, § 920, and authorities cited; *Merchants Dispatch Transp. Co.* v. *Bloch*, 86 Tenn. 392, 6 Am. St. Rep. 847; *Galveston, H. & H. R. Co.* v. *Allison*, 59 Tex. 193; 3 Tex. Ct. App. Civ. Cas. §§ 8, 84; *Cincinnati, H. & D. R. Co.* v. *Pontius*, 19 Ohio St. 221; *Ortt* v. *Minneapolis & St. L. R. Co.* 36 Minn. 396; *Jennings* v. *Grand Trunk R. Co.* 59 Hun, 227; *Condict* v. *Grand Trunk R. Co.* 54 N. Y. 500; *Toledo, P. & W. R. Co.* v. *Merriman*, 52 Ill. 123; *Bank of Kentucky* v. *Adams Exp. Co.* 93 U. S. 174, 23 L. ed. 872.

Messrs. **Barnard & Green,** for appellee:

Although a common carrier has the power to unconditionally bind itself to transport and deliver freight at any point far beyond its own road, yet it does not owe to the public any duty to transport or deliver any freight beyond its own road, and when shippers desire it to do so, it can do it upon any contract containing such reasonable terms, conditions, and limitations as the shipper and carrier may agree to, and such contract is valid and binding upon the parties to it.

The contract in this case contained the following clause: "The understanding of both parties hereto being that the party of the first part shall not be held or deemed liable for anything beyond the line of the International & Great Northern Railroad Company, excepting to protect the through rate of freight named herein."

Ft. Worth & D. C. R. Co. v. *Williams*, 77 Tex. 121; *Gulf, C. & S. F. R. Co.* v. *Baird*, 75 Tex. 256; *Harris* v. *Howe*, 5 L. R. A. 777, 74 Tex. 534; *Morse* v. *Brainard*, 41 Vt. 550; *Stewart* v. *Merchants Despatch Transp. Co.* 47 Iowa, 229, 29 Am. Rep. 476; *Detroit & M. R. Co.* v. *Farmers & M. Bank*, 20 Wis. 122; *Irwin* v. *New York Cent. & H. R. R. Co.* 59 N. Y. 653; Lawson, Carriers, § 236, and cases there cited; *Shelton* v. *Merchants Dispatch Transp. Co.* 59 N. Y. 258; *Illinois Cent. R. Co.* v. *Frankenberg*, 54 Ill. 88, 5 Am. Rep. 92; *Erie R. Co.* v. *Wilcox*, 84 Ill. 239, 25 Am. Rep. 451.

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

This action was brought by appellant to recover damages for injury alleged to have been caused to sixty head of cattle while in transit from San Antonio, Tex., to Chicago, in the state of Illinois. The cause was tried without a jury, and the court found that "the contract for shipment was a through contract from San Antonio, Texas, to Chicago, Illinois," but that the contract, among others, contained the followed stipulation: "*Twelfth.* And it is further stipulated and agreed between the parties hereto that, in cause the livestock mentioned herein is to be transported over the road or roads of any other railroad company the said party of the

NOTE.—The authorities on the question involved in the above case are too fully presented in the opinion to need any further attention in a note.

first part [appellee] shall be released from liability of every kind after said livestock shall have left its road; and the party of the second part hereby so expressly stipulates and agrees; the understanding of both parties hereto being that the party of the first part shall not be held or deemed liable for anything beyond the line of the International & Great Northern Railroad Company, excepting to protect the through rate of freight named herein." The court further found that no injury occurred to appellant's cattle while on appellee's line of railway, but that the cattle were injured while on a connecting line, to which they had been delivered by appellee, and on these findings rendered a judgment against the plaintiff. There is no statement of facts, and under the findings it must be conceded that appellee received the cattle under an agreement that they should be transported from San Antonio to Chicago; and the inference is that to do this it was necessary they should pass over road or roads other than that of appellee. That in such a case a carrier may by contract protect itself against liability for loss not occurring on its own line, whether the shipment be wholly within this state or be interstate, we had deemed a settled question in this court. *Gulf, C. & S. F. R. Co.* v. *Baird*, 75 Tex. 256; *Ft. Worth & D. C. R. Co.* v. *Williams*, 77 Tex. 121; *Hunter* v. *Southern Pac. R. Co.* 76 Tex. 195; *Texas & P. R. Co.* v. *Adams*, 78 Tex. 372; *Harris* v. *Howe*, 74 Tex. 537, 5 L. R. A. 777.

This is the rule we understand to be recognized by nearly all of the English and American courts. *Myrick* v. *Michigan Cent. R. Co.* 107 U. S. 102, 27 L. ed. 325; *Pratt* v. *Grand Trunk R. Co.* 95 U. S. 43, 24 L. ed. 336; *Ogdensburg & L. C. R. Co.* v. *Pratt*, 89 U. S. 22 Wall. 123, 22 L. ed. 827; *Tardos* v. *Chicago, St. L. & N. O. R. Co.* 35 La. Ann. 15; *Louisville & N. R. Co.* v. *Meyer*, 78 Ala. 597; *East Tennessee, V. & G. R. Co.* v. *Brumley*, 5 Lea, 401; *Mulligan* v. *Illinois, Cent. R. Co.* 36 Iowa, 186; *Detroit & M. R. Co.* v. *Farmers & M. Bank*, 20 Wis. 124; *Pendergast* v. *Adams Exp. Co.* 101 Mass. 120; *Berg* v. *Atchison, T. & S. F. R. Co.* 30 Kan. 562; *St Louis & I. M. R. Co.* v. *Larned*, 103 Ill. 293; *Field* v. *Chicago & R. I. R. Co.* 71 Ill. 462; *American Exp. Co.* v. *Second Nat. Bank of Titusville*, 69 Pa. 394, 8 Am. Rep. 268; *Ætna L. Ins. Co.* v. *Wheeler*, 49 N. Y. 616; *Snider* v. *Adams Exp. Co.* 63 Mo. 382; *Taylor* v. *Little Rock, M. R. & T. R. Co.* 32 Ark. 399, 29 Am. Rep. 1; *Central R. & Bkg. Co.* v. *Avant*, 80 Ga. 135; *Schiff* v. *New York Cent. & H. R. R. Co.* 52 How. Pr. 91; *Merchants Dispatch Transp. Co.* v. *Bloch*, 86 Tenn. 424; *Illinois Cent. R. Co.* v. *Frankenberg*, 54 Ill. 88, 5 Am. Rep. 92; *Burroughs* v. *Norwich & W. R. Co.* 100 Mass. 26, 1 Am. Rep. 78; *United States Exp. Co.* v. *Rush*, 24 Ind. 403; *Chicago & N. W. R. Co.* v. *Montfort*, 60 Ill. 175; *Erie R. Co.* v. *Wilcox*, 84 Ill. 239, 25 Am. Rep. 451; *Aldridge* v. *Great Western R. Co.* 15 C. B. N. S. 582.

Authorities upon this point might be multiplied. Even the case of *Muschamp* v. *Lancaster & P. J. R. Co.*, 8 Mees. & W. 421, does not assert a different rule. In England and in some of the states of the Union the mere receipt of goods to be carried to a destination beyond the line of the carrier who first receives them is held to evidence a contract to transport to such destination, while in others such receipt is not held to evidence a contract to convey beyond that carrier's line; but in the jurisdiction in which these diverse rulings are made there is a general concurrence of opinion in the proposition that the carrier may by special contract exempt itself from liability for an injury to freight resulting after it has gone into the hands of another carrier to be transported to destination. The ground of concurrence is contract, which in some jurisdictions it is held is necessary to relieve from liability for the act of a connecting carrier over whose line the freight must or does pass to its destination, while in the others it is held that, in the absence of special contract, no such liability rests on the receiving carrier for injuries accruing after he has safely passed the freight to a connecting carrier.

There are, however, a few cases in which it has been held that a carrier, under such a contract as that involved in this case, is liable for an injury to freight after it has passed into the hands of a connecting carrier uninjured; and among those are found some decisions by the court of appeals of this state, with which we regret to differ. In *Gulf, C. & S. F. R. Co.* v. *Vaughn* (Tex. App.) 16 S. W. Rep. 775, the liability of a carrier was asserted, although the shipping contract was substantially the same as that involved in this case; and two cases are invoked as authority for the ruling in that case. One of these is the case of *Galveston, H. & H. R. Co.* v. *Allison*, (decided by this court,) 59 Tex. 193. In that case the plaintiff shipped from Galveston, Tex., to Chicago, Ill., five cars of melons, in cars adapted to their preservation and safe carriage, under an agreement that the melons should be transported in those cars, without change, to Chicago. The evidence tended to show that a connecting carrier, to whom the cars were delivered, placed the melons in other cars less adapted to their safe transportation, and that from this injury resulted. The shipping contract provided that the railway company should not be liable for injury resulting from some causes enumerated, and that the company should not "be liable for any damage, loss, or injury occurring not on its own railroad." In disposing of the case it was said that the averments of the petition were to the effect that there was an agreement that the melons should be carried to their destination in the cars in which they were first placed. There is a general expression in the opinion that a carrier undertaking to carry freight to a destination beyond his own line cannot contract that his responsibility shall terminate at the end of his own line; but to ascertain what a court actually does decide, the facts on which the opinion is based must be considered, and no one paragraph in an opinion ought to be considered alone in arriving at the intention of the court. What this court did decide and intend to hold is so clearly expressed in the opinion in the case

that we can but feel that, had the whole opinion been read, it ought not to have been understood to lay down any such rule as that it is cited to sustain. It is said that "the exemption from liability is, however, available only when the carrier forwards the goods consigned to him in the manner and by the route with reference to which the contract is made. If he deviates from his route, or forwards the goods by a different conveyance from those contemplated by his agreement, he becomes an insurer of the goods, and cannot avail himself of any exception made in his behalf in the contract." *Fatman* v. *Cincinnati, H. & D. R. Co.* 2 Disney, 248; *Robinson* v. *Merchants Despatch Transp. Co.* 45 Iowa, 470. "The contract to forward the melons in this case through from Galveston to Chicago on the cars on which they were loaded was an entirety. By changing the cars after they left appellant's road the risk of their safe transportation was assumed by its agents, the connecting line, when the change occurred, for the company, and it became liable, notwithstanding the stipulation against damage beyond its own terminus. A case in point is that of *Stewart* v. *Merchants Despatch Transp. Co.*, 47 Iowa, 229, 29 Am. Rep. 476. These goods were delivered to a transportation company at Worchester, Massachusetts, to be taken to Muscatine, Iowa, through without transfer, in cars owned and controlled by the company, and the contract contained a clause of exemption against liability for loss by fire. When the goods reached Chicago they were transferred to a warehouse, and consumed by fire the same day. It was held that the company was liable for the loss notwithstanding the exemption. The contract in this case, so far as the limitation of liability is concerned, was, in effect, that the defendant company was not to be liable for any damage or loss occurring beyond their own route, provided the freight should not be changed from the cars in which it was shipped." Instead of being a decision in favor of the rule for which it was cited, the direct holding in the opinion, as well as all the implications, are so strongly to the contrary that the views of this court in that case ought not to be misunderstood.

The other case cited in support of the adverse rule is *Bank of Kentucky* v. *Adams Exp. Co.*, 93 U. S. 174, 23 L. ed. 872, but it seems to us the opinion asserts no such rule as it was cited to maintain. That case was simply this: The Southern Express Company and Adams Express Company were engaged in the express business between New Orleans, La., and Louisville, Ky.; the former transporting a package of money from New Orleans, to Humboldt, Tenn., where it was delivered to the latter for transportation to plaintiff at Louisville. There was a contract between the express companies by which they divided the compensation for such carriage in proportion to the distance a package might be transported by them respectively. Between Humboldt and Louisville both companies employed the same messenger, who was exclusively subject to the orders of the Southern Express Company when south of the northern boundary of the state of Tennessee, and to the orders of the Adams Express Company when north of that boundary. The shipping contract contained a clause exempting the carrier with which it was made from liability for loss "occasioned by the dangers of railroad transportation, or ocean or river navigation, or by fire or storm," and it provided that this should inure to the benefit of any person or company to whom the property might be delivered for transportation. When the package was delivered at Humboldt to the Adams Express Company's messenger, who was the messenger of both companies, he took charge of it, and placed it in an iron safe, and deposited the safe in an apartment of the car set apart for the use of the express company, for transportation to Louisville. While the train to which the car containing the packages was attached was passing over a trestle, and, while the package was in the exclusive charge of the messenger, the trestle over which the car was passing gave way, and the car was thrown from the track, caught fire from the locomotive, and, with the money in the safe, these were together burned. The action was brought against the Adams Express Company, and, there being some evidence that the accident was caused by a defective trestle, the circuit court in effect instructed the jury that the exceptions from liability found in the shipping contract exempted the express company from liability, even though the accident may have occurred through the negligence of the railway company to transport the express company's messenger and packages in his possession and custody. From this statement it will be seen that no such question was presented in that case as arises in this. The claim was that the shipping contract exempted the express company from liability for a loss occurring through the negligence of the railway company it had employed to transport its messenger and the packages in his exclusive possession. The court, in effect, held that the railway company was the servant of the express company, for whose negligence the latter was responsible, and that for this reason, among others, the exemption from liability could not be allowed. The express company had no means whereby to transport such packages as it might contract to transmit, other than such as it might hire from railway or other companies or persons engaged in the business of transportation; and, if such companies or persons were not to be deemed the servants of the express company, that liability from which the common carrier cannot escape by contract could not be fixed on either in such cases. That the express company was a common carrier in that instance was not denied, and it was declared so to be by the court; but its claim was that it was relieved from liability by the contract. This the court denied, on the ground before stated, and then proceeded to show how the case would stand as to the carrier, under the facts of the case, as follows: "Express companies make their own bargains with the companies they employ, while they keep the property in their own charge, usually attended by a messenger. It was so in the present case.

The defendants had an arrangement with the railroad company, under which the packages of money, inclosed in an iron safe, were put into an apartment of a car set apart for the use of the express company. Yet the safe containing the packages continued in the custody of the messenger. Therefore, as between the defendants and the railroad company, it may be doubted whether the relation was that of a common carrier to his consignor, because the company had not the package in charge. The department in the car was the defendant's for the time being; and if the defendant retained the custody of the packages carried, instead of trusting them to the company, the latter did not insure the carriage. *Miles* v. *Cattle*, 6 Bing. 743; *Tower* v. *Utica & S. R. Co.* 7 Hill, 47, 42 Am. Dec. 36; Redf. Railroads, § 74. . . . Had the packages been delivered to the charge of the railroad company, without any stipulation for exemption from the ordinary liability of carriers, it would have been an insurer both to the express company and to the plaintiff. But, as they were not so delivered, the right of the plaintiff to the extremest constant vigilance during all stages of the carriage is lost if the defendants are not answerable for the negligence of the railroad company, notwithstanding the exception in their bills of lading." The same court, in the subsequent case of *Myrick* v. *Michigan Cent. R. Co.*, 107 U. S. 106, 27 L. ed. 326, said: "A railroad company is a carrier of goods for the public, and, as such, is bound to convey safely whatever goods are intrusted to it for transportation, within the course of its business, to the end of its route, and there deposit them in a suitable place for their owners or consignees. If the road of the company connects with other roads, and goods are received for transportation beyond the termination of its own line, there is superadded to its duty as a common carrier that of a forwarder by the connecting line; that is, to deliver safely the goods to such line, — the next carrier on the route. This forwarding duty arises from the obligation implied in taking the goods for the point beyond its own line. The common law imposes no greater duty than this. If more is expected from the company receiving the shipment, there must be a special agreement for it. . . . The general doctrine, then, as to transportation by connecting lines, approved by this court, and also by a majority of the state courts, amounts to this: That each road confining itself to its common-law liability, is only bound, in the absence of a special contract, to safely carry over its own route, and safely to deliver to the next connecting carrier, but that any one of the companies may agree that over the whole route its liability shall extend. In the absence of a special agreement to that effect, such liability will not attach, and the agreement will not be inferred from doubtful expressions or loose language, but only from clear and satisfactory evidence."

Can an obligation, based alone on contract, arise in the face of an express agreement that it shall not exist? That is the question involved in this and like cases, and to it, in our opinion, there can be but one answer. No court will assert that a common carrier is under obligation to carry, or to contract to carry, beyond its own line; but the decision to which we have referred, and any others that may be in harmony with it, in effect hold that the reception of freight destined, and known to be destined, to a point beyond the carrier's line who receives it when the rate for through transit is fixed by that carrier, constitutes a contract by which that carrier assumes the duties and obligations of a common carrier for through transit, and thereby becomes liable for the negligence of every connecting carrier in the route, notwithstanding the initial carrier, in the paper which evidences the only contract, expressly contracts that it shall not be so bound. Such a construction of such a contract, it seems to us, violates every recognized canon of construction applicable to such a matter, and denies effect to the clearly expressed intention of the parties when he law interposes no obstacle to the enforcement of such intention based on grounds of public policy or other reason. It seems to us a mistake to assume that the initial carrier, throughout an entire route formed by two or more independent but connecting lines, becomes a common carrier when neither the rules of law nor the contract of the parties creates that relation, and upon this false assumption to base the proposition that it cannot exempt itself from liability for the negligence of a connecting carrier because the latter is the agent or servant of the former. If the relation be conceded, the proposition based on it would be a sequence, but, that failing, the conclusion drawn from it falls. Under the weight of American authority the contract in this case does not operate as a restriction on or exemption from liability; for to give that liability, it, but for the contract, must have existed, while the contract was, in effect, an express agreement that no such liability existed, or was intended or understood to exist. Under English and some American decisions the contract would operate as a restriction on the initial carrier's common-law liability, for in such a case, under that line of decisions, the liability would exist in the absence of the contract; but these decisions recognize the right of such a carrier to limit his liability to his own line; for in such cases there is always a liability resting on some one of the connecting carriers for injury resulting from the negligence of itself or servants, and in some jurisdictions the full common-law liability will rest on some connecting carrier at all times. The latter would be true where freight was carried over two or more connecting lines all wholly within this state, for no one of them could restrict its own common-law liability for contract, but the liability of connecting carriers for injury to freight while in the possession of one of them is not the common-law liability. It is unnecessary, in this case, to inquire what state of facts between connecting carriers would be sufficient to cast upon each the liability of a common carrier for the negligence of another; for no facts are found

in the record making such an inquiry necessary.

There was no error in the proceedings, and *the judgment will be affirmed.*

LOUISIANA SUPREME COURT.

Denis CLEMENTS *et al.*
v.
LOUISIANA ELECTRIC LIGHT CO., *Appt.*

(.....La.....)

*1. **The violation of a duty specified by law is negligence;** therefore, when a city ordinance under which an electric lighting company is operated requires it to have the "splices" on its wires perfectly insulated, the failure to do so is negligence.

2. **A person whose occupation brings him in proximity to the company's wires** has a right to believe that the wires have been insulated and the ordinance complied with. He is required to look for patent defects in the insulation only. If, not aware of a latent defect, he comes in contact with the wire, and is injured without fault on his part, the company is responsible.

3. **When the action of both parties must have concurred to produce the injury,** it devolves upon the plaintiff to show that he was not himself guilty of negligence.

4. **This proof need not be direct,** but may be inferred from the circumstances of the case.

5. **Where an electric wire is stretched over a roof,** and a party goes on the roof to repair it, and the wire is of that height above the roof that the chances are that he will come in contact with it by going under it, or stepping over it, it is not negligence to pursue either mode of crossing, if he exercises all necessary and prudent care to protect himself, in proportion to the danger.

6. **When a person is employed in the presence of a known danger,** to constitute contributory negligence it must be shown that the plaintiff voluntarily and unnecessarily exposed himself to the danger.

(May 2, 1892.)

APPEAL by defendant from a judgment of the Civil District Court for the Parish of Orleans in favor of plaintiffs in an action brought to recover damages for the death of their son which was alleged to have been caused by defendant's negligence. *Modified and affirmed.*

The facts are stated in the opinion.

Messrs. **Farrar, Jonas & Kruttschnitt** for appellant.

Messrs. **J. R. Beckwith** and **J. B. Fisher** for appellee.

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

Joseph Clements was killed on the 4th day of October, 1890, by an electric current from the wires of the defendant company, while engaged in repairing the gallery roof at the corner of Gravier and Camp streets, in the city of New Orleans. The plaintiffs, the father and mother of the deceased, sue the defendant company for damages for the death of their son. There was judgment for the plaintiffs for $5,000, and the defendant appealed.

Joseph Clements was a tinsmith by occupation. He had been employed to go on the roof of the gallery to repair the same by a contractor. He was accompanied by another young man, Alfred Anderson. In half an hour after they went on the roof Clements was killed by coming in contact with defendant's wires. Two of defendant's wires run up and down Camp street, over the roof of this gallery. They were 2 feet 4 inches above it. They were some 17 inches distant from each other, and the inside wire was about 4 feet from the Camp street edge of the gallery. The wires were fastened to a support or "horse" on the gallery, and the inside wire, to prevent its contact with other wires, was secured to the "horse" by a piece of telephone wire. Between the "horse" and the Gravier street side of the gallery there was, on the inside wire, a joint covered with insulating tape. To all appearances it was in good condition, but had been worn by the exposure to the weather, and had evidently lost some of its insulating properties. The defects, however, were not visible, but were exhibited during a storm, as shown by the testimony of S. W. Bennett. From his testimony, it is shown that the insulating tape had been defective for a considerable time. He occupied a room fronting on the roof, and forbade his employés from going on it, on account of the want of proper and safe insulation over the wires. Clements and his companion were engaged in cleaning the roof, the first in sweeping and the other in carrying off the dirt. The fatal injury to young Clements was rapid in its results; so quick in execution that no witness, not even the witness who was on the roof with him, was able to state with precision his position when he received the shock from the wire. But we think, from all the attendant circumstances, that he was either stepping over the wire or going under it. It is probable that he came in contact with both wires, making a short circuit, increasing the energy of the electric force. The unprotected or uninsulated places which were not visible on the splice in the wire came in contact with his body under the right shoulder blade. The wires were so close to the roof that, to pass from where Clements was first seen sweeping, to the gutter, he must either

*Head notes by McEnery, J.

NOTE.—The great rapidity with which electric wires are multiplying in all parts of the country and in almost constant proximity to people, whether in doors or out of doors, gives much importance to the above decision.

The rule that violation of a legal duty is negligence seems manifestly just when applied to the case of such dangerous agencies as electricity, even if there should be any question about it in more trivial matters.

16 L. R. A.

See also 18 L. R. A. 479; 22 L. R. A. 759; 25 L. R. A. 552; 26 L. R. A. 101; 28 L. R. A. 596; 45 L. R. A. 267; 46 L. R. A. 745.

have stepped over or crawled under. From the distance of the wire above the roof, to step over would in all probability have brought Clements' body in contact with one or both wires. He was only of medium height, and to step two feet four inches would require not only exertion, but some skill, to keep clear of touching the wires. It is in evidence that about the time the accident occurred there was considerable leakage on defendant's line of wires, and this is urged as evidence of neglect on the part of defendant, because it showed defective insulation. But the general defect along the defendant's line cannot be evidence of want of due diligence and care. It must be shown that the accident was occasioned by some defect at the point where the injury was inflicted. *Nivette* v. *New Orleans & L. S. R. Co.* 42 La. Ann. 1153.

We are aware of the difficulty which confronts the defendant company in keeping its many wires, passing over a large territory, to great distances, in a condition of perfect insulation. Parts of the line will necessarily become uncovered, and all that can be expected is that the company will inspect its lines, and repair defects as early as practicable. The particular defect in insulation in this case which is complained of was one of long standing, and, by a careful inspection of its lines, it would have been brought to its notice. By city ordinance 806, council series, the legal duty of the defendant is specified. Section 8 of the ordinance provides "that all splices or joints, wherever the same may occur, shall be thoroughly soldered, after such joint or splice is made, and, in addition thereto, shall be well and thoroughly wrapped with kerite tape or other insulating material, so as to produce perfect insulation at such joint or splice." This ordinance was a contract with each and every inhabitant of the city. The defendant's standard of duty was fixed by it, and it is the same under all circumstances, and its omission is neglect. The first requirements of the plaintiffs was to show the existence of this duty which they alleged had not been performed, and, having shown this, they must show a failure to perform the duty, and thus establish negligence on the part of the defendant. It is an affirmative fact, the presumption being, until the contrary appears, that every person will perform the duty enjoined by law or imposed by contract. Cooley, Torts, 659, 661. In many cases evidence of the injury done makes out a prima facie case; for instance, where a bailee returns in an injured condition an article which has been loaned to him, or where a passenger on a railway train is injured without fault on his part. The city ordinance does not specify at what particular localities splices shall be perfectly insulated. On all parts of the line of defendant company where they occur the duty is specified. The wire of defendant was spliced, and was not insulated, as required by the ordinance. It passed over a roof, to which people in adjoining rooms had access, and where, in the course of time, mechanics must go to make repairs, or laborers to sweep off or clean the roof. It was the duty of the company, independent of any statutory regulation, to see that its lines were safe for those who by their occupations were brought in close proximity to them. In this respect, and in this particular case, we are of the opinion that the defendant's negligence caused the death of Clements.

But notwithstanding this fault of defendant, if the evidence shows that the plaintiff himself was guilty of negligence contributing to the injury, he cannot recover. The question is whether the act of the party injured had a natural tendency to expose him directly to the danger which resulted in the injury complained of. If the plaintiff could, by the exercise of reasonable care, at or just before the happening of the injury to him, have avoided the same, he cannot recover damages for the injury. When the action of both parties must have concurred to produce the injury, it devolves upon the plaintiff to show that he was not himself guilty of negligence. He must show affirmatively that he was in the exercise of due and reasonable care when the injury happened. *Deikman* v. *Morgan's L. & T. R. & S. S. Co.* 40 La. Ann. 787; *Kepperly* v. *Ramsden*, 83 Ill. 354; *Beers* v. *Housatonic R. Co.* 19 Conn. 566; *Hale* v. *Smith*, 78 N. Y. 480; *Murphy* v. *Deane*, 101 Mass. 455, 3 Am. Rep. 390. This proof need not be direct, but may be inferred from the circumstances of the case. *Mayo* v. *Boston & M. R. Co.* 104 Mass. 137; *Myhan* v. *Electric Light & P. Co.* 41 La. Ann. 964; 2 Thomp. Neg. 1178.

The deceased, Clements, was lawfully on the gallery roof. He was engaged in a service that necessarily required him to run the risk of coming in contact with defendant's wires, either by stepping over them or going under them. It is probable that the latter mode was the most convenient, and there is no evidence that in so doing he incurred any greater risk. The wires were visible, and to all appearances were safe. The great force that was being carried over the wire gave no evidence of its existence. There was no means for a man of ordinary education to distinguish whether the wire was dead or alive. It had all the appearance of having been properly insulated. From this fact there was an invitation or inducement held out to Clements to risk the consequence of contact. He had a right to believe they were safe, and that the company had complied with its duties specified by law. He was required to look for patent and not latent defects. Had he known of the defective insulation, and put himself in contact with the wire, he would have assumed the risk. The defect was hidden, and the insulation wrapping was defective. It is certain, had it been properly wrapped, Clements would not have been killed. His death is conclusive proof of the defect of the insulation and the negligence of defendant. He exercised reasonable care in going under the wire in the performance of his duty, as he had a right to believe, from external appearances, that the wire was safe. His action was such as not to tend to expose himself directly to the danger which resulted in the injury. In fact, there was no apparent danger.

But it is urged that Clements was cautioned to keep away from the wires by his employer, Brady, and his failure to do so was gross carelessness on his part. The evidence on this point is as follows: "Question. Did you

call Clements' attention to the wires? Answer. No, sir; I cautioned him to be careful of the wires. Every man who goes over a roof must keep away from the wires. Q. It is the business of a man who goes over a roof to keep away from them? A. Yes, sir. Q. Did he understand that business? A. Yes, sir. Q. Did you caution him that morning to keep away from the wires? A. Yes, sir." Clements' attention was not directed to any particular danger from the wires. No apparent defect was pointed out to him. The admonition to him was only of a danger which he knew to exist, according to the statement of Brady, before he advised him to be cautious of going near the wires, or to keep away from them. There was only that instinctive dread of danger which overtakes one when he approaches a railroad track. The track in itself is not dangerous, and is only made so by the passage of a train of cars over it. They announce their approach, and hence a person, before he attempts to cross the track, must exercise great caution, stop and listen, and look up and down the track. Having done this, if a train approaches silently, without the accustomed signal, and injures him, he would be entitled to recover damages for the injury. *Curley* v. *Illinois Cent. R. Co.* 40 La. Ann. 817; *Brown* v. *Texas & P. R. Co.* 42 La. Ann. 350. The electric wires gave no signal of danger. Listening would not have revealed any danger. It is hidden and silent. But they are disarmed of danger if properly insulated. By looking, one can see if there are evidences of insulation. If there are evidences of it, and no defects are visible after careful inspection, one whose employment brings him in close proximity to the wire, and which he has to pass, either over or under it, is not guilty of contributory negligence by coming in contact with it, unless he does it unnecessarily, and without proper precautions for his safety. It cannot be said that when Clements went on to the roof to repair it he went into the presence of known danger, and assumed the hazards of the employment. The employment was not dangerous. The wires, if properly insulated, as above stated, would have been harmless. It was only a remote danger which he had to risk, and this depending upon the fact whether or not the defendant company had done its duty as specified by law. The external appearances, the only indications of performed duty to which Clements' attention could be fixed, were guaranties that the defendant company had done its duty. These appearances assured him that, in the performance of his work in sweeping the roof, it was not dangerous for him to risk going over or under the wire. *Bomar* v. *Louisiana N. & S. R. Co.* 42 La. Ann. 983. Even in the presence of a known danger, to constitute contributory negligence it must be shown that the plaintiff voluntarily and unnecessarily exposed himself to it, unless it is of that character that the plaintiff must assume the risk from the very nature of the danger to which he is exposed. From the appearances of the wire, its wrapping with insulated tape, and the known duty of the defendant to protect the insulation at this particular splice or joint, Clements had no reason to anticipate danger, except from the fault of the defendant company. This fault was the cause of his death, and his act in passing under or over the wire was too remote to give it the character of contributory negligence.

This suit was brought under the provisions of Act 71, of 1884, amending article 2315, Civil Code. The plaintiff, therefore, can only claim such damages as the deceased, Clements, could have done had he survived the injury. These would have been for mental and physical suffering and actual pecuniary loss. The deceased was almost instantly killed, and no damage can be awarded for suffering.

The next inquiry is, What have the plaintiffs suffered pecuniarily by the death of their son in the loss to them of his contributions to their support? The evidence does not show that the plaintiffs were dependent for their support upon his earnings, which were not very large, varying from $1.50 to $2.50 per day. The parents, although their domestic relations were pleasant, lived apart, each with a child. The deceased's father says that when he wanted anything he asked him for it, and he, if he had it, willingly gave it. From the facts as to the amount contributed by the deceased to the support of his parents, we conclude that the verdict of the jury awarding $5,000 damages is excessive. Two thousand dollars, we think, would be a most liberal award.

The judgment appealed from is amended, so as to fix the amount of the damages for plaintiffs at $2,000, and in other respects it is affirmed; appellees to pay costs of appeal.

INDIANA SUPREME COURT.

Lottie A. VOREIS *et al.*, *Appts.*,
v.
Lambert NUSSBAUM *et al.*

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

1. A note given by a married woman as surety for her husband is void even in the hands of a bona fide holder unless she has estopped herself to deny its validity under Rev. Stat. 1881, § 5119, providing that a married woman shall not enter into any contract of suretyship whether as indorser or in any other manner and that such contract as to her shall be void.

2. Merely executing as principal a note

NOTE.—*Rights of bona fide purchaser of note declared void by statute.*

The doctrine of the above case may be regarded as well established and is supported by the following decisions in addition to those cited in the opinion:

16 L. R. A.

See also 29 L. R. A. 827.

A statute which declares gaming contracts "void" makes a negotiable note given in such a transaction void even in the hands of a bona fide purchaser. Tenney v. Foote, 4 Ill. App. 594; Chapin v. Dake, 57 Ill. 295, 11 Am. Rep. 15.

This is true although the statute does not make

containing an acknowledgment of receipt of consideration will not estop a married woman from showing that she gave the note as surety and therefore against the prohibition of a statute.

(*McBride, J., dissents.*)

(April 27, 1892.)

APPEAL by defendants from a judgment of the Circuit Court for Marshall County in favor of plaintiffs in an action brought to foreclose a mortgage which was given to secure a note executed by defendant Lottie A. Voreis, she claiming to have executed it as surety for a debt of her husband. *Reversed as to her.*

The facts are stated in the opinion.

Messrs. **McLaren & Martindale** for appellants.

Messrs. **Packard & Drummond** for appellees.

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

The appellants contend that the court erred in its conclusions of law upon the special finding of facts. A synopsis of so much of the finding as is necessary to present the question of law involved is as follows: On the 19th day of November, 1888, the defendant Lottie A. Voreis, who was at the time a married woman, executed her promissory note of that date, payable one year after date to the order of William Bucklew, at a bank in Plymouth, and at the same time she, with her husband, George W. Voreis, executed a mortgage upon her separate property to secure the payment of the note; that George W. Voreis, her husband, received the consideration for which the note was executed, and used the same in payment of his own individual debts and for his own use, but afterwards gave his wife $10 of the money; that no part of the consideration was used for the betterment of her separate property or business; that afterwards, but before its maturity, the note was duly assigned to one Leonard Flagg, who, before its maturity, for a valuable consideration and in the regular course of business, assigned it to the plaintiffs; that the plaintiffs as well as the assignors, at the time of the execution of the note and of its assignment, had knowledge that the defendant Lottie Voreis was a married woman; that neither the payee of the note, the assignor, Flagg, nor the plaintiffs made any inquiry of the defendant Lottie A. Voreis, or her codefendant, George W. Voreis, as to who received the consideration for the note, or who would receive the benefit therefrom; but that neither the assignor, Flagg, nor the plaintiffs had any actual knowledge or notice whatever that the consideration for the note was not received and used by said defendant Lottie for her own special use and benefit, and had no actual knowledge or notice that said note and mortgage were executed by the wife as surety for her husband; that one of the plaintiffs, and the one who purchased the note from Flagg, and the defendant lived at the time of such purchase in Marmount, a small village in Marshall county, and were well and intimately acquainted. The court, as a proposition of law from the foregoing facts, concluded that the plaintiffs were entitled to a recovery against the defendant Lottie for the full amount of the note, and against both the defendants for a foreclosure of the mortgage, and judgment was rendered accordingly.

Since September 19, 1881, there has been in force in this state the following statute (Rev. Stat. 1881, § 5119): "A married woman shall not enter into any contract of suretyship, whether as indorser, guarantor, or in any other manner, and such contract as to her shall be void." The fact that the husband did, and the wife did not, receive the consideration for which the note was executed, conclusively establishes the proposition that she was a surety, and not the principal in the note, notwithstanding the form of the contract. *Vogel* v. *Leichner*, 102 Ind. 55; *Cupp* v. *Campbell*, 103 Ind. 213, 1 West. Rep. 255; *Nixon* v. *Whitely*, 120 Ind. 360; *Crisman* v. *Leonard*, 126 Ind. 202. The question to be decided is, Does the statute above cited invalidate a note made payable in bank, executed by a married woman as surety, in the hands of an innocent purchaser for value, acquired in the regular course of business? It seems to be the settled

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any express provision as to bona fide holders. Sneddy v. American Nat. Bank, 7 L. R. A. 705, 88 Tenn. 573.

So where a statute makes a contract given for a gambling or wager consideration "absolutely void and of no effect" a bona fide purchaser of a negotiable note given therefor cannot recover upon it. Traders Bank of Chicago v. Alsop, 64 Iowa, 97.

So under a code provision that gaming contracts are void and all evidences of debt on such a consideration are "void in the hands of any person." Cunningham v. Augusta Nat. Bank, 71 Ga. 400.

Likewise a statute making usurious contracts "void" is fatal to the right of a bona fide purchaser of a note tainted with usury. Chadbourn v. Watts, 10 Mass. 127, 6 Am. Dec. 100; Bridge v. Hubbard, 15 Mass. 96; Lowe v. Waller, 2 Dougl. 736; Bowyer v. Bampton, 2 Strange, 1155.

The same rule applies to a statute providing that the plaintiff in an action on a usurious contract shall "forfeit" three times the interest. Kendall v. Robertson, 12 Cush. 156.

But a statute providing that all payments or compensation for a sale of intoxicating liquors in violation of law shall be held in violation of law, does not have the same effect as if it declared the contract void and does not defeat the right of a bona fide purchaser of a negotiable note given for such payment. Cazet v. Field, 9 Gray, 329.

A statute declaring that notes of less than a certain amount shall be void unless wholly in writing makes them void even in the hands of a bona fide purchaser. Bayley v. Taber, 5 Mass. 286, 4 Am. Dec. 57.

A statute making null and void a contract between attorney and client whether in writing or otherwise if the attorney fails to attend to the suit in person or by competent attorney until judgment is rendered, and which prohibits under a penalty of forfeiting double the amount a transfer by the attorney of any note given therefor, makes a promissory note given in such case void even in the hands of a bona fide purchaser. Weed v. Bond, 21 Ga. 195. B. A. R.

doctrine of the courts and text-writers that a note executed in violation of a statute is void, even in the hands of an innocent purchaser for value. In Tiedeman, Com. Paper, § 178, it is said: "But where the statute making the consideration illegal declares a contract founded on such a consideration to be absolutely void, the language of the statute must be given its proper effect, and so the courts have held that the commercial paper founded on such considerations is void, even in the hands of bona fide holders." In *Vallett* v. *Parker*, 6 Wend. 615, it is said: "Whenever the statutes declare notes void, they are and must be so in the hands of every holder; but where they are adjudged by the court to be so, for failure of or the illegality of the consideration, they are void only in the hands of the original parties, or those who are chargeable with, or have had notice of, the consideration." In 2 Randolph, Com. Paper, the law is laid down in these words: "Sec. 517. All contracts which violate the provisions of the statute law, either expressly or by implication, are void. And this is true although the prohibition of the statute be not expressed, but must be implied from its nature and objects. Where a statute expressly declares the contract which forms the consideration of the note or bill to be void, the note or bill is illegal and void, even in the hands of a bona fide holder for value. So, where the Legislature has prohibited a transaction, a bill or note given for it is void." See also *Sondheim* v. *Gilbert*, 117 Ind. 71; *Spray* v. *Burk*, 123 Ind. 565. The statute says that "a married woman shall not enter into any contract of suretyship," and follows this prohibition with the express declaration that any "such contract as to her shall be void." Stronger language could not have been chosen in which to express the legislative intent to prohibit the making of such contracts, and to declare that the consequence of a violation of the statute should be to declare the instrument void. The presumption is that the word "void" was understandingly used by the law-makers, and this presumption is strengthened by the fact that the term correctly expresses the status of contracts executed in violation of statute, as established by the overwhelming weight of authority. The statute was enacted to shield and protect married women from contracts from which neither they nor their estates could be benefited, and such contracts were therefore to be void as to them. We have therefore held that they alone can invoke the benefit afforded by the prohibition. *Plaut* v. *Storey* (Ind.) (this term); *Johnson* v. *Jouchert*, 124 Ind. 105, 8 L. R. A. 795. We see no reason why, when they have elected to claim the benfit of the Act, the words of the statute shall not be given the same force and effect that would have obtained if the words "as to her" had been omitted. While the statute makes the contract of suretyship void as to a married woman, she alone can claim the benefit of the statute, and being, under our statute, bound by an estoppel *in pais* like any other person, it follows logically that she may in some cases be estopped by her conduct or representations from claiming the benefit of the statute. This is not an affirmance or ratification of a void contract, but an estoppel against the exercise of a personal right. The cases in which a married woman has been estopped from claiming the protection of the statute are cases where some statement, affidavit or representation has been made by the party to be estopped, which have been in good faith relied upon by the other contracting party, so that to permit her to show the truth would be to assist in the perpetration of a fraud. The cases of *Ward* v. *Berkshire L. Ins. Co.* 108 Ind. 301, 6 West. Rep. 596; *Rogers* v. *Union Cent. L. Ins. Co.* 111 Ind. 343, 9 West. Rep. 828; *Lane* v. *Schlemmer*, 114 Ind. 296, 12 West. Rep. 922,—are of this character. In *Cupp* v. *Campbell*, *supra*, and *Lane* v. *Schlemmer* it was held that a married woman is not estopped by the mere form of the contract which she has no power to make. In this case there was no statement or representation of any kind to indicate that the appellant was the principal in the note and received the consideration, except the form of the contract. This; we are satisfied, was not sufficient to constitute an estoppel to prevent her from showing who received the consideration and who did not. To hold otherwise would be to nullify the statute, and look to the form rather than to the substance of the transaction. This was well expressed by McBride, *J.*, in the late case of *Cummings* v. *Martin*, 128 Ind. 20, in these words: "It cannot be doubted that one of the principal reasons for the enactment of the statute forbidding married women to enter into any contracts of suretyship, and making such contracts void as to them, was to prevent them from squandering or incumbering their property as sureties for impoverished husbands. The courts have rightfully shown a disposition to scan closely contracts where there was reason to suspect that the transaction, while in form a contract, with the wife as principal, was in fact an attempted evasion of the statute, the consideration moving solely to the husband. Where this has been found to be true, it has uniformly been held that the contract is within the inhibition of the statute, and is void as to the wife."

Judgment reversed, with instructions to restate the conclusion of law in accordance with this opinion, and to render judgment for the appellant, Lottie A. Voreis.

McBride, *J.*, dissenting:

The note in this case was payable at a bank in this state. It was therefore upon its face commercial paper, governed by the law-merchant. It was transferred before due to one who took it in good faith, in the ordinary course of business, and paid full value for it. The only fact shown by the record which is relied upon to invalidate it in the hands of the indorsee is that he knew the maker was a married woman, and that, although upon its face it purported to be what the indorsee in good faith supposed it was, her individual contract, it was in fact a contract of suretyship. The court expressly finds that the indorsee had knowledge of this latter fact. The rule by which the innocent indorsee of commercial paper is protected against alleged illegality in its consideration is stated by eminent authority as follows: "The bona fide holder for value,

who has received the paper in the usual course of business, is unaffected by the fact that it originated in an illegal consideration, without any distinction between cases of illegality founded in moral crime or turpitude, which are termed '*malum in se*,' and those founded in positive statutory prohibition, which are termed '*mala prohibita*.' The law extends this peculiar protection to negotiable instruments, because it would severely embarrass mercantile transactions to expose the trader to the consequences of having the bill or note passed to him impeached for some court defect. There is, however, an exception to this rule,—that when a statute expressly or by necessary implication declares the instrument absolutely void it gathers no vitality by its circulation in respect to the parties executing it. . . . There are a very few cases in which the statute renders such instruments absolutely void, and the most important if not the only instances now to be met with are the statutes against usury and gaming." Dan. Neg. Inst. § 197. While the letter of the statute (sec. 5119, Rev. Stat. 1881) is that contracts of suretyship by a married woman "as to her shall be void," the spirit of the statute, as repeatedly interpreted by this court, makes them voidable, and not void. Indeed, in the case of *Bennett* v. *Mattingly*, 110 Ind. 197, 7 West. Rep. 912, the court expressly decided that such contracts were not void, but voidable. See also the case of *Plaut* v. *Storey*, (decided at this term, but not yet officially reported), deciding the same thing. The statute does not purport to declare them absolutely void, but only void as to her. The option is with her to repudiate them. If she declines to interpose the defense, no one else can do so. The defense is purely personal. The logic of *Johnson* v. *Jouchert*, 124 Ind. 105, also is that such contracts are voidable, and not void. See also the many cases there cited. Not even privies in estate can avoid such contracts without her cooperation. The voidable, rather than void, character of such contracts is easily demonstrable, and is logically and unerringly certain if there is any consistency whatever in the many recent decisions of this court relating to that subject. The last clause of section 5117, Rev. Stat. 1881, provides that a married woman shall be bound by an estoppel *in pais* like any other person. It has been many times decided that a married woman contracting as surety may be estopped to defend upon that ground. *Ward* v. *Berkshire L. Ins. Co.* 108 Ind. 301, 6 West. Rep. 596; *Rogers* v. *Union Cent. L. Ins. Co.* 111 Ind. 343, 9 West. Rep. 828; *Lane* v. *Schlemmer*, 114 Ind. 296, 12 West. Rep. 922; *Bouvey* v. *McNeal*, 126 Ind. 541; *Cummings* v. *Martin*, 128 Ind. 20. This could not be true if the contract was absolutely void. A transaction which is void cannot be purged of its infirmity by means of an estoppel. *Martin* v. *Zellerbach*, 38 Cal. 300, 99 Am. Dec. 365; *Cook* v. *Walling*, 117 Ind. 9, 2 L. R. A. 769. *Cook* v. *Walling*, *supra*, furnishes a most forcible illustration of this doctrine. Mary C. Walling was the wife of Creed C. Walling. The husband absented himself for more than seven years. The wife, supposing him dead, married one Hughes. She bought land, taking the title in the name of Mary C. Hughes. She, with her reputed husband, Hughes, in the year 1875, mortgaged the land to one Kate C. Cook, for a debt due to her. At that time, and for a year thereafter, she lived and cohabited with Hughes, and claimed him as her husband, and was reputed to be his lawful wife. In 1876, Creed C. Walling returned. His wife abandoned and was divorced from Hughes, and resumed her relations as wife of Walling. It was held that the mortgage was absolutely void, because the lawful husband, Walling, had not joined in it, and that, being void, she was not estopped and could not be estopped to defend against. While the mortgage in that case was executed before the enactment of section 5117, *supra*, the same doctrine is reiterated in *Johnson* v. *Jouchert*, *supra*, relating to a transaction occurring in 1884, since that section became a law. I therefore feel amply justified by the authority of this court in insisting that such contracts are not absolutely void; that they are void only in a qualified sense; and that the word "voidable," instead of "void," would have much more accurately expressed the legislative meaning. To now hold otherwise would require the express overruling of *Bennett* v. *Mattingly*, *supra*, and *Plaut* v. *Storey*, *supra*, and the tacit overruling of many other well-considered cases. If this is true, it follows that bona fide holders of such notes are entitled to protection under the rule above quoted from Daniel on Negotiable Instruments, which is abundantly supported by authority. The cases seeming to assert a different doctrine are either cases where the contract is absolutely void, (in which case no estoppel can avail,) or they are cases decided in jurisdictions where, as in this state prior to 1881, a married woman cannot be estopped by matter *in pais*. This court has repeatedly decided that, as the law now is in this state, the ability of married women to contract is the rule and disability is the exception. *Miller* v. *Shields*, 124 Ind. 166, 8 L. R. A. 406; *Arnold* v. *Engleman*, 103 Ind. 512, 1 West. Rep. 482; *Rosa* v. *Prather*, 103 Ind. 191, 1 West. Rep. 267; *Vogel* v. *Leichner*, 102 Ind. 55.

It has been decided that, when a married woman executes her individual note, it is prima facie her individual contract. She is presumed to have received the consideration, and, if she asserts, notwithstanding the form of her contract, that it is a contract of suretyship, the burden is on her to establish that fact. *Miller* v. *Shields*, 124 Ind. 166–174 *et seq.*, 8 L. R. A. 406. When a married woman executes her negotiable note alone, it will be presumed to be for her individual debt, and not a contract of suretyship, for several good reasons: (1) A person is presumed to do what is within his right and power, rather than what is beyond them. Lawson, Presump. Ev. Rule 68, p. 276; *Pool* v. *Morris*, 29 Ga. 375, 74 Am. Dec. 68. (2) The law forbids her to make any contract of suretyship, and the presumption is that any act was done of right, and not of wrong. Lawson, Presump. Ev. Rule 16, p. 81. (3) In commercial transactions the presumption is that the usual course of business was followed by the parties thereto. Id. Rule 15, p. 67. (4) Negotiable paper is presumed to have been

regularly negotiated, and to be or to have been regularly held. Id. Rule 15, subrule 3, p. 77; Randolph, Com. Paper, § 1024. (5) The expression of consideration (which is found in express terms on the face of this note) of itself raises a presumption of consideration moving from the payee to the maker. Randolph, Com. Paper, § 178, and authorities cited; also section 562 *et seq.*, and authorities cited. (6) Every one is presumed to know the law. This applies to married women, in common with all other persons. They are therefore presumed to know that a promissory note, payable to order or bearer, at a bank in this state, is negotiable as an inland bill of exchange. They are presumed to know that one of the distinguishing and most valuable characteristics of such a note is the facility with which it may be transferred, and the protection afforded an innocent indorsee for value before maturity against equities existing between the maker and the payee. When a married woman executes her promissory note, payable at a bank in this state, she is chargeable with knowledge of all the legal incidents of such a contract. When her note thus executed is offered for negotiation in the ordinary course of business, she is bound to know that it carries with it all of the foregoing presumptions. When a married woman thus executes and puts in circulation her note, which she must know carries with it to an innocent indorsee for value such presumptions, she has done an act which partakes of the character of an estoppel *in pais*, and which should estop her to say to such innocent indorsee that it is not what it purports to be, and what she has deliberately authorized him to believe it was. When an act is done or a statement made by a person which cannot be contradicted or contravened without fraud on his part and injury to others, whose conduct has been influenced by the act or omission, the character of an estoppel attaches to it. *State* v. *Pepper*, 31 Ind. 76; *Ray* v. *McMurtry*, 20 Ind. 307, 308, 83 Am. Dec. 322, and many other authorities. However, a proposition so fundamental and elementary in the law of estoppel *in pais* needs no citation of authority to support it. With all deference to my colleagues, in my opinion the conclusion reached by the majority of the court mistakes the law, cannot be sustained by valid reasoning, and will simply serve as a barricade, behind which dishonesty may entrench itself. I cannot concur.

PENNSYLVANIA SUPREME COURT.

Borough of SAYRE, *Appt.*,
v.
Harry PHILLIPS.

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

A borough ordinance which discriminates against nonresidents by prohibiting all persons from peddling or selling goods from house to house without a license, which is fixed at so high a figure that it amounts to prohibition, but which excepts residents of the borough from its provisions, is void.

(April 18, 1892.)

APPEAL by plaintiff from a judgment of the Court of Common Pleas for Bradford County in favor of defendant in an action brought to recover the prescribed penalty for

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NOTE.—*Discrimination by municipality between its own residents and other residents of the same state.*

The above decision does not seem to be based alone on the objection that the ordinance discriminating against nonresidents might interfere with interstate commerce or with the rights of citizens of other states, but to hold also that a municipal corporation cannot by ordinance discriminate between its own residents and other residents of the same state.

This doctrine seems to be uniformly held also by other courts which have rendered decisions on the subject.

Thus in Nashville v. Althorp, 5 Coldw. 554, an ordinance discriminating between dealers within the city and the same classes of persons outside of the city in respect to a license for sales by sample was held to be void.

The same principle was applied in Charleston v. State, 2 Speer, L. 719, in respect to a municipal tax on the slave of a nonresident employed within the city where the tax attempted was greater than that on slaves of residents.

Again, in *Ex parte* Frank, 52 Cal. 606, an ordinance requiring a greater license for the sale of goods not then within the city or in transit toward it than for the sale of goods within the city was held void for illegal discrimination against nonresidents.

In Graffty v. Rushville, 5 West. Rep. 858, 107 Ind. 502, an ordinance requiring a license for hawking and peddling except in a case of a resident peddler or of goods grown or manufactured within the county was held void, not only as an interference with interstate commerce, but as a denial of the right of citizens of the state under the Indiana Constitution to equal privileges and immunities.

So in Com. v. Stodder, 2 Cush. 562, 48 Am. Dec. 679, it was held that a city could not require a license even without a money payment as a condition of the running of a omnibus in the city by an inhabitant of another town. This decision however, seems to be based on the lack of power of the city over an employment which was not territorial rather than upon any objection as to discrimination against nonresidents. The court said that the by-law was an unnecessary restriction on the business of those carrying passengers for hire and was not binding on the inhabitants of other towns.

In Hayden v. Noyes, 5 Conn. 391, a by-law of a town prohibiting all persons except inhabitants of the town from taking shell-fish from that part of a navigable river within the limits of the town was held void, but the decision in this case is based on the fact that fishing in the river was a matter of common right and that the town had no right to take it away.

See also the decisions of the lower courts of Pennsylvania cited above in brief of counsel for appellee. R. A. R.

See also 17 L. R. A. 184; 31 L. R. A. 522; 32 L. R. A. 527; 36 L. R. A. 618; 39 L. R. A. 245.

an alleged violation of an ordinance forbidding peddling without a license. *Affirmed.*

The facts are stated in the opinion.

Messrs. **J. B. Niles, Deloss Rockwell, J. C. Horton** and **H. F. Maynard** for appellant.

Messrs. **D' A. Overton, John C. Ingham** and **Rodney A. Mercur,** for appellee:

Defendant was not a hawker or peddler.

Com. v. *Gardner,* 7 L. R. A. 666, 133 Pa. 289; *Com.* v. *Farnum,* 114 Mass. 270; *Com.* v. *Ober,* 12 Cush. 495; *Com.* v. *Smith,* 6 Bush, 303; *Com.* v. *Jones,* 7 Bush, 502; *Ex parte Seibenhauer,* 14 Nev. 365; *Rex* v. *McKnight,* 10 Barn. & C. 734; *Kansas* v. *Collins* (Kan.) 11 Am. & Eng. Corp. Cas. 414; *Com.* v. *Edson,* 2 Pa. Co. Ct. Rep. 332; *Com.* v. *Eichenburg,* 140 Pa. 158; *Fisher* v. *Patterson,* 13 Pa. 339.

There is no statute authorizing the passage of an ordinance prohibiting the sale by a hawker or peddler of certain articles, or discriminating in favor of certain individuals.

Sharon v. *Golden,* 4 Pa. Co. Ct. Rep. 357.

An ordinance discriminating in the imposition of a license tax between resident and nonresident merchants is invalid.

Conshohocken v. *Fennel,* 5 Pa. Co. Ct. Rep. 65; *Easton* v. *Easton Beef Co.* Id. 68.

A clause in an ordinance excepting all citizens of the borough from the operation of such ordinance will make it void because of discrimination.

Sansford v. *Brode,* 7 Pa. Co. Ct. Rep. 221.

An Act providing that persons residing out of the county shall pay a greater license fee than those residing therein is void under the Constitution of the United States.

Groh v. *Com.* 6 Pa. Co. Ct. Rep. 130; *Com.* v. *Standard Oil Co.* 101 Pa. 146.

A borough ordinance may regulate but not restrain trade.

1 Dillon, Mun. Corp. § 323; *Northern Liberties Comrs.* v. *Northern Liberties Gas Co.* 12 Pa. 321; *Kneedler* v. *Norristown,* 100 Pa. 373, 45 Am. Rep. 384; *Millerstown* v. *Bell,* 123 Pa. 155.

Whether an ordinance be reasonable and consistent with the law or not is a question for the court, and not the jury.

1 Dillon, Mun. Corp. § 327; *Com.* v. *Worcester,* 3 Pick. 462; *Vandine, Petitioner,* 6 Pick. 187; *Austin* v. *Murray,* 16 Pick. 121; *Com.* v. *Stodder,* 2 Cush. 562, 48 Am. Dec. 679; *Boston* v. *Shaw,* 1 Met. 130; *Hudson* v. *Thorne,* 7 Paige, 261, 4 L. ed. 148; *Dunham* v. *Rochester,* 5 Cow. 462; *Buffalo* v. *Webster,* 10 Wend. 100; *Brooklyn* v. *Breslin,* 57 N. Y. 591; *Paxson* v. *Sweet,* 13 N. J. L. 196; *Ex parte Frank,* 52 Cal. 606; *Northern Liberties Comrs.* v. *Northern Liberties Gas Co.* and *Kneedler* v. *Norristown, supra; Pittsburgh's App.* 6 Cent. Rep. 225, 115 Pa. 4; *Millerstown* v. *Bell, supra; Livingston* v. *Wolf,* 136 Pa. 519.

The following cases are conspicuous ones, examples of ordinances declared void, because they were unjust, unequal and unfair:

Ex parte Frank, supra; Conshohocken v. *Fennel,* 5 Pa. Co. Ct. Rep. 65; *Easton* v. *Easton Beef Co.* 5 Pa. Co. Ct. Rep. 68.

Congress is the only power that has authority to regulate interstate commerce, and any ordinances passed by municipal authorities restricting that right are invalid.

Robbins v. *Shelby County Tax. Dist.* 120 U. S. 489, 30 L. ed. 694; *Letoup* v. *Port of Mobile,* 127 U. S. 640, 32 L. ed. 311; *Asher* v. *Texas,* 128 U. S. 129, 32 L. ed. 368; *Stoutenburgh* v. *Hennick,* 129 U. S. 141, 32 L. ed. 637; *Leisy* v. *Hardin,* 135 U. S. 100, 34 L. ed. 128; *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18, 35 L. ed. 613; *Ex parte Stockton,* 33 Fed. Rep. 95; *Ex parte Kimmel,* 41 Fed. Rep. 775; *Re White,* 43 Fed. Rep. 913; *Ex parte Spain,* 47 Fed. Rep. 208; *Re Nichols,* 48 Phila. Leg. Int. 474.

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

The business of peddling has been treated as a proper subject for police regulation and control in this state since 1784. The Legislature has forbidden it to all unlicensed persons, and has prescribed the conditions on which licenses may be obtained from the courts. The necessity for such legislation is a question for the law-makers. The validity of any particular statute relating to the subject is a question for the courts. The Act of 1784, and the supplementary Acts, relating to the business of peddling, have been held to be valid, as an exercise of the police power, in many cases, among the more recent of which are *Warren* v. *Geer,* 117 Pa. 207, 9 Cent. Rep. 307; *Sharon* v. *Hawthorne,* 123 Pa. 106; *Com.* v. *Gardner,* 133 Pa. 284, 7 L. R. A. 666; *Titusville* v. *Brennen,* 143 Pa. 642, 14 L. R. A. 100. By the organization of a city or borough within its borders the state imparts to its creature, the municipality, the powers necessary to the performance of its functions, and to the protection of its citizens in their persons and property. The police power is one of these. Ordinances of cities and boroughs, passed in the legitimate exercise of this power, are therefore valid. An ordinance prohibiting the business of peddling within the municipal limits without a license from the proper municipal officer would seem to be as clearly justified by the police power as a statute prohibiting the same business throughout the commonwealth. But it is very clear that a police regulation must be directed against the business or practice that is harmful, not against one or some of the persons who may be engaged in it. The laws of the state are so framed. They are directed against the business of peddling. The ordinances of cities and boroughs must, in order to be supported as an exercise of the police power residing in the municipality, be directed in like manner as the business. If a statute or a municipal ordinance is in reality directed only against certain persons who are engaged in a given business or against certain commodities, in such manner as to discriminate between the persons who are engaged in the same trade or pursuit, in aid of some at the expense of others, such statute or ordinance is not a police, but a trade, regulation; and it has no right to shelter itself behind the police power of the state or the municipality. A law that should prohibit all persons peddling goods manufactured or produced in other states, and permit the same persons to peddle goods of the same character manufactured or produced in this state, would be a trade regulation, discriminating between the productions

of this and sister states, and would be incapable of enforcement, because in violation of the Constitution of the United States. So a law that should forbid the courts to grant a peddler's license to any person resident in another state, but should authorize the granting of licenses to citizens of this state, would be bad for the same reason. When the state creates a city or borough, it cannot confer upon the municipality powers that the state does not possess. It cannot give its creature immunity from the settled limitations that bind its own action. The municipality remains a part of the state after its creation as truly as the town or village was a part of the state before it acquired a corporate character. Only in matters of local government is its situation changed. It can have no better right to adopt discriminating trade regulations than the state has.

We come now to consider the ordinance on which this case depends. It professes to prohibit all persons from engaging in the business of peddling or selling goods from house to house, by sample or otherwise, without a borough license; and it fixes the price of a license at a figure that makes, as it was evidently intended to make, the ordinance amount to prohibition. So long, however, as it bears upon all persons impartially it may fairly claim to be a police regulation intended to destroy a business that was regarded as injurious, but at the end of the prohibiting section of the ordinance a proviso may be found which exempts all residents of the borough of Sayre from its operation. The proviso converts the police regulation into a trade regulation. The ordinance, taken as a whole, does not prohibit an injurious business, but injurious competition. That the resident dealer and peddler may enjoy a larger trade, the nonresident peddler is shut out. If the borough authorities may lawfully regulate the business of peddling for the benefit of residents, we see no reason why they may not lay their hands in like manner on every department of trade and of professional labor, and protect the village lawyer and doctor as well as the village grocer and peddler.

We are reminded by the appellant that this ordinance is like that which came into notice in *Warren* v. *Geer, supra;* and it is urged that the question now under consideration ought, therefore, to be regarded as ruled by that case. That case was well decided on the only issue presented by it. The plaintiff set out in the declaration the ordinance of the borough, and charged that the defendant had violated it by canvassing from house to house within the borough. The defendant demurred, thus admitting the acts charged and denying the power of the borough to require one engaged in canvassing to take a license. The court below held that the defendant was entitled as of common right to pursue his business, and that the borough was without the power to forbid it. The question came to this court in the form that it had been disposed of in the court below, as a question of power in the borough to require a license from peddlers and canvassers, and we held that the power existed under the Act of incorporation, and under the General Borough Law of 1851. Our Brother Green, who delivered the opinion of this court, stated the point in controversy thus: "The only question, therefore, is whether the borough of Warren possesses by either express grant or necessary implication the right to enact the ordinance" forbidding the exercise of defendant's employment without a license. We adhere to the doctrine of that case. The present question is whether, under the pretense of police control, trade may be regulated in the interest of resident dealers by making the same business a lawful one to all who live on one side of a municipal line, and an unlawful one to all who live on the other side.

We are very clear in our convictions that this cannot be done, and for this reason *the judgment is affirmed.*

MASSACHUSETTS SUPREME JUDICIAL COURT.

Sarah P. INGALLS *et al.*, *Appts.*,
v.
Warren D. HOBBS.

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

1. **Bugs infesting a summer-house at a watering place** which is hired already furnished for the season may render it so unfit for habitation that the tenant may be relieved from the agreement.

2. **In a lease of a completely furnished dwelling-house for a summer season** at a summer watering place there is an implied agreement that the house is fit for habitation without greater preparation than the tenant might reasonably be expected to make.

(May 9, 1892.)

APPEAL by plaintiffs from a judgment of the Superior Court for Suffolk County in favor of defendant in an action brought to recover rent alleged to be due and unpaid. *Affirmed.*

The facts are stated in the opinion.

Mr. **George E. Smith,** for appellants:

A careful examination of *Smith* v. *Marrable*, 11 Mees. & W. 5; *Sutton* v. *Temple*, 12 Mees. & W. 52; and *Hart* v. *Windsor*, Id. 68, will convince one that the same judges who decided in favor of an implied condition were, upon reexamination immediately after, very doubtful of the wisdom of that decision. They repudiated the authorities on which originally it was decided.

In *Foster* v. *Peyser*, 9 Cush. 242, 57 Am. Dec. 43, the defendant asked for an instruc-

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NOTE.—On the question of an implied agreement that a furnished house leased for a short time is fit for occupation the authorities are sufficiently presented in the report of the case But see, as showing the narrow limits of the rule followed above, the case of Franklin v. Brown, 6 L. R. A. 770, 118 N. Y. 110.

6 L. R. A.

See also 16 L. R. A. 236; 18 L. R. A. 264.

an alleged violation of an ordinance forbidding peddling without a license. *Affirmed.*

The facts are stated in the opinion.

Messrs. **J. B. Niles, Deloss Rockwell, J. C. Horton** and **H. F. Maynard** for appellant.

Messrs. **D' A. Overton, John C. Ingham** and **Rodney A. Mercur,** for appellee:

Defendant was not a hawker or peddler.

Com. v. *Gardner*, 7 L. R. A. 666, 133 Pa. 289; *Com.* v. *Farnum*, 114 Mass. 270; *Com.* v. *Ober*, 12 Cush. 495; *Com.* v. *Smith*, 6 Bush, 303; *Com.* v. *Jones*, 7 Bush, 502; *Ex parte Seibenhauer*, 14 Nev. 365; *Rex* v. *McKnight*, 10 Barn. & C. 734; *Kansas* v. *Collins* (Kan.) 11 Am. & Eng. Corp. Cas. 414; *Com.* v. *Edson*, 2 Pa. Co. Ct. Rep. 332; *Com.* v. *Eichenburg*, 140 Pa. 158; *Fisher* v. *Patterson*, 13 Pa. 339.

There is no statute authorizing the passage of an ordinance prohibiting the sale by a hawker or peddler of certain articles, or discriminating in favor of certain individuals.

Sharon v. *Golden*, 4 Pa. Co. Ct. Rep. 357.

An ordinance discriminating in the imposition of a license tax between resident and nonresident merchants is invalid.

Conshohocken v. *Fennel*, 5 Pa. Co. Ct. Rep. 65; *Easton* v. *Easton Beef Co.* Id. 68.

A clause in an ordinance excepting all citizens of the borough from the operation of such ordinance will make it void because of discrimination.

Sansford v. *Brode*, 7 Pa. Co. Ct. Rep. 221.

An Act providing that persons residing out of the county shall pay a greater license fee than those residing therein is void under the Constitution of the United States.

Groh v. *Com.* 6 Pa. Co. Ct. Rep. 130; *Com.* v. *Standard Oil Co.* 101 Pa. 146.

A borough ordinance may regulate but not restrain trade.

1 Dillon, Mun. Corp. § 323; *Northern Liberties Comrs.* v. *Northern Liberties Gas Co.* 12 Pa. 321; *Kneedler* v. *Norristown*, 100 Pa. 373, 45 Am. Rep. 384; *Millerstown* v. *Bell*, 123 Pa. 155.

Whether an ordinance be reasonable and consistent with the law or not is a question for the court, and not the jury.

1 Dillon, Mun. Corp. § 327; *Com.* v. *Worcester*, 3 Pick. 462; *Vandine, Petitioner*, 6 Pick. 187; *Austin* v. *Murray*, 16 Pick. 121; *Com.* v. *Stodder*, 2 Cush. 562, 48 Am. Dec. 679; *Boston* v. *Shaw*, 1 Met. 130; *Hudson* v. *Thorne*, 7 Paige, 261, 4 L. ed. 148; *Dunham* v. *Rochester*, 5 Cow. 462; *Buffalo* v. *Webster*, 10 Wend. 100; *Brooklyn* v. *Breslin*, 57 N. Y. 591; *Paxson* v. *Sweet*, 13 N. J. L. 196; *Ex parte Frank*, 52 Cal. 606; *Northern Liberties Comrs.* v. *Northern Liberties Gas Co.* and *Kneedler* v. *Norristown, supra; Pittsburgh's App.* 6 Cent. Rep. 225, 115 Pa. 4; *Millerstown* v. *Bell, supra; Livingston* v. *Wolf*, 136 Pa. 519.

The following cases are conspicuous ones, examples of ordinances declared void, because they were unjust, unequal and unfair:

Ex parte Frank, supra; Conshohocken v. *Fennel*, 5 Pa. Co. Ct. Rep. 65; *Easton* v. *Easton Beef Co.* 5 Pa. Co. Ct. Rep. 68.

Congress is the only power that has authority to regulate interstate commerce, and any ordinances passed by municipal authorities restricting that right are invalid.

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; *Stoutenburgh* v. *Hennick*, 129 U. S. 141, 32 L. ed. 637; *Leisy* v. *Hardin*, 135 U. S. 100, 34 L. ed. 128; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 35 L. ed. 613; *Ex parte Stockton*, 33 Fed. Rep. 95; *Ex parte Kimmel*, 41 Fed. Rep. 775; *Re White*, 43 Fed. Rep. 913; *Ex parte Spain*, 47 Fed. Rep. 208; *Re Nichols*, 48 Phila. Leg. Int. 474.

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

The business of peddling has been treated as a proper subject for police regulation and control in this state since 1784. The Legislature has forbidden it to all unlicensed persons, and has prescribed the conditions on which licenses may be obtained from the courts. The necessity for such legislation is a question for the law-makers. The validity of any particular statute relating to the subject is a question for the courts. The Act of 1784, and the supplementary Acts, relating to the business of peddling, have been held to be valid, as an exercise of the police power, in many cases, among the more recent of which are *Warren* v. *Geer*, 117 Pa. 207. 9 Cent. Rep. 307; *Sharon* v. *Hawthorne*, 123 Pa. 106; *Com.* v. *Gardner*, 133 Pa. 284, 7 L. R. A. 666; *Titusville* v. *Brennen*, 143 Pa. 642, 14 L. R. A. 100. By the organization of a city or borough within its borders the state imparts to its creature, the municipality, the powers necessary to the performance of its functions, and to the protection of its citizens in their persons and property. The police power is one of these. Ordinances of cities and boroughs, passed in the legitimate exercise of this power, are therefore valid. An ordinance prohibiting the business of peddling within the municipal limits without a license from the proper municipal officer would seem to be as clearly justified by the police power as a statute prohibiting the same business throughout the commonwealth. But it is very clear that a police regulation must be directed against the business or practice that is harmful, not against one or some of the persons who may be engaged in it. The laws of the state are so framed. They are directed against the business of peddling. The ordinances of cities and boroughs must, in order to be supported as an exercise of the police power residing in the municipality, be directed in like manner as the business. If a statute or a municipal ordinance is in reality directed only against certain persons who are engaged in a given business or against certain commodities, in such manner as to discriminate between the persons who are engaged in the same trade or pursuit, in aid of some at the expense of others, such statute or ordinance is not a police, but a trade, regulation; and it has no right to shelter itself behind the police power of the state or the municipality. A law that should prohibit all persons peddling goods manufactured or produced in other states, and permit the same persons to peddle goods of the same character manufactured or produced in this state, would be a trade regulation, discriminating between the productions

of this and sister states, and would be incapable of enforcement, because in violation of the Constitution of the United States. So a law that should forbid the courts to grant a peddler's license to any person resident in another state, but should authorize the granting of licenses to citizens of this state, would be bad for the same reason. When the state creates a city or borough, it cannot confer upon the municipality powers that the state does not possess. It cannot give its creature immunity from the settled limitations that bind its own action. The municipality remains a part of the state after its creation as truly as the town or village was a part of the state before it acquired a corporate character. Only in matters of local government is its situation changed. It can have no better right to adopt discriminating trade regulations than the state has.

We come now to consider the ordinance on which this case depends. It professes to prohibit all persons from engaging in the business of peddling or selling goods from house to house, by sample or otherwise, without a borough license; and it fixes the price of a license at a figure that makes, as it was evidently intended to make, the ordinance amount to prohibition. So long, however, as it bears upon all persons impartially it may fairly claim to be a police regulation intended to destroy a business that was regarded as injurious, but at the end of the prohibiting section of the ordinance a proviso may be found which exempts all residents of the borough of Sayre from its operation. The proviso converts the police regulation into a trade regulation. The ordinance, taken as a whole, does not prohibit an injurious business, but injurious competition. That the resident dealer and peddler may enjoy a larger trade, the nonresident peddler is shut out. If the borough authorities may lawfully regulate the business of peddling for the benefit of residents, we see no reason why they may not lay their hands in like manner on every department of trade and of professional labor, and protect the village lawyer and doctor as well as the village grocer and peddler.

We are reminded by the appellant that this ordinance is like that which came into notice in *Warren* v. *Geer*, *supra;* and it is urged that the question now under consideration ought, therefore, to be regarded as ruled by that case. That case was well decided on the only issue presented by it. The plaintiff set out in the declaration the ordinance of the borough, and charged that the defendant had violated it by canvassing from house to house within the borough. The defendant demurred, thus admitting the acts charged and denying the power of the borough to require one engaged in canvassing to take a license. The court below held that the defendant was entitled as of common right to pursue his business, and that the borough was without the power to forbid it. The question came to this court in the form that it had been disposed of in the court below, as a question of power in the borough to require a license from peddlers and canvassers, and we held that the power existed under the Act of incorporation, and under the General Borough Law of 1851. Our Brother Green, who delivered the opinion of this court, stated the point in controversy thus: "The only question, therefore, is whether the borough of Warren possesses by either express grant or necessary implication the right to enact the ordinance" forbidding the exercise of defendant's employment without a license. We adhere to the doctrine of that case. The present question is whether, under the pretense of police control, trade may be regulated in the interest of resident dealers by making the same business a lawful one to all who live on one side of a municipal line, and an unlawful one to all who live on the other side.

We are very clear in our convictions that this cannot be done, and for this reason *the judgment is affirmed.*

MASSACHUSETTS SUPREME JUDICIAL COURT.

Sarah P. INGALLS *et al., Appts.,*
v.
Warren D. HOBBS.

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

1. **Bugs infesting a summer-house at a watering place** which is hired already furnished for the season may render it so unfit for habitation that the tenant may be relieved from the agreement.
2. **In a lease of a completely furnished dwelling-house for a summer season** at a summer watering place there is an implied agreement that the house is fit for habitation without greater preparation than the tenant might reasonably be expected to make.

(May 9, 1892.)

APPEAL by plaintiffs from a judgment of the Superior Court for Suffolk County in favor of defendant in an action brought to recover rent alleged to be due and unpaid. *Affirmed.*

The facts are stated in the opinion.

Mr. **George E. Smith,** for appellants:

A careful examination of *Smith* v. *Marrable*, 11 Mees. & W. 5; *Sutton* v. *Temple*, 12 Mees. & W. 52; and *Hart* v. *Windsor*, Id. 68, will convince one that the same judges who decided in favor of an implied condition were, upon reexamination immediately after, very doubtful of the wisdom of that decision. They repudiated the authorities on which originally it was decided.

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tion to the jury: "That there was an implied warranty, in the letting of a house for a private residence, that it is reasonably fit for occupation." And Metcalf, *J.*, in the opinion says: "The court refused to instruct the jury that there is any such implied covenant in such a case. And it is well settled by authority that there is not."

The same principle was applied to the lease of a dwelling-house, in *Stevens* v. *Pierce*, 151 Mass. 207.

Messrs. **Choate & Dana,** for appellee:

In England the doctrine is now well established, that there is such an implied agreement or warranty.

Smith v. *Marrable*, 11 Mees. & W. 5; *Wilson* v. *Hatton*, L. R. 2 Exch. Div. 336; *Manchester Bonded Warehouse Co.* v. *Carr*, L. R. 5 C. P. Div. 507; *Bird* v. *Greville*, 1 Cababe & E. 317; *MacLean* v. *Currie*, Id. 361; *Chester* v. *Powell*, 52 L. T. 722; *Charsley* v. *Jones*, 53 J. P. Q. B. Div. 280. See also *Dutton* v. *Gerrish*, 9 Cush. 89, 55 Am. Dec. 45; *Edwards* v. *McLean*, 122 N. Y. 302.

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

This is an action to recover $500 for the use and occupation of a furnished dwelling-house at Swampscott during the summer of 1890. It was submitted to the superior court on what is entitled an "agreed statement of evidence," by which it appears that the defendant hired the premises of the plaintiffs for the season, as a furnished house, provided with beds, mattresses, matting, curtains, chairs, tables, kitchen utensils, and other articles which were apparently in good condition, and that when the defendant took possession it was found to be more or less infested with bugs, so that the defendant contended that it was unfit for habitation, and for that reason gave it up, and declined to occupy it. The agreed statement concludes as follows: "If, under the above circumstances, said house was not fit for occupation as a furnished house, and, being let as such, there was an implied agreement or warranty that the said house and furniture therein should be fit for use and occupation, judgment is to be for the defendant, with costs. If, however, under said circumstances, said house was fit for occupation as a furnished house, or there was no such implied agreement or warranty, judgment is to be for the plaintiffs in the sum of $500, with interest from the date of the writ, and costs." Judgment was ordered for the defendant, and the plaintiffs appealed to this court.

The agreement of record shows that the facts were to be treated by the superior court as evidence from which inferences of fact might be drawn. The only "matter of law apparent on the record" which can be considered on an appeal in a case of this kind is the question whether the judgment is warranted by the evidence. Pub. Stat. chap. 152, § 10; *Rand* v. *Hanson*, 154 Mass. 87; *Mayhew* v. *Durfee*, 138 Mass. 584; *Old Colony R. Co.* v. *Wilder*, 137 Mass. 536; *Hecht* v. *Batcheller*, 147 Mass. 335, 6 New Eng. Rep. 610; *Fitzsimmons* v. *Carroll*, 128 Mass. 401; *Charlton* v. *Donnell*, 100 Mass. 229.

The facts agreed warrant a finding that the house was unfit for habitation when it was hired, and we are therefore brought directly to the question whether there was an implied agreement on the part of the plaintiff that it was in a proper condition for immediate use as a dwelling-house. It is well settled, both in this commonwealth and in England, that one who lets an unfurnished building to be occupied as a dwelling-house does not impliedly agree that it is fit for habitation. *Dutton* v. *Gerrish*, 9 Cush. 89, 55 Am. Dec. 45; *Foster* v. *Peyser*, 9 Cush. 242, 47 Am. Dec. 43; *Stevens* v. *Pierce*, 151 Mass. 207; *Sutton* v. *Temple*, 12 Mees. & W. 52; *Hart* v. *Windsor*, Id. 68.

In the absence of fraud or a covenant, the purchaser of real estate, or the hirer of it for a term, however short, takes it as it is, and determines for himself whether it will serve the purpose for which he wants it. He may, and often does, contemplate making extensive repairs upon it to adapt it to his wants. But there are good reasons why a different rule should apply to one who hires a furnished room, or a furnished house, for a few days, or a few weeks or months. Its fitness for immediate use of a particular kind, as indicated by its appointments, is a far more important element entering into the contract than when there is a mere lease of real estate. One who lets for a short term a house provided with all furnishings and appointments for immediate residence may be supposed to contract in reference to a well-understood purpose of the hirer to use it as a habitation. An important part of what the hirer pays for is the opportunity to enjoy it without delay, and without the expense of preparing it for use. It is very difficult, and often impossible, for one to determine on inspection whether the house and its appointments are fit for the use for which they are immediately wanted, and the doctrine *caveat emptor*, which is ordinarily applicable to a lessee of real estate, would often work injustice if applied to cases of this kind. It would be unreasonable to hold, under such circumstances, that the landlord does not impliedly agree that what he is letting is a house suitable for occupation in its condition at the time. This distinction between furnished and unfurnished houses in reference to the construction of contracts for letting them, when there are no express agreements about their condition, has long been recognized in England, where it is held that there is an implied contract that a furnished house let for a short time is in proper condition for immediate occupation as a dwelling. *Smith* v. *Marrable*, 11 Mees. & W. 5; *Wilson* v. *Hatton*, L. R. 2 Exch. Div. 336; *Manchester Bonded Warehouse Co.* v. *Carr*, L. R. 5 C. P. Div. 507; *Sutton* v. *Temple* and *Hart* v. *Windsor*, *supra*; *Bird* v. *Greville*, 1 Cababe & E. 317; *Charsley* v. *Jones*, 53 J. P. Q. B. Div. 280. In *Dutton* v. *Gerrish*, 9 Cush. 89, 55 Am. Dec. 45, *Chief Justice* Shaw recognizes the doctrine as applicable to furnished houses; and in *Edwards* v. *McLean*, 122 N. Y. 302; *Smith* v. *Marrable*, and *Wilson* v. *Hutton*, cited above, are referred to with approval, although held in inapplicable to the question then before the court. See *Cleves* v. *Willoughby*, 7 Hill, 83; *Franklin* v. *Brown*, 118 N. Y. 110, 6 L. R. A. 770. We are of opinion that in the lease of a completely fur-

nished dwelling-house for a single season at a summer watering place there is an implied agreement that the house is fit for habitation, without greater preparation than one hiring it for a short time might reasonably be expected to make in appropriating it to the use for which it was designed.

Judgment affirmed.

GEORGIA SUPREME COURT.

GEORGIA SOUTHERN & FLORIDA R. CO., *Plff. in Err.*,
v.
Anthony ASMORE.

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

***A passenger on a railway train, who refuses to accede to a wrongful demand for fare, is entitled to be carried** on acceding to the demand, though the train may have been stopped with a view to his expulsion; but if the demand upon him is rightful he cannot avoid expulsion by tendering the fare while the train is being stopped, or after the stoppage. Where the failure of the passenger to have a ticket is due to the non-attendance of the agent at the ticket office, or to other fault or default of the company, the passenger is entitled to be carried at the ticket rate of fare; but where his failure is attributable to any other cause he has no right to be carried without paying the higher lawful rate exacted by the rules of the company.

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

(February 15, 1892.)

NOTE.—*Right of passenger to pay fare after train begins to stop for purpose of ejecting him.*

After the ejection of a passenger for factious refusal to pay fare, he has not the right to pay and continue his passage on that trip. Pease v. Delaware, L. & W. R. Co. 11 Daly, 350; People v. Jillson, 3 Park. Crim. Cas. 234.

This is true although the stop is within the limits of the ordinary stopping place of the train. Pease v. Delaware, L. & W. R. Co. *supra.*

The same rule applies even before the ejection if the train has stopped for the express purpose of ejecting the passenger. Cincinnati, S. & C. R. Co. v. Skillman, 39 Ohio St. 445; Hibbard v. New York & E. R. Co. 15 N. Y. 455; O'Brien v. Boston & W. R. Co. 15 Gray, 20, 77 Am. Dec. 347; Hoffbauer v. Delhi & N. W. R. Co. 52 Iowa, 342, 35 Am. Rep. 278.

But where the train has stopped at a regular stopping place an offer to pay fare before a passenger is ejected must be accepted. O'Brien v. New York Cent. & H. R. R. Co. 80 N. Y. 236.

Yet even if the place where a train is stopped is a regular station at which tickets are sold, if the particular train on which a passenger is traveling would not have stopped there except for the purpose of expelling him he is not entitled to prevent his expulsion and to continue his passage on that train by tender of fare after the train is stopped. Pickens v. Richmond & D. R. Co. 104 N. C. 312; O'Brien v. New York Cent. & H. R. R. Co. *supra*; Nelson v. Long Island R. Co. 7 Hun, 140.

A passenger who has refused to pay fare may change his mind and pay while the train is stopped at a station although the conductor has commenced to put him off, if he has not compelled the conductor to stop the train for that purpose or to resort to extreme measures, as for instance by force to pull him from his seat. Gould v. Chicago, M. & St. P. R. Co. 18 Fed. Rep. 155.

A valid ticket which a passenger had kept back and not shown until after he was ejected at a station for refusal to pay fare and insisting on his right to ride on a worthless ticket, will not entitle him to re-enter the train. State v. Campbell, 32 N. J. L. 309.

A passenger is not entitled to readmission to a train from which he has been ejected for nonpayment of fare by reason of a ticket which he purchases at the place where he is ejected, at least without paying fare for the distance already ridden. Stone v. Chicago & N. W. R. Co. 47 Iowa, 82, 29 Am. Rep. 458.

The rules above laid down are not without some limitations as clearly shown in the main case. Thus it is said that to bring a case within the rule that a person is not entitled to pay when being put off the train after refusal to pay fare there must be a willful or at least a positive refusal to pay proper fare. Texas & P. R. Co. v. Bond, 62 Tex. 442, 50 Am. Rep. 532.

So the rule that a passenger who has refused to pay his fare cannot pay after ejection or after the train is stopped to eject him and thus claim the right to continue on that train, it is said in Louisville, N. & G. S. R. Co. v. Harris, 9 Lea, 180, 72 Am. Rep. 668, ought to be limited to willful violation of his duty to pay.

A conductor is bound to receive fare from a third person if offered before the ejection of a passenger who has no ticket or money, whom he is about to eject for nonpayment of fare. Louisville & N. R. Co. v. Garrett, 8 Lea, 438, 41 Am. Rep. 640.

A New York case lays down the same rule, at least where the train is stopped at a station. Guy v. New York, O. & W. R. Co. 30 Hun, 399.

Where a conductor hastily pulls the bell and takes steps to eject a passenger who honestly disputes the correctness of the amount demanded, without giving the passenger reasonable time to consider, he must accept a tender of fare offered thereafter. Texas & P. R. Co. v. Bond, 62 Tex. 442, 50 Am. Rep. 532.

The same rule applies where the passenger is obliged to borrow money to pay the extra fare. He is entitled to a reasonable time for that purpose. Curl v. Chicago, R. I. & P. R. Co. (Iowa) 11 Am. & Eng. R. R. Cas. 85.

In California it is decided that a tender by a passenger of the remainder of his fare is in time although the train has stopped for the purpose of ejecting him, where the money which he had already paid to the conductor had not been returned to him. Bland v. Southern Pac. R. Co. 55 Cal. 570, 36 Am. Rep. 50.

In South Carolina R. Co. v. Nix, 68 Ga. 572, it is held that a conductor is not bound to receive fare after a train is in motion, from a passenger who has been ejected for nonpayment of fare, but it is said that he ought to do so if tendered while the train is not in motion or before the passenger is actually ejected. This last statement it will be seen is not in accord with most of the decisions cited above.

For *note* on payment of back fare for distance already traveled as a condition of being carried further, see Manning v. Louisville & N. R. Co. (Ala.), reported next after the main case. R. A. R.

ERROR to the Superior Court for Houston County to review a judgment in favor of plaintiff in an action brought to recover damages for his alleged wrongful ejection from defendant's train. *Reversed.*

The facts are stated in the opinion.

Messrs. **Gustin, Guerry & Hall** and **R. N. Holtzelaw** for plaintiff in error.

Mr. **A. S. Giles** for defendant in error.

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

The testimony was in some conflict. It raised the question of fact whether the failure of the passenger to have a ticket was due to the fault or default of the company, or to the omission of proper diligence by the plaintiff to supply himself with a ticket. Another question of fact on which the testimony differed was whether the passenger offered to pay at the conductor's rate before or not until after the train was stopped or being stopped for his expulsion. That he made the offer before he left the car, there is no dispute. The court charged the jury that, if he started to leave the train, and before doing so honestly changed his mind, and in good faith determined to remain and pay the amount charged, he had a right to do so; and, if he tendered that amount before he left the car, the conductor was bound to receive it, and ejection after such tender would be illegal and wrongful. Was this instruction correct? Tested by the letter of the decision in *South Carolina R. Co.* v. *Nix,* 68 Ga. 572, it was correct. Permission was granted in the argument here to review that case in respect to this question, and we have reviewed it. Our conclusion is that it is not sustainable, either on principle or by sound authority, and we feel constrained to overrule it in so far as it lays down in universal and unqualified terms the proposition, or its equivalent, that a passenger, by making a tender at any time before his ejection, may acquire the right to remain on board and be carried. Whenever a passenger refuses to accede to a just and lawful demand made upon him by the conductor for the payment of his fare, after being allowed reasonable time and opportunity to comply, he renounces his right to the position and the privileges of a passenger, and subjects himself to expulsion from the train. If he changes his mind, and tenders the fare before anything is done towards bringing the train to a stop in order to eject him, his refusal will be retracted in time, and his right to remain and be carried will stand unaffected. If he haggles and hesitates until he becomes a proper subject for ejection, and until steps have been taken to that end, he is too late. Any rule which would allow one passenger to play fast and loose with the conductor would allow all the passengers to do so, and a train might thus be kept halting and alternating between running at ordinary speed and stopping throughout the whole of its journey; and to this embarrassment not only one train, but every train run for the carriage of passengers, would be exposed. See the observations of Denio, *J.,* in *Hibbard* v. *New York & E. R. Co.,* 15 N. Y. 455; Hutchinson, Carr. 2d ed. § 589. The Code, § 2082, declares that "carriers of passengers may refuse to admit, or may eject from their conveyances, all persons refusing to comply with reasonable regulations, or guilty of improper conduct." It is certainly improper conduct for a passenger to delay the payment of his fare beyond the time when he ought to pay it, and a regulation that he shall pay on demand of the conductor is reasonable, and so necessary for the orderly conduct and transaction of business that it may fairly be presumed to be a regulation which all railway companies carrying passengers adopt and expect to enforce. This method of dealing with passengers who travel by railroad is so universal as to be a matter of general public observation and experience, and we apprehend that it would be a very rare instance in which a passenger would be surprised to find it in use. In the present case the passenger, when called upon, did not object to paying promptly what he admitted to be due. In fact, he put into the hands of the conductor money more than sufficient for the payment of his fare at the higher rate. Touching what immediately followed, the testimony is conflicting; but it is clear that a discussion arose as to whether payment should be made at the ticket rate or at the train rate, in consequence of which none of the money was retained, but all of it was returned. The plaintiff contended for the ticket rate, upon the ground that he tried to get a ticket, and that the agent was not at his place. The conductor insisted upon the higher rate, which was the usual and legal one exacted of passengers who had not procured tickets. According to sound legal principle, the right of the plaintiff to remain upon the train and be carried on payment or tender of the ticket rate should depend alone upon the fact whether the non-attendance of the ticket agent at the office, or any other fault or default of the company, was the true reason why the plaintiff was not supplied with a ticket. If his failure to have it was due to his own neglect, or to any cause not chargeable to the company, its agents or employés, the tender of the ticket rate had no relevancy whatever to the right of the plaintiff to be carried, or to shun ejection from the cars. He might as well have tendered nothing as not enough. On the other hand, it was the company's omission or fault that prevented the plaintiff from having a ticket, the conductor had no right to demand the payment of fare at a higher than the ticket rate; no right to reject that rate when tendered; and after its tender he could not lawfully expel the passenger for not complying with his unlawful demand of payment at a higher rate. This test of the respective rights of the passenger and the carrier goes to the foundation and rests upon the actual state of facts, and not upon mere belief or good faith either of the passenger or of the conductor. It requires them to know their respective rights, and to act accordingly. A passenger always knows why he fails to obtain a ticket. A conductor represents the company, and, if the company has failed in any of its duties to afford passengers opportunity to obtain tickets, he should be so informed. If the company will not allow him to take the word of the passenger, it must adopt some other means of informing him; as, for instance, requiring him to ascertain at each station, before leaving it, whether the ticket office has been properly kept open, and attended

for the sale of tickets or not. What the company, by any of its proper agents or employés, knows on that subject, the conductor, as representing the company on the train, may be presumed to know, and this presumption, as a general rule, should be treated as conclusive. The respective legal rights of the parties being as we have just announced, can those rights be changed by either without the consent of the other? It is clear to us that they cannot. Either may waive his own rights, but neither can compel any waiver by the other. If the passenger has the necessary state of facts to back him, nothing which the conductor can do will justify his expulsion. So, if the conductor, on the other hand, has at his back the necessary state of facts, he may enforce the rule of expulsion over any tender whatever which the passenger may make after steps have been rightfully taken to stop the train in consequence of the refusal to pay. Of course, this applies only to instances occurring between stations, and where the sole reason for stopping the train is to effect expulsion. We desire to restrict our ruling to what is necessary for a decision of the case before us. The sum of the matter is that a passenger cannot force a railroad company to reject him as a patron, and then force it, by making a tender which he ought to have made before, to cancel the rejection, and perform service the same as if there had been no failure to agree originally.

Judgment reversed.

ALABAMA SUPREME COURT.

James MANNING, *Appt.*,
v.
LOUISVILLE & NASHVILLE R. CO.

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

Refusal to pay fare for the distance already ridden without a valid ticket will justify the ejection of a passenger although on notice that he must pay such fare or be put off at the next station he has procured at that station a ticket for the remainder of his trip.

(April 26, 1892.)

APPEAL by plaintiff from a judgment of the Circuit Court for Jefferson County in favor of defendant in an action brought to recover damages for the alleged wrongful ejection of plaintiff from defendant's train. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Bowman & Harsh** for appellant.

Messrs. **Hewitt, Walker & Porter** for appellee.

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

Plaintiff purchased an excursion ticket to and from New Orleans from defendant's ticket agent at Birmingham. He obtained it at reduced rates, but on certain conditions as to its use, which were printed on the ticket, and subscribed by him. Plaintiff testified that he had read the conditions. Among them are the following: "In consideration of the reduced rate at which this ticket is sold, I, the undersigned, agree with the Louisville & Nashville Railroad Company as follows: That on the date of my departure, returning, I will identify myself as the original purchaser of this ticket, by writing my name on the back of this contract, and by other means, if required, in the presence of the ticket agent of the Louisville & Nashville Railroad Company at the point to which this ticket was sold, who will witness the signature, date and stamp the contract; and that this ticket and coupons shall be good returning only for a continuous passage from such date, and in no case later than the date canceled in the margin of this contract." Plaintiff conformed to all the requirements of this

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NOTE.—*Payment of back fare for distance already ridden as condition of being carried further.*

In Chicago, B. & Q. R. Co. v. Bryan, 90 Ill. 126, it is held, in conflict with the main case, that a passenger expelled from a train at a station for refusal to pay the amount of fare demanded may get on again and continue his journey on the same train on payment of the lawful fare from that point without paying fare for the distance previously ridden.

This distinction is based on his right to again become a passenger for a distinct trip, and it is held that he can do so on that train as well as any other.

But the majority of the cases agree with the main case above reported.

A passenger who has been expelled at a station for refusing to pay fare cannot continue his passage by paying fare from that point only, but must pay for the whole distance. Swan v. Manchester & L. R. R. 132 Mass. 116, 42 Am. Rep. 432; Pennington v. Philadelphia, W. & B. R. Co. 62 Md. 95.

The purchaser of a ticket from the station at which a passenger is ejected for nonpayment of fare does not entitle him to ride on the same train without payment for the distance already ridden even if he could claim the right to be admitted to that train on any terms. Stone v. Chicago & N. W. R. Co. 47 Iowa, 82, 29 Am. Rep. 458.

So on the same principle a tender of fare from a station where a passenger secures a seat, although he has already ridden for some distance, will not be sufficient without paying fare for the whole distance. Davis v. Kansas City, St. J. & C. B. R. Co. 53 Mo. 317, 14 Am. Rep. 457.

But where a passenger has a ticket not limited to any particular time or to the day on which it was purchased, and after it is punched stops over at a station and takes another train, if the conductor of the latter refuses to accept the ticket and threatens to eject him at the next station, he is entitled on procuring a ticket there to proceed upon it without paying fare again for the distance already ridden on that train as he has previously paid for the whole ride. Ward v. New York Cent. & H. R. R. Co. 30 N. Y. S. R. 604.

For *note* on the right of a passenger to pay fare after the train begins to stop for the purpose of ejecting him, see Gulf, C. & S. F. R. Co. v. Asmore next preceding the main case. B. A. R.

contract until he reached Mobile on his return trip. At that place he stopped off one day. At the end of that time he boarded another train of the railroad at midnight, and took a berth in a sleeping car. He proceeded unmolested on his homeward trip until he passed Montgomery, and was nearing Calera, less than forty miles from Birmingham. At that stage of his journey the conductor in charge of the train discovered he was traveling on a forfeited ticket, but possibly did not learn he had so traveled before he reached Montgomery. As a condition of his proceeding further the conductor exacted of him that he should pay fare from Montgomery to Birmingham, or, failing, that he would be put off the train at the next station, which would be Calera. Reaching Calera plaintiff procured from the ticket agent at that place a ticket to Birmingham, and upon that ticket sought to continue his journey on the same train. This the conductor refused to allow him to do, stating that under the road's regulations he could not permit him to proceed unless he would also pay the back fare from Montgomery. This he failed to do, and was ejected from the train. The present action is brought to recover damages for such ejection.

A regulation by which railroads, when passengers are found on their trains who have no tickets, or who have only forfeited tickets, require of such passengers fare, not only for that part of the route to be traveled, but also for the part already passed over, is certainly a reasonable one. If persons who are attempting to ride without paying fare can have the past forgiven, and need pay only from the place and time of their detection, would not this be the offer of a premium for an attempted undue advantage of the railroad? The regulation needs no argument to uphold its reasonableness. The authorities are uniform, and very abundant, that the conductor was authorized to demand fare, not only for the portion of the road yet to be traveled, but equally for that part of the road plaintiff had been carried, after his ticket had become *functus* by virtue of his stop over. And the conductor was fully justified in ejecting Manning from the train on his refusal to pay the fare as demanded. 3 Wood, Railway Law, § 361, p. 1433; Wheeler, Carr. 174; Hutchinson, Carr. 2d ed. § 580*a*; *Hill* v. *Syracuse, B. & N. Y. R. Co.* 63 N. Y. 101; *State* v. *Campbell*, 32 N. J. L. 309; *Swan* v. *Manchester & L. R. Co.* 132 Mass. 116; *Davis* v. *Kansas City, St. J. & C. B R. Co.* 53 Mo. 317, 14 Am. Rep. 457: *Stone* v. *Chicago & N. W. R. Co.* 47 Iowa, 82, 29 Am. Rep. 458; *Hall* v. *Memphis & C. R. Co.* 15 Fed. Rep. 57; *Pennington* v. *Philadelphia, W. & B. R. Co.* 62 Md. 95; *Pickens* v. *Richmond & D. R. Co.* 104 N. C. 312; *Atchison, T. & S. F. R. Co.* v. *Gants*, 38 Kan. 629; *Johnson* v. *Concord R. Corp.* 46 N. H. 213; *Rose* v. *Wilmington & W. R. Co.* 106 N. C. 168. Plaintiff (appellant here) relies on *Ward* v. *New York Cent. & H. R. R. Co.*, 30 N. Y. S. R. 604, as an authority in his favor. The ticket in that case was an ordinary one, and had no clause or stipulation requiring or looking to continuous passage. The decision is rested on the absence of that provision. It refers to and approves many of the decisions we have referred to above, pronounced on contracts requiring continuous passage. Properly interpreted, that case is an authority against appellant. In *Alabama G. S. R. Co.* v. *Carmichael*, 90 Ala. 19, 9 L. R. A. 388, we took occasion to comment on the great importance, the public necessity, of wisely observing regulations in the running of trains on railroads. We need not repeat what we there said. We hold that in the charge given to the jury the circuit court strictly followed the law.

Affirmed.

LOUISIANA SUPREME COURT.

LIVERPOOL & LONDON & GLOBE INS. CO.

v.

BOARD OF ASSESSORS, *Appt.*

(.....La.....)

***1. Foreign companies, being required, in order to carry on business in this state, to have an authorized agent** upon whom process may be served, do not, in appointing a board of directors to act as their agent, localize their business any more than those companies which manage their affairs through agencies not organized into boards, the duties of each agency being about the same.

2. A nonresident creditor of a state cannot be said to be, in virtue of a debt which a resident owes him, a holder of property within its limits. The credit is not within the state's jurisdiction, and of no value to the debtor, and is not property within the state, but property of the creditor, taxable at his place of residence.

3. Tangible movable property may be taxed where situate, under a special statute which provides for its taxation.

(May 2, 1892.)

APPEAL by defendant from a judgment of the Civil District Court for the Parish of Orleans in favor of plaintiff in an action brought to procure the cancellation of a certain tax assessment. *Affirmed.*

The facts are stated in the opinion.

Mr. **Carleton Hunt,** *City Atty.*, for appellant:

It is true that the doctrine of the international jurists, in relation to the *situs* of movables, forms part of the *jus gentium*, but this statement is, beyond all doubt, to be accepted, subject to the limitation that there is no positive law to the contrary of the country where the property involved happens in point of fact to be. For if there is, the law of the owner's

*Head notes by BREUX, J.

NOTE.—For an apparent modification of the doctrine that a debt due to a nonresident creditor cannot be taxed at the domicil of the debtor, see *note* to Detroit v. Rentz (Mich.), which is reported next following the above case.

See also 16 L. R. A. 59; 34 L. R. A. 232, 309.

domicil must necessarily yield to the law of the place where the property is actually situated.

Burroughs, Taxation, §§ 40–42; *Alvany* v. *Powell*, 55 N. C. 51; *Catlin* v. *Hull*, 21 Vt. 161; *State* v. *St. Louis County*, 47 Mo. 594; *People* v. *Home Ins. Co.* 29 Cal. 533; *St. Louis* v. *Wiggins Ferry Co.* 40 Mo. 580; *Wilcox* v. *Ellis*, 14 Kan. 602; *Tazewell County Suprs.* v. *Davenport*, 40 Ill. 198; *Douglas* v. *New York*, 2 Duer, 110; *People* v. *Ogdensburgh*, 48 N. Y. 390; *Oliver* v. *Liverpool & L. L. & F. Ins. Co.* 100 Mass. 538; *Atty-Gen.* v. *Bay State Min. Co.* 99 Mass. 148.

All the laws of the state of Louisiana relative to assessment and the taxation of property under the present Constitution, will be searched in vain for the expression of any legislative purpose to assess or to tax income.

See *Forman* v. *Houston*, 35 La. Ann. 825; *Parker* v. *North British & M. Ins. Co.* 42 La. Ann. 429.

The contention of the plaintiff, that the assessment involved, of $40,000, on money loaned on interest, credits, etc., and of $10,000, money in possession, is not liable to taxation in the state of Louisiana, but can be taxed at the domicil of the company only, Liverpool, England, is unmaintainable.

Every state, in view of the law, is equal to every other state, and every state possesses an exclusive sovereignty and jurisdiction within its own territory.

Story, Confl. Laws, par. 18.

The right of the State of Louisiana to direct her own course of policy regarding taxation is not to be questioned, nor does it suffice to defeat that policy, to criticise it as being narrow or illiberal.

Burroughs, Taxation, §§ 40–42.

The theory that personal property attends the person, and is where the owner lives, is a mere fiction, whose restricted application rests on the comity of nations, and the fiction itself is inapplicable in this case of Revenue Statutes.

Alvany v. *Powell*, 55 N. C. 51; *Catlin* v. *Hull*, 21 Vt. 161; *Smith* v. *Burley*, 9 N. H. 423; *State* v. *St. Louis County*, 47 Mo. 594; *People* v. *Home Ins. Co.* 29 Cal. 533; *St. Louis* v. *Wiggins Ferry Co.* 40 Mo. 580; *Wilcox* v. *Ellis*, 14 Kan. 602; *Tazewell County Suprs.* v. *Davenport*, 40 Ill. 198; *People* v. *Ogdensburgh*, 48 N. Y. 390; *Oliver* v. *Liverpool & L. L. & F. Ins. Co.* 100 Mass. 538; *Atty-Gen.* v. *Bay State Min. Co.* 99 Mass. 144; *Liverpool & L. L. & F. Ins. Co.* v. *Massachusetts*, 77 U. S. 10 Wall. 573, 19 L. ed. 1031.

While the money in possession and credits of the Liverpool & London & Globe Insurance Company, involved in the present case, as subject to taxation, are personal property, and in part intangible and incorporeal, it was perfectly competent for Act 106 of the Acts of 1890 of the state of Louisiana to separate them from the person of their owner for the purposes of taxation, and give them a *situs* of their own.

Tappan v. *Merchants Nat. Bank*, 86 U. S. 19 Wall. 499, 22 L. ed. 193.

Messrs. **E. A. O'Sullivan,** *City Atty.*, and **Henry Renshaw,** *Asst. City Atty.*, in support of petition for rehearing:

Said debts are embraced within the exercise of jurisdiction and power by the state over nonresidents, and petitioners cite garnishment process under writs of attachment and execution as an illustration of the exercise of jurisdiction as to credits due nonresidents.

C. P. 246; *Miller* v. *United States*, 78 U. S. 11 Wall. 297, 20 L. ed. 142; *Brown* v. *Kennedy*, 82 U. S. 15 Wall. 599, 21 L. ed. 195.

The legal fiction expressed by the maxim, *mobilia personam sequuntur* must yield to express law, where the credits sought to be taxed arise from business carried on within the state, by the plaintiff through its local agent.

The statute referred to is a lawful exercise of the legitimate power of the state.

See *Alvany* v. *Powell*, 55 N. C. 51; *Catlin* v. *Hull*, 21 Vt. 161; *State* v. *St. Louis County*, 47 Mo. 600; *People* v. *Home Ins. Co.* 29 Cal. 533; *St. Louis* v. *Wiggins Ferry Co.* 40 Mo. 580; *Wilcox* v. *Ellis*, 14 Kan. 602; *Tazewell County Suprs.* v. *Davenport*, 40 Ill. 198; *Oliver* v. *Liverpool & L. L. & F. Ins. Co.* 100 Mass. 538; *Liverpool & L. L. & F. Ins. Co.* v. *Massachusetts*, 77 U. S. 10 Wall. 573, 19 L. ed. 1031; *Tappan* v. *Merchants Nat. Bank*, 86 U. S. 19 Wall. 499, 22 L. ed. 193.

In the case of *State Tax on Foreign-Held Bonds*, 82 U. S. 15 Wall. 319, 21 L. ed. 186, the United States Supreme Court held: "Unless restrained by provisions of the Federal Constitution, the power of the state as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."

The Legislature having expressed its will through the statute, there is no difficulty in carrying out the enactment.

Miller v. *United States*, 78 U. S. 11 Wall. 296, 20 L. ed. 141; *Brown* v. *Kennedy*, 82 U. S. 15 Wall. 599, 21 L. ed. 196.

Messrs. **E. W. Huntington** and **Horace L. Dufour,** for appellee:

The *situs* of a debt as property is at the domicil of the creditor.

Burroughs, Taxn. 186; Cooley, Taxn. chap. 1, pp. 14, 15; *State Tax on Foreign-Held Bonds*, 82 U. S. 15 Wall. 319, 21 L. ed. 186. See also *Kirtland* v. *Hotchkiss*, 100 U. S. 496, 25 L. ed. 561; *Meyer* v. *Pleasant*, 41 La. Ann. 646; *Barber Asphalt Pav. Co.* v. *New Orleans*, 41 La. Ann. 1015.

A corporation retains the domicil of its birth, and, like natural persons, it is at that domicil "that its obligations for, and its liability to, taxation for debts or other incorporeal rights, which it owns, must be tested and settled."

Central Nat. Bank of Baltimore v. *Connecticut Mut. L. Ins. Co.* 104 U. S. 71, 26 L. ed. 700; *Yuba County* v. *Pioneer Gold Min. Co.* 32 Fed. Rep. 183.

The assessment is one on income, which is not permissible under our state Constitution.

Burroughs, Taxn. p. 159, § 82.

Annual premiums received by an insurance company constitute a part of its income.

Burroughs, Taxn. p. 160; *Parker* v. *North British & M. Ins. Co.* 42 La. Ann. 429; *Dubuque* v. *Northwestern L. Ins. Co.* 29 Iowa, 9.

An income tax does not come within the meaning of the word "property" as used and designated in the Constitution.

Glasgow v. *Rowse*, 43 Mo. 479.

contract until he reached Mobile on his return trip. At that place he stopped off one day. At the end of that time he boarded another train of the railroad at midnight, and took a berth in a sleeping car. He proceeded unmolested on his homeward trip until he passed Montgomery, and was nearing Calera, less than forty miles from Birmingham. At that stage of his journey the conductor in charge of the train discovered he was traveling on a forfeited ticket, but possibly did not learn he had so traveled before he reached Montgomery. As a condition of his proceeding further the conductor exacted of him that he should pay fare from Montgomery to Birmingham, or, failing, that he would be put off the train at the next station, which would be Calera. Reaching Calera plaintiff procured from the ticket agent at that place a ticket to Birmingham, and upon that ticket sought to continue his journey on the same train. This the conductor refused to allow him to do, stating that under the road's regulations he could not permit him to proceed unless he would also pay the back fare from Montgomery. This he failed to do, and was ejected from the train. The present action is brought to recover damages for such ejection.

A regulation by which railroads, when passengers are found on their trains who have no tickets, or who have only forfeited tickets, require of such passengers fare, not only for that part of the route to be traveled, but also for the part already passed over, is certainly a reasonable one. If persons who are attempting to ride without paying fare can have the past forgiven, and need pay only from the place and time of their detection, would not this be the offer of a premium for an attempted undue advantage of the railroad? The regulation needs no argument to uphold its reasonableness. The authorities are uniform, and very abundant, that the conductor was authorized to demand fare, not only for the portion of the road yet to be traveled, but equally for that part of the road plaintiff had been carried, after his ticket had become *functus* by virtue of his stop over. And the conductor was fully justified in ejecting Manning from the train on his refusal to pay the fare as demanded. 3 Wood, Railway Law, § 361, p. 1433; Wheeler, Carr. 174; Hutchinson, Carr. 2d ed. § 580*a*; *Hill* v. *Syracuse, B. & N. Y. R. Co.* 63 N. Y. 101; *State* v. *Campbell*, 32 N. J. L. 309; *Swan* v. *Manchester & L. R. Co.* 132 Mass. 116; *Davis* v. *Kansas City, St. J. & C. B. R. Co.* 53 Mo. 317, 14 Am. Rep. 457; *Stone* v. *Chicago & N. W. R. Co.* 47 Iowa, 82, 29 Am. Rep. 458; *Hall* v. *Memphis & C. R. Co.* 15 Fed. Rep. 57; *Pennington* v. *Philadelphia, W. & B. R. Co.* 62 Md. 95; *Pickens* v. *Richmond & D. R. Co.* 104 N. C. 312; *Atchison, T. & S. F. R. Co.* v. *Gants*, 38 Kan. 629; *Johnson* v. *Concord R. Corp.* 46 N. H. 213; *Rose* v. *Wilmington & W. R. Co.* 106 N. C. 168. Plaintiff (appellant here) relies on *Ward* v. *New York Cent. & H. R. R. Co.*, 30 N. Y. S. R. 604, as an authority in his favor. The ticket in that case was an ordinary one, and had no clause or stipulation requiring or looking to continuous passage. The decision is rested on the absence of that provision. It refers to and approves many of the decisions we have referred to above, pronounced on contracts requiring continuous passage. Properly interpreted, that case is an authority against appellant. In *Alabama G. S. R. Co.* v. *Carmichael*, 90 Ala. 19, 9 L. R. A. 388, we took occasion to comment on the great importance, the public necessity, of wisely observing regulations in the running of trains on railroads. We need not repeat what we there said. We hold that in the charge given to the jury the circuit court strictly followed the law.

Affirmed.

LOUISIANA SUPREME COURT.

LIVERPOOL & LONDON & GLOBE INS. CO.

v.

BOARD OF ASSESSORS, *Appt.*

(.....La.....)

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It is true that the doctrine of the international jurists, in relation to the *situs* of movables, forms part of the *jus gentium*, but this statement is, beyond all doubt, to be accepted, subject to the limitation that there is no positive law to the contrary of the country where the property involved happens in point of fact to be. For if there is, the law of the owner's

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All the laws of the state of Louisiana relative to assessment and the taxation of property under the present Constitution, will be searched in vain for the expression of any legislative purpose to assess or to tax income.

See *Forman* v. *Houston*, 35 La. Ann. 825; *Parker* v. *North British & M. Ins. Co.* 42 La. Ann. 429.

The contention of the plaintiff, that the assessment involved, of $40,000, on money loaned on interest, credits, etc., and of $10,000, money in possession, is not liable to taxation in the state of Louisiana, but can be taxed at the domicil of the company only, Liverpool, England, is unmaintainable.

Every state, in view of the law, is equal to every other state, and every state possesses an exclusive sovereignty and jurisdiction within its own territory.

Story, Confl. Laws, par. 18.

The right of the State of Louisiana to direct her own course of policy regarding taxation is not to be questioned, nor does it suffice to defeat that policy, to criticise it as being narrow or illiberal.

Burroughs, Taxation, §§ 40–42.

The theory that personal property attends the person, and is where the owner lives, is a mere fiction, whose restricted application rests on the comity of nations, and the fiction itself is inapplicable in this case of Revenue Statutes.

Alvany v. *Powell*, 55 N. C. 51; *Catlin* v. *Hull*, 21 Vt. 161; *Smith* v. *Burley*, 9 N. H. 428; *State* v. *St. Louis County*, 47 Mo. 594; *People* v. *Home Ins. Co.* 29 Cal. 533; *St. Louis* v. *Wiggins Ferry Co.* 40 Mo. 580; *Wilcox* v. *Ellis*, 14 Kan. 602; *Tazewell County Suprs.* v. *Davenport*, 40 Ill. 198; *People* v. *Ogdensburgh*, 48 N. Y. 390; *Oliver* v. *Liverpool & L. L. & F. Ins. Co.* 100 Mass. 538; *Atty-Gen.* v. *Bay State Min. Co.* 99 Mass. 144; *Liverpool & L. L. & F. Ins. Co.* v. *Massachusetts*, 77 U. S. 10 Wall. 573, 19 L. ed. 1031.

While the money in possession and credits of the Liverpool & London & Globe Insurance Company, involved in the present case, as subject to taxation, are personal property, and in part intangible and incorporeal, it was perfectly competent for Act 106 of the Acts of 1890 of the state of Louisiana to separate them from the person of their owner for the purposes of taxation, and give them a *situs* of their own.

Tappan v. *Merchants Nat. Bank*, 86 U. S. 19 Wall. 499, 22 L. ed. 193.

Messrs. **E. A. O'Sullivan,** *City Atty.*, and **Henry Renshaw,** *Asst. City Atty.*, in support of petition for rehearing:

Said debts are embraced within the exercise of jurisdiction and power by the state over nonresidents, and petitioners cite garnishment process under writs of attachment and execution as an illustration of the exercise of jurisdiction as to credits due nonresidents.

C. P. 246; *Miller* v. *United States*, 78 U. S. 11 Wall. 297, 20 L. ed. 142; *Brown* v. *Kennedy*, 82 U. S. 15 Wall. 599, 21 L. ed. 195.

The legal fiction expressed by the maxim, *mobilia personam sequuntur* must yield to express law, where the credits sought to be taxed arise from business carried on within the state, by the plaintiff through its local agent.

The statute referred to is a lawful exercise of the legitimate power of the state.

See *Alvany* v. *Powell*, 55 N. C. 51; *Catlin* v. *Hull*, 21 Vt. 161; *State* v. *St. Louis County*, 47 Mo. 600; *People* v. *Home Ins. Co.* 29 Cal. 533; *St. Louis* v. *Wiggins Ferry Co.* 40 Mo. 580; *Wilcox* v. *Ellis*, 14 Kan. 602; *Tazewell County Suprs.* v. *Davenport*, 40 Ill. 198; *Oliver* v. *Liverpool & L. L. & F. Ins. Co.* 100 Mass. 538; *Liverpool & L. L. & F. Ins. Co.* v. *Massachusetts*, 77 U. S. 10 Wall. 573, 19 L. ed. 1031; *Tappan* v. *Merchants Nat. Bank*, 86 U. S. 19 Wall. 499, 22 L. ed. 193.

In the case of *State Tax on Foreign-Held Bonds*, 82 U. S. 15 Wall. 319, 21 L. ed. 186, the United States Supreme Court held: "Unless restrained by provisions of the Federal Constitution, the power of the state as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."

The Legislature having expressed its will through the statute, there is no difficulty in carrying out the enactment.

Miller v. *United States*, 78 U. S. 11 Wall. 296, 20 L. ed. 141; *Brown* v. *Kennedy*, 82 U. S. 15 Wall. 599, 21 L. ed. 196.

Messrs. **E. W. Huntington** and **Horace L. Dufour,** for appellee:

The *situs* of a debt as property is at the domicil of the creditor.

Burroughs, Taxn. 186; Cooley, Taxn. chap. 1, pp. 14, 15; *State Tax on Foreign-Held Bonds*, 82 U. S. 15 Wall. 319, 21 L. ed. 186. See also *Kirtland* v. *Hotchkiss*, 100 U. S. 496, 25 L. ed. 561; *Meyer* v. *Pleasant*, 41 La. Ann. 646; *Barber Asphalt Pav. Co.* v. *New Orleans*, 41 La. Ann. 1015.

A corporation retains the domicil of its birth, and, like natural persons, it is at that domicil "that its obligations for, and its liability to, taxation for debts or other incorporeal rights, which it owns, must be tested and settled."

Central Nat. Bank of Baltimore v. *Connecticut Mut. L. Ins. Co.* 104 U. S. 71, 26 L. ed. 700; *Yuba County* v. *Pioneer Gold Min. Co.* 32 Fed. Rep. 183.

The assessment is one on income, which is not permissible under our state Constitution.

Burroughs, Taxn. p. 159, § 82.

Annual premiums received by an insurance company constitute a part of its income.

Burroughs, Taxn. p. 160; *Parker* v. *North British & M. Ins. Co.* 42 La. Ann. 429; *Dubuque* v. *Northwestern L. Ins. Co.* 29 Iowa, 9.

An income tax does not come within the meaning of the word "property" as used and designated in the Constitution.

Glasgow v. *Rowse*, 43 Mo. 479.

The absence of any express reference to income and of all appropriate provisions for defining and ascertaining the income to be taxed negatives the legislative intention to levy such tax.

Forman v. *Houston*, 35 La. Ann. 825. See also *Liverpool & L. & G. Ins. Co.* v. *Board of Assessors*, 42 Fed. Rep. 90.

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

This suit was brought by the Liverpool & London & Globe Insurance Company for the cancellation of an assessment against the company for the taxes of 1891, which reads as follows: "Money loaned on interest, all credits and all bills receivable from money loaned or advanced or for goods sold, $40,000;" "money in possession, on deposit or in hand, $10,000." It is admitted by the plaintiff company that it has the above amount of cash and open accounts in this city. The validity of the assessment is denied; also the legality of the tax claimed. The grounds of defense are that the premiums of insurance companies are its income, and that no law authorizes the imposition of any income tax, or makes any provision for its assessment and collection; that the cash, open accounts, credits, premiums, or gross receipts due by insurers in this state, or collected from insurers in other states, are not taxable in this state, as they are not retained at the office of the company, but are forwarded to the main office, at its domicil in Great Britain where they can be taxed. The evidence discloses that plaintiff is a foreign insurance company, carrying on business in this city through the agency of a secretary and a local board of directors; that the functions of this board and of said officer are the collection of premiums and the payment of losses. The answer of the defendants pleaded the general issue. The district court decreed that the assessment of 1891 (on money loaned on interest, all credits and all bills receivable for money loaned or advanced or for goods sold) of $40,000 is null and void, and that the assessment of 1891 against plaintiff on money in possession, on deposit or in hand, to the amount of $10,000, shall remain undisturbed, and in full force and effect. The appellee in the answer to the appeal prays that the judgment be amended by striking out and annulling the assessment against the company for the year 1891 for $10,000 on money in possession, on deposit and in hand, and that the judgment of the district court, as thus amended, be affirmed. The assessment was levied under Act 106 of Acts of 1890, section 7 of which provides that in assessing mercantile firms the purpose of the Act is that such value shall be placed upon the stock in trade or cash, whether forwarded or not, money at interest, open accounts, credits, as will represent in their aggregate a fair average on the capital, both cash and credit, employed in the business of the party or parties. It is also provided in this section of the Act that nonresidents carrying on business in this state through agents shall pay a similar tax to that exacted of residents; and this section further provides that all bills receivable, obligations, or credits arising from business done in this state is assessable at the business domicil of the nonresident owner, his agent or representative.

Business residence. The defendant urges upon our consideration that the Liverpool & London & Globe have here a business residence, an independent center of business, represented by a local board of directors, made up of well-known residents of the city; that they direct the affairs of the company, and are paid for so doing. The testimony shows that the local board and the secretary conduct the affairs of the plaintiff company in New Orleans under the direction of the head office; that the members of the board are paid $10 for each meeting they attend. Foreign companies are required to have, in order to carry on business in this state, one or more known places of business, and an authorized agent or agents in the state upon whom process may be served. Instead of carrying on business through a personal agency, the Liverpool & London & Globe has a board of directors and secretary appointed by itself. The business carried on by this board does not have the effect of localizing the company itself to a greater extent than if the business were conducted by an agency not organized into a board. The premiums of foreign companies are all collected through local agencies, and the losses are adjusted by these agencies. Whether represented by a board of their selection or by agents, they remain foreign companies, and, in so far as relates to residence, the same rule applies. The companies are the owners of the assets. Payments of losses made here in cash, or by drafts sent by the home companies, do not change their status, in so far as relates to business residence.

Debts to foreign companies not taxable. With reference to the first heading of the assessment the evidence shows that plaintiff has no money loaned on interest, nor bills receivable for money loaned, nor credits for goods sold. The issues are limited to all credits assessed for premiums due. A debt to a nonresident of a state is not liable to be taxed by a state in which he does not reside. His credits are not within the state's jurisdiction. They are of no value to the debtor. All the value there is in them belongs to the creditors, and is taxable at his domicil. Cooley, Taxn. 2d ed. p. 21; *State Tax on Foreign-Held Bonds*, 82 U. S. 15 Wall. 300-319, 21 L. ed. 179-186; *Oliver* v. *Washington Mills*, 11 Allen, 268; *De Vignier* v. *New Orleans*, 4 Woods, 206; *Dow* v. *Sudbury*, 5 Met. 73; *Herriman* v. *Stowers*, 43 Me. 497; *People* v. *Chenango County Suprs.* 11 N. Y. 563; *St. Paul* v. *Merritt*, 7 Minn. 258 (Gil. 198); *Catlin* v. *Hull*, 21 Vt. 152; *Phelps* v. *Thurston*, 47 Conn. 477. All corporations are taxable on property within the state. Debts are not property when the creditor is not a resident of the state. We conclude, says Burroughs, (Taxation, p. 59,) "that the *situs* of personal property for the purpose of taxation depends in a great measure upon the nature of the property." As to debts, a number of trustworthy decisions hold that "corporations, it is also conceded, may be taxed, like natural persons, on their prop-

erty and business; but debts owing to foreign creditors, either corporations or individuals, are not the subject of taxation. The creditor cannot be taxed because he is not within the jurisdiction; and the debts cannot be taxed in the debtor's hands through any fiction of the law, which is to treat them as being for this purpose the property of debtors. They are not property of the debtors in any sense; they are the obligations of the debtor, and only possess value in the hands of the creditor. With them they are property, but to call them property in the hands of the debtors is simply a misuse of terms." *Com.* v. *Chesapeake & O. R. Co.* 27 Gratt. 344; *Oliver* v. *Washington Mills*, 11 Allen, 268; *Macon* v. *Jones*, 67 Ga. 489; *San Francisco* v. *Mackey*, 22 Fed. Rep. 602; *Goldgart* v. *People*, 106 Ill. 25; *Kirkland* v. *Hotchkiss*, 100 U. S. 496, 25 L. ed. 561.

"The mere right of a foreign creditor to receive from his debtor within the state the payment of his demands cannot be subjected to taxation within the state." Cooley, Taxn. p. 15. The proposition of counsel for defendants that the Statute No. 106 of 1890, under which the taxes here claimed are levied, authorizes the taxation of credits held by nonresidents, is true. The statute must be applied, in so far as relates to tangible movables belonging to nonresidents, and as to them the general rule recognized by the comity of states, *mobilia personam sequuntur*, must yield. The Supreme Court of the United States says upon that subject: "It is undoubtedly true that the actual *situs* of personal property which has a visible and tangible existence, and not the domicil of the owner, will in many cases determine the state in which it may be taxed. The same thing is true of public securities consisting of state and municipal bonds and circulating notes of banks. These, by general usage, have acquired the character of and are treated as property in the place where they are found, though removed from the domicil of the owner." *State Tax on Foreign-Held Bonds*, 82 U. S. 15 Wall. 300, 21 L. ed. 179. We are dealing exclusively with the question of credits as assessed, and we hold, as decided in *Meyer* v. *Pleasant*, 41 La. Ann. 645, and *Barber Asphalt Pav. Co.* v. *New Orleans*, 41 La. Ann. 1015, "that debts have their *situs* at the domicil of the debtor," because debts are property, and have a value which is inseparable from the creditor, and because the state had no greater power or jurisdiction to tax debts due to nonresident creditors than it has to tax any other personal property of such nonresident which is not situated in the state. The want of jurisdiction and power would render it useless to maintain the general rule applying to tangible movables.

Situs of the capital for taxation purposes. With reference to the second heading of the assessment, "Money in possession," the evidence shows that plaintiff is correctly assessed. It is property within the state and subject to taxation. It is visible and tangible, and expressly made taxable by statute, and is taxable where situated. The authorities we have referred to as maintaining that debts cannot be assessed against nonresidents have established the rule that nonresidents owning tangible movable property within the state may be taxed.

Judgment affirmed, at appellants' costs. Rehearing refused.

MICHIGAN SUPREME COURT.

COMMON COUNCIL of the City OF DETROIT, Relator,
v.
Theodore RENTZ *et al.*, Board of Assessors of the City of Detroit.

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

1. The bound volumes of the legislative journals containing matter not contained in the journal as published from day to day, certified by the clerk, will be presumed to have been properly amended in such respect by authority of the Legislature in determining whether a statute was duly passed.

2. Discrepancies between a copy of a bill as printed in a supplement to the legislative journal and the bound volume of the journal containing the bill as signed will not invalidate the statute where it affirma-

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NOTE.—*Power to tax mortgages.*

In Dundee Mortg. T. Invest. Co. v. Multnomah County School Dist. No. 1, 19 Fed. Rep. 359, it was decided that the contract between mortgagor and mortgagee was not impaired by a statute passed after the mortgage was given requiring the mortgagee to be assessed for the amount of the mortgage and a corresponding amount deducted from the assessment of the mortgagor. As in the main case it was held that such tax on the mortgagee was the exercise of the governmental power and as between him and the state a loan not relating to his contract with the mortgagor although the latter was in effect relieved from taxation *pro tanto*.

So in the state court of Oregon it was held that a statute taxing mortgages does not impair the obligation of a contract as to a prior mortgage. Mumford v. Sewall, 11 Or. 70.

And an agreement by the mortgagor to pay taxes is not binding on the state so as to prevent it from taxing the mortgagee. People v. Wharteby, 38 Cal. 461.

But in Cleveland, P. & A. R. Co. v. Pennsylvania, ("State Tax on Foreign-Held Bonds") 82 U. S. 15 Wall. 300, 21 L. ed. 179, the Supreme Court of the United States held that a tax on bonds held by a nonresident although secured by mortgage on real property within the state, impaired the obligation of the contract at least where the statute authorizing the tax was passed after the bonds were issued, and it seems both from this case and Pittsburgh, Ft. W. & C. R. Co. v. Pennsylvania, 82 U. S. 15 Wall. 326, 21 L. ed. 189, *note*, that it is the same where the contract was made after the passage of the statute.

Credits, although secured by mortgage, are not "property" within the California Constitution, which requires all property to be taxed in propor-

16 L. R. A.

See also 16 L. R. A. 56; 18 L. R. A. 465; 27 L. R. A. 797; 34 L. R. A. 308; 37 L. R. A. 384; 48 L. R. A. 238.

tively appears from the journals that the Legislature finally dealt with and passed some other bill than that contained in such supplement.

3. **A vote of the House to print a bill in the journal** as a supplement makes the bill when so printed a part of the journal.

4. **A provision that in case the mortgagee fails to pay his share of the tax it shall be paid by the mortgagor** and the amount applied in reduction of the mortgage debt, contained in an Act providing for the separate taxation of the different interests in mortgaged real estate, is not void as requiring one man to pay the debt of another.

5. **A mortgagor's right to ask for the correction of the assessment of his interest** under a statute providing for the separate assessment of the different interests in mortgaged real estate is sufficiently preserved by a clause providing for a correction of the assessment on sufficient cause shown by any person whose property is assessed.

6. **Permitting a sale of the fee upon nonpayment of taxes upon the mortgagee's interest in land** without any provision for distinguishing the assessment under which the sale is made, although it may result in loss to the mortgagor because of the mortgagee's default, is not unlawful where the mortgagor may prevent a sale by paying the tax and the sale is limited to a parcel sufficient to pay the tax.

7. **The obligation of a prior mortgage contract is not impaired** by a statute providing for the assessment to the mortgagee of taxes which had previously been paid by the mortgagor and permitting the mortgagor, in case he pays such taxes, to deduct the amount from accrued interest on the indebtedness, and if it exceeds the interest due, then from the principal, even though the effect of the latter would be to extinguish a part of the interest-bearing debt.

8. **A mortgage upon realty is sufficiently an interest in real estate to make it taxable** in the state where the land is situated although owned by a nonresident.

9. **Taxation of mortgages as real estate does not create illegal double taxation** although held by savings banks and representing deposits, upon which the depositors are taxed.

10. **Failure to provide a method for apportioning the tax upon a mortgage** covering lands lying in different taxing districts, will not invalidate an Act providing for the separate taxation of the different interests in mortgaged real estate; the mortgage will be taxable in each district in proportion to the amount of land lying therein.

11. **An agreement by a mortgagor to pay all assessments on all interests in the land will not be abridged or abrogated** by subsequent statute providing for the separate taxation of the different interests in mortgaged real estate.

12. **An agreement by a mortgagor to pay all taxes** upon the land in addition to full legal interest upon the mortgage is not usurious.

(Grant and Long, JJ., dissent from propositions 1, 4, 7 and 10. Morse, Ch. J., dissents from proposition 3.)

(March 15, 1892.)

APPLICATION for a writ of mandamus to compel defendants as the board of assessors of the city of Detroit to make assessments according to the provisions of Act No. 200 of Public Acts of 1891, relating to the taxation of property, which respondents had re-

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tion to its value. People v. Hibernia Sav. & Loan Soc. 51 Cal. 254, 21 Am. Rep. 704.

This case seems to overrule earlier California cases, including People v. Eddy, 43 Cal. 331, which decided that the Legislature could not exempt solvent debts secured by mortgage. One of the judges puts his decision also on the ground that the taxation of a mortgage upon land which is also taxed is double taxation and void for that reason. This question of double taxation was also extensively discussed in Savings & Loan Soc. v. Austin, 46 Cal. 415, in which, however, the court was too much divided to decide it.

Double taxation.

Notwithstanding the position taken by some judges in the California case last cited, the general doctrine seems to be explicitly or tacitly established nearly everywhere that a mortgagee may be taxed on his mortgage although the land is also taxed for its full value to the mortgagor. People v. Worthington, 21 Ill. 171, 74 Am. Dec. 86; Lamar v. Palmer, 18 Fla. 147.

Where taxable.

The decisions are not harmonious on the question of the place where mortgages may be taxed. Some hold that a mortgage in land is a mere chattel interest taxable only in the county where the mortgagee resides although recorded where the land lies. Gallatin County v. Beattie, 3 Mont. 173; Latrobe v. Baltimore, 19 Md. 13.

Also that a tax on "money at interest secured by mortgage or otherwise" is a tax on the debt and should be made where the mortgagee resides. People v. Wharteuby, 38 Cal. 461; People v. Eastman, 25 Cal. 601; People v. Park, 23 Cal. 138.

But in State v. Runyon, 41 N. J. L. 98, it is said that the Legislature may select as the *situs* of taxation of mortgages either the political division where the owner resides or that in which the mortgaged premises are situated. It does not appear, however, that the rights of nonresidents were in question in this case.

So under the Massachusetts statutes the interest of a mortgagee is assessed as real estate where the land lies. Firemen's F. Ins. Co. v. Com. 137 Mass. 80.

So in Mumford v. Sewall, 11 Or. 70, it is said that a real-estate mortgage is local, as the land is, in the state where the land lies.

To the contrary is Cleveland, P. & A. R. Co. v. Pennsylvania, *supra*.

The New Jersey statute, by which a mortgagee is not assessable for the mortgage where he resides in case the premises lie in another township or county, does not relieve him from tax thereon at his residence if the lands lie in a city or place where by special law the land is taxed without regard to incumbrances. State v. Massaker, 25 N. J. L. 531.

Nonresident owners.

A mortgagor cannot be taxed on a mortgage due to a nonresident of the state because the mortgage is not property within the state. Davenport v. Mississippi & M. R. R. Co. 12 Iowa, 539.

A nonresident mortgagee is not taxable on his mortgage where the land lies unless the mortgage is there in the hands of an agent. Goldgart v. People, 106 Ill. 25.

fused to do because of the alleged unconstitutionality of the Act. *Writ granted.*

The facts are stated in the opinions.

Messrs. **Charles W. Casgrain** and **Charles S. McDonald,** for relator:

Since *Taggart* v. *Sanilac County Suprs.*, 71 Mich. 16, the competency of the Legislature to assess and tax real-estate mortgages and other securities representing values will not be questioned in this state.

It is competent for the Legislature to direct that mortgages, for the purpose of assessment and taxation, be treated as an interest in real estate pledged.

It is customary to classify property for taxation as real and personal, and to assess the two classes on somewhat different principles. The classification is commonly made on common law distinctions, but this is not necessarily the case, and it will frequently be found that enumerations of property in statutes as real or personal for the purpose of taxation differs considerably from what it would be for other purposes in the same state.

2 Cooley, Taxn. 566, 567, and cases there cited; *Johnson* v. *Roberts*, 102 Ill. 655; *Steere* v. *Walling*, 7 R. I. 317.

The law must be held operative on mortgages executed before it went into effect, equally with mortgages given subsequently.

This is not an attempt to impair the obligations of contracts, and it therefore in no wise violates the constitutional prohibition on that point.

McCoppin v. *McCartney*, 60 Cal. 367; *State* v. *Runyon*, 41 N. J. L. 98.

The law applies to real-estate mortgages held by persons not residents of this state.

Persons and property not within the territorial limits of a state cannot be taxed. In such a case the state affords no protection, and there is nothing for which taxation can be equivalent.

Cooley, Taxn. p. 55.

But it is not necessary that both person and property should be within the jurisdiction in order to be taxed; it is sufficient if either is.

Cooley, Taxn. p. 55.

Under some circumstances personal property has for some purposes a different *situs* from that of the owner, and such is the case in regard to taxation.

Irvin v. *Nashville, C. & St. L. R. Co.* 92 Ill. 105; *State* v. *Falkinburge*, 15 N. J. L. 320.

The Legislature may select, as the *situs* of the taxation of mortgages, either the political division where the owner resides, or that in which the mortgaged premises are situate.

State v. *Runyon*, 41 N. J. L. 105; *Tappan* v. *Merchants Nat. Bank of Chicago*, 86 U. S. 19 Wall. 490, 22 L. ed. 189.

The right is frequently exercised in taxing notes, bonds, and mortgages in the hands of an agent in the state where investments are made, while the domicil of the owner may be elsewhere.

People v. *Comrs. of Taxes*, 23 N. Y. 224; *Poppleton* v. *Yamhill County*, 18 Or. 377; *Catlin* v. *Hull*, 21 Vt. 152; *People* v. *Smith*, 88 N. Y. 576; *Tazewell County Suprs.* v. *Davenport*, 40 Ill. 197; *Redmond* v. *Rutherford*, 87 N. C. 122.

The value of real-estate mortgages owned by savings banks and insurance companies, should not be deducted from the value of the capital stock of such bank or insurance company in determining the value of the shares of stock for assessment and taxation to their owners.

Lenawee County Sav. Bank v. *Adrian*, 9 West. Rep. 697, 66 Mich. 277.

Mr. **A. A. Ellis,** *Atty-Gen.*, for the state:

The court cannot go beyond the legislative

But mortgage securities in the hands of a nonresident agent cannot be assessed to a resident owner as "personal estate within the state." People v. Smith, 88 N. Y. 576; People v. Gardner, 51 Barb. 352.

So notes and mortgages securing them on real estate in another state where they are left with an agent for collection, and which have never been in the state where the owner resides, cannot be taxed there. Fisher v. Rush County Comrs. 19 Kan. 414.

The same rule is applied even to notes given for purchase price of lands although not secured by mortgage. Wilcox v. Ellis, 14 Kan. 588, 19 Am. Rep. 107; Catlin v. Hull, 21 Vt. 152.

A state Legislature has power to tax residents on money invested in bonds secured by deed of trust of lands in another state and held by a trustee in in that state. Kirkland v. Hotchkiss, 42 Conn. 426, 19 Am. Rep. 546.

This decision was not based on any distinction between debts with real estate security and other debts, but declared the general power to tax residents on loans in other states.

So the amount due on a contract for a sale of land which is in the hands of an agent for a nonresident may be taxed to the agent. People v. Ogdensburgh, 43 N. Y. 390; Redmond v. Rutherford, 87 N. C. 122.

But contracts for the sale of lands in the hands of an agent for a resident of another county in the same state are not taxable to the agent as personal estate in his possession or under his control, where the statute provides that every person shall be assessed where he resides for all personal estate owned by him including that which is in his possession or under his control as agent. Lord v. Arnold, 18 Barb. 104.

Abandoning altogether the theory that a mortgage on real estate is purely personal property, it is held in Mumford v. Sewell, 11 Or. 70, as in the main case, that a state may tax real-estate mortgages where the land lies without regard to the domicil of the owner or the *situs* of the debt or note secured thereby.

The fact that the owner is a foreign corporation does not affect the right of a state to tax mortgages where the land lies although held by nonresidents. Dundee Mortg. T. Invest. Co. v. Multnomah County School Dist. No. 1, 19 Fed. Rep. 359.

It would seem that the above cases could be reconciled with Cleveland, P. & A. R. Co. v. Pennsylvania, *supra*, if at all, only by distinguishing between a tax on mortgages and one on bonds secured by mortgage. But the opinion of the United States Supreme Court in the latter case is based in part on the doctrine that a mortgage is a mere chose in action having no locality independent of the owner's residence and that this had been the law in Pennsylvania.

The correctness of this doctrine would not seem to be in itself a Federal question, and it might perhaps be decided by the same court that a tax on a mortgage owned by a nonresident, although under a statute passed subsequent to the mortgage, did not violate the Federal constitution where the state law had not previously treated the mortgage as mere personalty. B. A. R.

journals in determining whether or not this is a valid Act.

Auditor General v. *Menominee County Supvrs.* (Mich.) Dec. 30, 1891.

In England and in some of the states in this country the courts hold that the Act could only be tried by itself, its enrollment in chancery in England, and in the states of this country, by its filing in the office of the secretary of state.

Rex v. *Arundel*, Hob. 110; *Colledge of Phisitians & Cooper or Hubert*, 3 Keb. 587; *State* v. *Young*, 32 N. J. L. 42; *Pacific R. Co.* v. *Governor*, 23 Mo. 353; *Fouke* v. *Fleming*, 13 Md. 412; *Duncombe* v. *Prindle*, 12 Iowa, 1; *People* v. *Purdy*, 2 Hill, 31; *Eld* v. *Gorham*, 20 Conn. 16.

Where the journals are to be regarded they cannot be rebutted by parol proof.

State v. *Moffitt*, 5 Ohio, 363; *Koehler* v. *Hill*, 60 Iowa, 545; *Wise* v. *Bigger*, 79 Va. 269; *People* v. *Mahaney*, 13 Mich. 492; *Atty-Gen.* v. *Rice*, 7 West. Rep. 642. 64 Mich. 385; *People* v. *McElroy*, 2 L. R. A. 609, 72 Mich. 446; *People* v. *Zilwaukie Twp. Board*, 10 Mich. 274; *Green* v. *Graves*, 1 Dougl. (Mich.) 351; *Sackrider* v. *Saginaw County Supvrs.* 79 Mich. 59.

Neither the original bill as introduced, nor the amendments attached to it, nor parol evidence can be received in order to show that an Act of the Legislature, properly enrolled, authenticated, and deposited with the secretary of state, did not legally become a law.

Sherman v. *Story*, 30 Cal. 253, 89 Am. Dec. 93; *State* v. *Swift*, 10 Nev. 176, 21 Am. Rep. 721.

Section 17 of the Tax Law of 1891 is substantially a verbatim statement of the Tax Law of California, and it is presumed that in adopting the provisions of the statute the Legislature was aware of the judicial construction they had received in that state, and that the intent was in accordance with such construction.

Stadler v. *Moors*, 9 Mich. 264; *Drennan* v. *People*, 10 Mich. 169; *Harrison* v. *Sager*, 27 Mich. 476; *Greiner* v. *Klein*, 28 Mich. 12; *Campau* v. *Gillette*, 1 Mich. 416, 53 Am. Dec. 73; *Daniels* v. *Clegg*, 28 Mich. 32; *Risser* v. *Hoyt*, 53 Mich. 185.

In California, as well as in this state, a mortgagee has no interest in the real estate until forfeiture and foreclosure.

McGurren v. *Garrity*, 68 Cal. 566.

The purpose and object of a state constitution are not to make specific grants of legislative power, but to limit that power where it would otherwise be general or unlimited.

Sears v. *Cottrell*, 5 Mich. 257.

Without any limitation of the legislative power in our Constitution, that power would have been, at least, as absolute and unlimited, within the borders of the state, as that of the parliament of England, subject only to the Constitution of the United States.

See 1 Kent, Com. 448; *Sill* v. *Corning*, 15 N. Y. 303; *Scott* v. *Smart*, 1 Mich. 306; *Williams* v. *Detroit*, 2 Mich. 560; *People* v. *Gallagher*, 4 Mich. 244.

A statute cannot be declared void on the ground that it violates sound political principles when it does not come in conflict with constitutional provisions.

People v. *Mahaney*, 13 Mich. 481; *Green* v. *Graves*, 1 Dougl. (Mich.) 351; *Tyler* v. *People*, 8 Mich. 320; *Atty-Gen.* v. *Preston*, 56 Mich. 177; *People* v. *Gallagher*, 4 Mich. 244; *Sears* v. *Cottrell*, 5 Mich. 251; *Inkster* v. *Carver*, 16 Mich. 484.

The Constitution seeks to avoid double taxation, and the old law as it existed, taxing the land at its full value, and at the same time taxing the mortgage at its full cash value, was double taxation.

Taggart v. *Sanilac County Supvrs.* 71 Mich. 26.

It is competent for the Legislature to assess and tax securities representing values.

Ibid.

The statutes of the state of Michigan have always declared what should be considered as real estate, and what should be considered as personal property.

Westinghausen v. *People*, 44 Mich. 265; *Firemen's F. Ins. Co.* v. *Com.* 137 Mass. 81.

It is competent for the Legislature to determine what shall be real estate, and what shall be personal property for the purposes of taxation.

Ibid.; *Mumford* v. *Sewall*, 11 Or. 67; *Dundee Mortg. T. Invest. Co.* v. *Multnomah County School Dist. No. 1*, 19 Fed. Rep. 359; *Pullman Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 35 L. ed. 613.

The state has also power to provide methods for collecting its revenue, and so long as they are general and impartial the courts will not be disposed to limit the exercise of the power merely because they seem harsh, unreasonable, and arbitrary.

Robertson v. *Land Comr.* 44 Mich. 279; *Sears* v. *Cottrell*, 5 Mich. 251; *Cowles* v. *Brittain*, 9 N. C. 204; *State* v. *Allen*, 2 McCord, L. 55; *McGregor* v. *Montgomery*, 4 Pa. 237; *Henry* v. *Horstick*, 9 Watts, 412.

The Legislature has the power to authorize and require the taxation of mortgages on real property irrespective of the residence of the owner of the debt thereby secured, and such an act in no way impairs the obligation of the contract between the parties thereto.

Dundee Mortg. T. Invest. Co. v. *Multnomah County School Dist. No. 1* and *Mumford* v. *Sewall, supra.*

If the mortgage contained a stipulation that the mortgagor should pay all the taxes assessed on the real estate, such contract will remain unaffected.

Hammond v. *Lovell*, 136 Mass. 185; *Codman* v. *Johnson*, 104 Mass. 491; *Walker* v. *Whittemore*, 112 Mass. 187.

Nonresidence of the mortgagee is immaterial.

Dundee Mortg. T. Invest. Co. v. *Multnomah County School Dist. No. 1*, 19 Fed. Rep. 369; *Pullman Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 35 L. ed. 613; *Mumford* v. *Sewall*, 11 Or. 67; *Duer* v. *Small*, 4 Blatchf. C. C. 263; *Com.* v. *Lehigh Valley R. Co.* 129 Pa. 457.

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

This proceeding brings before us for examination Act 200 of the Laws of 1891, being a revision of the general tax laws of the state. It is claimed—*first*, that this purported statute, as it appears upon the statute-

book, was not duly enacted; and *second*, that the law as promulgated is in parts unconstitutional.

1. It has been repeatedly held that the court may look beyond the engrossed bill to the legislative journals with a view to ascertaining whether the Legislature enacted the statute. This has long been a recognized power of the court, frequently invoked. *People* v. *Mahaney*, 13 Mich. 492; *Atty-Gen.* v. *Joy*, 55 Mich. 94; *People* v. *Burch*, 84 Mich. 408. In many of the states the court has denied that this power rests with the judiciary, and have held that the engrossed bill, duly authenticated, is final, and cannot be impeached. This court, while adhering to the view that the journals are open to inspection, has frequently, and particularly in the later cases, held that every intendment is in favor of the due enactment of the statutes which have received the executive sanction, and that to overcome this legal presumption the journal must show conclusively that the statute which received the signature of the governor was not duly passed. *People* v. *Burch*, 84 Mich. 408; *People* v. *McElroy*, 72 Mich. 450, 2 L. R. A. 609, and cases cited.

The history of the present statute, so far as it is important to be noted, is as follows: On June 29th, after the bill had been amended, it was voted "that the bill be laid on the table, and ordered printed as a supplement in to-day's journal." The bill had the file number 340, and was a substitute for House Bill No. 178. A supplement to the house journal was printed as of the date June 29th, with the heading: "File No. 340. House of Representatives. Substitute for Senate Bill No. 178. (Introduced by Mr. Doremus.) Ordered printed for use of the committee on judiciary. Lansing, June 29, 1891,"—followed by the title. The bill contained 116 sections. On June 30, Mr. Doremus moved that house substitute for Senate Bill No. 178 (file No. 340) be taken from the table and placed on its immediate passage, which motion prevailed. The question being on the passage of the bill, the bill was read a third time, and pending the vote on the passage thereof, on motion of Mr. Doremus, the bill was laid on the table. On July 1st Mr. Doremus moved that house substitute Bill No. 178 (file No. 340) be taken from the table and put on its immediate passage, which motion prevailed. Numerous amendments were then made to the bill, and after such amendments the bill duly passed the House, which was the final action taken by the House on the bill. If it be the fact that the bill as printed was the bill with which the House was dealing on July 1, it is entirely clear that the bill as it passed the House is not the bill engrossed and signed by the governor, as it appears that the bill as printed contains numerous entire sections which were not eliminated by amendment, but which do not appear in the law as signed, while the engrossed bill contains numerous provisions which are not contained in the printed bill as it would stand amended by incorporating the amendments made on July 1.

It is claimed, however, that the journal itself furnishes on its face evidence that after the bill in question was printed in the journal the House dealt, not with the printed bill, but with some other instrument, and that it is fairly to be inferred from what appears on the face of the journal that there were errors in the printing of the bill which the House discovered and which led to the abandonment of the printed copy appearing in the journal. These evidences are as follows: (1) It appears that the House took up the bill by its title and reference as printed in the journal, and before taking action on it laid it on the table, and that, when the bill was again taken up, it was referred to, not as a substitute for Senate Bill 178, but as a substitute for House Bill 178, which it really was. (2) The amendments offered from time to time do not correspond with the bill as printed. As, for instance, one amendment offered was by inserting in line 1, of section 33, after the word "time," the words "or upon any mortgage or other obligation taxed as an interest in lands owned by such persons as provided by this Act." Not only does it appear by section 33 as printed that the word "time" does not appear in line 1, but it further appears that there is no provision in section 33 to which the proposed amendment is in any way germane. Without tracing all the instances through, it appears beyond cavil that the amendments could not have been offered with reference to the printed copy. (3) The bill as printed had its sections numbered consecutively, and was not after being printed considered at all in committee of the whole; and yet we find on July 1, the following in the journal: "Mr. Doremus stated that certain sections in the bill had been stricken out and some added in the committee of the whole, which, with the above amendments, would not leave the sections in consecutive order; and thereupon Mr. Doremus further moved to amend the bill by directing the engrossing and enrolling committee to renumber the sections of the bill so that they should be numbered as near as may be by consecutive numbers, which motion prevailed, and the sections of the bill were thereupon accordingly renumbered." This action of the House makes it entirely clear, not only that the House was not dealing with the bill as printed in the journal, but also that they were not dealing with an exact copy of the same. It appears, however, that this last-quoted section does not appear in the house journal as it was printed from day to day; and it is suggested, therefore, that this must be disregarded. But it does appear in the bound volume published by authority and certified by the clerk of the House. The daily journal, as printed, is subject to amendment. Are we at liberty to infer that this emendation is a forgery? It seems to me that the case of *People* v. *Burch*, 84 Mich. 408, furnishes a decisive answer to this question. In that case the journal as printed from day to day, and as printed in the bound volume, showed the following: "Mr. Wesselius moved to reconsider the vote by which the Senate passed the bill, which motion prevailed. The question being on

the passage of the bill, on motion of Mr. Wesselius, the bill was ordered returned to the House." At the close of the senate journal, and preceding the certificate of the secretary, which bore date July 3, 1891, is a page headed: "*Errata* in the Record of Bills. . . . On page 811, lines ten and eleven, the vote reconsidered was not the passage of the bill, but the vote by which the Senate concurred in the house amendments to the bill on page 797." The court says: "It does not affirmatively appear at what time the secretary made this correction of the record, but it is to be presumed, from the place where the *errata* is found, that he made it on or before the date of his certificate, July 3, 1889, as the certificate follows the correction. The Legislature adjourned *sine die* upon that date; and, as every intendment is to be taken in favor of the correctness of legislative action, it must also be presumed that the correction was made before the adjournment of the Senate. If it was done, as we must presume that it was, before the final adjournment of the Legislature, we must also presume that it was authorized by the Senate, and that the true journal entry of the proceedings is as corrected by the '*errata.*'" So in the case of the law under consideration. The house adjourned July 3, 1891. The certificate of the clerk bears date July 3, 1891, and as the correction to the daily journal as originally printed appears before his certificate, and indeed as of a prior date, we must presume that it was made before the final adjournment of the Legislature, and we must also presume that it was authorized by the House.

In *McCulloch* v. *State*, 11 Ind. 424, the court in speaking of such records said: "This journal must be held conclusive evidence of the facts which appear upon its face, because it must be presumed that the members as a body inspected it and made all necessary corrections before they allowed it to assume the character of a journal of their proceedings. As well might evidence be received to contradict a statute to show that it contains certain provisions inserted through mistake as to contradict an entry made upon the journal. The house keeping the journal is the only tribunal by which it can be corrected, and, until corrected by such authority, it must be considered conclusive as to the facts which it contains." In the case of *Turley* v. *Logan County*, 17 Ill. 151, it was held that the journals must show that the constitutional requirements have been observed; but in that case the journals having been produced, and it appearing from the minutes of the clerk that the same Legislature had corrected their journals at a subsequent session so as to conform to the constitutional requirements, this was held to be sufficient, and the law was sustained. In *Post* v. *Kendall County Supvrs.*, 105 U. S. 670, 26 L. ed. 1205, it was said: "By virtue of the Statute of Illinois of February 12, 1849, the copies of the original daily journals kept by the clerks of the two Houses made by persons contracted with or employed for the purpose, as authorized and directed by that Act, (though not sworn public officers,) in well-bound books furnished by the secretary of state, pursuant to the duty thereby imposed upon him, and afterwards deposited and kept in his office, are official records in his custody, copies of which certified by him are admissible, upon settled rules of evidence, as well as by the decision of the Supreme Court of Illinois in *Miller* v. *Goodwin*, 70 Ill. 659; and neither the competency nor the effect of such copies is impaired by the loss and destruction of the daily journals or minutes." In *Atty-Gen.* v. *Rice*, 64 Mich. 385, 7 West. Rep. 642, *Mr. Justice* Morse uses the following language: "Are these journals kept by the clerk of each House, and read and corrected each day by each body, and duly certified by the proper officers to be correct, to stand as conclusive evidence of their proceedings, or are they liable to be disputed and overthrown by parol testimony, either of individual officers and members, or of strangers who may be interested in nullifying legislative action? It would seem that there could be but one answer. The legislative record must prevail. Any other rule would necessarily lead to dangerous and alarming results."

Without passing upon the effect of a mere omission of parts of the journal as printed from day to day from the bound journal, I I think it is entirely clear that as such journal is always subject to amendment by the House itself, both on the authority of *People* v. *Burch*, and the other cases above cited, and on principle, we are bound by an amendment appearing in the bound volume.

Some of my brethren are of the opinion that the supplement referred to cannot be treated as a part of the journal; that, as there is no requirement that bills shall be printed in the journal, the order entered on June 29 for the printing of the bill in question should have been construed as having been made for the convenience of the members, and not with the intent that the bill when printed should become a part of the journal. While not assenting to this view, I think it is clear that, if it be treated as a part of the journal, yet, for the reason stated, it is not possible to say that the bill with which the House was dealing was the one printed in the supplements.

Attention has been directed to an unbound portion of the journal, with paging corresponding to that in the bound volume, and it is suggested that this demonstrates that the statement purporting to have been made by Mr. Doremus was inserted after the Legislature adjourned. But as well might it be said that the printer's proof-sheet, before correction, is more authentic than the corrected publication. No such view can be adopted, unless we reverse the usual doctrine in such cases, and start out with the presumption that the clerk of the House has falsified instead of correctly certifying the record. This I am not prepared to do.

2. It is claimed that so much of the statute as provides for the taxation of the mortgage interest in lands, and points out the method of collection, is unconstitutional for various reasons. The provisions of the law, so far as necessary to be noted, are: "Sec-

tion 2. Any real-estate mortgage, deed of trust, contract, or other obligation, by which a debt is secured, when land within this state is pledged, shall for the purpose of assessment and taxation, be deemed and treated as an interest in the land so pledged." Section 17 provides "that the value of the property affected by such mortgage, . . . less the value of the security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof." Section 15 provides that in making the assessment roll the value of the interest in such real estate represented by a mortgage, deed of trust, or other obligation shall be set opposite the name of the owner, and the value of the interest of the owner of the fee, less the value of the mortgage or other interest, shall be set down opposite the name of the owner or occupant, and that the taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security. If paid by the mortgagor or holder of the real property, such portion as was assessed to the mortgagee shall be considered and treated as payment of any interest that may be due, or if there is no interest due, then as payment of so much of the principal. If paid by the mortgagee or holder of the security, such portion as was assessed to the mortgagor or owner of the fee shall become a lien upon the land, and be added to all other obligations. It is further provided that neither the mortgagee nor the mortgagor shall be at liberty to pay so much of the tax as is assessed against the other until the warrant has been in the hands of the collector thirty days,"—thus affording the party assessed the opportunity to himself pay the tax in the first instance.

(1) The first criticism passed upon these provisions is that the law requires the mortgagor to pay the mortgagee's tax; but it should not be overlooked that the statute contemplates an assessment of the entire interest in the land, both that of the mortgagor and mortgagee, by separate assessments, it is true, but still an assessment of the entire interest. It cannot be doubted that it is entirely competent for the Legislature to cause this entire value to be assessed to the mortgagor. This has been the law of Michigan for many years. This Act, then, is in relief of the mortgagor, and it cannot be held to be invalid because it relieves him only on condition that the owner of the mortgage interest shall within a stated time pay the tax.

(2) It is said that the mortgagor would have no right under the law to appear before the board of review to ask for a correction of the assessments of the mortgage interest. But I do not so read the statute. Section 20 provides that "at the request of any person whose property is assessed, . . . and on sufficient cause shown, the board shall correct its assessment as to such property." The owner of the fee can under this provision be heard as to the amount of both the mortgage interest and his own; for the assessment of the mortgage interest is to be deducted from his own, and, if the mortgage interest be too small, his own assessment is too large. If the mortgage interest is assessed at too high a figure, his assessment will be too low, and he would have the right to have it increased.

(3) It is next suggested that where the interest of the mortgagee is assessed and remains unpaid, a sale is made of a fee simple, and the deed conveys an absolute title; and while it is conceded that it may be competent for the Legislature to provide for the sale of the fee under the assessment of the mortgagee's interest, yet it is claimed the law is defective in not pointing out how the two interests sold are to be distinguished, if the mortgagor and mortgagee fail to pay their respective taxes. It is said, if the fee simple is sold, the mortgagor will lose his land, although he may have paid his own tax. I have already pointed out that the mortgagor will, as under former statutes, be bound to pay the entire tax, on the value of the property, subject only to the relief afforded him, if the tax assessed against the mortgage interest shall be paid by such mortgagee, and, while I quite agree with respondent's counsel that the Legislature intended a fee to be sold, I think that the provision of section 62 "that no greater interest [portion] of any parcel shall be sold than is sufficient to pay the tax for which the same is sold" is sufficient protection to both mortgagor and mortgagee. The land is by the provisions of this law, as under the former statute, made subject to the entire tax assessed on its full value. The mortgagor or mortgagee can either prevent a sale by payment of the tax.

(4) It is next claimed that the provision that the mortgagor may pay the tax assessed against the mortgage interest in case of the mortgagee's default, and deduct the same from the amount owing on the mortgage, impairs the obligation of contracts. But in my judgment this view is not tenable. The contract between the mortgagor and mortgagee remains the same. The mortgagee may and should pay the tax, and if he fails to do so the state appropriates so much of the fund which the mortgage represents—so much of the mortgagee's estate in the land—as is necessary to pay the tax. It is true the state interposes between the mortgagee and the mortgagor, and excuses the latter from making a payment to the former which, by the terms of his contract, he would otherwise be bound to make; but this is not because of any interference with contract relations, or by virtue of any abrogation of the contract rights of the mortgagee. It is because the state has attached or seized so much of the mortgage debt before it has reached the mortgagee. The cases are numerous in which a law providing that agents of a corporation might withhold from the party entitled to the same so much of declared dividends as shall be necessary to satisfy taxes imposed by the state has been upheld. Cooley, Taxn. 299, and cases cited. These cases are entirely analogous. The case of *Robertson* v. *Land Comr.*, 44 Mich. 274, does not conflict with these views. What was held in that case, in effect, was that authorizing the one party to the contract to refuse performance until

evidence should be produced of the payment of the tax was in the nature of a penalty, and not a means of collecting the tax directly. But the court says: "It must no doubt be admitted that the state may provide modes for collecting its revenues that will seem harsh, unreasonable, and arbitrary. Some such are to be found in the laws of Congress, as well as in the legislation of the states. The judiciary would not venture to indicate limits to the power of the sovereign in this regard, so long as its laws were general and impartial."

(5) It is further suggested that as, in certain cases, a portion of the principal debt secured by the mortgage is appropriated, it interferes with the contract obligation of the mortgagor to pay interest upon this sum, and to that extent, at least, is an impairment of the contract. But it is equally true that if the money was paid by the mortgagee in hand, or was seized by the tax collector, he could not thereafter receive interest on the fund. This would be no hardship. If he refuses to pay the tax, the state appropriates so much of the fund within its control to that purpose. It no more interferes with his contract relation with the mortgagor than would the seizure of personal property in the hands of a bailee by a taxing officer interfere with the contract existing between the bailor and the bailee. In such cases, doubtless, the bailee would be relieved from his agreement to return the property, just as under this law the mortgagor is relieved from the payment of so much of his debt as is thus appropriated by the state.

(6) It is strenuously insisted that the provision which makes the mortgagor liable for the tax assessed against the mortgagee is unconstitutional; and it is said that it is not within the constitutional power of the Legislature to compel one man to pay another man's debt,—a proposition safe enough in itself, but not conclusive as to the right to provide that the mortgagor or occupant of lands shall be liable for the tax on such lands. It is not necessary to go to the length to which the majority of the court went in *Sears* v. *Cottrell*, 5 Mich. 251, in order to sustain this provision. The relation of the owner of the fee to the property is such that the right to assess the whole property to him is undoubted, and to my mind it would be an unsound doctrine, resting upon shadow rather than substance, which would deny the power of the Legislature to relieve him conditionally on the pretense that by so doing his constitutional rights are being infringed.

(7) It is, again, urged that the law is unconstitutional, in so far as it attempts to tax mortgages owned by nonresidents, for the reason that the mortgage is personal property and a mere security for a debt, and is of that character of personal property which must be held to attach to the person, and to have no other *situs* for any purpose; and the case of *State Tax on Foreign-Held Bonds*, 82 U. S. 15 Wall. 300, 21 L. ed. 179, is cited in support of this contention. It is further said in support of that position that in Michigan a mortgage is a mere incident to the debt, and conveys no title to the land. *Carruthers* v. *Humphrey*, 12 Mich. 270; *Ladue* v. *Detroit & M. R. Co.* 13 Mich. 380; *Wagar* v. *Stone*, 36 Mich. 364. And it is urged that as this is so the taxation of such mortgage interest amounts to a taxation of the debt, and brings the case within the *Case of State Tax on Foreign-Held Bonds*. But, while it is true that the mortgage is a mere security for the debt, yet it conveys a qualified property in the land. While it is not an estate which entitles the mortgagee to possession before foreclosure, it is nevertheless an estate or interest in lands which is protected by our registration laws as fully as any other title or interest. It is held that the mortgage interest so far partakes of the character of real property as to require administration in the state of its location, and that neither a foreign administrator nor his assignee can maintain an action to foreclose a mortgage in the state where the mortgaged property is situate. *Cutter* v. *Davenport*, 1 Pick. 81, 11 Am. Dec. 149; *Dial* v. *Gary*, 14 S. C. 573, 37 Am. Rep. 737; and the opinion of Cooley, *J.*, in *Reynolds* v. *McMullen*, 55 Mich. 568. It has also been held that the Legislature may select as the *situs* of the taxation of mortgages either the political division where the owner resides, or that in which the mortgaged premises are situated. *State* v. *Runyon*, 41 N. J. L. 105; *Mumford* v. *Sewall*, 11 Or. 70. See also *Firemen's F. Ins. Co.* v. *Com.* 137 Mass. 81; *Providence Sav. Inst.* v. *Boston*, 101 Mass. 575. The *Case of State Tax on Foreign-Held Bonds* is apparently in conflict with these cases. The doctrine of that case was announced by a bare majority of the court, and ought not to be treated as binding authority, except as to the precise questions before the court. The law which the court had under consideration provided "that the president, treasurer, or cashier of every company, except bank or savings institutions, incorporated under the laws of this Commonwealth, doing business in this state, which pays interest to its bondholders or other creditors, shall before the payment of the same retain from said bondholders or creditors a tax of five per centum of the interest upon every dollar paid as aforesaid." In the opinion of the majority of the court *Mr. Justice* Field states the question before the court as follows: "The question presented in this case for our determination is whether the eleventh section of the Act of Pennsylvania of May, 1868, so far as it applies to the interest on the bonds of the railroad company made and payable out of the state, issued to and held by nonresidents of the state, citizens of other states, is a valid and constitutional exercise of the taxing power of the state, or whether it is an interference, under the name of a tax, with the obligation of a contract between the nonresident bondholders and the corporation." It will be seen that the court was not dealing with a statute which in terms imposed a tax upon a mortgage interest in lands. This statute was a clear attempt to tax credits distinctively as such, and applied alike to mortgages secured by bonds, and to those which were not so secured. In that respect it is distinguishable from the statute of

Michigan, as our statute, in all its provisions relating to the subject, imposes a tax upon an interest in real estate as such. It seems to me that the case is not given any added force as authority here by the fact that the particular bonds in question were secured by mortgage, for the attempt was not to tax the mortgage interest in lands, but to impose a tax upon the bond itself which the court held to have a *situs* at the domicil of its owner. So in *Latrobe* v. *Baltimore*, 19 Md. 20, it was held that the *situs* of the mortgage was the domicil of the owner, and that such owner could not be taxed where the property covered by it was located. But in the opinion it is said: "We are not aware that the action of the assembly regulating the imposition and collection of taxes has effected any modification of the rules of law, which otherwise must govern the determination of this question." So it will be seen that the question of the power of the Legislature to fix the *situs* for the purpose of taxation has been determined, and that, even though held by nonresidents, they may be given a *situs* in the place where the mortgage property is situated. This the Act in question purports to do, and it should be sustained.

(8) The question is presented whether the mortgages held by savings banks and insurance companies are to be treated as real estate, and deducted from the amount of capital stock, or whether the tax on mortgages is over and above the tax on capital. The law provides for the assessment as personal property of "all shares in banks organized in this state under any law of this state or of the United States at their cash value, after deducting the value of the real estate taxed to the banks." As to insurance companies, it is provided "that in computing taxable property of insurance companies organized under the laws of this state the value of the real property on which a company pays taxes shall be deducted from its net assets above liabilities, as ascertained at the last report." I think the intent is clear to treat mortgages as real estate, and that the interest in real estate so taxed to banks and insurance companies may be deducted from the shares of stock as assessed. See *Firemen's F. Ins. Co.* v. *Com.*, 137 Mass. 80. It is said that the amount of mortgages held by savings banks in many cases greatly exceeds the capital stock. So, if the amount for which such mortgage is assessed is deducted, there will be no tax on their shares, and this state of things is urged as a reason why the Legislature could not have intended to tax mortgages held by these institutions. But, on the other hand, it must have been known to the Legislature that the exemption of the mortgages held by such corporations from the burdens imposed upon like securities in the hands of individuals would give to such bank a practical monopoly of the business of loaning money on mortgages in this state. This is a result so manifestly unjust as that it would not be inferred unless such a construction of the statute is made necessary by its plain provisions. This, I think, is not the case here. It is also contended that if the statute be construed so as to admit of taxation of mortgages of saving banks as real property the result is double taxation in many cases, inasmuch as the mortgages represent deposits, and the depositors are required to pay a tax. I do not think this amounts to double taxation, in any objectionable sense. If the banks hold property subject to taxation in excess of their actual capital, the case is no harder for them than it is in the case of any individual taxed for the value of property owned by him, though he may at the time be indebted to the amount of nearly or quite its full value. In Cooley on Taxation, (page 160,) it is said: "Now whether there is injustice in the taxation in every instance in which it can be shown that an individual who has been directly taxed his due proportion is also compelled indirectly to contribute, is a question we have no occasion to discuss. It is sufficient for our purposes to show that the decisions are nearly if not quite unanimous in holding that taxation is not invalid because of any such unequal results. It cannot be too distinctively borne in mind that any possible system of tax legislation must inevitably produce unequal and unjust results in individual instances; and, if inequality in result must defeat the general law, then taxation becomes impossible, and governments must fall back on arbitrary exactions." It is not within the power of this court, as I understand it, to declare that the Legislature, in enacting a statute, has exceeded its constitutional authority, except in a case where it clearly appears, by a comparison of the terms of the statute with the Constitution itself, that some provision of the fundamental law has been violated. I do not assert that the court may not construe the Constitution as well as the statute, or that we may not hold that what is by clear implication inhibited is beyond legislative power; but in my opinion this fixes the extreme limit of judicial control over the legislative department. The pernicious notion that courts may scrutinize legislation with a view to ascertaining how far it accords with some uncertain, shadowy spirit of our institutions, when such spirit is not expressed in our Constitution, cannot be too early or too definitely or too absolutely denied. *Robinson* v. *The Red Jacket*, 1 Mich. 171; *Green* v. *Graves*, 1 Dougl. (Mich.) 351; *People* v. *Mahaney*, 13 Mich. 481; *Atty-Gen.* v. *Preston*, 56 Mich. 177, opinion of Cooley, *J.*, in *State Tax Cases*, 54 Mich. 446.

It is suggested that, where lands covered by mortgage lie in two or more taxing districts, it will be impossible to properly apportion the tax. I do not consider that there will in many cases be such difficulty. The mortgage being treated as an interest in lands, the proportion which is properly taxable in each district will be that proportion which the land lying in such district bears to the whole; and, when the taxing officer can inform himself as to these values, there is no reason why he cannot properly make the assessment. There may be instances where this will not be possible, but it is a difficulty which will not often occur. There

must be, are, and always will be, difficulties in the way of taxing all the property that ought to bear the burdens of taxation; but this cannot obstruct taxation altogether, or even taxation upon any species of property. And this defect, where it exists, is not beyond remedy by subsequent legislation; and the difficulties under the present law will be found insurmountable only in a few extreme cases. In my opinion, such a defect ought not to invalidate the whole scheme involved in the provisions relating to taxing mortgages. *Atty-Gen.* v. *Detroit*, 29 Mich. 108; *Robison* v. *Miner*, 68 Mich. 549, 13 West. Rep. 471.

(9) The question has been suggested as to whether the statute is to be so construed as to relieve mortgagors from the obligation of paying the tax in cases where there were agreements on their part to do so, in force at the time when the law took effect; and also as to whether it is competent for the mortgagor to engage to pay the taxes which may be assessed against the mortgagee's interest in the lands, in addition to paying the full legal rate of interest allowed by statute. The first question would of necessity depend upon the terms of the contract, but it is clear, both on reason and authority, that if the engagement of the mortgagor is sufficiently broad to cover any assessment which may be made on all interest in the land mortgaged, his undertaking is in no way interfered with or abridged by the present statute. *Hammond* v. *Lovell*, 136 Mass. 185. Nor is there any obstacle, either in Act 200 or in the Usury Law, (Act No. 156,) to an agreement by the mortgagor to pay all taxes which may in the future be assessed against all interest in real property owned by such mortgagor, including the interest granted to the mortgagee. Such an agreement does not amount to a reservation of interest, but is in the nature of an agreement to preserve the estate which constitutes the security, and is no more unlawful than an agreement to keep the property insured with a similar purpose. See *Banks* v. *McClellan*, 24 Md. 62. That it was not the purpose of the Legislature to limit the power of parties to contract as they may choose in this regard is made clear by the fact that a clause of the tax law, as orginally drafted, prohibiting such contracts, was struck out by amendment before its final passage.

I think *the mandamus should issue* as prayed, commanding the board of assessors (1) to assess the value of any land contract to the owner of such security as real estate; (2) to assess as real estate, to the owner thereof, the value of any real-estate mortgage executed either before or after the law of 1891 took effect, and whether held by residents or nonresidents of this state; (3) to assess to savings banks or insurance companies, as real estate, the value of any real-estate mortgages owned by such banks or insurance companies, and to deduct the value of all real-estate mortgages owned by any savings banks or insurance companies from the value of the capital stock of such banks as determined for assessment purposes.

Morse, *Ch. J.*, and **McGrath**, *J.*, concurred with **Montgomery**, *J.*

Morse, *Ch. J.:*

There is no better settled rule of law in this state than that, in the investigation of a question whether a law has been properly and constitutionally passed by the Legislature, every presumption and intendment are strongly in favor of its due enactment; and if the journals are resorted to, the law can only fail where it conclusively appears from such journals that constitutional methods were lacking in its passage.

In the law before us, we have: *First.* The law published in the Public Acts which are made presumptive proof that the laws therein contained were duly enacted, and which are received as such without further evidence of their authenticity than they bear upon their face. *Second.* We find in the office of the secretary of state, where it is provided it shall be kept, the duly enrolled and engrossed manuscript Act, signed by the speaker of the House, the president of the Senate, and the governor. This engrossed Act agrees entirely with the published law. Here we have, again, another strong presumption in support of the proper passage of the Act, which we thus find enrolled and certified by the proper officers. *Third.* We now go to the journals of both Houses, published by authority of law and certified to be correct by the proper officers, and the only journals that the Constitution or laws prescribe shall be kept and preserved as journals of the Legislature, and find nothing in such official journals militating against the proper and constitutional passage of the Act in question. These journals are also presumed to be correct, and it is doubtful if they could be overthrown by parol proof. *Fourth.* This bill was read section by section, at length, just before its passage. It is to be presumed that the Legislature knew what was being voted upon. *Fifth.* It was reported to the House as correctly enrolled and engrossed, and the presumption is that it was. *Sixth.* Fortunately, although not required by law to be preserved, the original bill itself, as passed, with its erasures, amendments, and riders is found in the office of the secretary of state, and upon examination is found to be identically the same as the published law. This bill could not be resorted to in order, by its discrepancies, if any there were, to defeat the law, yet it establishes the fact that there is no difference between the law as published and the Act as passed. I refer to it simply to show how easily, by reasoning from false premises and using all presumptions against the validity of the Act, it is apparently conclusively shown that a falsehood is the truth. For instance, in this case, assuming that the so-called "supplement" presented to us upon the last argument is a part of the journal, and further assuming that the bill was correctly printed therein as of the condition it was in when the motion to print the supplement was carried, and then, again, assuming that this bill as printed in such supplement

was the bill thereafter acted upon, amended, and passed by the two Houses, it is made to conclusively appear that the law as published is not the Act passed by the Legislature, but a radically different one; having, as shown by the opinion of *Mr. Justice* McGrath, thirteen sections not found in the supplement, nor put there by subsequent amendment, and the supplement having eight sections not found in the law, nor eliminated from said supplement by amendment. Yet the bill in the secretary's office, the one handled and preserved by the clerk of the House, and to which all amendments were attached in its progress, is the identical law as published; and the only suspicion resting upon it is that one clause erased therein has written upon its margin the words, "Richardson says this is stricken." When this writing was done does not appear, but the presumption must be that it was done before the passage of the Act. The trouble with the argument against the constitutionality of the passage of this Act is that it abounds in presumptions against the regularity of the proceedings, when the law holds that all presumptions must be strongly the other way. Without these false presumptions, there is no standing for an argument against the validity of the passage of this law.

1. This supplement has no place in the journals except by false presumptions. It was not made a part of the journals by those authorized to publish and certify to their correctness. It must be presumed that the journals were corrected and approved, as certified by the clerk of the House and secretary of the Senate, before the Legislature adjourned, and the certificates attached to the same on the last day of the session, as shown by such certificates. *People* v. *Burch*, 84 Mich. 408. This supplement is not the only one ordered published by the House. There were two others, to wit: Senate Substitute Bill No. 64, (file No. 464,) the General Election Law. "On motion of Mr. Diekema the bill was ordered printed as a supplement to to-day's journal." House Jour. 2143. And House Bill No. 583, (File No. 269,) charter of the City of Detroit. "The bill was then ordered printed as a supplement to the Journal, referred to the committee of the whole, and placed on the general order." House Jour. 2031. Neither of these supplements is found in the published volumes of the house journals. This effectually disposes of the claim that the supplement of July 29 was left out of the published journals for fraudulent purposes, and also establishes the fact that, under legislative practice, these supplements are not considered as parts of the journal, but that they are the mere printing of bills for the convenience of the members, and can be no more used to stultify or contradict the journals than can any other printed copy of a bill laid upon the desks of members and used by them for reference during the session. The natural as well as the legal presumption is that these supplements were printed, as other bills are printed, for the convenience and use of the members, and that it was not the intention of the Legislature to make them a part of the journals. This natural and legal presumption accords with the fact as to legislative practice, as shown above; and any presumption to the contrary is not only a forced and illegal one, but contrary to the truth, as shown by the custom of the Legislature since the Constitution of 1850. No such thing as a supplement to the journal has ever yet found its way into the legislative journals, and probably never will, unless inserted by this court. To enforce the argument against the law, this legal and natural presumption is disregarded, and the custom of the Legislature ignored, in order to declare this supplement a part of the journal; and the clerk of the House is also presumed to have disregarded his duty, and committed a fraud or grave mistake, in leaving it out of the corrected and printed journals. Other presumptions are also necessary, to wit, that the supplement presented to us is the supplement ordered printed June 29, with the further presumption that it was laid upon the desks of the members of the House the next morning, and with still another presumption, that it was correctly printed. Every step taken in the argument must necessarily be based upon presumptions which are unlawful under our previous holdings. There is no law providing that the secretary of state shall file or keep copies of the daily journals, as they are published from day to day, in his office, and none are kept there. The law provides only for printed and bound volumes to be preserved. How. Stat. § 15. The supplement presented to us was found in the files of legislative journals kept by one Frank A. Potter, chief clerk in the office of the secretary of state. It also appears that no files of the legislative journals have heretofore been kept in said office for all these years, and that there are no files there at the present time, except such as are the personal property of clerks in the office. It is also shown by a resolution of the Legislature that copies of the daily journal were mailed and distributed to the people entitled to them, outside of the Legislature, directly from the state printer, and that such copies were never before either House of the Legislature. This supplement found in Potter's file had no place even in that file with the journal of the 29th, but was found at the end of the legislative daily journals with other supplements and miscellaneous documents. If this supplement can be used here, then any other purported supplement, or any paper purporting on its face to be a portion or a part of the printed daily journals of the Legislature, can be brought into court at any time to dispute and impeach the authenticity of the official journals published and bound by the state printer by authority of the Legislature, and certified to be correct by the clerk of the House and the secretary of the Senate. It will not be necessary, under the reasoning of the argument in favor of this supplement, to inquire where the paper came from. It will be conclusively presumed that it is an exact copy of those that it will also be presumed were laid upon the desks of the members of the

Legislature; and whether picked up in the street, or found in the files preserved by some one, by whom it was received in the mails, it will, by presumptions never before indulged in in favor of any document, and without proof, because no proof can be received, stand in the courts as the journal of the Legislature for the day or days it purports to cover, and, if it conflicts with the published journals the latter must fall. It is to be hoped that no such dangerous precedent as this will ever be established by this court. As for myself, from the beginning, I have regarded this supplement—as the Legislature evidently regarded it—as no part of the journals; and a patient and laborious investigation of the journals in connection with it, and treating it as a part of such journals, has, as conclusively shown by the opinions of my Brothers McGrath and Montgomery, proven that the Legislature, in their action upon the bill before them, paid no attention to it, and utterly disregarded it. To now make it a part of the journal, and to impeach and destroy legislative action by virtue of it, would be a usurpation by this court of power which belongs to the Legislature, under our Constitution, and would be a declaration of law which, in this case, would evidently lead to a false determination, and a denial of the truth as to the action of the Legislature in the passage of the law before us. This case is not at all like the case of *Rode* v. *Phelps*, 80 Mich. 598. In that case the bill under consideration was found printed in the body of the journal as it came from the Senate. "The bill as amended was ordered printed at length in the journal." "The bill is as follows." (Then follows the bill in full.) See House Jour. 1889, p. 1792. Every subsequent alteration of the bill as printed appears upon the journals, and it was never read again in the House, and it was finally passed by a concurrence in the report of the conference committee of the two Houses. No presumptions were indulged in in that case, because everything appeared plainly and conclusively in the official journals, and there was no possible escape from the fact that the bill, as signed by the governor, never passed either House of the Legislature.

As to the law itself, I think it valid, as shown by the opinion of *Mr. Justice* Montgomery, in which I concur. The writ must issue as prayed.

McGrath, *J.*:

I concur in the views expressed by *Mr. Justice* Montgomery as to the constitutionality of the Act in question. Respecting the enactment of the law, I do not regard it as important whether the supplement referred to is or is not to be treated as a part of the house journal. If regarded as a part of the journal, in the absence of anything upon the face of the journal pointing away from that print of the bill, the presumption would be that it was the print acted upon; but if it affirmatively appears from the journal that the action of the House was not aimed at that print, but was directed to some other print, the supplement print has no more weight than any other print ordered by the House, whether printed in the journal or elsewhere, for the convenience of the House. The bill was originally ordered printed for the use of the committee. House Jour. 1247. The committee reported a substitute on June 19th, which was also printed for the use of the House. Id. 2050. This print was known as "Substituted for House Bill No. 178, (File No. 340.)" On June 29th after it was again reported, it was ordered printed in a supplement to the journal. Hence, we have three distinct prints of the pending bill, two of which were presumably in the usual form of printed bills, with numbered lines and wide spaces between the lines, and the other printed in double columns on daily journal size paper, without numbering of lines, and with ordinary spacing. On June 29, Mr. Doremus moved that the bill be laid on the table, and ordered printed as a supplement in to-day's journal. Prior to this time the several prints of the bill had been considered in committee, reported with amendments, and had been considered in committee of the whole. In the supplement the print was entitled, "Substitute for Senate Bill No. 178." On June 30, Mr. Doremus moved that house substitute for Senate Bill No. 178, entitled, etc., be taken from the table, and on motion by same party said bill was again laid upon the table. It is significant that in this instance Mr. Doremus, who had charge of this legislation, referred to this print as "house substitute for Senate Bill No. 178," and that in no other instance is there any evidence upon the journal that this print was again before the House. It is significant, too, that at this time this bill was read a third time, and that subsequently, on July 1, the bill then taken up and passed was also read "a third time."

On July 1, on motion of Mr. Doremus, House Substitute Bill No. 178, (file No. 340,) was taken from the table and put upon its passage. A large number of amendments were offered by Messrs. Doremus, Dafoe, Connor, and Richardson: (1) To strike out of line 9 of section 11 the words "to hire." Line 9 of section 11 of the supplement print is as follows: "Procuring any such property to be manufactured upon contract shall be." (2) By adding to section 11, line 33, after the word "assessment," the words, etc. Line 33 of section 11 reads thus: "Any shed shall not be deemed in transit, but shall be assessed to the." (3) To insert in line 12 of section 15, after the word "properly," the words, etc. Line 12 of section 15 reads as follows: "The quantity of land comprised in any town, city, or village." (4) To insert in line 1 of section 33, after the word "time," the words, etc., and to insert in line 10 of section 33, after the word "necessary," the words, etc. There is no such word as "time" in the first ten lines of section 33, and no such word as "necessary" in the tenth line. (5) To strike out of line 40 of section 34 the word "assessment," and insert, etc. Line 40 of section 34 reads: "Collected as hereinafter provided, and shall give his receipt therefor. The." (6) To strike out of line

5 of section 38 the word "a;" but line 5 of section 38 contains no such word. (7) To strike out of lines 8 and 9 of section 38 certain words; but the words do not occur in lines 8 and 9, and do occur in lines 9 and 10. (8) To insert in line 18, § 40, after the word "lien," certain words; but the word "lien" does not occur in line 18, but does occur in line 20. (9) To insert in line 7 of section 48, after the words "and the;" but no such words are contained in line 7. (10) To insert in line 10, after the words "state and;" but line 10 has no such words. (11) To strike out all of section 48 between the words "each year" in line 15; but line 15 contains no such words. (12) To insert in line 17 of section 55, after the words "sold for the," etc.; but line 17 of section 55 contains no such words. (13) To strike out of line 21 of section 60 the words "auditor general," and insert, etc.; but the words "auditor general" do not occur in line 21 of section 60. (14) To strike out of section 71, commencing with the word "shall," in line 5, etc.; but the part stricken out commenced in line 6. (15) To strike out lines 9 to 23, inclusive, of section 71; but the part actually stricken out includes 14 other lines which appear in the supplement. The journal strikes out fifteen lines, whereas thirty-nine lines, as they appear in the supplement, were actually stricken out.

It does not appear that the bill was considered in committee or in committee of the whole after it was ordered printed in the supplement. The California mortgage tax system, and the county system for the collection of delinquent taxes, refer to provisions which at the time were already incorporated in the bill, as indicated by the resolutions themselves. House Jour. 2167, 2168. The supplement print, however, contains sections 43, 44, 64, 65, 66, 67, 68, and 69, which do not appear in the law as published, and sections 20, 21, 51, 63, 67, 74, 75, 76*a*, 78, 79, 81*a*, 81*b*, and 82, contained in the law do not appear in the supplemental print; and nowhere does the journal after the print was ordered in the supplement to the journal on June 29th refer to any amendment striking out either of the sections 43 to 69 above named or to the incorporation of sections 20 to 82 inclusive above named either by number or matter; nor does the journal after the supplemental print was ordered contain any intimation that the bill was referred to or reported by any committee or that it was considered in committee of the whole. The journal does show, however, that at the same morning session at which the amendments referred to were adopted the bill was read the third time as amended, and passed, (House Jour. 2203;) that it went to the Senate, and was there passed with amendments, and the amendments were afterwards concurred in by the House, (Id. 2242, 2243;) and that afterwards the committee on engrossment and enrollment reported as correctly enrolled, signed, and presented to the governor, House Bill No. 178, (file No. 340) being an Act, etc. (House Jour. 2284.) The journal nowhere intimates that this print of the bill was before the House for amendment or adoption nor does it show that a single amendment was directed to or aimed at it but the journal conclusively shows that some one of the other prints was before the House; and, this fact appearing, it must be presumed, I submit, that it was such other print that was finally read the third time, put upon its passage and passed. It cannot be presumed that four different members of the House, each offering amendments, had before them this supplemental print, when every amendment that was offered refers to some other print of the bill. The supplement print contained no numbered lines. The numbered lines appeared only in the other prints of the bill, which existed before the print was ordered in the supplement to the journal. If either of the four members offering amendments had before him a copy of the bill which was being considered by the House, in which the lines were numbered, he must have had a copy previously made. If the clerk had a copy in which the lines were numbered, he too must have had a copy of some other print. If the members had a copy in which the lines were numbered, they too must have had a copy of some previous print. It must be recollected that each of the other prints, having numbered lines and wide spaces between the lines, were, when printed, distributed to the members, and each member of the House had before him a file of the bills which had been ordered printed by the House. It will not do to say that this supplement print received certain amendments which appear upon the journal; for none of the sixteen amendments above referred to are directed to or aimed at the said print, and none of the other amendments offered necessarily refer to said printed copy. There is not a figure, line, or sentence in the journal of July 1 that necessarily refers to the print contained in the journal supplement. On the other hand the sixteen motions to amend, enumerated above, refer to some other print which was then before the House, in the hands of the members offering amendments, before the clerk, and understood by the members of the House generally. The House had the undoubted right to disregard this print in the supplement. So far as we know it may have been incorrectly printed. Some other copy than that intended may have been printed. The House had a clear right to discard this print for any reason, and to take up either of the other prints. They had been presented, referred to the committee, reported with amendments, and considered in committee of the whole. No house rule or parliamentary precedent can be invoked to defeat legislation. Every amendment offered can be found in the Act as passed in its proper place, with the proper context. Sixteen of the amendments offered cannot be associated with the supplemental print without doing violence to the express language of the journal. If the validity of the Act passed is to be tested by this print, then the law is defective, not simply because it does not contain the clause relating to agreements for the payment of the tax by mortgagors, but for the additional reason that sections 43, 44, 64, 65, 66, 67, 68, and 69 of the supplemental print are not con-

tained in the law, and sections 20, 21, 51, 63, 67, 74, 75, 76*a*, 78, 79, 81*a*, 81*b*, and 82 are contained in the law, and are not contained in the supplement. If a portion of section 17 was surreptitiously stricken out, then why have not the sections above named, from 43 to 69, inclusive, been surreptitiously eliminated, and why have not the other sections, 20 to 82, inclusive, been surreptitiously interpolated? It must be clear to every one who examines the matter carefully that the House had before it some copy of the bill, other than the bill printed in the supplement,—some copy that had been amended by the substitution of the sections appearing in the law, which do not appear in the supplement print, and by striking out, if ever in, the sections which appear in the supplement print and do not appear in the law,—some copy in which section 17 had been amended. Thus is explained every word in the Act, and every word in the journal which records the action of the House. It being clear that some copy of the bill other than the supplement print was before the House when the amendments were offered, the natural presumption is that the House kept that copy in sight, and that this is the same copy that was read a third time and passed. The committee on engrossment and enrollment report the bill "as correctly engrossed and enrolled, and presented to the governor," and the governor approves the bill so engrossed and enrolled. The passage of the Act intervened between amendments and enrollment. The same theory, and the only theory that explains the journal entries when the bill was before the House for amendment, accounts for the bill as passed and enrolled. Any other theory renders senseless and nugatory sixteen amendments which appear upon the face of the journal, emasculates both supplemental print and Act, and makes a dupe of the governor, dolts of the members of the Legislature, and knaves of the members of the committee on engrossment and enrollment, and the clerk of the House.

Grant, J., dissenting:

This is an application for the writ of mandamus to compel the respondents, who are the assessors of the city of Detroit, whose duty it is to assess at its true cash value all the real and personal property in the city, and to make out the assessment rolls, to comply with the provisions of Act No. 200 of the Public Acts of 1891, which require them —*first*, to assess the value of any land contract to the owner of such security as real estate; *second*, to assess as real estate, to the owner thereof, the value of any real estate mortgage executed before the tax law of 1891 went into effect; *third*, to assess to any savings bank or insurance company as real estate, the value of any real-estate mortgage owned by such bank or insurance company, executed since said tax law took effect; *fourth*, to assess the value of any real-estate mortgage executed since said tax law took effect to the owner thereof, as real-estate; *fifth*, to assess the value of any real estate mortgage executed since said tax law took effect, and owned by a nonresident of this state, to such nonresident owner, as real estate; *sixth*, to deduct the value of any real-estate mortgage owned by any savings bank or insurance company from the value of the capital stock of such bank or insurance company, as determined for assessment purposes by the statute in such case made and provided. The respondents answered, alleging various reasons against the constitutionality of the Act.

The first question for determination is whether the Act approved by the governor and deposited with the secretary of state is the Act which passed the Legislature. Courts will not go behind the legislative journal for any evidence touching the validity of an Act of the Legislature. We must be able to determine from an inspection of the journal that the Act as signed did not pass, in order to declare it void. The history of this Act, as found in the journal, is as follows:

Early in the session a joint special committee of the Senate and House was appointed, to which were referred the recommendations of the retiring and incoming governors on taxation, with instructions to prepare and report a general tax bill. Three general tax bills were introduced,—two in the House and one in the Senate,—and referred to this committee. The house bills were numbered 178 and 984, and the senate bill, 325. April 17 this committee reported a substitute for House Bill No. 178, which was concurred in, ordered printed, and referred to the committee on judiciary. House Jour. 1246. June 19, the judiciary committee reported to the House Bill No. 178, (file No. 340,) entitled "A Bill to Provide for the Assessment of Property, and the Levy of Taxes thereon, and for the Collection of Taxes heretofore and hereafter Levied, and to Repeal Act No. 195 of the Session Laws of 1889, and all Other Acts or Parts of Acts in Any Wise Contravening Any of the Provisions of the Same;" reported a substitute therefor; recommended the substitute be concurred in and passed. This report was accepted, the committee discharged, and the substitute ordered printed, and made the special order for the next Tuesday. House Jour. 2050. June 23, which was the following Tuesday, appears another report from this same committee, and in precisely the same language, upon the same bill, which report was accepted and the committee discharged. The bill was then made the special order for June 24. Id. 2066. June 24 appears another report from the same committee upon the same bill, and in precisely the same language. Again the report was accepted and the committee discharged. A vote was taken, and the House did not concur in the substitute. The original bill was then referred to the committee of the whole, and placed on the general order. Id. 2082, 2083. The bill was considered in committee of the whole June 27, which reported that they had had under consideration "substitute for House Bill No. 178, (file No. 340,) entitled 'A Bill,'" etc., (giving the same title as above;) that they had not gone through therewith, and asked leave to sit again, which was

granted. Id. 2156. The same bill was further considered in committee of the whole on the same day, and the committee asked leave to sit again. Id. 2157. The same bill was again considered in committee of the whole June 29, but its consideration was not completed, and leave was granted to sit again. Id. 2163. The like proceedings were repeated the same day upon this same bill. Id. 2164. At the evening session of the same day the bill was further considered in committee of the whole, when the same was reported back to the House with sundry amendments thereto, in which the House was asked to concur, and its passage recommended. The House concurred in the amendments, and the bill was placed on the order of third reading. Subsequently the vote by which they concurred in the amendments was reconsidered, and a motion was made to concur in all the amendments, except the amendments made to section 17 and section 12, which motion prevailed. A motion was then made to concur in the amendments made to section 17, which motion prevailed. A motion was also made to concur in the amendments made to section 12, which motion did not prevail. The motion by which the House concurred in the amendments to section 17 was then reconsidered, and pending the motion to concur in these amendments the following motion was made: "That the bill be laid on the table, and ordered printed as a supplement in to-day's journal." This motion prevailed. Two resolutions were then passed by the House,—one declaring that it was desirable to incorporate into the tax laws of this state the California mortgage tax system, as provided in House Bill No. 178, (file No. 340;) the other declaring that it was desirable to incorporate the county system for the collection of delinquent taxes, as provided for in the same bill. House Jour. 2164-2168. The bill was printed in the journal as directed, under the heading: "Supplement to House Journal. File No. 340. House of Representatives. Substitute for Senate Bill No. 178. (Introduced by Mr. Doremus.) Ordered printed for the use of the committee on judiciary. Lansing, June 29, 1891." It is conceded that the expression, "Substitute for Senate Bill 178," should read: "Substitute for House Bill No. 178." This was a clerical error, and corrects itself, since no tax bill by that number was pending in the Senate. A statement of this clerical error is made in the index to the journal. The bound volumes of the journal are now produced, and this bill, which the House ordered printed in that day's journal, is omitted therefrom.

July 1st it appears from the journal that, "on motion of Mr. Doremus, House Substitute Bill No. 178, (file No. 340,) entitled," etc., "was taken from the table and put upon its immediate passage." Several amendments were then made to the bill by the House, which appear in the bound volumes of the journal on pages 2199 to 2201, and on pages 1431 and 1432 of the journal as issued daily. I do not consider it necessary to state them here. The bill was then passed and sent to the Senate and on the same day the Senate returned the bill to the House, reporting that it had passed the bill with some amendments. These amendments were concurred in by the House, appear upon the journal, and are in the Act as signed by the governor. July 1, while the bill was being considered by the House, and just before its passage, the journal contains the following: "Mr. Doremus moved to further amend the bill as follows: (1) By striking out sections, 109, 110, 111, 113, and 116; (2) by inserting in line 3 of section 114, after the word 'such,' the word 'blank,' and after the words 'forms of' the words 'delinquent tax record, certificates, deeds, and other necessary papers;' (3) by inserting in line 5 of section 115, after the word 'accrued,' the words 'or may hereafter accrue,'—which motion prevailed. The question recurring to a passage of the bill, pending the taking of the vote thereon, Mr. Doremus moved that there be a call of the House, which motion prevailed." After the roll of the House was called the pending bill was laid on the table. Shortly after this, on the same day, by unanimous consent, the bill was taken from the table and placed upon its immediate passage. Here, again, a clerical error was committed, by referring to the bill as "house substitute for Senate Bill No. 178;" but it was also referred to as file No. 340, and the title given identical with the one just before laid upon the table. There is no doubt that the bill then passed was the same as that which had just before been laid upon the table, nor does any one contend that it is not. It also affirmatively appears that the bill taken from the table was the identical bill which had been laid upon the table, ordered printed, and printed in the journal. The record last above stated is taken from the daily journal of the House, as it was issued and published at the time, and sent to the various state, county, and township officials as containing the records and proceedings of the House. See page 1432 of the Daily Journal. The bound volume, No. 3, of the journal, is now produced, with the certificate of the clerk of the House of Representatives attached thereto, certifying that it is a correct journal of the proceedings of the House of Representatives for 1891. There now appears at page 2201 of this bound journal, after the three amendments above given, and between the words "which motion prevailed" and "the question recurring to the passage of the bill," the following: "Mr. Doremus stated that certain sections of the bill had been stricken out and some added in the committee of the whole, which, with the above amendments, would not leave the sections in consecutive order; and thereupon Mr. Doremus further moved to amend the bill by directing the engrossing and enrolling committee to renumber the sections of the bill so that they should be numbered, as near as may be, by consecutive numbers, which motion prevailed, and the sections of the bill were thereupon accordingly renumbered." It is apparent that the numbering of the sections might have been done by the committee on engrossment and enrollment

without any instruction from the House, and without in any manner affecting the validity of the bill.

It must first be determined whether the bill ordered printed, and actually printed in the journal as a supplement, constitutes a part of the journal. If it does, then the clerk of the House had no authority to leave it out of the bound volume. He possesses no power under the Constitution, or under any legislative action, to add to or take from the journal which the House has made and published. He can only make corrections under the authority and direction of the House. After the Legislature has adjourned, the sole authority possessed by him is to see that the journals, as made, corrected, and approved from day to day, are correctly published and bound, and given to the people of the state for preservation in a lasting form, as the correct and exact proceedings of that body. He may possibly have the right to correct grammatical or clerical errors which appear upon the face of the journal. To hold that he may do more would be not only absurd, but it would be monstrous. If clothed with that power, he might change and control legislation at his will. His certificate, made after the Legislature has adjourned, possesses no such sanctity. Courts will go behind the Acts of the Legislature, published by authority, to the written Act, as signed by the governor and found in the office of the secretary of state, to ascertain what the law is. For the same reason, they will go behind the bound volumes of the journal, to the record made and approved by the Legislature; to ascertain what that journal is. The language of this court in *Rode* v. *Phelps*, *infra*, speaking through my Brother Morse, at page 609, 80 Mich., applies with equal force to the facts of this case, viz.: "If the rule prevailed here which is adopted in some of the states of the Union, that the courts have no power to go behind the authentication of a law by the presiding officers of the Legislature and the approval of the governor to ascertain whether or not it was legally passed, under the requirements of the Constitution, we should always be in danger of having laws upon our statute-books which, although the courts would be obliged to hold them valid under such a rule, were never passed by the Legislature, and were really created by the carelessness or corruption of some member, clerk, or employé of that body, or perhaps by the interpolation of a member of what is sometimes facetiously called the 'Third House,' but which is nothing more nor less than an organized and generally unscrupulous lobby." Courts will take judicial notice of the methods of procedure in the Legislature. No written journal is kept by the House or Senate. The journal, as published and placed upon the desks of the members every morning, is the only record kept of its proceedings. By resolution of the House, the record of its proceedings, called the "Journal," was sent daily to the various township, county, and state officials, including the secretary of state and the members of this court. For what purpose, other than to be received and acted upon as the official record of its proceedings, and the original record thereof?

Rule 8 of the House rules is as follows: "Upon the announcement by the clerk that a quorum of the House is present, the journal of the preceding day shall be read, unless otherwise ordered by the House, and any mistake therein corrected." It is provided by Rule 11 that "after correcting the journal of the preceding day the order of business shall be as follows," etc. In practice, under these rules, the record of each day's proceedings, as it appears in this journal, which is in the hands of every member, stands approved, unless a correction is suggested and made, which will then appear in the journal the next day. Section 15 of Howell's Statutes provides for printing and binding, in volumes of convenient size, "the official journal of the Senate and House of Representatives." The Legislature of 1891 provided, by concurrent resolution No. 12, "that secretary of the Senate and the clerk of the House of Representatives be and are hereby directed to compile and prepare for publication, make indexes, and superintend the publication of the journals," etc. What constitutes this "official journal" mentioned in the statute, and "the journal" mentioned in this resolution? Has there been no official journal before this time? Can there be none until one is compiled, indexed, and bound into volumes, which do not and cannot appear for months afterwards? Is there no official journal in existence, of which courts will take judicial cognizance? If a question arises as to the passage of a law enacted early in the session, and given immediate effect, to what "official journal" will the courts resort to determine it while the Legislature is in session? Ample opportunity is now offered to test such questions in the courts before the adjournment of the Legislature.

The Constitution also requires each House to keep and publish a journal of its proceedings. The decision in *People* v. *Burch*, 84 Mich. 408, went no further than to hold that the clerk, under a resolution directly authorizing him, might make corrections before the Legislature adjourned. In the present case the clerk omitted this part of the journal from the copy he certified, not by any direction of the house nor to correct any error, but upon his own motion, and apparently because he did not consider it a part of the journal. The Liquor Tax Law of 1889 was printed in the journal of the House under precisely the same language as was used in the present case, except the words "as a supplement." The term "in the journal" means what it says, and has but one meaning. To print "in the journal, as a supplement," has the same legal significance as to print "in the journal." In *Rode* v. *Phelps*, 80 Mich. 598, the bill which was printed in the journal was considered by this court as the bill then pending before the House, and from an examination of the journal, taking that as the pending bill, it appeared that the bill passed by the Legislature was not the one signed by the governor. It is true that in that case the bill "as amended" was ordered printed, but

I do not regard those words as possessing any significance. By "the bill," when laid on the table and ordered printed, is meant, not the bill as it was introduced but the bill then in possession of the House, under consideration, and as amended. Any other construction would be doing violence to the plain meaning of language. The object of printing it was to place it, as it then stood, before each member of the House, for his personal examination and guidance, by reason, undoubtedly, of the short time remaining for the consideration of so important a measure. This supplement is brought into court by the secretary of state, in whose office it is found, and to whom it was sent when published, and who has preserved it there ever since, as a part of the legislative journal, issued by authority. Its identity cannot be, and is not, denied. Upon reason, common sense, and grounds of public policy, this supplement must be taken and considered a part of the journal.

But it is insisted that the words, "ordered printed for the use of the committee on judiciary," appearing on the supplement, show that it was not published for the use of the House. The fallacy of this claim is apparent when it is considered that the committee on the judiciary had before this reported the bill to the House, had been discharged from its further consideration, and that it was at no time thereafter referred to them. Those familiar with legislation will know that these words were on the original bill before it was reported by the committee to the House.

It is also urged that this daily journal may be produced from a supervisor, or from any person to whom it was sent, and who has taken the pains to preserve it, and be received to contradict the bound volumes. This position might be tenable if the bound volume was the original record. But it is not. No one original is made or kept. Each number issued is an original. This journal, issued daily to its members and to the people of the state, purports to be made and published by authority, is in fact made and published by authority, and bears upon its face its own authentication. It and the bound volumes are both published by authority, are open to the examination of the courts, and it is of no consequence whether they are found in public or private libraries, in public or private offices, in the possession of members of this court or of private individuals. When produced, each authenticates itself. The Legislature has provided that both shall be sent to the members of this court. When so sent and received, by which are they to be governed? We are not pointed to, nor can I find, any statute which makes this bound volume conclusive evidence of the proceedings of the Legislature. It follows in the present case that this journal, as issued daily, preserved by the secretary of state, and produced to this court, is one of the original, official journals of the House, and to it we must look to determine what action the House took, and what it did not take, upon the Act in question.

The following cases are cited in support of the position taken by relator, viz.: *McCulloch* v. *State*, 11 Ind. 424; *Turley* v. *Logan Co.* 17 Ill. 151; *Post* v. *Kendall County Suprs.* 105 U. S. 670, 26 L. ed. 1205; *Atty-Gen.* v. *Rice*, 64 Mich. 385, 7 West. Rep. 642. An examination of these cases shows that the question now under consideration was not either directly or indirectly involved. In *McCulloch* v. *State* evidence was offered to show that two members who were shown by the record as having voted for the bill were not present and did not vote for it, and that another member, who was recorded as having voted for it, in fact voted against it. It was with reference to this state of facts that the language in that opinion was used. No dispute arose as to what was in fact the journal. It is there said: "The House keeping the journal is the only tribunal by which it can be corrected, and, until corrected, by such authority, it must be considered conclusive as to the facts it contains." Applying this language to the present case, and where is found any correction of the journal by the only tribunal which can correct it? In *Turley* v. *Logan County* a correction was made at a subsequent session by the Legislature itself, and in the decision is this language: "We cannot doubt the power of the same Legislature, at the same or a subsequent session, to correct its own journal by amendments which show the true facts as they actually occurred, *when they are satisfied that by negligence or design the truth has been omitted or suppressed.*" (The italics are my own.) So far as this language is applicable to the present case, it is clear that the Legislature alone can make the correction, and that it must appear on the journal as made by its authority. In *Post* v. *Kendall County Supra.* the law was held void because the journals did not show it to have been enacted in conformity with the requirements of the Constitution; and *Mr. Justice* Gray, in delivering the opinion, says: "If the journals, being produced or proved, fail to show that an Act has been passed in the mode prescribed by the Constitution, the presumption of its validity, arising from the signatures of the presiding officers and of the executive, is overthrown, and the Act is void." Under the statute of Illinois, "the copies of the original daily journals kept by the clerks of the two Houses, made by persons contracted with or employed for the purpose, as authorized and directed by that Act, in well-bound books furnished by the secretary of state, pursuant to the duty thereby imposed upon him, and afterwards deposited and kept in his office, are official records in his custody, copies of which, certified by him, are admissible upon settled rules of evidence. . . . And neither the competency nor the effect of such copies is impaired by the loss or destruction of the daily journals or minutes." It is further said: "The copies of the journals, certified by the secretary of state and the printed journals, published in obedience to law, are both competent evidence of the proceedings in the Legislature." If in that case the daily "journals" or "minutes" had been "produced" or "proved," and they had differed from the bound books, by

which would the court have been guided? See same case, reported in 94 U. S. 260, 24 L. ed. 154. In *Atty-Gen.* v. *Rice*, *Mr. Justice* Morse, speaking for the court, referred to these "journals kept by the clerks of each House, and read and corrected each day by each body, and duly certified by the proper officers to be correct. If the bound volumes differ from these journals "kept, read, and corrected each day," which should govern? The offer in that case was to contradict the journal, which showed that a certain bill was introduced, by showing that it was a skeleton bill, with a head but no body. I cite also, in this connection, *Miller* v. *Goodwin*, 70 Ill. 659. In that case the statute of Illinois required the secretary of state to record in a bound volume prepared and kept in his office for that purpose the daily proceedings of the Legislature. The proper officers of the respective Houses kept the minutes of their proceedings upon blanks furnished to them. These were daily sent to the secretary of state, recorded in this book, which was called the "Journal Record," and, after they were so transcribed, he sent them to the public printer, and they were never returned. Objection was made that the journal record was not the original record, and parol proof was offered of the proceedings of the Legislature to contradict this record. This was held incompetent. In that case this record was made by law the official record. In the present case, as already stated, the journal published daily is the official record. The court in that case said: "Public information of the proceedings is required to be furnished by publication; and, if this record is not designed to be a permanent depository of the evidence of the proceedings required to be copied into it, then we must presume that the law requires the making and preservation of a public record with no end in view."

The next question for determination is whether the statement and motion appearing in the bound volume, and above given in full, are a part of the official journal of the House. As already stated, they do not appear in the journal of July 1st, as it was published at that time. The Legislature continued in session July 2 and 3, and neither in the journals of those days, as they were then published, nor as they appear in the bound volume, is there found any correction of the journal of July 1, nor any reference whatever to any such statement or any such motion as a correction. The Legislature adjourned without making any such record. That it was inserted after the adjournment is beyond dispute. Its effect is to contradict the official record, which had then been made and published to the people of the state. No record of it having been made anywhere in the journal prior to the adjournment, the legal presumption follows that no such action was taken. That courts, on the ground of public policy alone, should not recognize them as a part of the journal, is, in my judgment, too clear to require argument. If the clerk may add to the record, as left in his hands to compile, he may also take from it; and thus he, either alone or in combination with others, may defeat the will of the people. Suppose he, either intentionally or inadvertently, should leave out of the bound volume the record of the vote by which a bill had passed the House by a yea and nay vote, as required by the Constitution, § 19, art. 4. Can it be possible that courts are not clothed, not only with the right, but the duty, to examine the original journals, and thus enforce the people's will?

The conclusion that no such proceedings took place can safely rest upon the records as above given. But they are not the only evidence within our reach. Whatever of credit is to be given to these bound volumes is not derived from the fact that they are bound, but from the certificate of the clerk, attached thereto, that it is a correct journal of the proceedings, and the fact that they are published by the Legislature as its official journal. That is what gives it its official character contemplated in the statute and resolution above referred to, and determines its prima facie authenticity and correctness. Courts, in their search for the truth as to what the proceedings actually were, will examine an unbound as well as a bound copy. The compilation and publication of the official journal required a repaging, different from that of the journal as issued daily. The record of the proceedings now under discussion is found on page 1432 of the original journal issued at the time, and on page 2201 of the bound volume. Since the argument a printed copy has been handed to me by counsel for respondent, as prepared by the clerk of the House, for printing and binding into volumes, with pages the same as those in the bound volume, and with the clerk's certificate attached thereto, in which, on the same page, viz., 2201, is found a record of these proceedings; and it corresponds exactly with the record of the journal as issued daily at page 1432. It thus appears that this journal covering, as bound, 2286 pages, was prepared by the clerk, certified to by him, placed in the hands of the printer, repaged and printed, without the disputed proceedings appearing in it, and without any reference whatever thereto. Now, then, is it possible to reach any other conclusion than that this statement and motion were inserted after the Legislature had adjourned, by some one without authority? Of the right of this court to examine this copy, there is no doubt. When the case of *Auditor General* v. *Menominee County Supvrs.* (Mich.) 51 N. W. Rep. 483, was heard, October 29 and 30, 1891, this court was referred to the unbound numbers of the senate journal, certified to by the secretary of the Senate, for the official record of the Senate on the Act then in question, and they were accepted without objection as an official record of the proceedings of that body. If, when bound, that record should be found to differ from the record then before the court, by which should it be governed, in the absence of any evidence upon the journal of a correction by the Senate? It is established beyond controversy that the bill, as printed in the journal July 29th, was the identical bill then under consideration, the one to which amend-

ments were made by the House, and which, as amended, should have been engrossed and enrolled, and signed by the governor. There is no claim that any amendments were made by the House after the bill was printed in the journal which do not appear upon the journal. Putting the bill and these amendments together, it is impossible to make up the bill which was afterwards signed by the governor and printed in the Public Acts. There was no other substitute for House Bill No. 178, except this one, and no other which was known as "File No. 340." The first nineteen sections of the Act, as printed, are identical in subject-matter with the first nineteen sections of the printed bill in the journal, and are also identical in language, except in so far as they are in a few instances modified by the amendment shown to have been passed by the House, and a few provisions which the journal nowhere shows to have been stricken from the bill then pending. Sections 84 to 108 of the Act, inclusive, are also identical, both in subject-matter and in language, with sections 85 to 108, inclusive, of the bill, while sections 109, 110, 111, 113, and 116 of the bill as printed, and which the journal shows were stricken out, do not appear in the Act as signed. Another conclusive evidence that the bill printed in the journal was the identical bill under consideration, and to which amendments were made, is the fact that the bill as printed contained 116 sections, 5 of which, as already shown, were stricken out, while the bill signed by the governor contains 111 sections, just the 5 sections less.

It is said by counsel for relator, in his brief: "Every affirmative amendment proposed [referring to the amendments found in the journal] is found in the Act as now enrolled." This is undoubtedly true, and these amendments can all be traced to their proper place in the bill printed in the journal. The lines as printed in the journal were not numbered. It is well known that the lines of the sections of bills printed for use in the Legislature are numbered. All the amendments made to the bill by the House, except four, were made by Mr. Doremus, who evidently had charge of the bill. Of these four, three were proposed by Mr. Richardson, and one by Mr. Conner. In proposing these amendments, reference was made to the sections and lines by number, except in case of the amendment proposed by Mr. Connor. Evidently, those proposing these amendments had before them a printed copy of the bill, with the sections and lines numbered. This was evidently for convenience in directing the attention of the members, as well as the clerk, to the place where the amendments were to be made. But it cannot be argued from this that the House had before it a bill different from that which they had laid upon the table two days before, and ordered printed. Nor is there, in my judgment, any foundation in fact for even a supposition to that effect. When a bill by order of the House is printed in its journal, as the bill then pending, is shown by the same journal never to have been referred to any committee, but to have received certain amendments, which appear in full upon the journal, and then, as thus amended, to have passed both branches of the Legislature, such bill, as thus amended, is the one that has become enacted into law, as having received the solemn sanction of the Legislature. If the bill when engrossed and enrolled and signed by the governor contains other provisions, it is null and void, and must be set aside. This I believe to be the rule founded upon authority and reason. See authorities above cited; also *Ryan* v. *Lynch*, 68 Ill. 160, and authorities there cited. Tested by it, the tax law of July cannot be sustained. It differs from the Act which passed the Legislature, as appears by the house journal, in several essential particulars. I deem it necessary to mention but one. It was the intention of the Legislature to incorporate into this law the California system of taxing mortgages. For this purpose the law declares that mortgages shall be considered real estate; that the value of the mortgage shall be deducted from the value of the land, and each assessed accordingly. Section 17 of the bill and section 17 of the Act cover this subject. Section 17 of the bill printed in the journal contains this clause: "Every contract hereafter made, by which a debtor obligates himself to pay any tax assessed on the interest of the holder of any mortgage, deed of trust, or other lien, shall, to the extent of such obligation, be null and void." This provision does not appear in the bill signed by the governor, nor in the Act as published in the Public Acts. The house journal does not show even an attempt to strike it out. The only record to be found anywhere in regard to it is on the printed copy of the bill, with riders attached, found in the office of the secretary of state, and which is claimed to be the bill as passed and from which the engrossed copy was made; and there, opposite this clause is found the following pencil memorandum: "Richardson says this was struck out." But I do not consider this as competent evidence. It is to the journal that we must look. By the absence of this provision from the law, it is shorn of all force and effect, so far as taxing mortgages is concerned; for it is now conceded by counsel for the relator that under the Act as it is the mortgagor and the mortgagee may make a valid contract, by which the mortgagor must pay the taxes. Common experience tells us that every mortgagee would insist upon such a contract, and that, therefore, no relief is afforded in this respect to the mortgagor by the Act as it now appears. This was an important and radical provision. We cannot assume that the Legislature intended to leave it out. The journal records that they did not, and it must prevail. It is of no avail to say that certain sections of the bill printed in the journal are not contained in the law, nor that the law contained certain sections which do not appear in the printed bill. This may seem strange, as was said in *Atty-Gen.* v. *Joy*, *infra;* but this furnishes no basis for courts to infer that amendments were made which its journal does not show. The journal must control. In *Atty-Gen.* v. *Joy*, 55 Mich. 94,

the bill under consideration required the vote of two thirds of the members to secure it passage. The journal showed one vote short of this number, but the bill was declared carried by the requisite majority, and the parties interested acted upon that assumption. It was urged that there was evidently a mistake in the journal, but the court said, speaking through *Chief Justice* Cooley: "There was a considerable vote in opposition to the Act in question, and, if the vote in its favor was insufficient, it seems strange that attention was not challenged to the fact immediately; . . . and it seems incredible that, if a mistake was made in declaring a bill passed which had not received the necessary vote, the mistake should not have been discovered as early as the day following. . . . But we cannot now determine judicially that there was any such mistake. The legislative journals furnish no proof of it, and it remains merely a plausible conjecture."

The Act in question should be held void and the writ of mandamus denied. It would follow that the pre-existing tax laws are in force, and that the assessment and collection of taxes must proceed under them.

I concur in the conclusion reached by my Brother Long, that the law is unconstitutional.

Long, *J.*, dissenting:

I fully concur in the view expressed by my Brother Grant, in which it is held that the Act signed by the governor is not the Act which passed the Legislature, and is therefore void. Aside from that, conceding that the Act signed is the one which passed the Legislature, as held by the majority of the court, there are many provisions which in my opinion should be held unconstitutional.

The whole scheme of the Act for taxing mortgages is that the owner's interest and the mortgagee's interest shall be taxed separately. Section 17 provides that "if the mortgagee shall neglect or refuse to pay the tax assessed to him as the holder of any such mortgage, deed of trust, contract, or other obligation, the treasurer shall proceed to collect the same from the mortgagor or holder of said real estate in the same manner as provided by law for collecting other taxes; and any delinquent tax accruing by reason of the failure to collect the tax assessed upon any such mortgage, deed of trust, contract, or other obligation may be returned against the land in the same manner as other delinquent taxes." The Act applies as well to existing mortgages as those hereafter given, and to mortgages held by nonresidents as well as to those held by residents. The scheme for taxation is as follows: The assessing officer, in the first column of his roll, is to set down a description of the land. In the second column, and opposite to the description, he gives the name of the owner or occupant, if known, and, if not known, the words "Owner unknown." He is then to assess the owner or occupant, known or unknown, the true cash value of the land, less the value of the mortgage or other interest therein. He shall also set down the name of the owner of the mortgage or other such interest, and opposite thereto the value of such interest; and the taxes to be apportioned and carried out upon the roll in accordance with such assessment. At first blush, this would seem to be just and equitable. But let us look at the means of collection. It often happens that taxes are not paid. The mortgagee may be a nonresident and fail to pay the tax, or the mortgagor may be a nonresident and fail to pay upon his interest. If the tax is not paid, and there can be found no personal property of the owner of the land from which the tax can be collected by distress, the whole tax upon the land and upon the mortgage interest is made a lien upon the land, for which it can be sold; and thus the land of the owner is sold to pay a debt of the mortgagee. It is also provided that, if the owner of the fee has personal property, not only his portion of the tax may be collected from him, but the taxes upon the mortgage interest may also be collected from him by distress and sale of his personal property. The tax upon the mortgage interest is not against the mortgagor, but against the mortgagee, and yet the personal property of the mortgagor may be seized and sold for such tax. It is true that the law provides that the mortgagor, upon payment of the mortgagee's tax after thirty days from the time the roll goes into the hands of the collecting officer, or upon the payment by distress and sale of the goods and chattels of the mortgagor, may have the same treated as a payment upon the interest that may be due on the mortgage, and, if no interest is due, then as a payment upon the principal. It is also provided that, if the mortgagor's tax is paid by the mortgagee, "it shall become a lien upon the land, and be added to his other obligation, and be subject to the same terms and conditions as such mortgage," etc. It will be seen from this that whatever the contract may be, as stipulated in the mortgage, between the mortgagor and the mortgagee, and though not a dollar is due upon the principal or interest of the mortgage, and not a dollar to become due for five years thereafter, yet the collecting officer is authorized and empowered under the Act to seize for the debt of the mortgagee the last piece of personal property the mortgagor has; for there are no exceptions from seizure and sale from taxes under this Act. Under certain circumstances, it is distressful enough for a man to be compelled to surrender the last article of personal property he possesses to pay his own tax; but to say that this distress may be visited upon him to pay the debt of another is not only monstrous, but clearly beyond the constitutional power of the Legislature. The Constitution, by article 4, § 43, provides: "The Legislature shall pass no bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." Under the circumstances above stated the mortgagor would be compelled to pay upon his mortgage the amount of the mortgagee's tax, five years before any amount was due thereon. This compulsion of payment precipitates the maturity of the obligation, and changes the contract between the

parties, in violation of the above provision of the Constitution.

In *Lyon* v. *Guthard*, 52 Mich. 281, it appears that a tax was assessed against Cornwell, Price & Co., a corporation doing business in Detroit, and after the assessment and levy of the tax the corporation made a common-law assignment for the benefit of the creditors to Mr. Lyon, who accepted the trust and entered at once upon his duties. On the day of the assignment, and after it was made, efforts were made by the defendant, as receiver of taxes, to collect the same. On December 22, he entered the store of plaintiff, and threatened to take possession and sell the assigned property to pay the tax, which amounted to $677.78. The plaintiff, to prevent this, paid the tax under protest, and on the following day brought suit in assumpsit to recover this amount. The city charter of Detroit provided that the city taxes should be a lien upon the property assessed until paid. This court held that that provision did not apply to personal property. The defendant claimed that it was his duty to enforce the collection of this tax against the plaintiff's property under the assignment; that his act in so doing was official, and had the color of right; therefore he was not personally liable. It was said by this court: "Several cases decided by this court have been referred to as supporting this position, but they are not applicable to the facts in the present case. This was not the case of a person whose property had been illegally seized, and against whom the collector's warrant ran, but an attempt to take the property of one person to pay another person's taxes. This cannot be done, under our Constitution or laws. It would be the grossest injustice, and finds no support in the decisions of this court."

But, again if the mortgagee does not pay the tax, and it is not collected of the mortgagor by distress, it becomes a lien upon the land of the mortgagor, and, thus the property of the mortgagor is taken to pay the mortgagee's taxes. Under this law the assessment or listing and valuing of property is made in April or May, but no taxes are levied until after the October meeting of the board of supervisors, and they become a lien upon real and personal estate only on and from the 1st day of December. Mortgages are often accompanied by a note to which the mortgage is collateral. The note may be negotiable paper, which passes from hand to hand by delivery or indorsement, and in equity carries with it the mortgage security, without actual assignment. It may have been purchased in reliance solely upon the responsibility of the maker or indorsers. A purchaser of such paper, in good faith and for value, before maturity and before the tax becomes a lien upon the mortgage, has a right to enforce it against the maker for the full extent called for by the promise upon its face; and it is not subject to offset for taxes assessed against the payee and paid by the maker. The mortgagor cannot, by payment of the tax assessed against the mortgagee, offset it against the bona fide assignee, who under the law was not liable to pay the tax. The mortgagor paying the tax of the mortgagee, under such circumstances, would have no means of enforcing repayment by an offset against the mortgage. *Mr. Justice* Campbell, in *Taggart* v. *Sanilac County Supvrs.*, 71 Mich. 31, says: "A mortgage, under our legislation, conveys no legal or equitable estate in land. It is no more and no less than a collateral security upon land, and which has no value in itself, but depends entirely upon some outside obligations, from which it is inseparable. If it is given to secure a debt, it belongs to the owner of that debt, and passes with it to any lawful holder, without assignment. If the debt is negotiable, it passes to any one to whom the paper belongs. If it is given to secure several debts or several installments, it belongs ratably to as many persons as there are owners of these. It may be given by way of indemnity, and in that case it may never have any money value. It may be given for a debt amply secured by other mortgages on other property, or it may be on property already so heavily incumbered as to make it no security at all. So the mortgagee may be a mere trustee, with no interest himself in it." There are many other circumstances which might be stated, where it would be impossible to separate these interests and enforce the payment of the tax out of the goods of the mortgagor without violating the obligations of the contracts.

The obligation of a contract is the law which binds the parties to perform their agreement. *Sturgis* v. *Crowninshield*, 17 U. S. 4 Wheat. 157, 4 L. ed. 539. In *Green* v. *Biddle*, 21 U. S. 8 Wheat. 84, 5 L. ed. 568, it was said: "The objection to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. A deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposes conditions not expressed in the contract, or, dispensing with those which, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation." "One of the tests," says the court in *Planters' Bank of Mississippi* v. *Sharp*, 47 U. S. 6 How. 327, 12 L. ed. 458, "that the contract has been impaired, is that its value has by legislation been diminished. It is not, by the Constitution, to be impaired at all. There is no question of degree or cause, but of encroaching in any respect upon its obligation, dispensing with any part of its force." In *Bourgette* v. *Williams*, 73 Mich. 214, it was said: "The obligation of a contract is said to consist in its binding force on the party who makes it. This depends upon the law in existence when it was made. These laws are necessarily referred to in all contracts, and form a part of them, as the measure of the obligation to perform them by one party and the right acquired by the other; and, if any subsequent law affects to diminish the duty or to impair the right, it necessarily bears upon the obligation of the contract in favor of one party to the injury of the other." At the time these prior mortgages were made, the law then in force did not permit

the mortgagor's property to be seized to pay the tax of the mortgagee. It is now sought by the present law to authorize such seizure. To my mind, no plainer case could be stated where an attempt is made by the Legislature by subsequent enactment to impair the obligation of existing contracts, and these unconstitutional provisions are so interwoven in the law that no part of it can be carried out.

This position is sought to be answered by the proposition that, inasmuch as it would be competent for the Legislature to cause the entire value of the land to be assessed to the mortgagor, therefore it does not impair the obligation of the contract between the mortgagor and the mortgagee to compel the mortgagor to pay that part of the tax assessed to the mortgagee. The illustrations of the workings of the law before given are sufficient answers to this proposition. Under the present law the mortgage interest is not assessed to the mortgagor at all. It is assessed to the mortgagee, and then the tax may be collected by distress of the property of the mortgagor; and in the last illustration used the assignee of the mortgagee, if he procures it before the tax becomes a lien, and for value, takes it freed of any obligation to pay to the mortgagor after payment by him of the tax. Again, let it be supposed that one class of mortgagees pay their taxes, and thus relieve the mortgagor of the burden. Another class of mortgagees fail to pay, and the mortgagors are compelled by distress to make the payments. We have the anomaly of the Legislature compelling in one instance the payment of a part of the tax upon the land by the mortgagee, and in another case, where the mortgagee does not pay, compelling the mortgagor to make the payment, which, we have seen, he may not always be in a position to collect back. This destroys the uniformity of taxation which is provided by the Constitution in article 14, § 11.

It is also said that the imposition of this burden upon the mortgagor does not impair the obligation of contracts, for, if the mortgagee does not pay, the state simply appropriates so much of the fund which the mortgage represents as is necessary to pay the tax before it reaches the mortgagee. In other words, it is proposed to permit the state to take the money of one man to pay the debt of another, or to appropriate a fund not yet due and compel its payment before due; that is, compel the mortgagor to make payment upon his mortgage long before anything is due thereon, so that the state may get its revenues,—the very thing which the Constitution prohibits. The assumption that this may be done is based upon the idea, as before stated, that the Legislature might in the first instance have compelled the assessment upon the land of the whole tax. The idea upon which the Act was brought into existence was that this was unjust, and a burden upon the land-owner, from which he ought to be relieved, and therefore the part which the mortgage bears should be assessed against the holder of the mortgage. This undoubtedly could have been done, if the Legislature had confined the provisions of the Act to mortgages thereafter made; but it is beyond the power of the Legislature to change existing contracts between the parties to the extent pointed out. Many mortgages contain a provision that the mortgagor shall pay all the taxes assessed on the land. By the Act the Legislature attempts, in violation of such contracts, to divide the tax, and compel the payment of a part of it by the mortgagee, which by section 35 of the Act may be compelled by seizure of his personal property. That section provides:

"If any person shall neglect or refuse to pay any tax assessed to him, or upon any mortgage or other obligation taxed as an interest in lands owned by such person, as provided by this Act, the township treasurer shall collect the same by seizing the personal property of such person, to an amount sufficient to pay such tax, fees, and charges for subsequent sale, whenever the same may be found in the county, from which seizure no property shall be exempt." The law under which the mortgage was given did not prohibit the entering into contracts by which the mortgagor was compelled to pay the tax assessed upon the whole land. The contract in the mortgage is that the mortgagor shall pay the tax. The Legislature now provides that the amount of the mortgage shall be deducted from the value of the land, and that the mortgagees shall pay the tax on that part, and compels the payment by distress of his personal property. A bare statement of this proposition shows a violation of the Constitution, as it clearly violates the obligation of the contract.

The whole scheme of taxation of mortgages, and the collection of the taxes thereon, by the methods pointed out by this Act, are so defective that for this reason the whole Act should fail. Let us take a few examples of the practical workings of the scheme. The mortgage interest is to be assessed in the taxing district where the land is situated. In case the mortgage covers lands in more than one taxing district, which is frequently the case, the law provides as to future mortgages, when this is shown to be the case, that they shall not be entitled to record unless there be appended a statement showing the proportionate amount to be assessed as an interest on each parcel in the different assessing districts. There is no sufficient provision in regard to existing mortgages for ascertaining these facts. The only provision relating to them is that "it shall be the duty of the holder of any such mortgage . . . to file with the supervisor or assessing officer of the township or assessing district in which the land or real property affected thereby is situate, before the 10th day of April of each year a written statement, under oath, of all his estate situate in such township or assessing district, liable to assessment and taxation under the provisions of this Act; otherwise, a written statement of the mortgagee's interest of any such real estate may be filed with the supervisor by the mortgagor or owner of the fee." In other words, as to existing mortgages the only means the assess-

ing officer has in ascertaining the value of the mortgage interest in each parcel, when situate in separate assessing districts, are these statements of the mortgagor or mortgagee. If they are both nonresidents, as the case often happens to be, and the mortgage is upon real property in different assessing districts, there is no way pointed out, except as above stated, to ascertain the facts; and, if the parties are not accessible then no means is given to ascertain the facts. Let us suppose the case of a mortgage given by a resident of Detroit, or by an owner residing out of the state, upon lands in Oscoda and Roscommon counties, in the lower peninsula, and Chippewa county, in the upper peninsula. The supervisors in Oscoda and Roscommon counties enter the land for assessment upon their respective rolls, and then find it incumbered by a mortgage covering lands in the other two counties, and they attempt to apportion the mortgage upon the several parcels of land in all the counties according to their respective values. How can it be done? The land is assessed, "Owner unknown." The mortgagee is a nonresident. Neither can be reached. Must a supervisor ascertain the facts and apportion? And, if the facts cannot be found, how shall he apportion? This is one of the many problems which the law, in its crude state, presents.

Again, in the matter of review under this statute. If the mortgagee does not appear before the board of review, he will be barred from contesting the amount of his tax in any court, as he will have an opportunity to appear before that body, and such an appearance or opportunity for an appearance would be regarded as his day in court upon the question of the amount of his assessment. Mortgagees must therefore be on the watch in every assessing district where their mortgages may be assessed,—and a mortgage may be assessed in every assessing district where any of the land lies covered by it,—or suffer the consequences of an over assessment or overvaluation by each assessing officer on the one mortgage. Take the case of the savings banks and insurance companies situate in Detroit, all of which are organized under the laws of this state. They own nearly $14,000,000 of real-estate mortgages held by them as security to depositors in banks and policyholders in insurance companies. Many of these mortgages cover more than one piece of land, and presumably lands which are situated in two or more taxing districts are covered by the same mortgage. These mortgages are upon lands in different parts of the state. The assessing officers not having the values at hand by which they can apportion the mortgage according to the value of each parcel of land, each assessing officer may assess the mortgage in each district according to his own view as to the proportion which it bears to the whole land. Must the bank or insurance company, in order to prevent an overvaluation in each district, appear before the board of review, or in default thereof be held to the amount assessed against the mortgage in each district? The law does not define how these matters may be arranged. Many other defects could be pointed out, and the imperfections of the law shown. These defects may not prove insurmountable barriers to a valid assessment, but I have cited them to show the difficulties of carrying the law into effect.

Upon the questions which have not been discussed by my Brother Grant or myself, I concur fully in the views of my Brother Montgomery. I am of the opinion, however, that the writ of mandamus should be denied.

IDAHO SUPREME COURT.

LATAH COUNTY, *Respt.*,
v.
E. G. PETERSON, *Appt.*

(.....Idaho.....)

Condemnation of land for a private road to be laid out upon the application of a particular individual and paid for and kept in repair by him is for a public purpose where the road is in fact for public use by all who desire to use it.

(June 6, 1892.)

APPEAL by defendant from a judgment of the District Court for Latah County in favor of plaintiff in a proceeding instituted to

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NOTE.—*Constitutionality of condemnation proceedings to establish a private road.*

The decisions on this subject are in much apparent conflict which is to some extent real. Many cases have decided that the establishment of a private way by condemnation proceedings is unconstitutional although just compensation is provided where the road is for individual or private use alone, as such a taking of land is not for a public use. Nesbitt v. Trumbo, 39 Ill. 110, 89 Am. Dec. 290; Osborn v. Hart, 24 Wis. 89, 1 Am. Rep. 161; Taylor v. Porter, 4 Hill, 140; Witham v. Osburn, 4 Or. 318, 18 Am. Rep. 287; Logan v. Stogdale, 8 L. R. A. 58, 123 Ind. 372; Sadler v. Langham, 34 Ala. 311; Crear v. Crossly, 40 Ill. 175; Johnson v. Clayton County, 61 Iowa, 89; Stewart v. Hartman, 46 Ind. 331; Clack v. White, 2 Swan, 540; Varner v. Martin, 21 W.Va. 538.

This doctrine can hardly be said to be in any dispute, but the courts do in fact divide on the question as to what use is for individual or private use alone.

Other decisions hold that a road although denominated a private road which when established becomes a way over which all who had occasion may lawfully pass is public and that the Legislature may provide for the condemnation of land therefor. Sherman v. Buick, 32 Cal. 241, 91 Am. Dec. 577; Denham v. Bristol County Comrs. 108 Mass. 205; Pocopson Road, 16 Pa. 15; *Re* Private Road in Redstone Twp. 112 Pa. 183; Hickman's Case, 4 Harr. (Del.) 530; Brewer v. Bowman, 9 Ga. 37; Robinson v. Swope, 12 Bush, 21.

In Delaware a private road is held to be a part of the system of public roads and open to the public

See also 16 L. R. A. 586; 19 L. R. A. 647; 20 L. R. A. 241, 662; 22 L. R. A. 496,

condemn land for a right of way in which defendant was awarded $100 damages for land taken from him. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Freund & Loughary,** for appellant:

Section 933 of the Revised Statutes of Idaho is unconstitutional for the reason that it attempts to authorize the taking of private property for a private use or benefit.

Cooley, Const. Lim. 3d ed. *530; *Re Albany Street*, 11 Wend. 149, 25 Am. Dec. 618; *Gillan* v. *Hutchinson*, 16 Cal. 154.

The taking of private property for a private road is not conferred by the right of eminent domain, hence when the Legislature undertakes to authorize such appropriation of private property, it is an attempted delegation of power not possessed by the Legislature nor the people in legislative capacity, and is unconstitutional.

See Cooley, Const. Lim. 3d ed. p. 530; Smith, Const. Stat. 2d ed. p. 477; 7 Lawson, Rights, Rem. & Pr. p. 6114; *Taylor* v. *Porter*, 4 Hill, 140, 40 Am. Dec. 274; *Witham* v. *Osburn*, 4 Or. 318, 18 Am. Rep. 287; *Dickey* v. *Tennison*, 27 Mo. 373; *Logan* v. *Stogdale*, 8 L. R. A. 58, 123 Ind. 372; *Com.* v. *Cambridge*, 7 Mass. 158; *Nesbitt* v. *Trumbo*, 39 Ill. 110, 89 Am. Dec. 290; *Crear* v. *Crossley*, 40 Ill. 175; *Stewart* v. *Hartman*, 46 Ind. 331; *Blackman* v. *Halves*, 72 Ind. 515; *Wild* v. *Deig*, 43 Ind. 455, 13 Am. Rep. 399; *Re Eureka Basin W. & Mfg. Co.* 96 N. Y. 48; *Osborn* v. *Hart*, 24 Wis. 89, 1 Am. Rep. 161; *Bankhead* v. *Brown*, 25 Iowa, 540; *Embury* v. *Conner*, 3 N. Y. 511; *Baker* v. *Braman*, 6 Hill, 47, 40 Am. Dec. 387; *Sadler* v. *Langham*, 34 Ala. 311.

When the public is only incidentally benefited, the right of eminent domain does not obtain.

Cooley, Const. Lim. 3d ed. *530, 531; 7 Lawson, Rights, Rem. & Pr. p. 6113; *Re Eureka Basin W. & Mfg. Co.* 96 N. Y. 42;

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although made on a private petition. Hickman's Case, *supra*.

In New Hampshire all ways laid out by the selectmen are held to be public although they are made for the particular accommodation and at the expense of individuals and it is also held that the town is under obligation to repair them so far as the public accommodation requires. Metcalf v. Bingham, 3 N. H. 459; Proctor v. Andover, 42 N. H. 348.

In Massachusetts a "private way for the use of one or more of the inhabitants" of a town, which the statute authorizes to be laid out by selectmen, is a public road. Denham v. Bristol County Comrs. 108 Mass. 205.

In Vermont a pent road is also a public highway. Whitingham v. Bowen, 22 Vt. 317.

In Ohio a township road is for the public use and consequently land may be condemned therefor. Ferris v. Bramble, 5 Ohio St. 109; Shaver v. Starrett, 5 Ohio St. 495.

In New Jersey it is said that a private road is public in its character and use, and that every citizen has a right to travel over it. Allen v. Stevens, 29 N. J. L. 504; Perrine v. Farr, 22 N. J. L. 356.

In Alabama, although a statute authorizing the condemnation in such a case had been enforced in Long v. Commissioners' Ct., 18 Ala. 482, without raising the constitutional question, it was held in a later case that as there was nothing in the statute that authorized public travel on such a road, the taking by condemnation was unconstitutional. Sadler v. Langham, 34 Ala. 311.

But in Steele v. County Comrs., 83 Ala. 304, it was held that, under the new Alabama Constitution of 1861, providing that "the right of way may be secured by law to persons and corporations" over the land of other persons and corporations, a statute authorizing condemnation for a private road was constitutional.

In Witham v. Osburn, 4 Or. 318, 18 Am. Rep. 287, as in many of the other cases, in which the road is held to be private, it is said that the statute contains no provision that the road shall be public or that they may be kept open if the individual at whose instance they are established seeks to close them.

In Dickey v. Tennison, 27 Mo. 373, a private act to establish a "neighborhood road" was held unconstitutional on the ground that it was not for a public use where the petitioner was required to pay all expenses including the fees of the commissioners. The court, however, distinguished this from cases under the general statute to enable persons to secure a right of way which contemplated only a recognition to the right independent of statute to a way of necessity.

A private road to a tract of enclosed land on which the owner does not reside is merely for a private use and condemnation therefor is not constitutional. Varner v. Martin, 21 W. Va. 534.

In Pells v. Boswell, 8 Ont. Rep. 689, 9 Am. & Eng. Corp. Cas. 358, the court decides that the opening of a street merely in the interest of two individuals who objected to pay what the owner demands for the coveted strip of land may be enjoined.

In Com. v. Sawin, 2 Pick. 547, it is decided that a highway cannot be laid out in consideration of the bond of an individual to pay part of the expense, if the common convenience is not sufficient to warrant it, wholly at the expense of the town, as this would not be taking the land solely for public use.

Outlet for communication with public.

In Iowa the right to condemn land for a private road, although laid out to reach the residence of a citizen, is denied even where condemnation for a public road would be proper. The decision is based in part on the fact that the public is not bound to work the road and that there is nothing to prevent the petitioner from closing it up, thus showing that the road is private. Bankhead v. Brown, 25 Iowa, 540.

On the other hand, it is held that a citizen cannot defeat a proceeding to lay out a public road to reach his residence on the ground that it is only a private road, as a road to reach the residence of a citizen and prevent his isolation is for a public use. Johnson v. Clayton County, 61 Iowa, 89.

In Wild v. Deig, 43 Ind. 455, 13 Am. Rep. 399, it is held that a private road is not public so as to justify a condemnation of land therefor on the ground that it is a branch of the highway and part of the system and that the power has long been exercised and undisputed and that the public is interested in securing to every citizen a way to and from his land where the private road cannot be used by the public, but that a public road should be laid out instead if any road is necessary.

The fact that a freeholder is shut off from a highway and his land and residence entirely surrounded by that of other persons, does not prevent a statute authorizing the condemnation of a private road across the land of another person from being unconstitutional. Logan v. Stogdale, 8 L. R. A. 58, 123 Ind. 372.

But the doctrine of the above cases is in conflict with that announced in other cases following.

Lewis, Em. Dom. § 206; *Com.* v. *Cambridge*, 7 Mass. 166.

It is not the policy of the governmental power of this state to extend the right of eminent domain to answer the whim or personal and pecuniary motive and interest of every individual or of individuals for personal gain or even personal convenience.

Coster v. *Tide Water Co.* 18 N. J. Eq. 54; 2 Bouvier, Law Dict. p. 488; Tiedeman, Pol. Powers, p. 382.

Messrs. **Forney & Tillinghast** and **Mitchell & West**, for respondent:

Although the Legislature has miscalled these roads "private roads" so as to classify them, still they are not private roads but are for the public use.

Sherman v. *Buick*, 32 Cal. 242, 91 Am. Dec. 577; *Monterey County* v. *Cushing*, 83 Cal. 507.

Section 933 was adopted directly from the California Code, and under its provisions a very large number of this class of roads have been opened and are now used. In accordance with the familiar rule that in adopting the laws of any state we also adopt the decisions upon these laws, these decisions in California must be binding upon us.

See also *Bell* v. *Prouty*, 43 Vt. 279; *Whitingham* v. *Bowen*, 22 Vt. 317; *Brock* v. *Barnett*, 57 Vt. 172; *Harvey* v. *Thomas*, 10 Watts, 63, 36 Am. Dec. 141.

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

On or before the 15th day of July, 1890, a petition in due form was presented to the board of county commissioners of Latah county, praying for the establishment of a private or by road over the lands belonging to the defendant, E. G. Peterson, described in plaintiff's complaint. On said 15th day of July the board of county commissioners appointed three viewers, and directed that said viewers should meet on the 5th day of September, 1890, and view and survey and mark out said road, and estimate the damages accruing to nonconsent-

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Thus, in Kentucky a passway to enable a citizen to attend courts, elections, churches or mills, or to reach an established highway, is regarded as for a public purpose. Robinson v. Swope, 12 Bush, 21.

So in Brewer v. Bowman, 9 Ga. 37, it is said that the public have an interest in permitting the owner of land to have an outlet to a public road so that he can get out to elections, and to perform jury duty, road duty, militia or patrol duty, give evidence in court and carry produce of his land to market. In this case, however, the statute authorizing condemnation of land for a private road was held unconstitutional because no provision was made for compensation.

The same doctrine seems to be implied in the decisions below cited from North Carolina, Michigan, and Pennsylvania.

Necessity of road.

In Pennsylvania the constitutionality of statutes authorizing the condemnation of land for a private road does not seem to have been directly contested and passed upon but the decisions limit the right to a road which is strictly necessary. Pocopson Road, 16 Pa. 15; *Re* Private Road in Redstone Twp. 112 Pa. 183.

In People v. Richards, 38 Mich. 214, it is held that mere convenience will not justify condemnation for a private road, but that it can be had only where there is no other way of access to the lands of the applicant, and that the accommodation of lot-owners to get access to a village plat is insufficient.

So in Rundel v. Blakeslee, 47 Mich. 575, it is held that there must be an express finding that the road is necessary.

So in Colville v. Judy, 73 Mo. 651, it is held that the fact that the way sought is a "way of necessity," is a jurisdictional fact which must be set out in the petition.

In North Carolina condemnation of land for a private road which is "necessary, reasonable, and just" is also permitted, but it seems that the question of the constitutionality has not been explicitly considered. Warlick v. Lowman, 103 N. C. 122.

Thus in Burgwyn v. Lockhart, 60 N. C. 269, and Mayo v. Thigpen, 107 N. C. 63, it is held that a way is not necessary, reasonable, and just if there is another convenient outlet to a public road; and in Lea v. Johnston, 31 N. C. 15, it is held that a public road to which access may be had defeats the right although it is not so convenient as a proposed private road.

But it is decided in Caroon v. Doxey, 48 N. C. 23, that a private road cannot be obtained by condemnation to reach unimproved land which is used only as a range for cattle as the statute requires the owner to be "settled" upon the land for which an outlet is claimed.

So in Kentucky one who resides upon a tract of land which is situated upon a public highway cannot condemn a passageway over the lands of another merely for the benefit of a tract of land which is entirely surrounded by the land of other persons. Robinson v. Swope, 12 Bush, 21; Shake v. Frazier, 13 Ky. L. Rep. 825. See also Varner v. Martin, 21 W. Va. 538.

In Missouri a private road if it is a way of necessity may be condemned over another's land. Barr v. Flynn, 3 West. Rep. 777, 20 Mo. App. 383.

So in Snyder v. Warford, 11 Mo. 513, 49 Am. Dec. 94, it is said that a right of way by necessity being merely an easement, a statute authorizing the establishment of such a right over the land of another is not unconstitutional. The decision proceeds on the theory that such right of way exists independently of the statute and that the act only provides a convenient mode of locating the way.

But in Stewart v. Hartman, 46 Ind. 331, and Clack v. White, 2 Swan, 540, the doctrine that a right of way by necessity exists whenever land is entirely enclosed by that of others, and therefore that a statute authorizing the condemnation for a private road in such a case is constitutional as a mere recognition of a prior right, is denied and it is expressly held that no such way of necessity exists over a stranger's land, but that it depends upon an implied grant.

The fact that only an easement is taken for a private road does not prevent the taking from being unconstitutional as it amounts practically to taking the land. Crear v. Crossly, 40 Ill. 175.

A general review of all the authorities leads to the conclusion that condemnation of land for a so-called private road the expense of which the petitioner is required to pay in whole or in part, ought not to be held unconstitutional if the road is in fact open for the use of the public. This doctrine has evidently gained ground during the time in which the question has been in dispute, and in several states express constitutional provisions have been made in favor of the right to condemn lands for private roads, as in Alabama, art. 1, § 24; Colorado, art. 2, § 14; Illinois, art. 4, § 30; Michigan, art. 18, § 14; Missouri, art. 2, § 20; New York, art. 1, § 7, and perhaps in some other states. B. A. R.

ing land-owners. The said viewers met as directed; surveyed and marked out the road; platted and mapped the same; made their report to said board, which thereupon ordered the road overseer to tender to defendant, who was a nonconsenting land-owner, the sum of money awarded to him, which sum the defendant refused to accept. Thereupon this suit was commenced. The cause was tried before the Hon. W. G. Piper, *Judge*, and a jury. The jury assessed the damages accruing to defendant at $100. Judgment of condemnation was thereupon entered. Defendant appealed from said judgment to this court. The principal contention of the appellant is that the act of the territorial Legislature, to wit, section 933, Rev. Stat. Idaho, is unconstitutional, for the reason that it attempts to take private property for private use. It is a general rule that the right of eminent domain does not imply a right in the sovereign power to take the property of one citizen, and transfer it to another, even for a full compensation, where the public interest will be in no way promoted by such transfer. This doctrine, in the absence of any constitutional provision, is established by a long line of decisions not necessary here to enumerate. Among other decisions, the appellant cites *Osborn* v. *Hart*, 24 Wis. 89, 1 Am. Rep. 161. The statute of Wisconsin authorized the laying out of private roads upon the application of any freeholder, such applicant to pay all damages and costs. To this was added by the same statute the further provision that "such private road, when so laid out, shall be for the use of the applicant, his heirs or assigns, . . . nor shall the owner of the land through which such roads shall be laid out be permitted to use the same as a road, unless he shall have signified his intention of so doing, . . . before the damages were ascertained." The court held in above case that, inasmuch as the public could not use such road, and had no interest in it, and the owner of the land could not use it, the law could not be sustained. It will be noticed that our Statute (sec. 933 *et seq.*) contains no such exclusive provisions, but a private road, when opened, can be used for any purpose to which it is adapted by the general public and by any individual thereof. In the same case the court says: "In some of the states it has been held that these roads, although termed 'private,' yet were in fact public, roads, so far as the right to use them was concerned, and upon this ground the power of the Legislature to authorize them to be laid out has been sustained." *Osborn* v. *Hart*, 24 Wis. 91, 1 Am. Rep. 161; *Perrine* v. *Farr*, 22 N. J. L. 356; *Re Hickman*, 4 Harr. (Del.) 580. In case of *Witham* v. *Osburn*, 4 Or. 318, 18 Am. Rep. 287, also cited by appellant, the court holds that private property cannot be taken for exclusively private use, whether compensation be made or not; but the court also holds that the Legislature may provide for the establishment of private roads, or "byways," as they are termed in our statute, by providing that they shall be public instead of private roads, and that they may be used by the public. It will be noticed that the decree of the court, in the case at bar, directs that the said highway shall be opened for the use and benefit of the said P. N. Lunstrum, the applicant, and the general public, so that the decree itself provides that it shall be a public as well as a private road.

In *Nesbitt* v. *Trumbo*, 39 Ill. 110, 89 Am. Dec. 290, and *Crear* v. *Crossly*, 40 Ill. 175, the court holds that section 93 of the Act of 1861 (Ill. Stat. p. 263) is unconstitutional, for the reason that it transfers the use of the land condemned to the person for whose use the road was established, his heirs and assigns, forever. The owner is deprived of its use, and the other acquires its use perpetually. For all practical purposes, this amounts to a transfer of the land. It will be seen that this statute is very different from section 933, Idaho Rev. Stat. The owner of the soil and the general public has as much interest in and the right to the use of such private road, as fully and completely, as the person upon whose application it is opened; and the effect would be that, if the use of the land for such purpose should cease, it would revert to the owner of the soil. In the two last-named cases *Mr. Justice* Lawrence, one of the most eminent jurists of his time, dissents from the opinion of the court, and giving his reasons, in *Crear* v. *Crossly*, he says: "If the government, after making a grant, owns all the surrounding lands, the grantee takes a right of way over the surrounding land to the public highway as an incident to his grant; and if the government retains the title to a tract of land, having sold the land surrounding it on every side, a right of way to a public road is reserved by implication. This right of way continues in both cases, both in favor of and against subsequent grantees, for it is a right created by operation of law, and from necessity, to enable owners to enjoy their lands. I consider our statute in regard to private roads as simply based on this common-law right, and regulating its exercise. The right existed before the Act was passed, by the established rules of the common law in regard to the construction of grants." These reasons apply with equal force to our own statute, and in our opinion would be sufficient reason for upholding it, were there no other authority. There is abundant authority, however, for sustaining the statute in the decisions of the courts. Where the road, though laid out upon the application and paid for and kept in repair by a particular individual, who is especially accommodated thereby, is, in fact, a public road, and for the use of all who may desire to use it, then it is regarded as accomplishing a public purpose for which land may be condemned. Lewis, Em. Dom. § 167; *Shaver* v. *Starrett*, 4 Ohio St. 494; *Ferris* v. *Bramble*, 5 Ohio St. 109; *Denham* v. *Bristol County Comrs.* 108 Mass. 202; *Sherman* v. *Buick*, 32 Cal. 241, 91 Am. Dec. 577, and cases there cited; *Monterey County* v. *Cushing*, 83 Cal. 507; *Brock* v. *Barnet*, 57 Vt. 172.

The Constitution (art. 1, § 14) substantially recognizes the right of the Legislature to provide for laying out private roads or byways, as follows: "The necessary use of lands for reservoirs or storage basins, for the purposes of irrigation, or for rights of way for the construction of canals, ditches, flumes, or pipes, . . . or any other use necessary to the complete development of the material resources of the state, . . . is hereby declared to be a

public use." This provision is certainly sufficient to authorize the Legislature to provide for the establishment of byways, or pentways, as they are sometimes called, or private roads, which are for the use of anyone who may desire to use them. The necessity for such private roads is apparent when it is stated that it would be impossible to improve very many valuable tracts of land in this state which are not reached by public highways, unless this power existed. Such roads are therefore necessary to the complete development of the material resources of the state. We are therefore of the opinion that section 933, Idaho Rev. Stat., is constitutional.

The appellant complains that the decree of the court authorizes the condemnation of a strip of land only 30 feet wide instead of 50 feet, which is required for the width of highways. It would seem that the person whose land is condemned cannot be heard to complain that the court did not take 50 feet of land instead of 30 feet. It is hardly consistent with his position, since he appears here complaining that any was taken

The appellant also makes the point that the complaint does not state facts sufficient to constitute a cause of action. We think this point cannot be sustained. The ultimate facts only are necessary to be alleged, and these are sufficiently set forth. The respondent in this case complains that the court below rendered a judgment in form against P. N. Lunstrum for the amount of the damages and one half the costs, while it is undoubtedly true that no judgment can be rendered against one not a party to the suit. As neither the respondent, the county of Latah, nor Lunstrum, nor Peterson has taken any appeal from this part of the judgment, it is not before this court. The condemnation is made substantially upon condition that said Lunstrum shall pay the defendant, Peterson, the damages and one half the costs, (into court,) and, upon such payment or tender, the decree can be enforced.

Judgment affirmed.

Sullivan, *Ch. J.*, and **Huston,** *J.*, concur.

KANSAS SUPREME COURT.

UNION STOVE & MACHINE WORKS,
Plff. in Err.,
v.
J. D. CASWELL, *et al.*

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

***Where property is sold and the purchaser agrees to pay the consideration therefor, or a portion thereof, to a creditor of the vendor,** the purchaser, as between himself and the vendor, becomes the principal debtor, and the vendor only a surety; and if the creditor afterwards, and because of this arrangement, accepts the purchaser as a debtor, he must accept him in the same manner, and as his principal debtor, with the vendor only as a surety; and if the creditor then, by a valid

*Head note by VALENTINE, *J.*

NOTE.—*Release of mortgagor as surety by mortgagee's dealing with vendee who has assumed the mortgage.*

The above case in denying that a mortgagee can hold both the mortgagor and a grantee of the latter as principal debtor is in plain conflict with the courts of Iowa and Connecticut and also with *dicta* at least of the courts of Michigan and Missouri.

In Iowa the decisions are explicit to the effect that until a mortgagee in some way recognize the mortgagor as surety only, he may treat both mortgagor and his vendee, who has assumed the debts, as principals. Corbett v. Waterman, 11 Iowa, 87; Massie v. Mann, 17 Iowa, 134, James v. Day, 37 Iowa, 164.

In Crawford v. Edwards, 33 Mich. 354, the court says that a mortgagee may treat both the mortgagor and vendee of the latter, who assumes the debt as principal debtors for the purpose of a personal decree against them; but in this case a personal decree was sought only against the vendee.

In Connecticut Mut. L. Ins. Co. v. Mayer, 8 Mo. App. 18, the court says that as to the mortgagee both the mortgagor and his vendee who assumes the debt may be principal debtors or otherwise. The actual point decided is that the consent of the mortgagee that grantees of the mortgagor, who are insolvent, may remove machinery from the premises, reducing its value so as to leave the security insufficient, does not release the grantor.

In Connecticut the assumption of a mortgage debt by a vendee of the mortgagor makes him a principal and the vendee a mere surety only as between themselves and not as to the mortgagee, or his assignee, although such assignee deals with the the vendee as a principal debtor by taking an assignment of the mortgage for the latter's accommodation in order to give him further time for payment but without making any binding contract for extension. Boardman v. Larrabee, 51 Conn. 39.

The relation between mortgagor and mortgagee is not changed by assumption of the mortgage debt by a vendee of the mortgagor and a new mortgage of the lots purchased by him to secure it. Waters v. Hubbard, 44 Conn. 340.

On the other hand, the courts in New York and Maryland, and a circuit court of the United States, hold that a mortgagor is entitled to be treated as a surety and released as such when the mortgagee has treated the mortgagor's vendee, who has assumed the mortgage, as the principal debtor by making a new contract with him. Thus they hold that the extension of time to the vendee of a mortgagor who has assumed the mortgage debt without the mortgagor's consent releases the latter. Union Mut. L. Ins. Co. v. Hanford, 27 Fed. Rep. 588; Fish v. Hayward, 28 Hun, 456; Calvo v. Davies, 73 N. Y. 211; Paine v. Jones, 76 N. Y. 274; Murray v. Marshall, 94 N. Y. 611; Spencer v. Spencer, 95 N. Y. 353; George v. Andrews, 60 Md. 26, 45 Am. Rep. 706.

But on the contrary in Iowa, in accordance with the doctrine there adopted, such an extension of time to the vendee of a mortgagor without the latter's consent will not release him. Corbett v. Waterman, 11 Iowa, 87.

So in Iowa the release of a part of the mortgaged property which has been bought by one who assumes the debt will not discharge the mortgagor although he does not consent to the release. James v. Day, 37 Iowa, 164. B. A. R.

agreement with the purchaser, and without the consent of the vendor, extends the time for the payment of the debt, he will release and discharge the vendor.

(May 7, 1892.)

ERROR to the District Court for Reno County to review a judgment refusing to subject the lands of defendant Caswell to the lien of a judgment in favor of the defendant, Union Stove & Machine Works, in an action by Smedley Darlington, to foreclose a mortgage upon Caswell's land in which the corporation was made defendant, and set up a claim for independent relief under its alleged judgment. *Affirmed.*

The facts are stated in the opinion.

Mr. **R. F. McGrew,** for plaintiff in error:

The evidence does not state that the Fisher chattel mortgage was for the Caswell debt. The demurrer should have been sustained.

See 1 Parsons, Cont. 7th ed. pp. 217–222, and *notes;* Story, Prom. Notes, 6th ed. §§ 105, 404, 408, 438; *Plano Mfg. Co.* v. *Burrows*, 40 Kan. 361.

There must not only be an agreement of a second party to pay a debt of the first party to a third party, but there must be an agreement of all parties upon a sufficient consideration to accept the first party as paymaster exclusively, and also to release the second party.

See Parsons, Cont. 7th ed. pp. 217–222; *Plano Mfg. Co.* v. *Burrows*, *supra.*

There might be knowledge of and acceptance of the several promises of Eastland and Fisher, and without an agreement to release Caswell, there would be no satisfaction of the judgment as to Caswell until fully paid by either of the obligors.

Plano Mfg. Co. v. *Burrows*, *supra.*

Messrs. **Charles H. Apt** and **Bowman & Bucher,** for defendants in error:

Payment cannot be proved under a general denial.

St. Louis, Ft. S. & W. R. Co. v. *Grove*, 39 Kan. 731.

Where payment is alleged, proof thereof is admissible and the burden of proving the same is on the party pleading it.

Guttermann v. *Schroeder*, 40 Kan. 507.

When the creditor accepts the new debtor, such new debtor becomes the principal and the former debtor the surety.

Center v. *McQuesten*, 24 Kan. 480; *Plano Mfg. Co.* v. *Burrows*, 40 Kan. 361.

This extension given the principal for value without the consent of the security released the surety.

Rose v. *Williams*, 5 Kan. 483; *Hubbard* v. *Ogden*, 22 Kan. 363.

The pursuing of Fisher on his chattel mortgage and procuring full indemnity for the claim of the Union Stove & Machine Works is conclusive evidence of the release of Caswell.

Walker v. *Crosby*, 38 Minn. 34.

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

This was originally an ordinary action upon a promissory note and a real-estate mortgage, brought in the district court of Harvey county by Smedley Darlington, the payee and mortgagee, against John D. Caswell and Sarah J. Caswell, husband and wife, the payors and mortgagors, to recover the sum of $866.50 and interest. The plaintiff also made the Union Stove & Machine Works, a corporation of Leavenworth, Kan., a party defendant. As the plaintiff's claim seems to have been admitted by all the parties, and no claim of error is assigned as against him, it will not be necessary to again mention his name. The Union Stove & Machine Works answered, setting forth, among other things, a cause of action against John D. Caswell for $807.82, and to enforce an alleged lien upon the real estate in question, subject, however, to the plaintiff's lien, which cause of action so set forth by the Union Stove & Machine Works was founded upon an alleged judgment rendered in its favor and against Caswell on December 8, 1886, in the district court of Pratt county, for the sum of $963.99, and a transcript thereof filed in the office of the clerk of the district court of Harvey county on December 20, 1886, upon which judgment a payment was admitted to have been made of $214. Among other allegations contained in this answer are the following: "That there was paid on said judgment the sum of $214 on the 8th day of June, 1887, that there is still due and unpaid on said judgment the sum of $807.82 after allowing all credits on the same." The defendants, the Caswells, replied to this answer, admitting the judgment, but alleging that it had been paid and satisfied in the following manner, to wit: "Said John D. Caswell and Sarah J. Caswell further allege that since the rendition of said judgment, and on December 12, 1886, one William Fisher, being then and there indebted to said Caswell in a sum greater than the amount of said judgment, assumed the payment of the same, and the said Union Stove & Machine Works took and accepted the said William Fisher therefor in full payment and satisfaction of said judgment, taking from the said William Fisher a note for the same, secured by both real and chattel mortgage, and that said Union Stove & Machine Works has since foreclosed said mortgage by an action of replevin in the district court of Pratt county, Kansas. That by reason of the premises aforesaid said judgment has been fully satisfied, and said Caswells released and relieved from the payment of the same." The defendants, the Caswells, with leave of court, filed the following amendment to their reply, to wit: "That said indebtedness of said William Fisher to said J. D. Caswell arose in this manner: That on or about November 27, 1886, said J. D. Caswell sold and conveyed his stock of merchandise and business house and lot in Saratoga, Pratt county, Kansas, to one William Eastland, who, as a part consideration therefor, assumed and promised to pay a note of the said J. D. Caswell to the Union Stove & Machine Works, which note was secured by a mortgage upon the business house and lot aforesaid, and also by a chattel mortgage upon the heating stoves of the stock of merchandise aforesaid; that afterwards, and on or about December 12, 1886, said William Eastland sold and conveyed said stock of merchandise to said William Fisher, and said business house and lot to Bertha Fisher, the wife of said William Fisher, subject, however, to the in-

cumbrances placed on the same by the said J. D. Caswell to the Union Stove and Machine Works as aforesaid; and as a part of the consideration for the sale and transfer of said business house and lot and the stock of merchandise the said William Fisher assumed the obligation of the said William Eastland as aforesaid, and promised and agreed to pay the indebtedness of the said J. D. Caswell to said Union Stove & Machine Works as aforesaid." The Union Stove & Machine Works replied to the Caswells' reply by filing a general denial. Afterwards the case was taken on a change of venue to the district court of Reno county, where it was tried upon the foregoing pleadings, and, as between the Union Stove & Machine Works and the Caswells, before the court and a jury, and the jury rendered a general verdict in favor of the Caswells and against the Union Stove & Machine Works, and also made certain special findings of fact, which verdict and findings, omitting formal parts, read as follows: Verdict: "We, the jury duly empaneled and sworn in the above-entitled case, do upon our oaths find for the defendant J. D. Caswell." Special findings: "(1) Did the Union Stove & Machine Works ever agree to release the defendant Caswell from the payment of said judgment, and take one Fisher for the payment of the same? Answer. Yes, they did, through their agent, McGrew. (2) If you find that the Union Stove & Machine Works accepted Fisher as paymaster of the judgment in question, and released defendant Caswell from the payment of the same, state what witness or witnesses testified to that fact. *A.* Note and mortgage. (3) Was it not expressly agreed between the Union Stove & Machine Works Company and Fisher, at the time Fisher gave the chattel mortgage to the Union Stove & Machine Works Company, that it was given as additional security for the Caswell judgment, and that Caswell was not to be released from the payment of said judgment? *A.* It was not. (4) If you answer the above question in the negative, then state fully what the agreement between Fisher and the Union Stove & Machine Works was at the time said mortgage was given. *A.* Note, mortgage, and extension of time." The court rendered judgment in accordance with the general verdict, and the Union Stove & Machine Works, as plaintiff in error, brings the case to this court, making the Caswells the defendants in error.

The first alleged error is the ruling of the court permitting the Caswells to introduce evidence tending to prove payment and satisfaction of the aforesaid judgment. There was certainly no error in this, for although the Caswells admitted the judgment and did not specifically deny that anything was due thereon, yet they substantially alleged that the whole of it had been paid and was satisfied; and this, under the facts of the case, was better than a denial.

The next alleged error is that the court permitted certain papers supposed to constitute copies of certain deeds, mortgages, etc., to be introduced in evidence. There does not appear to be any error in this. The originals of the papers were not within the custody or the control of the Caswells, and the copies introduced in evidence seem to have been properly certified copies, and they were introduced in evidence under section 372 of the Civil Code. *Hammerslough* v. *Hackett*, 30 Kan. 58.

The next alleged error is the overruling of the demurrer of the Union Stove & Machine Works to the evidence of the defendants Caswell. The substantial question presented by the demurrer to the evidence was whether the evidence of the Caswells proved their alleged defense that the aforesaid judgment had been paid and satisfied. It is not necessary for us to consider this question, for, after the overruling of the demurrer, much additional evidence was introduced, and the Union Stove & Machine Works again by a motion for a new trial raised the broader question whether, upon the whole of the evidence introduced on the trial, the Caswells' defense was proved or not. We shall consider only this broader question raised by the motion for the new trial. Taking all the evidence together, and it proves substantially, among others, the following facts: John D. Caswell was a retail dealer in hardware, stoves, tinware, etc., at Saratoga, in Pratt county; but he owed the Union Stove & Machine Works a large amount of debt, for which his real estate and some of his personal property were mortgaged, and for which debt the aforesaid judgment was rendered in that county. The judgment was also for the sale of the mortgaged real estate. Caswell sold this property and business to William Eastland, and Eastland assumed and agreed to pay Caswell's debt to the Union Stove & Machine Works. Afterwards Eastland sold the property and business to William Fisher, and Fisher assumed and agreed to pay the aforesaid debt. After the Union Stove & Machine Works procured an execution to be issued upon said judgment, and R. F. McGrew, an attorney and agent of the Union Stove & Machine Works, with Mr. A. Magruder, the undersheriff of the county, who was holding the execution, went to the place of business of Fisher to levy upon the property, but finally Fisher gave his negotiable promissory note, dated December 17, 1886, to the Union Stove & Machine Works for $975, due in ten days, and also executed a chattel mortgage to the Union Stove & Machine Works upon his entire stock of hardware, stoves, etc., to secure the payment of the note, and no levy was made, and the execution, by order of McGrew, was returned to the court. This mortgage included the property which had already been mortgaged by Caswell to the Union Stove & Machine Works, and much other property. In all these transactions the Union Stove & Machine Works was represented by McGrew. Three days after the execution of this note and mortgage, to wit, on December 20, 1886, the Union Stove & Machine Works, by their agent, McGrew, filed a transcript of the judgment in the office of the clerk of the district court of Harvey county in accordance with the provisions of section 419 of the Civil Code, for the purpose that the judgment should become a lien upon all Caswell's real estate in Harvey county, and so that the Union Stove & Machine Works could enforce the judgment against Caswell's real estate in that county. This note and mortgage were given, according to the

testimony of McGrew and Fisher, as additional security for the debt owing by Caswell to the Union Stove & Machine Works, and evidenced by the judgment. Afterwards the Union Stove & Machine Works replevied the mortgaged property from Fisher. Fisher gave a redelivery bond, and retained the property, and carried on his business for some time, but afterwards judgment was rendered against him in the replevin action for a return of the property or its value, to wit, $975, and costs, and he delivered the property to the Union Stove & Machine Works. Fisher testified that the replevied property was worth about $1,500, and his evidence upon this subject was not contradicted by the testimony of any other witness. There is nothing in the case further than the above showing that the judgment of the Union Stove & Machine Works against Caswell has ever been fully paid or satisfied, and nothing further than the above showing that the Union Stove & Machine Works ever released or agreed to release Caswell, or ever took or agreed to take Fisher as their debtor in the place of Caswell; but the evidence, so far as it goes, shows affirmatively that the note and mortgage taken by the Union Stove & Machine Works from Fisher were taken as additional security for the debt owing by Caswell to the Union Stove & Machine Works, and that the Union Stove & Machine Works did not intend to release either the judgment or Caswell.

Under the evidence introduced in this case it is claimed by the Union Stove & Machine Works that the foregoing judgment in its favor and against the Caswells has never been paid or satisfied or released, but is still in full force and effect; while, on the other side, it is claimed—*first*, that under the facts of this case such judgment has been fully satisfied by payment, but that, if it has not been satisfied in that manner, then, *second*, that it has been satisfied by a release and discharge in the following manner, to wit, that by the transactions had between Caswell, Eastland, and Fisher, and as between themselves, Fisher became the principal debtor and Caswell became only a surety, and that by the recognition on the part of the Union Stove & Machine Works of Fisher's liability to it for Caswell's debt, the Union Stove & Machine Works made Fisher its principal debtor, and converted Caswell into only a surety, and that by accepting the foregoing note and chattel mortgage from Fisher to itself it extended the time for the payment of the debt from Caswell to itself; and thereby, under the rules of law with respect to principal debtors and sureties, Caswell, who was then only a surety, was released from the payment of the debt, and thereby the judgment was also released, discharged, and satisfied, so far as it affected Caswell or his property. Within these antagonistic claims on the part of these contending parties are involved many questions of law with respect to which the authorities are diverse and conflicting, while with respect to others of the questions involved in the case the authorities are harmonious. Some of the questions involved in this case have already been settled and determined by this court, while others have not. In all cases where two persons have made a contract for the benefit of a third, or where an owner of property has sold it upon an agreement that the purchaser should pay the consideration therefor, or a part thereof, to a creditor of the vendor, some of the questions have been settled by this court. *Piano Mfg. Co.* v. *Burrows*, 40 Kan. 361 *et seq.*, and cases there cited; *Mumper* v. *Kelley*, 43 Kan. 262. Also some of the questions with respect to the rights of sureties where the creditor and principal debtor have extended the time for the payment of the debt have also been settled by this court. *Rose* v. *Williams*, 5 Kan. 483; *Hubbard* v. *Ogden*, 22 Kan. 363. But there are still many other questions remaining to be settled. All, or very nearly all, the authorities agree that where a vendor of property and the purchaser agree that the consideration therefor, or a part thereof, shall be paid to the creditor of the vendor, the purchaser, as between these two parties, will become the principal debtor, and the vendor be transformed into a mere surety. But no transaction or agreement of this kind or of any other kind had between the vendor and the purchaser alone can affect or abridge any of the rights of the debtor. He may stand upon his absolute legal rights if he chooses to do so, looking only to the vendor as his creditor. With his consent, however, his rights may be greatly affected. With his consent the original debt may be extinguished absolutely, and the purchaser alone become liable to him, or the three parties together may modify their rights in any manner, and to any extent as they may agree. With the creditor's consent the vendor, who was the original debtor, may undoubtedly be made only a surety, and the purchaser be made the principal debtor, but of course it takes his consent either expressly or impliedly. One of the questions then arising is as follows: Can the creditor recognize the purchaser's liability to him at all without at the same time recognizing it as it really and in fact exists at the time as between the vendor and the purchaser? We would think not, and we would think the weight of authority sustains this view. *George* v. *Andrews*, 60 Md. 26, 45 Am. Rep. 706; *Calvo* v. *Davies*, 73 N. Y. 211; *Paine* v. *Jones*, 76 N. Y. 274; *Murray* v. *Marshall*, 94 N. Y. 611; *Spencer* v. *Spencer*, 95 N. Y. 353; *Fish* v. *Hayward*, 28 Hun, 456; *Metz* v. *Todd*, 36 Mich. 473; *Union Mut. L. Ins. Co.* v. *Hanford*, 27 Fed. Rep. 588. There are cases which hold that in such a case both the vendor and purchaser may be treated by the creditor as principals, and neither merely as a surety. *Boardman* v. *Larrabee*, 51 Conn. 39; *Corbett* v. *Waterman*, 11 Iowa, 87; *James* v. *Day*, 37 Iowa, 164. In that class of cases which holds that the purchaser becomes the principal debtor and the vendor merely a surety it is held that, if the creditor enters into a valid contract with the purchaser for the extension of the time for the payment of the debt without the vendor's consent, the vendor, who is merely a surety, is released and discharged; while in that class of cases which holds that both the purchaser and the vendor are principals it is held that an extension of the time for the payment of the debt by the creditor as to either the vendor or the purchaser will not release or discharge the other. We shall follow the former class of

cases, as we are inclined to think that both the weight of authority and of reason is that way. Mr. Jones, in his work on Mortgages, 4th ed. § 742, expresses the doctrine, as it relates to mortgage debts, as follows: "A purchaser having assumed the payment of an existing mortgage, and thereby become the principal debtor, and the mortgagor a surety of the debt merely, an extension of the time of payment of the mortgage by an agreement between the holder of it and the purchaser, without the concurrence of the mortgagor, discharges him from all liability upon it. The holder cannot enlarge the time of payment, and protect himself by reserving his rights against the surety in the agreement of extension. Such a reservation has no effect unless the mortgagor agree to it." See also, upon the general subject of releasing the surety by the extension of the time for the payment of the debt by the creditor to the principal debtor, 2 Brandt, Suretyship, 2d ed. §§ 359, 360, 363, 364, 369, 372, 373, 375.

With the views above expressed the question then arises, Was the time for the payment of the debt in the present case extended? The note and chattel mortgage taken by the Union Stove & Machine Works from Fisher were not to be paid or to be due for ten days after their date. They were intended, however by the Union Stove & Machine Works to be taken only as additional security. Now, it is true that any kind or any amount of additional or collateral security may be taken by the creditor without discharging a surety on the original debt, provided the time for the payment of the original debt is not extended. But was that the case in the present case? If it was, and if the time for the payment of the original debt was not extended, then, of course, the vendor, Caswell, was not released; but, if the time for the payment of the original debt was extended, then the vendor, Caswell, is released. Now, Fisher was the principal debtor with regard to the original debt, and was not the time for the payment of all debt extended as to him? Could the Union Stove & Machine Works have sued Fisher for the purpose of collecting any debt prior to the expiration of the ten days given by the note and mortgage? We must answer this question in the negative. 2 Brandt, Suretyship, 2d ed. §§ 363, 364. And answering this question in the negative, then would not Caswell, as the surety, be discharged? This question, we think, must be answered in the affirmative. Upon questions of this kind it is possible, however, that the authorities are not entirely harmonious, but we think the weight of authority and of reason is as we have intimated. See the authorities above cited; also *Mobile L. Ins. Co.* v. *Randall*, 71 Ala. 220; *Kane* v. *Cortesy*, 100 N. Y. 132, 1 Cent. Rep. 245; *Cumming* v. *Montreal Bank*, 15 Grant, Ch. 686.

We think it must be held, under the facts of this case, that Caswell was discharged, and that by his discharge the judgment held by the Union Stove & Machine Works against him was also discharged, released and satisfied; and probably there was no injustice in this. The Union Stove & Machine Works probably had sufficient security for their debt against Caswell without recognizing or accepting Fisher as their debtor at all, as it voluntarily did. Caswell, with all his property subject to execution, was liable. Besides the Union Stove & Machine Works had a chattel mortgage upon a portion of Caswell's stock in trade, which stock in trade was transferred first to Eastland and then to Fisher; and also had a real-estate mortgage upon the real estate where the goods were kept. But the Union Stove & Machine Works voluntarily chose to recognize and accept Fisher as its debtor, and it thereby, under the law, made him its principal debtor, and from him it obtained additional security which would seem to be ample. It procured a chattel mortgage upon all Fisher's stock in trade, and afterwards replevined it from him; and Fisher, its own witness, testified that the replevied property was worth about $ 1,500, while the judgment against Caswell, before any payments were made thereon, amounted to only $963.99. This property was probably largely wasted by the transactions had between the Union Stove & Machine Works and Fisher, which perhaps would not have been the case except for the voluntary intermeddling by the Union Stove & Machine Works.

Before closing this discussion, it would perhaps be well to quote a portion of section 1312 of 2 Daniel on Negotiable Instruments, 4th ed. as follows: "The principle that whatever discharges the principal discharges the surety is of extended application, and it is operative whenever anything is done which relaxes the terms of the exact legal contract by which the principal is bound, or in any wise lessens, impairs, or delays the remedies which the creditor may resort to for its assurance or enforcement; for, whenever the creditor relaxes his hold upon the principal debtor, he impairs the hold upon him which the surety would acquire by substitution in his place on making payment; and good faith and fair dealing require that the surety should not be exposed to the injuries which might thus be inflicted upon him. In the immense majority of cases the act done does not actually damage the surety a shilling, yet the doctrine is so firmly established that only legislative enactment can change it."

We have now considered every substantial question in this case. There are other questions presented by counsel's briefs, but with the views that we entertain we do not think that it is necessary to discuss them.

The judgment of the court below will be affirmed.

All the Justices concur.

UNITED STATES CIRCUIT COURT, NORTHERN DISTRICT OF GEORGIA.

CENTRAL TRUST CO. of New York
v.
MARIETTA & NORTH GEORGIA R. CO.

INTERVENTION OF BLUE RIDGE MARBLE CO.

(.....Fed. Rep.....)

A receiver of a railroad company is not obliged to complete the transportation of freight or repay any part of the prepaid charges although the freight had been taken by the railroad company with an *advance* payment of the freight for the whole distance under a contract which gave the shippers the right to take it off and have certain work done upon it at an intermediate point where it was at the time of the receiver's appointment.

(June 22, 1892.)

INTERVENTION in foreclosure proceedings to compel specific performance by the receiver of a contract to transport certain freight the charges on which had been paid to the mortgagor. On demurrer to petition. *Sustained.*

Statement by **Newman, J.:**

On January 19, 1891, there was an existing contract between the Blue Ridge Marble Company and the Marietta & North Georgia Railway Company, by which the railway company agreed to haul marble from the quarries at Tates Station to Marietta, Ga., and allow said freight to be stopped over, cut and dressed at an intermediate station called Nelson. On said date, under this contract, there was considerable marble at Nelson, being dressed and worked, the freight on which had been prepaid from Tates Station to Marietta; and on said date said railway was put in the hands of a receiver on the petition of the trustee for the bond-holders. Said receiver refused to recognize said contract, and to haul freight stopped over at Nelson, although the freight

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NOTE.—*Receiver's obligation on contract of the party whose property he holds.*

The doctrine seems to be well established, although the cases on the subject are few, that a receiver is not bound by a contract of the party whose property is committed to his care, unless the contract creates a lien on the property. This is decided in substance not only by the case of Southern Exp. Co. v. Western N. C. R. Co. 99 U. S. 200, 25 L. ed. 321, on which the above decision is based, but also by Brown v. Warner, 11 L. R. A. 394, 78 Tex. 543, and the other cases referred to below.

In Brown v. Warner, *supra*, the court said: "A receiver as a general rule is but the agent of the court that appoints him with authority to take the possession and control of property, the subject matter of litigation; and is not the representative of the owner for the fulfillment of the latter's contracts, except in cases in which he has made the contracts his own by some act of adoption."

In that case it was held accordingly that a receiver of a railroad company was not liable for removing a switch, although he thereby broke a contract of the railroad company, which was purely personal, to maintain it at a certain place. The court said that for failure to perform the contract, the cause of action was against the company and not of that character which could be brought against the receiver without leave of court.

On the other hand, in How v. Harding, 76 Tex. 17, a contract of a railway company to take and pay for water from a spring on land over which a right of way was granted as part of the same contract was held to be binding upon a receiver of the company, because a lien existed upon the right of way for securing the payments for the water, that being deemed the real consideration for the grant of the right of way.

Although it has now become well established that a court appointing a receiver of railroad property may make the expenses of preserving and operating the road a lien superior to a prior mortgage, the court has no general authority to displace vested contract liens. Kneeland v. American Loan & T. Co. 136 U. S. 89, 34 L. ed. 379.

Somewhat analogous to the case of a receiver is that of trustees of a railroad mortgage to secure bonds, which is confirmed by the Legislature, and gave the trustees power to take and operate the road in a certain contingency subject to redemption within a certain time. It was held that such trustees were not bound by a contract as to transportation of express matter, made between the railroad company and an express company which had notice of the mortgage indenture. Ellis v. Boston, H. & E. R. Co. 107 Mass. 1.

In Elmira, I. & S. Roll. Mill Co. v. Erie R. Co., 26 N. J. Eq. 284, a railroad company having a contract for the right to run over another road was held not entitled to relief against a severance of the connection by a receiver of the other road, which relief was asked for on the ground that the receiver's conduct was oppressive and unwarranted; but the court made an order requiring the receiver to perform the contract upon certain equitable terms, holding that it was for the advantage of the railroad in his hands that the contract should be performed. The question as to the legal effect of the contract upon the receiver was not discussed.

In Central Trust Co. v. Wabash, St. L. & P. R. Co., 32 Fed. Rep. 566, a contract by a railroad company to take up lumber for a mill-owner at a sand switch was held not of such a character that he was entitled to any preference over mortgage bond-holders on a claim of damages for breach of the contract, but the effect of the contract to bind the receiver was not discussed.

The same rule above laid down as to contracts generally applies to a lease. Receivers of a lessee do not become responsible for rent merely by accepting their trust and receiving the assets, unless they elect to take possession of the leased property and assume the liability to pay the rent or do some act which is in law equivalent to such an election. Com. v. Franklin Ins. Co. 115 Mass. 279; Fidelity Safe Deposit & T. Co. v. Armstrong, 35 Fed. Rep. 566.

A receiver who enters into possession of and occupies leased property unequivocally manifests his election to recognize the lease and thereby incurs a liability for the payment of the rent. Woodruff v. Erie R. Co. 93 N. Y. 609; Brown v. Toledo, P. & W. R. Co. 35 Fed. Rep. 444; Easton v. Houston & T. C. R. Co. 38 Fed. Rep. 784; People v. University L. Ins. Co. 30 Hun, 142.

The decision in the main case, like the others above referred to, is undoubtedly intended to recognize the validity of a claim against the receiver for breach of contract which can take its place without preference among other debts of the estate. R. A. R.

See also 28 L. R. A. 452.

charges had been prepaid to Marietta. The Blue Ridge Marble Company intervened in foreclosure proceedings, and asked that a receiver be compelled to complete the haul of all freight at Nelson, the charges on which had been prepaid; or that said receiver return to the Marble Company the freight charges unearned.

The Central Trust Company demurred to intervention, upon the ground that the claim is not a lien superior to the rights of the bondholders, and because the claim was not a traffic balance, or a claim within those usually allowed prior to the bonds.

Messrs. **F. C. Tate, R. N. Holland, B. F. Abbott** and **C. A. Abbott** for intervenor.

Mr. **Henry B. Tompkins** for Central Trust Co.

Mr. **A. S. Clay** for the receiver.

Newman, J., delivered the following opinion:

I am satisfied that the question involved in this intervention is controlled by the case of *Southern Exp. Co.* v. *Western N. C. R. Co.*, 99 U. S. 191, 25 L. ed. 319. In that case, the contract was made between the express company and the railroad company, whereby the express company agreed to lend the railroad company $20,000 to be expended in preparing and equipping its road, and the railroad company should grant the express company the necessary privileges and facilities for the transaction of all express business over the road; the sum found to be due the railroad company therefor upon monthly settlements of accounts to be applied to the payment of the loan and the interest thereon.

The $20,000 was paid in compliance with the contract, and shortly thereafter the express company entered upon the road, transporting freight according to the terms of the contract, keeping regular accounts, and exhibiting them to the company, which were always approved; and it continued to act under said contract until a receiver, appointed in a bill to foreclose the mortgage, refused to continue the contract; and the express company was compelled to abandon the road, although its debt was unpaid.

By consent of the court, the express company was allowed to file its bill in circuit court of the United States for the Western District of North Carolina, where the foreclosure proceedings were pending. The bill prayed for a decree compelling the railroad company to specifically perform its contract and to such other and further relief as the nature and circumstances of the case might require.

The prayer of petitioners in this intervention is the same in effect as the prayer of complainants in the case referred to. The supreme court, after disposing of other questions, used the following language in the opinion:

"There is another objection to the appellant's case which is no less conclusive.

The road is in the hands of the receiver appointed in a suit brought by the bond-holders to forelose their mortgage. The appellant has no lien. The contract neither expressly nor by implication touches that subject. It is not a license as insisted by counsel. It is simply a contract for the transportation of persons and property over the road. A specific performance by the receiver would be a form of satisfaction or payment which he cannot be required to make. As well might he be decreed to satisfy the appellant's demand by money, as by the service sought to be enforced. Both belong to the lien-holders, and neither can thus be diverted. The appellant can therefore have no *locus standi* in a court of equity."

I am clear that the view of the supreme court as just quoted must control the question presented by the intervention in this case. It is a peculiar condition of things, and unfortunate for the petitioners and a hardship on them undoubtedly; but to require the receiver to transport its marble to Marietta would be equivalent to require the receiver to pay them in money the amount of the freight from Nelson to Marietta; and this the court certainly could not do, inasmuch as they have no lien.

The petition of intervenors sets forth the fact as above stated, and consequently the *demurrer* to the petition *must be sustained*, and it is so ordered.

VIRGINIA SUPREME COURT OF APPEALS.

RICHMOND & DANVILLE R. CO.,
Plff. in Err.,
v.
C. C. SCOTT.

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

1. A carrier is not liable for injury to a passenger's hand from striking against a bridge where he put it out of a car window, although it projected but three inches.

2. A verdict in favor of a railway passenger to compensate him for injuries to his arm caused by contact with a bridge abutment cannot be sustained on appeal after the striking of a count alleging that he voluntarily placed his arm out of the car window if the other counts allege that it was

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NOTE.—*Passenger's negligent exposure of person at car window.*

A passenger cannot recover for the breaking of his arm by a timber frame supporting a water tank while the arm is projecting out of a car window if the injury would not have been received if the arm had been inside the car. Indianapolis & C. R. Co. v. Rutherford, 29 Ind. 82, 92 Am. Dec. 336, 1 L. R. A.

Nothing less than gross negligence on the part of the carrier will permit recovery by a passenger for the breaking of his arm while the elbow was projecting outside of a car window by coming in contact with a standard on a freight car which would not have struck the arm if it had been inside the car. Louisville & N. R. Co. v. Sickings, 5 Bush, 1.

See also 23 L. R. A. 208; 24 L. R. A. 50; 36 L. R. A. 123.

flung out by a lurch of the car caused by one rail being lower than the other, and the evidence shows only one half inch difference in the height of the rails, that the window was fifteen inches from the abutment, which was not touched by the car, and the body of no passenger was moved from its position, the allegation being so improbable in view of the evidence that the stricken count must have influenced the verdict.

(March 31, 1892.)

ERROR to the Circuit Court for Charlotte County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Messrs. **Staples & Munford,** for plaintiff in error:

A railroad company in carrying passengers on its trains over its roads is not an insurer of their lives or safety, but it is only incumbent upon it to provide for their safe transportation by the use of such well-equipped machinery and the maintenance of such well constructed road-bed and bridges as will secure their safety, so far as human skill and foresight and the precautions and appliances ordinarily in use in such business will contribute thereto.

2 Wood, Railway Law, p. 1049; *Christie* v. *Griggs*, 2 Campb. 79; *Simmons* v. *New Bedford, V. & N. S. B. Co.* 97 Mass. 361, 93 Am. Dec. 99.

The accident, which occurred to the plaintiff in the manner in which he has described was such an accident as could not have been foreseen.

2 Thomp. Neg. p. 985.

Mr. **W. W. Henry,** for defendant in error:

When carriers undertake to convey passengers by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. Any negligence or default in such case will make such carriers liable in damages under the statute. The slightest neglect against which human prudence and foresight might have guarded, and by reason of which his death may have been occasioned, renders such company liable in damages for such death. Said railroad company is held by the law to the utmost care, not only in the management of its trains of cars, but also in the structure, repair, and care of the track and bridges, and all other arrangements necessary to the safety of passengers.

Baltimore & O. R. Co. v. *Wightman*, 29 Gratt. 445, 26 Am. Rep. 484. See *Baltimore & O. R. Co.* v. *Noell*, 32 Gratt. 399; *Moon* v. *Richmond & A. R. Co.* 78 Va. 745, 49 Am. Rep. 401; *Torian* v. *Richmond & A. R. Co.* 84 Va. 191; *Richmond City R. Co.* v. *Scott*, 86 Va. 907.

One whose arm while protruding outside the open window of a car in swift motion was struck on the elbow by wood piled near the track is guilty of contributory negligence which will prevent his recovery, however incautious the carrier may have been in guarding against such accidents, unless it had omitted to warn him after knowledge of his danger. Dun v. Seaboard & R. R. Co. 78 Va. 645, 49 Am. Rep. 388.

But it is not contributory negligence for a passenger in a railroad car to ride with his elbow on the sill of an open window where it is jarred outside of the car and broken in a collision of the train with a freight car standing on a side track. Farlow v. Kelly, 108 U. S. 288, 27 L. ed. 726.

To similar effect is Hallahan v. New York, L. E. & W. R. Co., 2 Cent. Rep. 924, 102 N. Y. 194, in which a verdict was supported for plaintiff, whose arm while resting on the window-sill of a car was struck by the arm of a crane used to deliver mail to passing trains.

So a passenger whose arm is struck and injured by something on a passing freight train while it was resting upon a window-sill, but not protruding beyond it, is not guilty of such contributory negligence as will prevent him from recovering for the injury. Breen v. New York Cent. & H. R. R. Co. 11 Cent. Rep. 891, 109 N. Y. 297.

Simply resting an elbow on the sill of a car window with the head on the arm in a natural and not unusual position, does not make a proper case for instructions on contributory negligence. Winters v. Hannibal & St. J. R. Co. 39 Mo. 468.

In an early Pennsylvania case (New Jersey R. Co. v. Kennard, 21 Pa. 203) it was held not to be negligence for a passenger to allow his arm to project slightly over the edge of a window-sill of a car if not more than was customary for passengers, and that the carrier must so construct the cars if the road was so narrow in some places as to endanger projecting limbs that the passengers could not put their limbs through the windows.

But this case was overruled by a later decision that it is negligence *per se* for a passenger to let his elbow protrude from a car window where it is struck by another car. Pittsburgh & C. R. Co. v. McClurg, 56 Pa. 294.

Question of law or fact.

There is a conflict among the decisions as to whether it is negligence *per se* to allow an arm or any other part of the body to project beyond a car window, or whether it raises a question for the jury. Like the case last above cited, a recent Alabama case holds that it is negligence *per se* to be declared so as matter of law for a passenger on a steam railway to protrude his arm, hand, or elbow through the window of a car while in motion and beyond the outer edge of the window or outer surface of the car. Georgia Pac. R. Co. v. Underwood, 90 Ala. 49, 44 Am. & Eng. R. R. Cas. 367.

In an action by the passenger for such an injury the jury should be instructed to find a verdict for the defendant. *Ibid.*

So if a passenger's arm or a portion of it is outside of the window of a railroad car and there is no dispute or controversy about this fact, or that the position of the arm contributes to an injury sustained by a blow from the door of a freight car on an adjoining track which had been left unfastened, the court must decide that the passenger cannot recover against the railroad company for the injury. Todd v. Old Colony & F. R. R. Co. 3 Allen, 18, 80 Am. Dec. 149.

And a passenger whose arm is struck while projecting out of a car window by a freight car which did not touch the car in which he was riding will be held negligent as matter of law and cannot recover for the injury. Pittsburgh & C. R. Co. v. Andrews, 39 Md. 329, 17 Am. Rep. 568; Breen v. New York Cent. & H. R. R. Co. 11 Cent. Rep. 891, 109 N. Y. 297.

In support of the same doctrine the court held that a charge that if the elbow of a passenger was out of the car when struck and injured by some object from outside, it was a circumstance or fact

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

This is a writ of error to a judgment of the circuit court of Charlotte county, rendered on the 28th day of March, 1890. The action is trespass on the case by the defendant in error against the plaintiff in error for damages for injuries received by him while riding as a passenger on the train of the plaintiff in error on the 15th day of February, 1888. The declaration of the plaintiff contained three counts, and the defendant in the circuit court demurred thereto, and to each count thereof; which demurrer the court overruled, the evidence was taken and instructions asked on both sides, and refused by the court, and other instructions given by the court of its own motion, and the defendant excepted. The verdict was in favor of the plaintiff, and the defendant moved the court to set aside the verdict and grant a new trial, which motion the court overruled, and certified the evidence; and the defendant having duly excepted and filed bills of exceptions to the rulings of the court against it in refusing to admit certain evidence offered by it, in refusing its instructions and giving others, and in overruling its motion to set aside the verdict and grant to it a new trial, applied for and obtained a writ of error to this court.

The first error assigned here is as to the action of the circuit court of Charlotte county in overruling the defendant's demurrer to the plaintiff's declaration, and to each count thereof. The first count, and also the second count, sets forth that the plaintiff, on the 15th day of February, 1888, was being carried as a passenger on the road of the defendant. Sitting near an open window of the car, by a lurch of the train caused by uneven condition of the rails, one being lower than the other, and the bridge being too narrow, the hand and arm of the plaintiff were thrown out of the window, and came in contact with the bridge through which it was then passing, and the plaintiff was injured. The third count sets forth that the plaintiff put his hand out of the window three inches, and it struck against the bridge through which the train was passing.

The third count was bad, and the demurrer should have been sustained as to that. In the case of *Dun* v. *Seaboard & R. R. Co.*, 78 Va. 662, 49 Am. Rep. 388, it was said, after citing numerous cases: "According to these decisions, the protrusion of the limbs of the passenger, even to the minutest distance, out of the windows of the car, will be regarded as necessarily, and, under all circumstances, such contributory negligence on the part of the passenger as will deprive him of all right to claim compensation from the carrier for injuries which may be occasioned thereby, however in-

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from which the jury might infer negligence or want of ordinary care on the part of a passenger, was not erroneous because substantially in conformity with a request to charge that if the elbow was outside of the window it was an act of negligence which would prevent recovery against the railway company. Holbrook v. Utica & S. R. Co. 12 N. Y. 236, 64 Am. Dec. 502.

But there are cases on the other hand which hold the question of negligence in such cases to be one for the jury and not for the court. It was so held in a Missouri case where a passenger's arm protruding outside a car window was struck by articles loaded on a wagon and broken. Barton v. St. Louis & I. M. R. Co. 52 Mo. 253, 14 Am. Rep. 418.

In Wisconsin it is held to be a question for the jury, and not of law, whether a passenger on a railroad car was guilty of contributory negligence in riding with his arm projecting from a car window where it was struck and broken by a loosened timber on the inside of a railroad bridge. Spencer v. Milwaukee & P. D. C. R. Co. 17 Wis. 488, 84 Am. Dec. 758.

So in South Carolina the court cannot charge that it is prima facie negligence for a passenger to ride with his elbow projecting out of the window of a car as the question of negligence is for the jury and the court cannot give them his opinion upon it. Quinn v. South Carolina R. Co. 29 S. C. 381.

And in Oregon a non-suit will not be granted on the ground that plaintiff was guilty of negligence as matter of law in a suit by a passenger for an injury to his arm while his elbow was resting on the window-sill of a car and slightly projecting out of the window when a stick of cordwood fell from a pile near the track through the open window striking in the palm of his hand or near it and catching in the mouth of his coat sleeve and jamming the arm backwards and injuring it. Moakler v. Portland & W. V. R. Co. 6 L. R. A. 556, 18 Or. 189.

In Illinois, where the doctrine of comparative negligence is established, the negligence of a passenger in letting his arm slightly project outside of a car window will not prevent his recovery for the injury, where it is struck by a freight car standing near the track and broken. Chicago & A. R. Co. v. Pondrom, 51 Ill. 333, 2 Am. Rep. 306.

Passengers on street-cars.

The strict rule adopted by part of the above cited decisions is not applied to passengers on street-cars.

A passenger on a street railroad is not guilty of contributory negligence by letting his arm rest upon the sill of an open window with the elbow projecting out of the car a few inches so as to prevent him from recovering for an injury by which his arm is broken by a car on an adjoining track on account of the narrowness of the space between the tracks. Summers v. Crescent City R. Co. 34 La. Ann. 139, 44 Am. Rep. 419.

The court said: "The evidence as well as common observation establishes that it is a customary practice for persons riding in the street-cars of this city when not crowded to sit with an arm resting on the window and projecting more or less outside of the car." *Ibid.*

To lay one's arm on the ledge of a street-car, where it was struck by a load of hay, was not *per se* such negligence as to prevent a recovery against the carrier. Federal Street & P. V. R. Co. v. Gibson, 96 Pa. 83.

Resting one's arm upon the window-sill of a street-car, but keeping it wholly within the car, cannot be declared negligence in law, although the arm is thrown out of the window by a jolt and is struck and broken by another car on an adjoining track. Germantown Pass. R. Co. v. Brophy, 105 Pa. 38.

The negligence of a passenger on a street-car in sitting with his elbow and arm on the window-sill with the wrist and hand outside, where it is struck by a passing car, is entirely a question for the jury. Miller v. St. Louis R. Co. 5 Mo. App. 471.

So as to resting one's hand on and partly over the window-sill of a street-car, where it is struck by planks standing upright near the passing car. Dahlberg v. Minneapolis St. R. Co. 32 Minn. 404, 50 Am. Rep. 585.

cautious the latter may have been in guarding against such accidents." In that case the declaration set forth that the arm of the plaintiff protruded two inches outside of the car, and the lower court sustained the demurrer, and the plaintiff appealed to this court, where the judgment of the lower court was affirmed. In this case, as that, the declaration containing this count was bad for the same reasons assigned in that case. It is not necessary to consider the declaration further. It cannot be said that the jury found their verdict under the first any more than the third count: and a glance at the evidence indicates that, without the third count, there could reasonably have been no such verdict for the plaintiff. Admitting the evidence for the plaintiff to be true, it appears that the depression of the right-hand rail was one half of an inch lower than the other, when tested by the level which was applied to it. The plaintiff testifies that his body was not moved from its position, and other uncontradicted witnesses testified that they were not moved in their seats. This casting of the hand of a man out of the window fifteen or eighteen inches, to strike a bridge, while his body did not move out of his seat, states a proposition which is as improbable as that half an inch of difference in the rails would cause any lurch that could be discoverable to any occupant of the car. It is shown by a passenger who sat on the next seat to the plaintiff, and by the conductor who came up as soon as outcry was made, and by the doctor, who dressed the injured limb, that the plaintiff said he got his hand hurt by putting it out of the window; and he himself saying in his declaration that he got it hurt by putting it out of the car window, and it being proved that the top of the car did not touch the bridge when the supposed careen occurred, and the distance of the car window from the side of the bridge being established, and the depression being only claimed to be half an inch on one rail, it is unreasonable to suppose that the jury disregarded the third count, and grounded their verdict on what must have appeared an impossibility, —that, when the body is not disturbed in the seat, the hand and the arm could have been thrown backwards out of the window while it was still attached to the body of the passenger. We cannot presume this to have been the ground of the jury's action, while the declaration stated and the proof showed that there was a reasonable way by which the hand got out of the window, contrary to no reasonable experience, but in accordance with every-day experience and observation. Passengers sometimes put their arms and other parts of their body out of the window of a car in motion, but that a hand of a passenger should be cast out of a window near which he was sitting, by reason of half an inch depression in one rail, cannot be said to be in accordance with the every-day observation of men. We do not say and we do not know upon what ground the verdict rested, but it is clear that, under the pleadings, it might have rested upon the third count, and the evidence tending to suggest it, and that is enough. No recovery can be had under such circumstances.

The demurrer should have been sustained as to the third count, and the circuit court erred in overruling the same, and for that cause *the judgment will be reversed and annulled.* It is not necessary to go further into the case. The case will be remanded to the circuit court, where the plaintiff may amend his declaration, if he be so advised, by leave of the circuit court.

MONTANA SUPREME COURT.

Kate D. EDGERTON, *Appt.*,
v.
Erastus D. EDGERTON, *Respt.*

(.....Mont.....)

1. A statutory provision for alimony when a divorce is granted does not by implication exclude a right of action to enforce a husband's obligation to furnish his wife maintenance independent of a proceeding for divorce.

2. A suit to compel a husband, if able, to support his wife whom he has deserted and left destitute is within the jurisdiction of equity, especially where the Constitution provides that a speedy remedy shall be afforded for every injury of person, property, or character, and that right and justice shall be administered without sale, denial, or delay, while the statutes provide that a married woman shall have the same protection as a man for all her rights and the same right to appeal in her own name alone to the courts of law or of equity.

3. A judgment of divorce cannot be collaterally attacked as void because the appearance of the wife by an attorney was authorized only by a letter of authority which her husband compelled her to write and sign where such facts did not appear on the record.

(May 2, 1892.)

APPEAL by complainant from a judgment of the District Court for Lewis and Clarke County, sustaining a demurrer to the complaint in an action brought to compel defendant to maintain the plaintiff. *Affirmed.*

The facts are stated in the opinion.

Messrs. **Alexander C. Botkin** and **E. P. Cadwell,** for appellant:

Wherever want of jurisdiction over the person of the defendant is shown, the judgment rendered without said jurisdiction is absolutely void and is a nullity. This want of jurisdiction may as well be shown by evidence *aliunde* the record as from the face of the record. In

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NOTE.—The great array of authorities presented by counsel on their respective sides of the question as to the jurisdiction of equity to compel a husband to support his wife, together with the discussion of the question by the court, seem to cover the question so completely that no annotation is called for.

either case, if this want of jurisdiction is shown, the decree is absolutely void; it has no force or effect.

Starbuck v. *Murray*, 5 Wend. 157, 21 Am. Dec. 172.

The remark of the court in *Thompson* v. *Whitman*, 85 U. S. 18 Wall. 457, 21 L. ed. 897, that the judgment could not be attacked on a collateral proceeding, was unnecessary to the decision, and was in effect overruled by the subsequent cases of *D'Arcy* v. *Ketchum*, 52 U. S. 11 How. 165, 13 L. ed. 648, and *Webster* v. *Reid*, 52 U. S. 11 How. 437, 13 L. ed. 761.

See also *Harris* v. *Hardeman*, 55 U. S. 14 How. 334, 14 L. ed. 444; *Christmas* v. *Russell*, 72 U. S. 5 Wall. 290, 18 L. ed. 475; *Elliott* v. *Peirsol*, 26 U. S. 1 Pet. 340, 7 L. ed. 170; *United States* v. *Arredondo*, 31 U. S. 6 Pet. 691, 8 L. ed. 547; *Shriver* v. *Lynn*, 43 U. S. 2 How. 59, 11 L. ed. 178; *Hickey* v. *Stewart*, 44 U. S. 3 How. 762, 11 L. ed. 819.

The appearance was the act of the counsel, and not the act of the court.

Shelton v. *Tiffin*, 47 U. S. 6 How. 183, 12 L. ed. 396.

If the court acts without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a recovery sought, even prior to a reversal in opposition to them.

Elliott v. *Peirsol*, 26 U. S. 1 Pet. 328, 7 L. ed. 164.

A judgment rendered by a court that has no jurisdiction over the person of the defendant is void, and it is equally so whether this want of jurisdiction appears upon the face of the record or appears from evidence outside of the record.

Bishop, Mar. & Div. §§ 418, 419; *Caswell* v. *Caswell*, 9 West. Rep. 154, 120 Ill. 377; *Greene* v. *Greene*, 2 Gray, 361; *Edson* v. *Edson*, 108 Mass. 590, 11 Am. Rep. 393; Freeman, Judgm. §§ 98, 99, 117, 118, 499, 509; Kerr, Fraud, p. 51; *Feikert* v. *Wilson*, 38 Minn. 341; *Holyoke* v. *Haskins*, 5 Pick. 20, 16 Am. Dec. 376; *Atty-Gen.* v. *Purmort*, 5 Paige, 631, 3 L. ed. 860; *Gest* v. *Packwood*, 39 Fed. Rep. 535; *Earle* v. *Earle*, 27 Neb. 277; *Bradshaw* v. *Heath*, 13 Wend. 416, 417.

The wife can maintain an action against her husband for support, call it maintenance or alimony as you please, under the facts stated in the complaint.

Galland v. *Galland*, 38 Cal. 269; *Wilson* v. *Wilson*, 45 Cal. 399; *Daniels* v. *Daniels*, 9 Colo. 133; *Earle* v. *Earle*, 27 Neb. 277; *Platner* v. *Platner*, 66 Iowa, 378; *Glover* v. *Glover*, 16 Ala. 446; *Hinds* v. *Hinds*, 80 Ala. 225; *Purcell* v. *Purcell*, 4 Hen. & M. 507–511; *Almond* v. *Almond*, 4 Rand. (Va.) 662, 15 Am. Dec. 781; *Wallingsford* v. *Wallingsford*, 6 Harr. & J. 485; *Macnamara's Case*, 2 Bland, Ch. 566, *note* 567; *Crane* v. *Meginnis*, 1 Gill & J. 953, 19 Am. Dec. 237; *Helms* v. *Franciscus*, 2 Bland, Ch. 544, 20 Am. Dec. 402; *Verner* v. *Verner*, 62 Miss. 263, and cases cited; *Butler* v. *Butler*, 4 Litt. 202; *Lockridge* v. *Lockridge*, 3 Dana, 28, 28 Am. Dec. 52; *Walker* v. *Stringfellow*, 30 Tex. 570; *Rhame* v. *Rhame*, 1 McCord, Eq. 197–205, 16 Am. Dec. 597; *Hair* v. *Hair*, 10 Rich. Eq. 163; *Prather* v. *Prather*, 4 Desaus. Eq. 33–43; *Bascom* v. *Bascom*, Wright (Ohio) 632; *Questel* v. *Questel*, Id. 491; *Spiller* v. *Spiller*, 2 N. C. 16 L. R. A. 482; *Knight* v. *Knight*, 3 N. C. 101; *Bueter* v. *Bueter* (S. Dak.), 8 L. R. A. 562; *Spengler* v. *Spengler*, 38 Mo. App. 266; *Lindenschmidt* v. *Lindenschmidt*, 29 Mo. App. 295; *Barber* v. *Barber*, 62 U. S. 21 How. 582, 16 L. ed. 226; *Cheever* v. *Willson*, 76 U. S. 9 Wall. 108, 19 L. ed. 604.

Messrs. **McConnell & Clayberg** and **T. C. Bach**, for respondent.

Our Constitution provides: "The district court shall have original jurisdiction in all cases at law and in equity, etc."

Montana Const. art. 8, § 11.

Under such provision courts of equity can only exercise such jurisdiction as was exercised by the English court of chancery at the date of the Revolution.

1 Pom. Eq. Jur. pars. 282, 285, 294, *et seq.*; *Fontain* v. *Ravenel*, 58 U. S. 17 How. 369, 15 L. ed. 80; *Jones* v. *Boston Mill Corp.* 4 Pick. 507, 16 Am. Dec. 358. See also cases *infra*.

Lord Loughborough, in *Ball* v. *Montgomery*, 2 Ves. Jr. 195, says: "It is contrary to the established doctrine that a married woman should be the plaintiff in a suit in this court for a separate maintenance."

This case was followed in *Stone* v. *Cooke*, 7 Sim. 22, and *Vandergucht* v. *DeBlaquiere*, 8 Sim. 315.

Unless the jurisdiction is provided for by positive statutory enactment or by constitutional provision, courts of equity in this country possess no jurisdiction to hear or determine suits brought solely for the recovery of alimony or maintenance.

Lawson v. *Shotwell*, 27 Miss. 630; *Bankston* v. *Bankston*, Id. 692; *Bowman* v. *Worthington*, 24 Ark. 529; *McGee* v. *McGee*, 10 Ga. 477; *Goss* v. *Goss*, 29 Ga. 109; *Fischli* v. *Fischli*, 1 Blackf. 360, 12 Am. Dec. 251; *Muckenburg* v. *Holler*, 29 Ind. 139, 92 Am. Dec. 345; *Moon* v. *Baum*, 58 Ind. 194; *Chestnut* v. *Chestnut*, 77 Ill. 346; *Trotter* v. *Trotter*, Id. 511; *Ross* v. *Ross*, 69 Ill. 569; *Harshberger* v. *Harshberger*, 26 Iowa, 503; *Wilson* v. *Wilson*, 49 Iowa, 544; *McFarland* v. *McFarland*, 51 Iowa, 565; *Jones* v. *Jones*, 18 Me. 311, 36 Am. Dec. 726; *Henderson* v. *Henderson*, 64 Me. 419; *Littlefield* v. *Paul*, 69 Me. 533; *Shannon* v. *Shannon*, 2 Gray, 287; *Baldwin* v. *Baldwin*, 6 Gray, 342; *Coffin* v. *Dunham*, 8 Cush. 405, 54 Am. Dec. 769; *Adams* v. *Adams*, 100 Mass. 365, 1 Am. Rep. 111; *Peltier* v. *Peltier*, Harr. Ch. 19; *Perkins* v. *Perkins*, 16 Mich. 167; *Doyle* v. *Doyle*, 26 Mo. 545; *Simpson* v. *Simpson*, 31 Mo. 24; *Parsons* v. *Parsons*, 9 N. H. 317, 32 Am. Rep. 362; *Sheafe* v. *Sheafe*, 24 N. H. 569; *Kirrigan* v. *Kirrigan*, 15 N. J. Eq. 146; *Nichols* v. *Nichols*, 25 N. J. Eq. 60; *Yule* v. *Yule*, 10 N. J. Eq. 138; *Rockwell* v. *Morgan*, 13 N. J. Eq. 119; *Anshutz* v. *Anshutz*, 16 N. J. Eq. 162; *Cory* v. *Cory*, 11 N. J. Eq. 400; *Atwater* v. *Atwater*, 53 Barb. 621; *Ramsden* v. *Ramsden*, 91 N. Y. 281; *Codd* v. *Codd*, 2 Johns. Ch. 141, 1 L. ed. 323; *Lewis* v. *Lewis*, 3 Johns. Ch. 519, 1 L. ed. 703; *Mix* v. *Mix*, 1 Johns. Ch. 108, 1 L. ed. 78; *Perry* v. *Perry*, 3 Paige, 501, 2 L. ed. 1006; *Harrington* v. *Harrington*, 10 Vt. 505; *Prosser* v. *Warner*, 47 Vt. 667, 19 Am. Rep. 132; *Rees* v. *Waters*, 9 Watts, 281; *Barker* v. *Dayton*, 28 Wis. 367; *Wilson* v. *Wilson*, 19 N. C. 377; 1 Bishop, Mar. Div. & Sep. §§ 1383–1421; 24 Am. L. Reg. N. S. 1; *Woods* v. *Waddle*, 26 Am. L. Reg. N. S. 33.

The judgment pleaded is not a void but a voidable judgment, and in this action the attack upon it is collateral.

Freem. Judgm. 2d ed. § 116; 1 Black, Judgm. § 170.

A judgment of a state court of general jurisdiction can only be attacked collaterally in the courts of the same state where it bears its own infirmity upon its face.

Cook v. *Darling*, 18 Pick. 393; *Granger* v. *Clark*, 22 Me. 128; *Coit* v. *Haven*, 30 Conn. 190; *Wingate* v. *Haywood*, 40 N. H. 437; *Penobscot R. Co.* v. *Weeks*, 52 Me. 456; *Clark* v. *Bryan*, 16 Md. 171; *Callen* v. *Ellison*, 13 Ohio St. 446, 82 Am. Dec. 448; *Horner* v. *Doe*, 1 Ind. 131, 48 Am. Dec. 355; *Prince* v. *Griffin*, 16 Iowa, 552; *Hahn* v. *Kelly*, 34 Cal. 391, 94 Am. Dec. 742; *Ex parte Ah Men*, 77 Cal. 198, 11 Am. St. Rep. 263; *Galpin* v. *Page*, 1 Sawy. 317; *Hunter* v. *Ferguson*, 13 Kan. 471; *Blasdel* v. *Kean*, 8 Nev. 308; Black, Judgm. §§ 271–273; *Gilman* v. *Gilman*, 126 Mass. 26, 30 Am. Rep. 646; *Lee* v. *Kingsbury*, 13 Tex. 68, 62 Am. Dec. 546; *Brown* v. *Nichols*, 42 N. Y. 26; *Sperry* v. *Reynolds*, 65 N. Y. 179.

Many cases have been cited wherein the particular reasons herein relied upon were urged as reasons that the judgment was void and could be collaterally attacked, but the weight of authority is against such proposition.

Freem. Judgm. § 128; 1 Black, Judgm. § 272; *Newcomb* v. *Peck*, 17 Vt. 302, 44 Am. Dec. 340; *Baker* v. *Stonebraker*, 34 Mo. 172; *Carpentier* v. *Oakland*, 30 Cal. 440; *Harshey* v. *Blackmarr*, 20 Iowa, 161, 89 Am. Dec. 520; *American Ins. Co.* v. *Oakley*, 9 Paige, 496, 4 L. ed. 789, 38 Am. Dec. 561; *Reed* v. *Pratt*, 2 Hill, 64; *Brown* v. *Nichols*, 42 N. Y. 26; *Rogers* v. *Burns*, 27 Pa. 525; *Bunton* v. *Lyford*, 37 N. H. 512, 75 Am. Dec. 144.

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

There are two questions brought here for determination by this appeal. The first relates to the jurisdiction, in equity, of the district courts of this state, and may be stated by the following proposition: Have the district courts of this state power, in the existence of their equity jurisdiction, to enforce maintenance of a wife by decreeing proper relief in an action brought by her against her husband, independently of an action for divorce, where it is shown that he, without just cause, has abandoned her, or by his cruelty or other improper conduct has given her just cause for living separate and apart from him, and she is without means of support, and he is able to maintain her. An action of this character, if maintainable at all, would naturally lie within the equitable jurisdiction of the district court. The subjects of equity, as well as common-law jurisdiction, are so well defined there can seldom arise a dispute as to whether a particular action for the enforcement of rights or the redress of wrongs lies within the cognizance of one or the other, or whether such action is not within either of these jurisdictions. In relation to the question just propounded, however, there have been and still are differences of opinion in the courts and among able jurists; and the discussion of it has sounded the depths and surveyed the scope and circumference of the equity jurisdiction of courts where it has been brought in question. It is unnecessary to recite the facts involved in the case at bar in order to treat this proposition. It may be treated as a question of law, relating to the equity jurisdiction of the court, without reference to any particular action. That the marriage relation lays upon the husband an obligation to furnish his wife necessary and comfortable maintenance, commensurate with his ability to provide, is a proposition upon which there is no dispute. It is an obligation imposed by law as one of the conditions of the marriage contract, and is recognized by all courts of justice, and is enforced, in proper cases, were the jurisdiction lies. Courts of common-law jurisdiction (as distinguished from equity courts) enforce that obligation by giving judgment against the husband for necessary supplies furnished the wife by third persons, where the husband, without just cause, withholds the same, or abandons his wife, or by cruelty or otherwise makes it unsafe or improper for her to abide at the family home. In this way it will be seen that even courts of common-law jurisdiction not only recognize, but to some extent enforce, performance of that obligation. This jurisdiction exercised by the common-law courts was usually explained on the theory that the law presumed the wife to be the agent of the husband to the extent of authority to obtain upon his credit necessary personal supplies. But it is plainly observable by an investigation of these cases that the common-law courts proceed upon a different ground than the mere relation of principal and agent; for when the husband had abandoned his wife, or driven her away by cruelty or other improper conduct, and had sought to avoid responsibility of her maintenance by giving notice forbidding parties to furnish her supplies, and attempting to revoke her authority in that respect, still the common-law courts, notwithstanding such notice held him bound for her necessary supplies, by an obligation irrevocable at will, arising by virtue of the marriage relation, and gave judgment against him. Schouler, Dom. Rel. § 66; *Sykes* v. *Halstead*, 1 Sandf. 483; 1 Bishop, Mar. & Div. 572, and cases cited. It will be observed in these cases, too, that, where the wife was living separate and apart from her husband, it was always a proper inquiry whether she had just cause for so doing; and, if she had not, that was a good defense. It seems to be clear, then, that the common-law courts proceeded in such cases upon a different principle than the law of agency alone, and founded their judgments on the obligation of the husband to support his wife, even separate and apart from his habitation, where by his conduct he justified her separation, or where he had, without cause, forsaken her, — an obligation which he could not terminate at will, as may be done in case of principal and agent. 2 Kent, Com. 146; Schouler, Dom. Rel.

§ 66; 1 Bishop, Mar. & Div. §§ 550–572, and cases cited; *Liddlow* v. *Wilmot*, 2 Stark. 77; *Casteel* v. *Casteel*, 8 Blackf. 240, 44 Am. Dec. 763; *Clement* v. *Mattison*, 3 Rich. L. 93; *Hall* v. *Weir*, 1 Allen, 261; *Cartwright* v. *Bate*, 1 Allen, 514, 79 Am. Dec. 759; *Cunningham* v. *Irwin*, 7 Serg. & R. 247, 10 Am. Dec. 458; *Rumney* v. *Keyes*, 7 N. H. 571; *Allen* v. *Aldrich*, 29 N. H. 63; *McGahay* v. *Williams*, 12 Johns. 293; *Mayhew* v. *Thayer*, 8 Gray, 172; *Walker* v. *Simpson*, 7 Watts & S. 83, 42 Am. Dec. 216; *Schnuckle* v. *Bierman*, 89 Ill. 454; *Reese* v. *Chilton*, 26 Mo. 593; *Rutherford* v. *Coxe*, 11 Mo. 347; *Breinig* v. *Meitzler*, 23 Pa. 156; *Billing* v. *Pilcher*, 7 B. Mon. 458, 46 Am. Dec. 523; *Snover* v. *Blair*, 25 N. J. L. 94; *Blowers* v. *Sturtevant*, 4 Denio, 46.

Although the common-law courts will give judgment against the husband in such cases, it must be admitted by all to be an uncertain and inadequate relief; for in many cases she may be unable to obtain credit under such circumstances, where she can only offer the chance of compelling payment by suit against a husband who is endeavoring to escape such liability. Her position is also embarrassed by the reluctance of parties generally to becoming directly or indirectly implicated in family troubles, or to undertake to show justification for the conduct of the wife, which operates as a powerful influence in deterring persons from given her credit. The relief offered by the common-law courts is inadequate for still other reasons. While it may succeed for a brief period in some cases, the derelict husband is left free to carry out his purpose, to abandon and neglect the support of his wife, and avoid such judgments altogether by disposing of his property or by carrying it beyond the jurisdiction. In this way he not only ignores his obligation, but sets at naught the attempt of the common-law courts to compel its performance. There are other aspects of this method of granting relief which ought not to be passed without observation. If that remedy happens to be effectual in some cases, because the husband fails to use the means within his power to escape the liability, that method of enforcing maintenance would involve a multiplicity of lawsuits; for the wife must usually go to various parties to secure supplies, whereby would arise a separate cause of action in favor of each party from whom supplies were obtained; and, as often as one collection was made, another cause of action would begin to accrue. Again, the inadequacy of relief worked out by the common-law remedy is not alone relative to the position of the wife. It has its counterpart of hardship in reference to the husband. In case the husband has just grounds for his conduct, and desires to establish the same, he would have to present his defense in as many actions at law as happened to be brought against him for supplies furnished the wife; for having established his defense in one or more actions would not preclude the annoyance, loss of time, and expense of defending other actions of the same character. So the question naturally arises whether or not, upon principle, these cases lie within the jurisdiction of courts of equity, and the conditions just pointed out suggest two familiar principles of equity as grounds upon which courts exercising that jurisdiction take cognizance of actions, and determine the rights of parties, namely: (1) Inadequacy of the relief which can be obtained in the courts of law; (2) that to obtain relief in courts of common-law jurisdiction would involve a mutiplicity of suits. Mr. Pomeroy, upon this head observes: "In fact, the multiplicity of suits, which is to be prevented, constitutes the very inadequacy of legal methods and remedies which calls the concurrent jurisdiction into being under such circumstances, and authorizes it to adjudicate upon purely legal rights, and confer purely legal reliefs. On the other hand, the prevention of multiplicity of suits is the occasion for the exercise of the exclusive jurisdiction." 1 Pom. Eq. Jur. § 243. This class of actions was not generally entertained by the English chancery court, for the obvious reason that in England the ecclesiastical tribunal existed, to which, as was conceded by all, such adjudications peculiarly belonged. There was therefore no reason in general for the chancery court in England to concern itself with actions seeking such relief. Fonbl. Eq. 4th Am. ed. 98, *note 105*. But it nevertheless seems plain that had not another court existed in the judicial system of England, which had jurisdiction of this class of cases, there is every analogy which would have brought those cases within the jurisdiction of the court of chancery. This court took cognizance of other cases concerning marital laws. It enforced against the husband antenuptial contracts, and settlements made on behalf of his intended wife; compelled settlements to be made on behalf of the wife, where he was seeking to obtain possession or control of her property; withheld her separate property from his grasp, and devoted it to her maintenance, where he had so conducted himself as to justify her living in separation from him; enforced agreements by the spouses as to property rights, and maintenances made in contemplation of separation; by writ *ne exeat*, "restrained the husband from quitting the kingdom to evade the payment of an agreed or decreed allowance;" used its power to enforce decrees of the spiritual court, awarding separate maintenance to the wife; and, by process known as the "writ of *supplicavit*," the chancery court protected the wife against the husband's violence, and in cases where it was found unsafe for her to abide with him, as incident to such proceedings, compelled the husband to provide maintenance for her while she was separate and apart from him, by reason of his violent conduct towards her. This proceeding, however, appears to have become obsolete, probably because statutes provided a remedy for protection of all persons from threatened violence. No doubt other instances could be pointed out wherein the English chancery court exercised jurisdiction in reference to the marital rights and obligations. Fonbl. Eq. 90–106, and *notes*; 2 Spence, Eq. Jur.

489, 526; 2 Story, Eq. Jur. §§ 1423, 1476; 3 Pom. Eq. Jur. §§ 1114-1120; 2 Bishop, Mar. & Div. § 352. It is also clear that within the principles, procedure, and practice applied by courts of equity there are ample and appropriate methods to adequately enforce in one action the right of the wife to support against a husband who without cause abandons her, and at the same time, in the same action, vouchsafe to the husband any defense he may have to offer in justification of his conduct.

It is proper at the outset of this investigation to inquire whether, by statute, any provision has been made in relation to the right in question, and the remedy to be applied in case of its nonfulfillment. Our statute provides that the district court, "sitting as a court of chancery," may, for certain causes specified, decree a "dissolution of the bonds of matrimony," and that, "when a divorce shall be decreed, it shall and may be lawful for the court to make such order touching the alimony and maintenance of the wife, the care and custody of the children, or any of them, as from the circumstances of the parties and nature of the case shall be fit, reasonable, and just, and, in case the wife be complainant, to order the defendant to give reasonable security for such alimony and maintenance, or may refuse the payment of such alimony and maintenance in any other manner consistent with the rules and practice of the court, and may also grant alimony '*a pendente lite*', and the court may, on application, from time to time, make such alterations in the allowances of alimony and maintenance as shall appear reasonable and just." Sections 1000, 1004, 1006, div. 5, Comp. Stat.

It is contended that these provisions of the statute as to the decree for alimony and maintenance "when divorce is granted," by implication, exclude from the courts the jurisdiction to enforce the maintenance, except in an action where divorce is decreed. Some have so held, but upon this phase of the question, as upon nearly all aspects of it, eminent authorities are opposed to one another in the views entertained. Our own conclusion upon this particular feature of the question is that the great weight of reason is against the idea that the Legislature, in adopting the statute referred to, intended any regulation of the right of the wife to maintenance, or the obligation of the husband to furnish the same, arising and existing by virtue of the marriage bond prior to the dissolution of that bond by decree of court, or that by such statute the Legislature intended to take away, or in any manner control, whatever jurisdiction the courts may have had to enforce the fulfillment of that obligation in an action independent of a proceeding for divorce. In construing or applying a statute the cardinal rule, always applicable, is to seek the intention of the Legislature. The simple question then is, Did the Legislature, in providing for the granting of divorces on certain prescribed grounds, and providing that, when divorce was decreed, alimony and maintenance might also be decreed, intend to have it inferred or implied therefrom that the obligation of the husband to maintain his wife should not be enforced, unless the bonds of matrimony were first dissolved? Or was it only the intention of the Legislature, as manifest in such statute, to make sure, by the provisions authorizing the decree of alimony and maintenance of the wife after dissolution of the bond of matrimony, to fasten upon the husband the continued obligation to support his wife, even though the bond of matrimony had been dissolved because of his wrongful conduct? After divorce the obligation to maintain the wife, which arose by virtue of the marriage contract, could not be referred to that relation, because of its non-existence; and there might be grave reason to doubt whether a court was authorized to continue to enforce that obligation after dissolution of the bond by which it arose, without a statutory provision to that effect. It is manifest by said statute that the Legislature intended that the offending husband should not escape the obligation he had entered into, to support his wife while she kept faith with her marriage vows and duties, even though he succeeded by his wrongful conduct in driving her to obtain a divorce. If this provision implied that the obligation could only be enforced by first dissolving the bonds of matrimony, the law would be open to the charge that it was so framed as to encourage divorces; for the wife who kept faith with the marriage vows might be driven by privation, in some cases at least, to release the husband from the bonds of matrimony by applying for a divorce, in order to obtain relief from penury and want. Such a construction of the legislative intent would make the statute provide, in effect, that in case a wife was driven away or deserted, and left without means of support, if the husband remained in the state, (and committed no more flagrant violations of the marriage bond,) she must wait a year, and in the mean time suffer in destitution, or suffer the humiliation of becoming a public charge, or seek relief through friends or strangers, before she could call upon a court to grant her a divorce, and then compel the offending husband, out of his substance, to fulfill his obligation to support her; at which time the derelict husband may have placed himself and property beyond the reach of the court; at least, he would in such case be given ample opportunity to do so. It can hardly be presumed that the Legislature, while carefully providing for the continuance of the obligation of the husband to maintain his wife after divorce, intended by the statute to cut off any jurisdiction which might be in the courts to simply enforce the obligation while the bonds of matrimony still existed. A more reasonable conclusion, we think, is that the statute under consideration manifests no such intention, but leaves the marital rights and obligations before divorce to be dealt with by the courts in whatever respect their jurisdiction might allow.

We therefore return to the main question, as to whether there is in the equity courts

of this state any jurisdiction to interfere on behalf of a wife deserted and left destitute, without cause, and compel the husband, if able, to support her. This subject has led to a very close investigation by the American courts (see cases cited in briefs of counsel) of the manner in which the chancery court of England dealt with such cases. The jurisdiction exercised by that court upon kindred subjects has already been adverted to. But upon this particular branch of adjudication, as is affirmed by some, the holding of the English chancery court has not been harmonious; and, while this criticism is probably correct, it must still be admitted that the doctrine finally became settled, to the effect that cases where such relief was sought would not be entertained in the chancery court, but left to the spiritual court. This was, of course, the natural result when we considered the judicial system prevailing at that time in England. Even with these conditions, however, the English chancery court did not seem to have construed its jurisdiction as so unyieldingly restricted in this matter that no relief could be granted in that court. There is a notable case, as late as 1811, where *Lord* Eldon, one of the greatest and most conservative of English chancellors, ordered certain property in probate devoted to the support of a deserted wife. It is not clearly stated in the opinion or statement of the master that this property belonged to the husband by descent, but that seems to be the case from the context; for if the property had descended to the wife in her own right, according to the course of equity, there would have been no hesitation whatever in applying it to her separate maintenance, where she was abandoned by her husband. In ordering the property applied the lord chancellor said: "I have a strong impression on my mind that this has been done; and, independent of precedent, I think the court may do it; as the husband deserting his wife leaves her credit for necessaries, and would be liable to an action, and, though execution could not be had against the stock, the effect might be obtained circuitously, as he could not relieve himself except by giving his consent to the application of this fund." *Guy* v. *Pearkes*, 18 Ves. Jr. 196. In the American states the ecclesiastical court was not made a part of the judicial system. There being a court of chancery or equitable jurisdiction, however, and there being the conditions involved, whereby that court had grounds, upon principle, to take jurisdiction of such cases, it is not at all strange that some of the American courts of equity entertained them; and thus was established what *Judge* Story termed the broader jurisdiction asserted by the American courts in such cases. In his work on Equity Jurisprudence, he says: "In America, a broader jurisdiction in cases of alimony has been asserted in some of our courts of equity; and it has been held that if a husband abandons his wife, and separates himself from her without any reasonable support, a court of equity may in all cases decree her suitable maintenance and support out of his estate, upon the very ground that there is no adequate or sufficient remedy at law in such a case. And there is so much good sense and reason in this doctrine that it might be wished it were generally adopted." 2 Story, Eq. Jur. § 1423. It will be seen from these remarks that this eminent authority on equity jurisprudence saw clearly that these cases involved conditions which, upon fundamental principles of equity would bring them into that jurisdiction, *i. e.*, there was a legal right of the wife to maintenance, existing and deeply implanted in the law,—a right capable of judicial enforcement, and that the common-law courts, although recognizing and attempting to enforce such right, by reason of their forms of procedure, fell far short of giving adequate relief. There was therefore the ground in principle for equitable relief.

Since *Judge* Story wrote, the doctrine of the American courts of equity, which he mentions, has steadily been gaining ground, until now it is held, without the aid of statute, in a large number of the states, as will be seen by reference to citations of appellant's brief. The latest case we have examined was decided in the year 1890 by the Supreme Court of South Dakota, wherein Kellam, *J.*, in a very able opinion held that the case was within the equitable jurisdiction of the courts of that state; and he did not base the conclusion upon any specific constitutional or statutory provision or implication mentioned in his opinion. *Bueter* v. *Bueter*, (S. Dak.) 8 L. R. A. 562. The Supreme Court of the United States, in 1858, had occasion, in the case of *Barber* v. *Barber*, 62 U. S. 21 How. 582, 16 L. ed. 226, incidentally to review a number of cases in which the equity jurisdiction was held to extend over this class of cases; and no expression is found in the opinion, showing that the court regarded the exercise of such jurisdiction extraordinary, nor in any manner an arbitrary assumption of a jurisdiction not properly belonging to courts of equity on principle. Over against the holding which *Judge* Story mentions, there are courts of eminent authority holding the contrary. (See cases cited by counsel for respondent.) But the divergence of views upon this subject held by the American courts may not be without reasonable explanation, which would apply at least to some states. While there is a general harmony in the American courts of equity with one another, and with the English court of chancery, in the practice, procedure, and principles applied, and the precedents emanating from them may be safely referred to as authority in cases lying within their jurisdiction, still, when the question is as to the extent of the equitable jurisdiction possessed by courts of one state, the determination of courts of another as to the extent of their own jurisdiction cannot, as a rule, be relied on as furnishing an exact criterion for measuring the boundaries of the jurisdiction in the former state, unless the statutory or constitutional provisions governing the subject are substantially alike. This arises from the great variation in the constitutional and statutory provisions establishing and defining such jurisdiction in the different states. Therefore,

for example, to quote from Massachusetts, as denying that the equitable jurisdiction of their courts extends to cases like the one at bar, cannot be regarded strictly as authority for denying that such jurisdiction belongs to equity courts at all, nor that such jurisdiction may not pertain to the equity courts of another state, because, although emanating from one of the ablest benches in the Union, the court is speaking of the extent of its own equity jurisdiction, which appears to be limited to certain heads, specifically defined by statute, and that jurisdiction does not appear to be as broad as that exercised by the English court of chancery or that exercised by other states of the Union. 1 Pom. Eq. Jur. § 286; Mass. Gen. Stat. 1860, p. 558; *Adams* v. *Adams*, 100 Mass. 365, 1 Am. Rep. 111. There, also, the statute not only provided for absolute divorce, but for a decree of separation from bed and board, with separate maintenance out of the husband's estate. Mass. Gen. Stat. chap. 107, p. 531.

These variations in the scope of the equitable jurisdiction granted to the Federal courts, and that possessed by the courts of the various states, is fully explained by Mr. Pomeroy in his great work on Equity Jurisprudence. He says: "In some of the states this statutory delegation of power is so broad and comprehensive that the jurisdiction which it creates is substantially identical with that possessed by the English court of chancery, except so far as specific subjects, like administration, have been expressly given to different tribunals; but in others the delegation of power is so special in its nature and limited in extent that a reference to the statutes themselves, on the part of the courts, as the source and measure of their jurisdiction, is a matter of constant practice and of absolute necessity. A correct knowledge of these statutory provisions in the various states is of the highest importance from another point of view. Without it the force and authority of decisions rendered in any particular state cannot be rightfully appreciated by the bench and bar of other commonwealths." 1 Pom. Eq. Jur. § 283. In the same chapter the author brings to view the statutory and constitutional provisions under discussion. It is therefore not surprising, when these conditions are considered, to find different views held by different courts, when the question turns upon the extent of the equitable jurisdiction possessed. Mr. Bishop, in his valuable work on the subject of Marriage & Divorce, (vol. 2, § 356, 6th ed.), exerts the great weight of his authority against the proposition that cases like the one at bar lie within the equitable jurisdiction, unless jurisdiction is given by statutory or constitutional provisions. It is observable that, in treating the question, he has in mind a court in this country, invested with an equitable jurisdiction measured exactly by that exercised by the English court of chancery "at the time of the settlement of this country." With his usual accuracy, he states how the English chancery court dealt with the question at that time, and arrives at the conclusion that said court did not then exercise the jurisdiction in question. But he goes further, and lays down the proposition that "there is no one head of equity power to which, by analogy, this can be said to belong." If it is meant, in view of the right involved, and the relief obtainable through common-law courts, that there is no analogy, when the principles of equity are considered, by which the case would come within the equitable jurisdiction, upon the same principles as many cases come within that jurisdiction, we cannot subscribe to his views. It is fair to say, however, as to Mr. Bishop's views, that he at all times, in treating this subject, reasons from the proposition that to enforce the right of the wife to support, who by the wrongful conduct of her husband is compelled to live separate and apart from him, is equivalent to, and in fact amounts to, the granting of a divorce *a mensa et thoro*. From this position he asserts his conclusion that there is no analogy which would bring the case under any head of equitable power, and draws a very striking picture of a court, admittedly without any jurisdiction in a certain case, arbitrarily holding the alleged offender, and "dodging all difficulties," administering a drastic remedy for an alleged wrong. Bishop, Mar. & Div. 6th ed. § 356. With great deference to the learned author, and admiration for the method and discrimination generally employed by him in the treatment of subjects of the law to which he has devoted his labor, we are unable to adopt his conclusion until we find reason to adopt his premise, that merely to compel the husband, who wrongfully abandons or drives away his wife, to support her, is in fact granting her a divorce *a mensa et thoro*. This is the difficulty which must be either confronted with attention, and fairly treated, or "dodged." He states the proposition in this way: "A divorce from bed and board given to the wife concludes with the same decree for alimony which this proceeding does. But it also contains a finding and a judgment, not that the marriage is dissolved, but that she who is to be alimented is entitled, by reason of the fault of the other party, to live in separation. In the proceeding under consideration, a court acknowledging itself without power to adjudicate the right to live in separation —for that would be simply and exactly to pronounce a divorce from bed and board—undertakes to make a permanent order for alimony. And yet, as foundation for the order, it passes upon, without reducing to record, the very question of right which it admits not to be within its jurisdiction." 2 Bishop, Mar. & Div. § 356. As long as courts of equity are induced to admit that this proceeding is equivalent to granting a divorce from bed and board, no doubt the jurisdiction will be denied. Let us, therefore, examine this proposition. In every case (where the husband and wife are living separate and apart) in which the common-law courts give judgment for necessaries furnished the wife by third persons, one of the facts upon which the judgment rests is that the wife has just cause for living in separation from her husband during the time in question, when such

necessary supplies were furnished. See cases from common-law courts, and other authorities, cited *supra*. Now, may it not be said with quite as much force that in these cases the common-law courts (admittedly without any jurisdiction to authorize the spouses to live separate and apart) do by their judgments confirm the proposition that during the time in question the wife had good cause for living in separation from her husband? In the case of *Liddlow* v. *Wilmot*, *supra*, brought in the common-law court by a third person, against a husband, for necessary supplies furnished his wife while she was living separately from him, *Lord* Ellenborough said: "The first question for consideration is whether the defendant turned his wife out of doors, or by the indecency of his conduct precluded her from living with him; for then he was bound by law to afford her means of support adequate to her station." In *Hultz* v. *Gibbs*, 66 Pa. 360, the same doctrine is stated as follows: "When a husband turns his wife out of doors, without any reasonable or just cause, or forces her to withdraw from him, without any means for her support, the law implies that he has given her credit to supply herself with such necessaries as are suitable and proper for her to have, namely, clothing, boarding, lodging, and the like. Her condition would be deplorable, indeed, if this were not so, because of her inability to contract for such things, and to obtain them, if she happens to have no separate estate. When, therefore, necessaries are furnished to a wife so situated, on the credit of her husband, the party claiming to be paid for them must bring himself, in order to recover for them, within the rule stated. He must make out a case which shall negative all idea of a captious, voluntary abandonment of the husband's domicil, and show that she has either been turned out or forced to leave his residence. *Walker* v. *Simpson*, 7 Watts & S. 85, 43 Am. Dec. 216, and the authorities therein referred to." Declarations of this doctrine could be quoted by great number from the common-law courts. See cases *supra*.

So the common-law court must try the question whether the wife was abandoned without cause, or compelled to withdraw and live separately. In other words, these conditions must be shown before judgment can be given in favor of a third party for necessaries furnished her living separately from her husband. Then, is not the judgment in such case an affirmation by the common-law court that the wife had just cause for living in separation? And, if the conditions thus judicially affirmed as sufficient ground still exist, such judgment would not be far from judicially sanctioning her continuance of the separation. It would at least affirm indirectly that as long as the cause for separation, which was adjudged sufficient, existed, she would be justified in living separate and apart. Yet the jurisdiction of the common-law courts to give such judgments does not appear to be questioned on the ground that the same amounts to adjudging the wife justified in living apart from her husband, which, if decreed in terms, would amount to a decree of divorce *a mensa et thoro*. The proposition, however, is held up before the equity court as an all-sufficient "difficulty," whenever it is called upon to do, in a more adequate, direct, simple, and just manner, the very thing which the common-law court fearlessly attempts. But does the judgment or decree, whether of common-law or equity court, simply compelling the husband to continue to support his wife when he has, without cause, abandoned her, amount to a divorce from bed and board? We have seen that she must be fully justified in her separation, and that justification must be shown, before either the common-law or equity court will give relief. But the proposition that such inquiry, and the giving of relief, is equivalent to the granting of a divorce from bed and board, it would seem, must involve the common-law court in the same embarrassment as Mr. Bishop has attempted to draw the equity court into whenever it affirms that it lies within the equitable jurisdiction to grant such relief. Is there anything in the proceeding whether in the common-law or equity court, which authorizes the spouses to live separate and apart, or authorizes the delinquent husband to continue his neglect, without cause, to provide for his wife. Is not the wrongful conduct of the husband, instead of the proceeding whereby a court compels him to support his wife, the only justification she has for her separation? And is there anything in the proceeding either authorizing the husband to continue his wrongful conduct, or fail to resume the voluntary discharge of his marital duties? Is there anything in the proceeding which merely compels him to support his wife, in the nature of casting an obstacle in the way of his seeking reconciliation with her, and resuming the voluntary discharge of his marital obligations? It is within the power of courts of equity to make their decrees in all such cases subject to such modifications as circumstances may demand; and it is worthy of consideration whether the actual effect of a just and proper exercise of such jurisdiction would not tend to induce reconciliation, by checking the husband in his willful and unjustifiable abandonment of his marital obligations. The proceeding, it would seem, simply checks the husband in his attempt to entirely abandon his obligation, without sanctioning the separation any further than inquiring whether it is enforced by the husband's conduct,—the same as done by common-law courts,—and without placing the slightest obstacle in the way of reconciliation. These considerations are in no way suggested as furnishing the reasons upon which to base an answer to the question whether the equity courts of this state possess the jurisdiction in question. They are brought to view in connection with the proposition asserted by some, as we have seen, that to grant such relief is equivalent to, and in fact includes, the decree of divorce *a mensa et thoro*. But we are inclined, after much reflection, to regard the proposition as untenable. When the whole nature and effect of the relief are considered, it

appears to be an extreme view, born of a zealous advocacy of one side of this disputed question of jurisdiction.

We will close the inquiry upon this branch of the case by bringing to view certain statutory and constitutional provisions of this state which to some extent, we think, should influence our determination. The statute provides that: "Women shall retain the same legal existence and legal personality after marriage as before marriage, and shall receive the same protection of all her rights as a woman which her husband does as a man; and for any injury sustained to her reputation, person, property, character, or any natural right, she shall have the same right to appeal in her own name alone to the courts of law or equity, for redress and protection, that her husband has to appeal in his own name alone." Section 1439, div. 5, Comp. Stat. Our Constitution provides that "the district courts shall have original jurisdiction in all cases at law and in equity, . . . and for such special actions and proceedings as are not otherwise provided for." Section 11, art. 8. And, further, that "there shall be but one form of civil action, and that law and equity may be administered in the same action." Section 28, art. 8. And, further, that "courts of justice shall be open to every person and a speedy remedy afforded for every injury of person, property, or character, and that right and justice shall be administered without sale, denial, or delay." Section 6, art. 3. This latter provision was, we think, set before the courts, by the framers of the Constitution, as a tenet for consideration in a case like this, where, clearly, there is an established right existing, subject to judicial enforcement, and the question is raised on purely artificial grounds, as to whether such right shall be enforced in such an action and in such jurisdiction as by its practice and methods of procedure can insure an appropriate, just, and adequate relief, or whether there shall be a denial of such appropriate and adequate remedy as the courts can afford. It is admitted that the right exists, and it is contended there is a remedy at law; but we have seen that in many cases that answer would be but a mockery to the aggrieved, in her unjust abandonment. The court is then confronted with the question whether there shall be a denial of enforcement of this right, except where absolute divorce is granted. We think the intendment of our Constitution and statutes is to negative that proposition. With these provisions before us, in addition to the grounds of equity jurisdiction considered, we are drawn to the conclusion that our courts are invested with a jurisdiction broad enough to give proper and adequate remedy for the enforcement of the right in question, in proper cases, where it is shown that such jurisdiction ought to be exercised, and that such remedy lies within the equity jurisdiction of our district courts.

The second proposition of law to be determined in this case will be developed by a brief statement of facts set forth in plaintiff's complaint. Among other things, it is alleged that plaintiff and defendant intermarried on or about the 9th day of September, 1879, at Watkins Glen, Schuyler county, state of New York, and lived together as man and wife until October 24, 1886; that from September, 1882, until October, 1886, they resided in the city of Helena, territory of Montana; that in May, 1887, defendant, without any cause or provocation on the part of plaintiff, willfully abandoned and deserted her, and compelled her to live separate and apart from him; that, from the last date up to about seven months prior to the commencement of this action, defendant contributed the sum of $50 per month, and at times $75 per month, for plaintiff's support; that, for about seven months last past, defendant has neglected and refused, and still refuses, to furnish plaintiff any money whatever, and that she is now wholly without means of support, and is entirely dependent upon her personal exertions and the contributions of her friends for support of herself and infant son, the issue of said marriage, now in plaintiff's care and custody; that about April 24, 1887, at the city and state of New York, defendant, by threats and menances, (particularly alleged and described), compelled plaintiff to write and sign, as dictated by defendant, a letter of authority addressed to E. D. Weed, Esq., an attorney at law, residing, and engaged in the practice of law, at the city of Helena, territory of Montana, authorizing him to appear as her counsel in an action which defendant proposed to commence against her to obtain a divorce from the bonds of matrimony existing between plaintiff and defendant; that, when defendant had thus compelled the writing of said letter by plaintiff, he took the same into his possession; that thereafter plaintiff requested defendant to destroy said letter, and that he then told plaintiff, in order to deceive and defraud her, that he had destroyed said letter, but that, contrary to such statement, defendant retained said letter in his possession, and thereafter presented the same to said attorney, and told said attorney that plaintiff desired said letter to be delivered to him, and desired him to appear for plaintiff, and "represent her in a divorce proceeding to be commenced by the defendant:" that thereafter said attorney appeared as counsel for this plaintiff in an action commenced in the district court of the fourth judicial district of the territory of Montana within and for the county of Yellowstone, by defendant herein against this plaintiff, to obtain a divorce from her; that such proceedings were had in said action as resulted in defendant obtaining from said court a decree of divorce from this plaintiff. Plaintiff further alleges that she did not appear in said action, nor had any knowledge of the fact that said attorney had appeared for her therein. Respondent interposed a demurrer to this complaint, which was sustained by the court, and plaintiff appealed from that order.

Appellant's counsel succinctly state their position on this branch of the case as follows: "Are the parties hereto husband and wife? Is said decree void or voidable? If

void, we will then claim that plaintiff is the wife of defendant, and is entitled to mantain this action. If voidable, then we concede that we are premature in our action." It is not contended by appellant that the decree of the territorial district court, dissolving the bonds of matrimony which theretofore existed between plaintiff and defendant, is void for any reason that appears on the face of such decree. It was pronounced by a court of general jurisdiction, and of special statutory jurisdiction of actions for divorce. Comp. Stat. div. 5, § 1000. Moreover, by appellant's own showing in her complaint, it appears that said court had jurisdiction of her person, by her appearance through her attorney, duly and expressly authorized by letter. Sections 80, 491, Code Civil Proc. This decree must be regarded, of course, as if pronounced by a court of this state, as the transformation from territorial to state form of government is for many purposes to be considered as a continuity of government. Const. art. 20, § 2. The theory of appellant's counsel is that the judgment is void, not by reason of any facts appearing on the face of the proceedings, but by reason of the facts pleaded as to the conduct of defendant, which led up to the court obtaining jurisdiction to grant said decree. They contend that, by reason of those facts pleaded, (which are deemed admitted on demurrer), it is shown that the court had no jurisdiction over the person of appellant, who was defendant in said proceedings for divorce. On this premise they submit "that wherever want of jurisdiction over the person of defendant is shown the judgment rendered without such jurisdiction is absolutely void, and is a nullity, and that this want of jurisdiction may as well be shown by evidence *aliunde* the record as from the face of the record; that in either case, if this want of jurisdiction is shown, the decree is absolutely void, and of no force or effect." It seems to us that, if such a premise be followed, it would sweep away all distinction between judgments void for reasons manifest on the face of the record, and those which, as appears by the record, are valid, and must be given full faith and force until impeached in a proper proceeding, by establishing facts *aliunde* the record sufficient for that purpose. While there is much conflict relating to certain questions of law concerning judgments, we think it may be safely said to be almost uniformly settled now that domestic judgments of courts of general jurisdiction, valid on their face, cannot be collaterally attacked in courts of the same state, by showing facts *aliunde* the record although such facts might be sufficient to impeach the judgment in question if brought to bear upon it in a proper proceeding. The proposition in this case appears to be to open a way through said decree of divorce for the progress of this action, by going back of that judgment, and raising a question as to the good faith and lawfulness of the plaintiff's conduct in obtaining it. Such a practice cannot be sustained. It is needless to go into a discussion of the reasons and public policy which forbid such a rule. These are fully developed in the authorities. Freem. Judgm. §§ 116, 128; 1 Black, Judgm. §§ 170, 270; *Hahn* v. *Kelly*, 34 Cal. 391, 94 Am. Dec. 742. *Carpentier* v. *Oakland*, 30 Cal. 440; *Granger* v. *Clark*, 22 Me. 128; *Penobscot R. Co.* v. *Weeks*, 52 Me. 456; *Prince* v. *Griffin*, 16 Iowa, 552; *Callen* v. *Ellison*, 13 Ohio St. 446, 82 Am. Dec. 448; *Coit* v. *Haven*, 30 Conn. 190; *Clark* v. *Bryan*, 16 Md. 171; *Wingate* v. *Haywood*, 40 N. H. 437; *Galpin* v. *Page*, 1 Sawy. 309; *Horner* v. *Doe*, 1 Ind. 130, 48 Am. Dec. 355; *Baker* v. *Stonebraker*, 34 Mo. 172; *Reed* v. *Pratt*, 2 Hill, 64; *Harshey* v. *Blackmarr*, 20 Iowa, 161, 89 Am. Dec. 520. See also a late case from Oregon,—*Morrill* v. *Morrill*, 20 Or. 96, 11 L. R. A. 155, published in 23 Am. St. Rep. 95, with an elaborate note by Mr. A. C. Freeman, editor, and also author of Freeman on Judgments, citing many cases upon the subject.

Upon the view that said decree was not void, but only voidable in a proper proceeding for that purpose, the court sustained respondent's demurrer and in our opinion the ruling is correct.

The judgment will therefore be affirmed.

Blake, *Ch. J.*, and **DeWitt,** *J.*, concur.

MINNESOTA SUPREME COURT.

Wiseman A. SPARROW, *Appt.*,
v.
C. H. POND, *Resp't.*

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

(May 3, 1892.)

*Blackberries while growing on the bushes are not subject to levy on execution as personal property.

*Head note by MITCHELL, *J.*

APPEAL by plaintiff from a judgment of the District Court for Dodge County in favor of defendant in an action brought to recover possession of certain blackberries which plaintiff had purchased at an execution sale upon a judgment against defendant. *Affirmed.*

The facts are stated in the opinion.

NOTE.—*Classification of growing fruit as real or personal property.*

Direct decisions as to the nature or classification as property of fruit before it is severed from trees or bushes are very few indeed, although the question is discussed in a multitude of cases which actually involve only the question of cultivated crops which are grown by annual planting.

Very similar to the main case is the decision that peaches on the trees are not subject to levy as per-

Mr. **S. T. Littleton,** for appellant:

A levy may be made upon grain or grass while growing and upon any other unharvested crops.

Gen. Stat. chap. 66, § 315.

Chattels real may be levied upon and sold on execution.

Id. § 300.

In this state the interest of the vendee under a contract of purchase of real estate may be levied upon under a writ of execution.

Henry v. *Traynor*, 42 Minn. 234; *Reynolds* v. *Fleming*, 43 Minn. 513.

So may any equitable interest in land.

Atwater v. *Manchester Sav. Bank*, 45 Minn. 341.

And generally all tangible property which the debtor could himself sell can by execution be made the subject of involuntary transfer to pay his just debts.

1 Freem. Executions, § 110.

Blackberries in this state depend on annual cultivation and do not thrive or produce berries fit for market if left to nature. The crop of berries is the result of the labor and skill of the gardner, *fructus industrialis.*

Id. § 113; Benjamin, Sales, Bennett's 4th ed. §§ 129, 130.

In *Frank* v. *Harrington*, 36 Barb. 415, all the cases prior to that time were reviewed and it was considered that strawberries, grapes, and hops as now cultivated grow by the manurance and industry of the owner and should be put in the category of personal instead of real estate and so of any kind of produce raised annually by labor and cultivation except grass growing or fruit not gathered from the trees.

Latham v. *Atwood*, Cro. Car. 515.

Messrs. **Samuel Lord** and **Robert Taylor,** for respondent:

Blackberries grow wild in these parts and bear fruit with or without manurance or cultivation. They are perennial, living and growing for many years without being renewed or transplanted, and sending up, each year, shoots or canes, which live over, bear fruit the second year and then die. These facts are of such general notoriety and are so commonly known that the court will take judicial notice of them.

1 Greenl. Ev. 14th ed. § 6; *Brown* v. *Piper*, 91 U. S. 37, 23 L. ed. 200; *Floyd* v. *Ricks*, 14 Ark. 286, 58 Am. Dec. 374; *Tomlinson* v. *Greenfield*, 31 Ark. 557; *Dixon* v. *Nicolls*, 39 Ill. 373, 89 Am. Dec. 312; *Raridan* v. *Central Iowa R. Co.* 69 Iowa, 527; *Patterson* v. *McCausland*, 3 Bland, Ch. 69; *Wetzler* v. *Kelly*, 83 Ala. 440; *Gordon* v. *Tweedy*, 74 Ala. 232, 49 Am. Rep. 813; *Loeb* v. *Richardson*, 74 Ala. 311; *Mahoney* v. *Aurrecochea*, 51 Cal. 429; *Garth* v. *Caldwell*, 72 Mo. 622.

Growing blackberries do not fall within the term "any other unharvested crops," used in the statute.

Bouvier, Law Dict. titles, *Crops, Emblements;*

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sonal property. State v. Gemmill, 1 Houst. (Del.) 9.

The other cases arise in respect to contracts of sale.

A contract for the sale of all the growing fruit in an orchard to be picked and delivered by the vendor at a certain price per bushel and which gives the vendee no right to enter upon the land or touch the trees or the apples until they are picked, is not a contract for the sale of an interest in land within the Statute of Frauds. Brown v. Stanclift (Buff. Super. Ct.) Op. by Smith not reported; aff'd by Mem. Dec. 80 N. Y. 627.

A sale of a crop of peaches while growing in the orchard to be gathered and removed as they mature is not within the Statute of Frauds as a sale of an interest in land. Turner v. Piercy, 40 Md. 212, 17 Am. Rep. 591.

A contract giving "one half in the orchard of all the apples and peaches and one half of all the blackberries on the bushes" on certain land during a period of three years, which contract was construed to require a delivery thereof by the vendor, is not a contract for the sale of a chattel real, but for the sale of personal property, and therefore is not within that provision of the Statute of Frauds as to the sale of an interest in real estate, although it is within another provision of that statute as to contracts not to be performed within one year. Smock v. Smock, 37 Mo. App. 56.

A sale of an entire crop of fruit for a certain year is not a sale of realty which needs to be in writing. Vulicevich v. Skinner, 77 Cal. 239.

In this case it seems that the vendor, as in the cases above, was required to deliver the fruit to the vendee, and in that view the case is strictly parallel with the other decisions above concerning sales of fruit. The court, however, does not mention this fact as having any bearing on the decision, but treats the fruit as *fructus industrialis.*

As against the above cases concerning sales of fruit an earlier English case decided that the sale of a crop of fruit and vegetables is the sale of an interest in land, within the meaning of a statute requiring a conveyance of such an interest to be stamped. Rodwell v. Phillips, 9 Mees & W. 502.

But in this case it appears, as it does not in any of the American cases above, that the purchaser was by the contract to enter upon the land and gather the fruit and the action was in assumpsit for "not permitting the plaintiff to gather" it. The case therefore can be readily distinguished from the American cases on that ground.

This same distinction will harmonize the American cases as to sales of growing fruit which hold it to be personal property with the main case and the case of State v. Gemmill, 1 Houst. (Del.) 9, which deny that it can be levied on as personalty. Otherwise we have decisions treating fruit as realty for the purpose of levy but as personalty for the purpose of sale.

In full agreement with the decisions holding that growing fruit cannot be levied on as personalty is the generally accepted doctrine that such fruit is not the subject of larceny. Text-books all seem to agree in stating this to be the rule unless changed by statute, but they base it apparently on the reason of the law rather than upon any actual decisions of the courts to that effect. In Bartlett v. Brown, 6 R. I. 37, the same doctrine is stated. That case was an action for malicious prosecution in procuring plaintiff's arrest on a charge of stealing such fruit. The court held, however, that the action would not lie as the charge of theft was only a harsh or exaggerated charge of a statutory offense of taking the fruit without license.

Taking all the cases that can be found in which there was actually decided anything about the kind of property that growing fruit belongs to, it seems that they fairly establish the doctrine that such fruit is real property, but that for the purpose of a contract of sale by which the vendor agrees to sever it from the realty and deliver it to the purchaser it may be regarded as already severed and changed into personal property. B. A. R.

4 Am. & Eng. Encyclop. Law, p. 887, title *Crops*.

At common law the "growing crops" or "emblements," that were subjected to the levy of a writ of *fi. fa.* against the tenant were only such crops of his annual planting as were mainly the result of his manurance and labor in their cultivation and as would mature the same season in which they were planted, and did not include the grasses nor the fruits of perennial shrubs, even though planted and cultivated, or pruned, by the tenant himself.

1 Schouler, Pers. Prop. §§ 100, 104, *et seq.*, 475, *et seq.*; 4 Kent, Com. p. 73; 1 Bouvier, Law Dict. 7th ed. 465; *Rodwell* v. *Phillips*, 9 Mees. & W. 501; *Smith* v. *Leighton*, 38 Kan. 544, 5 Am. St. Rep. 778; 1 Hilliard, Real Prop. 13.

When a product of the soil is claimed not to be subject to seizure and sale under a *fi. fa.* the claim must be determined by ascertaining whether such product is real or personal estate; and this last question is in turn to be settled by inquiring whether the product is chiefly the result of roots permanently attached to the soil or of the labor and skill of defendant in sowing and cultivating the soil.

1 Freem. Executions, § 113; Schouler, Pers. Prop. §§ 100, 104, *et seq.*; 2 Bl. Com. 123, Sharswood's *note*.

An exception was made as to the single product of hops.

Latham v. *Atwood*, Cro. Car. 515; *Frank* v. *Harrington*, 36 Barb. 415.

In Darlington on Personal Property, p. 26, "*fructus naturales*" are defined to be those products which require to be planted but once and then bear for years.

Thompson, Law of the Farm, § 25. See also Gwynne, Sheriff & Coroner, p. 220; Crocker, Sheriffs & Constables, p. 207; *Craddock* v. *Riddlesbarger*, 2 Dana, 206; *State* v. *Gemmill*, 1 Houst. (Del.) 9; Jones, Chat. Mort. § 145; *Rodwell* v. *Phillips*, 9 Mees. & W. 503.

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

At common-law those products of the earth which are annual, and are raised by yearly manurance and labor, and essentially owe their annual existence to the cultivation of man, termed "emblements," and sometimes "*fructus industriales*," were, even while still annexed to the soil, treated as chattels, with the usual incidents thereof as to seizure on attachment during the owner's life, and transmission after his death. This class included grain, garden vegetables, and the like. On the other hand, the fruit of trees, perennial bushes and grasses growing from perennial roots, and called, by way of contradistinction, "*fructus naturales*," were, while unsevered from the soil, considered as pertaining to the realty, and as such passed to the heir at the death of the owner, and were not subject to attachment during his life. 4 Kent, Com. p. 73; 4 Bacon, Abr. 372, title *Emblements;* Freem. Executions, § 113; 1 Schouler, Pers. Prop. § 100 *et seq.*; *State* v. *Gemmill*, 1 Houst. (Del.) 9; *Craddock* v. *Riddlesbarger*, 2 Dana, 205; 9 Am. & Eng. Encyclop. Law, title *Crops;* *Rodwell* v. *Phillips*, 9 Mees. & W. 501. A possible exception to this classification is the case of hops on the vines, which have been held to be personal chattels, and subject to sale as such. The ground upon which this seems to be held is that, although the roots of the hops are perennial, the vines die yearly, and the crop from the new vines is wholly or mainly dependent upon annual cultivation. The decisions upon that question, however, seem to be all based upon the old case of *Latham* v. *Atwood*, Cro. Car. 515. See *Frank* v. *Harrington*, 36 Barb. 415.

It is sometimes stated that the test whether an unsevered product of the soil is an emblement, and, as such, personal property, is whether it is produced chiefly by the manurance and industry of the owner. But, while this test is correct as far as it goes, it is incomplete. Under modern improved methods, all fruits are cultivated, the quality and quantity of the yield depending more or less upon the annual expenditure of labor upon the trees, bushes, or vines; but it has never been held that fruit growing upon cultivated trees were subject to levy as personal property. No doubt all emblements are produced by the manurance and labor of the owner, and are called "*fructus industriales*" for that reason; but the manner, as well as purpose, of planting is an essential element to be taken into consideration. If the purpose of planting is not the permanent enhancement of the land itself, but merely to secure a single crop, which is to be the sole return for the labor expended, the product would naturally fall under the head of "emblements." On the other hand, if the tree, bush, or vine is one which requires to be planted but once, and will then bear successive crops for years, the planting would be naturally calculated to permanently enhance the value of the land itself, and the product of any one year could not be said to essentially owe its existence to labor expended during that year; and hence it would be classed among "*fructus naturales*," and the right of emblements would not attach. Darlington, Pers. Prop. 26. This classification is, of course, more or less arbitrary, but it is the one uniformly adopted by the courts, (unless hops be an exception), and it is the only one which will furnish a definite and exact rule. Blackberry bushes are perennial, and when planted once yield successive crops. They grow wild, but, like every other kind of fruit or berry, are improved by cultivation. The quantity and quality of the yield is largely dependent upon the amount of annual care expended upon them, but the difference in that respect between them and other fruits is only one of degree. It seems to us quite clear that at common law such berries, while growing upon the bushes, were not subject to levy on execution as personal property, and we have no statute changing the rule. Evidently the main purpose of section 315, chap. 66, Gen. Stat., was, while permitting immature growing crops to be levied on, to prohibit their sale until they were ripe and fit to be harvested. The word "crops" had, long before this statute, acquired in law a meaning synonymous with or equivalent to the common-law term "emblements," and neither of them included fruits of perennial trees or shrubs, and it is to be presumed that the term "crops" is used in the statute in this same sense. The only change effected by the stat-

moment too rough or too narrow to meet all the exigencies of the situation. Whatever is so much out of the ordinary course as not to be naturally foreseen, as a probable result of the condition of the highway, the road authorities are not bound to provide against; and their neglect to make such provision can be neither a proximate nor a concurring cause of the injury received in consequence of such extraordinary happening. If the road in Jackson township was suitable and safe for ordinary travel, a traveler could ask no more. If, notwithstanding the condition of the road, a traveler was injured as the result of a series of accidents like those that befell Mrs. Wagner, and for which it is conceded the township was not responsible, viz., the fright of her horse, his sudden turn in the road, the crushing of the wagon wheel, the dragging of the axle and the consequent pulling of the wagon out of the track and against the stone pile, it is clear that the stone pile, which did not interfere with ordinary travel or the common beaten wagon track, was not the proximate or a concurrent cause of the injury, and that the question of concurring negligence was not properly in that case.

The judgment in this case is reversed.

INDIANA SUPREME COURT.

Henry W. LANGENBERG, Sheriff of Marion County, *Appt.*,
v.
Philip C. DECKER.

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

The power to fine and imprison for contempt is essentially a judicial one and an attempt to confer it on a state board of tax commissioners who have power to take testimony is in violation of a constitutional provision that no person charged with official duties under either the legislative, executive, or judicial department of the government shall exercise any of the functions of another department, since such board belongs to the executive or administrative department.

(May 10, 1892.)

APPEAL by respondent from a judgment of the General Term of the Superior Court for Marion County affirming a judgment of the Special Term in favor of petitioner in a habeas corpus proceeding to release petitioner from the custody of respondent, to which he had been committed by the state board of tax commissioners for alleged contempt in refusing to answer questions propounded to him. *Affirmed.*

The facts are stated in the opinion.

Mr. **A. G. Smith,** *Atty-Gen.*, for appellant:

The power of assessment and taxation is legislative, with no limitation except that taxation shall be uniform and equal. Courts cannot interfere with this power or the mode prescribed for its enforcement.

U. S. Const. art. 1, § 8; Ind. Const. art. 10, § 1; Cooley, Const. Lim. pp. 593–596; Blackwell, Tax Titles, 1; Montesquieu, Spirit of the Law, bk. 13, chap. 1; *Perry* v. *Washburn*, 20 Cal. 318, 350; *Van Horn* v. *People*, 46 Mich. 183, 41 Am. Rep. 159; *Citizens Sav. & L. Asso.* v. *Topeka*, 87 U. S. 20 Wall. 655, 22 L. ed. 455; *McCulloch* v. *Maryland*, 17 U. S. 4 Wheat. 316, 428, 4 L. ed. 579, 606; *Providence Bank* v. *Billings*, 29 U. S. 4 Pet. 514, 561, 7 L. ed. 939, 955; *Kirkland* v. *Hotchkiss*, 100 U. S. 491, 25 L. ed. 558; *Board of Education* v. *McLandsborough*, 36 Ohio St. 227, 38 Am. Rep. 582; *Lima* v. *McBride*, 34 Ohio St. 338, 350; Cooley, Taxn. p. 41; 1 Desty, Taxn. 81, § 22.

For the purposes of state taxation this right and power is exercised by the Legislature. The officers that are to perform the duty must be named by the Legislature; and when they have had conferred upon them the power necessary to carry into execution this great trust, it is conclusive so far as the courts are concerned. No one dare deny that power. No one dare lay his hand upon the Constitution to limit it, for the Constitution has but one limitation, and that is the limitation of eternal equality.

Tiedeman, Pol. Powers, p. 481; 1 Desty, Taxn. p. 83; *Robertson* v. *State*, 7 West. Rep. 481, 109 Ind. 79; *Wright* v. *Defrees*, 8 Ind. 298; *Smith* v. *Myers*, 7 West. Rep. 90, 109 Ind. 1–9, 58 Am. Rep. 375.

The subject of taxation is a legislative question, "and over purely legislative questions the courts have no supervision or control. A question of that character is beyond the touch of the judiciary, for one department of government cannot enter the domain of another."

Carr v. *State*, 11 L. R. A. 370, 127 Ind. 208, and authorities cited; *Smith* v. *Myers* and *Robertson* v. *State*, *supra*.

The constitutional guaranty against unreasonable searches and seizures is not and never has been construed as a limitation upon the taxing power. It has no reference to or connection with the subject of taxation.

Boyd v. *United States*, 116 U. S. 616, 29 L. ed. 746; *Com.* v. *Dana*, 2 Met. 329; *First Nat. Bank of Youngstown* v. *Hughes*, 106 U. S. 523, 27 L. ed. 268, 6 Fed. Rep. 737.

For a person or corporation to give proper information to an officer of the law does not give publicity to his business; and a law requiring such information to be given is not repugnant to the 4th Amendment of the Constitution, and is not in its nature unreasonable searchers and seizures of one's private books, papers, etc.

Launder v. *Chicago*, 111 Ill. 291, 53 Am. Rep. 625; *Van Baalen* v. *People*, 40 Mich. 258; *Shuman* v. *Fort Wayne*, 11 L. R. A. 378, 127 Ind. 109; *Re Clayton*, 13 L. R. A. 66, 59 Conn. 510; Tiedeman, Police Powers, p. 471; Cooley, Const. Lim. 200; *Com.* v. *McCloskey*, 2 Rawle,

NOTE.—The fullness of the discussion of the question involved in the above case which is furnished by the report of the case itself makes any attempt at annotation unnecessary.

See also 25 L. R. A. 110; 28 L. R. A. 242; 36 L. R. A. 105.

374; *Beebe* v. *State*, 6 Ind. 501, 528, 63 Am. Dec. 391; *Johnston* v. *Com.* 1 Bibb, 603; *Flint River S. B. Co.* v. *Foster*, 5 Ga. 194, 48 Am. Dec. 248; *State* v. *Kruttschnitt*, 4 Nev. 178; *Walker* v. *Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24; *Hills* v. *Chicago*, 60 Ill. 86.

The courts are not the guardians of the rights of the people of the state, except as those rights are secured by some constitutional provision which comes within the judicial cognizance.

Cooley, Const. Lim. 201; *Bennett* v. *Boggs*, Baldw. 74; *Munn* v. *Illinois*, 94 U. S. 113, 24 L. ed. 77.

The doctrine of "due process of law" does not apply to the power of taxation at all.

Sedgw. Stat. & Const. Constr. p. 425; *McMillen* v. *Anderson*, 95 U. S. 40, 24 L. ed. 335; *Pearson* v. *Yewdall*, 95 U. S. 296, 24 L. ed. 436; *Kelly* v. *Pittsburgh*, 104 U. S. 78, 26 L. ed. 658; *Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569; *Bell's Gap. R. Co.* v. *Pennsylvania*, 134 U. S. 232, 33 L. ed. 892; Cooley, Taxn. 438; *Murray* v. *Hoboken Land & Imp. Co.* 59 U. S. 18 How. 272, 15 L. ed. 372; *Kennard* v. *Louisiana*, 92 U. S. 480, 23 L. ed. 478; Cooley, Const. Lim. 436, 437; *Vanzant* v. *Waddel*, 2 Yerg. 260; *Lenz* v. *Charlton*, 23 Wis. 478; *Pennoyer* v. *Neff*, 95 U. S. 714, 24 L. ed. 565; *Wynehamer* v. *People*, 13 N. Y. 378, 432; *Kalloch* v. *San Francisco Super. Ct.* 56 Cal. 229; *Baltimore* v. *Scharf*, 54 Md. 499.

If the statute confers upon the tribunal the right to act in a given matter with power to hear and determine questions lawfully submitted to it, and its acts are within the powers granted by the statute, the acts of such a tribunal are judicial and can be enforced as other judicial orders and commands are enforced.

Re Saline County Subscription, 45 Mo. 53, 100 Am. Dec. 337.

The duties of assessors, in estimating the value of property for purposes of general taxation are judicial.

Barhyte v. *Shepherd*, 35 N. Y. 238, 250; *Hassan* v. *Rochester*, 67 N. Y. 528, 536; *Stuart* v. *Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Williams* v. *Weaver*, 75 N. Y. 30, 33; Cooley, Taxn. 266; Burroughs, Taxn. 102; *Jordan* v. *Hyatt*, 3 Barb. 275, 283; *Ireland* v. *Rochester*, 51 Barb. 416, 430, 431; *State* v. *Jersey City*, 24 N. J. L. 662; *State* v. *Morristown*, 34 N. J. L. 445; *Griffin* v. *Mixon*, 38 Miss. 424, 437, 438; *State* v. *Wood*, 8 West. Rep. 540, 110 Ind. 83; *Kuntz* v. *Sumption*, 2 L. R. A. 655, 117 Ind. 1; *Hyland* v. *Brazil Block Coal Co.* 128 Ind. 335; *Garrigus* v. *State*, 93 Ind. 239; 1 High, Inj. § 493; Mechem, Pub. Off. & Officers, § 616; *Shoultz* v. *McPheeters*, 79 Ind. 378; *Steele* v. *Dunham*, 26 Wis. 393; *South Nashville St. R. Co.* v. *Morrow*, 2 L. R. A. 853, 87 Tenn. 406; *Van Steenbergh* v. *Bigelow*, 3 Wend. 43; *Martin* v. *Mott*, 25 U. S. 12 Wheat. 31, 6 L. ed. 541; *Jenkins* v. *Waldron*, 11 Johns. 121, 6 Am. Dec. 359; *Kendall* v. *Stokes*, 44 U. S. 3 How. 98, 11 L. ed. 512; *Porter* v. *Haight*, 45 Cal. 637.

Quasi judicial officers are empowered to punish any one guilty of contemptuous conduct in their presence.

Swafford v. *Berrong*, 84 Ga. 65; *Re Clayton*, 13 L. R. A. 66, 59 Conn. 510.

Penalties in tax laws are enforced without the aid of courts.

16 L. R. A.

Cooley, Taxn. 2d ed. p. 356; *Olds* v. *Com.* 3 A. K. Marsh. 465; *State* v. *Parker*, 33 N. J. L. 192; *State* v. *Bishop*, 34 N. J. L. 45; *State* v. *Parker*, 34 N. J. L. 49; *State* v. *McChesney*, 34 N. J. L. 63; *Thompson* v. *Tinkcom*, 15 Minn. 295; *People* v. *Stockton & C. R. Co.* 49 Cal. 414; *Boyer* v. *Jones*, 14 Ind. 354; *State* v. *Washoe County Board of Equalization*, 7 Nev. 83; *State* v. *Apgar*, 31 N. J. L. 358; *Genin* v. *Belmont County*, 18 Ohio St. 534; *Champaign County Bank* v. *Smith*, 7 Ohio St. 43; *State* v. *Woods*, 8 West. Rep. 540, 110 Ind. 83.

The power to discover omitted property and cause it to be placed upon the tax duplicate is one of the legitimate powers of taxation. This power, given by the Legislature, carries with it the authority to ascertain what property has been omitted from the tax lists, the character and value of the same, and who is the owner thereof. It does not require the aid of courts to enforce the power. The mode of accomplishing this end is provided in the statute, and the "due process of law" to be resorted to in such cases is the enactment of the Legislature upon that subject.

State v. *Wood*, *supra*; *Kuntz* v. *Sumption*, 2 L. R. A. 655, 117 Ind. 1; *First Nat. Bank of Youngstown* v. *Hughes*, 106 U. S. 523, 27 L. ed. 268, 6 Fed. Rep. 737; *Hyland* v. *Brazil Block Coal Co.* 128 Ind. 335; *Genin* v. *Belmont County*, 18 Ohio St. 534; *Champaign County Bank* v. *Smith*, 7 Ohio St. 43; *Boyd* v. *United States*, 116 U. S. 616, 29 L. ed. 746; Pom. Const. Law, §§ 283, 284; *Wade* v. *Kimberly*, 5 Ohio C. C. 33; *Scott* v. *Raine*, 25 Week. L. Bull. 154; *Woll* v. *Thomas*, 1 Ind. App. 232; *San Luis Obispo* v. *Pettit*, 87 Cal. 499; Rev. Stat. 1881, § 6416; *Vandercook* v. *Williams*, 5 West. Rep. 248, 106 Ind. 345.

The subject of taxation belongs to the police power of the state, is complete within its scope and subject only to legislative control, and may be exercised to any extent to which the law-making power chooses to carry it.

Hagar v. *Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569; *Bell's Gap. R. Co.* v. *Pennsylvania*, 134 U. S. 232, 238, 33 L. ed. 892, 895; *Kidd* v. *Pearson*, 128 U. S. 1, 24–26, 32 L. ed. 346, 351, 352; *Powell* v. *Pennsylvania*, 127 U. S. 678, 32 L. ed. 253; *Mugler* v. *Kansas*, 123 U. S. 623, 31 L. ed. 205; *Yick Wo* v. *Hopkins*, 118 U. S. 365, 374, 30 L. ed. 225, 227; *Coe* v. *Errol*, 116 U. S. 517, 29 L. ed. 715; *Richmond, F. & P. R. Co.* v. *Richmond*, 96 U. S. 528, 24 L. ed. 736; *Northwestern Fertilizing Co.* v. *Hyde Park*, 97 U. S. 659, 24 L. ed. 1036; *Patterson* v. *Kentucky*, 97 U. S. 501, 24 L. ed. 1115; *Stone* v. *Mississippi*, 101 U. S. 818, 25 L. ed. 1079; *Neal* v. *Delaware*, 103 U. S. 384, 26 L. ed. 568.

Messrs. **Addison C. Harris, Thomas A. Stuart** and **William A. Ketcham**, for appellee:

So much of section 129 of the Act in question as gives to the state board power to punish for contempt a witness who appears and refuses to answer questions is an attempt to confer judicial powers on an administrative branch of the government, and is unconstitutional and void.

Cooley, Const. Lim. p. 2; Ind. Const. art. 3, § 1.

The state board of tax commissioners be-

longs to the administrative branch, which is but a part of the executive branch; and therefore, under our Constitution, "no person," (using that word in its broad sense,) "charged with official duties under one of these departments shall exercise any of the functions of any other branch."

Kilbourn v. *Thompson*, 103 U. S. 168, 26 L. ed. 377.

The power to punish for direct contempt was inherent in all courts of superior jurisdiction, and cannot be created, destroyed, or abridged by the Legislature."

Holman v. *State*, 2 West. Rep. 761, 105 Ind. 513.

The power to punish for contempt is the highest exercise of judicial power, and is not an incident to the mere exercise of judicial functions.

Re Mason, 43 Fed. Rep. 510; *Ex parte Doll*, 7 Phila. 595; *Re McLean*, 37 Fed. Rep. 648; *Anderson* v. *Dunn*, 19 U. S. 6 Wheat. 204, 5 L. ed. 242.

Judicial power can only be vested in the courts.

Const. art. 7, §1; *Shoultz* v. *McPheeters*, 79 Ind. 373, 375; *State* v. *Noble*, 4 L. R. A. 101, 118 Ind. 267; *Vandercook* v. *Williams*, 5 West. Rep. 248, 106 Ind. 345; *Ex parte Milligan*, 71 U. S. 4 Wall. 2, 18 L. ed. 281; *Gregory* v. *State*, 94 Ind. 385, 48 Am. Rep. 162; *Whitcomb's Case*, 120 Mass. 118, 21 Am. Rep. 502.

The question of the power of this board to commit for a contempt is, by the terms of the statute referred to, a question that this court may pass upon, and this would be the rule of law without any statute.

Miller v. *Snyder*, 6 Ind. 1.

If the commitment be against the law, as being made by one who has no jurisdiction of the case, or for a matter for which by law no man ought to be punished, the courts are to discharge.

Bacon, Abr. *Habeas Corpus*, 10.

An unconstitutional law is void, and it is as no law at all, and the alleged offense committed under it is not punishable. A conviction under it is not merely erroneous, but it is illegal and void, and cannot be held a legal cause of imprisonment.

Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717.

If a court having no jurisdiction over the person or subject-matter before it sentences a party or a witness for disobedience of its authority, such person, thus illegally deprived of his liberty, may be released by any court authorized to issue writs of habeas corpus.

Ex parte Fisk, 113 U. S. 713, 28 L. ed. 1117; *Ex parte Ayers*, 123 U. S. 443, 31 L. ed. 216; *Ex parte Perkins*, 29 Fed. Rep. 900; *Ex parte Farley*, 40 Fed. Rep. 66; *Ex parte Lange*, 85 U. S. 18 Wall. 163, 21 L. ed. 872; *People* v. *Cassels*, 5 Hill, 164; *People* v. *Warden of County Jail*, 1 Cent. Rep. 173, 100 N. Y. 20; *Fisher* v. *McGirr*, 1 Gray, 1–49; *Re Morton*, 10 Mich. 208.

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

The General Assembly of the state passed an Act, which was approved and went into force on the 6th day of March, 1891, entitled "An Act Concerning Taxation, Repealing All Laws in Conflict herewith, and Declaring an Emergency." The Act creates a state board of tax commissioners, composed of five persons, viz., the secretary of state, the auditor of state, and the governor of the state, who are styled *ex officio* members, and two persons of opposite political faith, appointed by the governor of the state. At the time the matters occurred out of which this suit arose the board was composed of the secretary of state, the auditor of state, the governor of the state, Josiah N. Gwin, and Ivan N. Walker. By the provisions of the Act the governor of the state is the chairman of the state board of tax commissioners. Section 129 of the Act provides that this board shall annually convene in the office of the auditor of state on the first Monday of August each year for the purpose of assessing railroad property, and equalizing the assessment of real estate; that it shall not be bound by any reports or estimates of value of railroad property, real estate, or other property, as returned to the county auditors or to the auditor of state, but shall appraise and assess all property at its true cash value, as defined by the Act, according to its best knowledge and judgment, and so equalize the assessment of property throughout the state. It also contains this provision: "They shall have the power to send for persons, books, and papers, to examine records, hear and question witnesses, to punish for contempt any one who refuses to appear and answer questions by fine not exceeding one thousand dollars, and by imprisonment in the county jail of any county not exceeding thirty days, or both. Appeals shall lie to the criminal court of Marion county from all orders of the board inflicting such punishment, which appeals shall be governed by the laws providing for appeals in criminal cases from justices of the peace, so far as applicable. The sheriffs of the several counties of the state shall serve all process and execute all orders of the board."

Claiming to act under the power and authority conferred upon it by the provisions of the statute, the state board of tax commissioners, on its own motion, caused a *subpœna duces tecum* to be issued to all the banks in the state, requiring the president, cashier, and bookkeeper, or either of them, of the bank named in the subpœna, to appear before the board at the office of the state board of tax commissioners in the state house in the city of Indianapolis, on a day named in the subpœna, and to bring and have with them then and there such books, papers, and accounts of such banking institution as should fully disclose and show the names of all persons having money, bonds, stocks, notes, or other property of value on deposit and in the custody of such bank on the 1st day of April, 1891, and the respective amounts of such deposits or other property in the custody of the bank, and to answer all questions which might be asked in relation thereto or with reference to the property owned by the bank itself. The subpœna was signed by Joseph T. Fanning, as secretary of the board. At the bottom of the subpœna, and following the signature of the secretary, was the following: "For the purposes of the state board of tax commissioners, as set forth in this

subpœna, it will answer if the president, cashier, or bookkeeper of the above-mentioned bank make out a sworn statement of the balances to the credit of its individual depositors on April 1, 1891, giving name in full of each depositor, amount of his credit balance, and forward said sworn statement to the state board of tax commissioners without delay."

One of the subpœnas was served upon the appellee at the city of Evansville, where he resides, and where he is vice-president of a state bank known as the "German Bank of Evansville." In answer to the subpœna he appeared before the state bank of tax commissioners on the 25th day of August, 1891, when there were present of the members of the board the following persons, and others, viz., Claude Matthews, secretary of state, acting as president of the board, J. O. Henderson, auditor of state, and Ivan N. Walker. Upon his appearance he was duly sworn, when the following proceedings were had, viz.: "Question. State your name and place of residence. Answer. Philip C. Decker. I reside in the city of Evansville. *Q.* In what business are you engaged? *A.* That of banking. *Q.* With what institution are you engaged, and in what capacity? *A.* I am vice-president of the German Bank of Evansville, Indiana. The president lately died, and I am acting as president. Our bank was organized under the laws of Indiana. *Q.* State the aggregate amount of the individual deposits held by the German Bank, of which you are vice-president, on the 1st day of April, 1891. *A.* About $300,000. *Q.* Give the amount of money held on deposit by said bank on the 1st day of April, 1891, belonging to some one depositor. The Witness: Before answering the question, I respectfully ask the board whether there is any appeal, complaint, suit, or proceeding of any kind pending before this board or elsewhere to assess any depositor, or to revise his tax list in any manner. By the Board: No. We are exercising the power of discovery. The Witness: I decline to answer, under the advice of counsel, either as to the name of any depositor or the amount of his deposit. *Q.* Give me the amount of personal property, other than money, held by your bank as custodian or agent, on the 1st day of April, 1891, such as notes, stocks, bonds, or other property of value belonging to any one depositor. *A.* I respectfully ask the board to state, before an answer to the question just put, whether there is any appeal, complaint, cause, or proceeding of any kind pending before this board or elsewhere to assess the property of said bank, or any partner therein. Answer by the Board: No. The Witness: I decline to do so, under advice of counsel. *Q.* For the purpose of ascertaining what, if any, money on deposit in your institution, belonging to persons, firms, companies, or corporations, has been omitted, purposely or otherwise, from the tax duplicate of Vanderburgh county, you will please give this board a list of the names of your depositors on the first day of April, 1891. *A.* I most respectfully decline to give such list, having just been informed by the board that no appeal, complaint, suit, or proceeding is here pending before this board or elsewhere to assess or revise the tax list of any depositor or partner or officer of the bank. *Q.* For the purpose above indicated, give a list of depositors on the 1st day of April, 1891, with the several amounts of money to their credit on that day. *A.* I decline to give either the names of my depositors or the several amounts standing to their credit, respectively, on the 1st day of April, 1891, either for taxes, or for any other purpose, because I am now informed by the board that there is no appeal, complaint, suit, or proceeding pending here or elsewhere to assess or revise the tax list of any depositor. *Q.* Likewise give us the names of all persons who have property other than money, stocks, bonds, jewelry, or other property of value by said German Bank held as custodian on the 1st day of April, 1891, and the several amounts, with a description and value of such property. *A.* I decline to answer your questions for the reasons given above. *Q.* By an examination of the books and papers of said bank, would you, as its vice-president, be able to furnish to this board the information asked for in the foregoing question? *A.* I would not. *Q.* You are now commanded to produce such books and papers of the German Bank for the inspection of this board as will fully afford the information herein sought to be obtained, and which will discover the names of the depositors of said German Bank on the 1st day of April, 1891, and the several amounts to their credit; also such books as will show the names and description of the property of value held by said bank as custodian and agent on said day. *A.* As vice-president of said bank, I now decline to produce any of its books or papers for the inspection of this board for any purpose." Thereupon the state board of tax commissioners, because of the refusal of the appellee to appear and answer the questions above set forth, and to give the information thereby sought to be elicited, assessed against him a fine of $500, and that he stand committed until the fine be paid or replevied, and entered the following judgment: "Therefore it is considered and ordered by the state board of tax commissioners that Philip C. Decker, on account of his refusal to appear and answer questions, and his disobedience to the order of this board, be, and hereby is, fined in the sum of five hundred dollars ($500), and it is further considered by the board that said Philip C. Decker do stand committed to the jail of Marion county, Indiana, until said fine be paid or replevied." Upon entering the foregoing judgment, the secretary of the board delivered to the appellant, as the sheriff of Marion county, a commitment reciting the fact that the appellee had been fined the sum of $500 for contempt, and ordering that he be committed to the jail of Marion county until discharged by due process of law. Upon this commitment the appellee was arrested. He thereupon filed his petition in the Marion superior court, praying for a writ of habeas corpus. To the writ issued upon this petition the appellant made his return, stating, among other things, substantially the proceedings above set forth. To this return the appellee filed exceptions, which were sustained by the court, and an order was entered discharging the appellee from custody.

The assignment of error calls in question the propriety of the ruling of the Marion superior

court in sustaining the exceptions to the return made by the appellant to the writ of habeas corpus. It is contended by the appellee: *First.* That the power to punish for contempt is a judicial function, which can only be exercised by a court, and, if it be claimed that the Act in question makes the state board of tax commissioners a court, then so much of the Act as seeks to do so is void, because it is not embraced in the title of the Act, and because three of the persons constituting the board are forbidden by the Constitution of the state from exercising judicial functions. *Second.* That, if the board has power to punish for contempt, it can only do so for the refusal of a witness to appear and answer questions pertinent and material to some issue in a suit, action, or proceeding then pending. *Third.* That the proceedings of the board in this matter are in violation of the provisions of the Constitution of the United States, which provides that "the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue but upon reasonable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." *Fourth.* That the state board of tax commissioners has no original jurisdiction, except in the matter of the assessment of railway corporations, and equalizing the assessments of real estate.

These several propositions have been ably and exhaustively argued on both sides, not only in the briefs on file, but also orally in open court; but it seems to us that, if the first proposition presented by the appellee, namely, that so much of the statute in question as attempts to confer on the state board of tax commissioners the power to fine and imprison for contempt of its authority is void by reason of being in conflict with the state Constitution, can be sustained, the other questions presented do not necessarily or properly arise. If this position cannot be maintained, then some or all of the others propositions do arise, and must be decided by this court. But the first inquiry in a case like this leads naturally to an investigation of the authority under which the complaining party has been deprived of his liberty. The solution of the question presented renders it necessary that we shall inquire—*first*, as to what department of the state government the state board of tax commissioners belongs; and, *second*, into the nature of the power to fine and commit for contempt.

Article 3, § 1, of our state Constitution is as follows: "The powers of the government are divided into three separate departments,—the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in the Constitution expressly provided." The division of power made by our Constitution exists in the Federal Constitution, and in most, if not all, of the state Constitutions. The powers of these departments are not merely equal; they are exclusive in respect to the duties assigned to each, and they are absolutely independent of each other. The encroachment of one of these departments upon the other is watched with jealous care, and is generally promptly resisted, for the observance of this division is essential to the maintenance of a republican form of government. *Wright* v. *Defrees*, 8 Ind. 298; *Lafayette, M. & B. R. Co.* v. *Geiger*, 34 Ind. 185; *State* v. *Denny*, 118 Ind. 382, 4 L. R. A. 79; *State* v. *Noble*, 118 Ind. 350, 4 L. R. A. 101; *Hovey* v. *State*, 127 Ind. 588, 11 L. R. A. 763. It is the duty of the legislative department of the state to make the laws; it is the duty of the judicial department to construe and apply them; and it is the duty of the executive department to see that such laws are faithfully executed. No provision of our Constitution was more carefully considered and fully discussed in the constitutional convention than the one now under consideration. As to the legislative department, it is believed that Mr. Biddle expressed what was the understanding of the convention when he said: "The General Assembly has no other duty nor power than to make laws. After a law has been enacted, this department has no further power over the subject. It can neither adjudge the law, nor execute it, but must leave it upon the statute books; and for any functions still remaining in the legislative power, there it would forever remain. All the power of this department here ends." 2 Const. Debates, 1324. It cannot with propriety be contended that the state board of tax commissioners belongs to the legislative department of the state, for it has no power to enact laws. The General Assembly cannot delegate its law-making power to any other person or body. It cannot be successfully maintained that the Legislature could confer on the governor of the state and the principal administrative officers of the state duties pertaining to the judicial department. Indeed, the learned attorney-general admits in argument that the state board of tax commissioners is not a court, and he does not contend that it can perform any function which is of a purely judicial character. As the state board of tax commissioners is neither a legislative body nor a court, it must belong to the executive or administrative department of the state. That it does belong to that department we think it too plain for argument. It is charged with the duty of executing certain provisions of the revenue laws of the state, and when it has performed that duty its functions are at an end. But because it is a body belonging to the executive or administrative department of the government it by no means follows that it may not perform functions which are, in their nature, judicial. Hearing and determining appeals from the county board of review, hearing witnesses, and equalizing the appraisement of real estate, and assessing the railroad property named in the Act, is the performance of a duty judicial in its nature. Mr. High, in his work on Injunctions, (sec. 493,) in speaking of the power of courts of equity to enjoin assessments, says: "So the fact that the tribunal fixed by law for determining and equalizing the value of property for the purposes of assessment has assessed it too high will not warrant an injunction, since the action of such officers is judicial in its nature, and will not ordinarily be reviewed in equity." Mr. Mechem, in his work

on Public Offices and Officers, in considering the subject of liability of judicial officers on account of their official acts, in section 636 says: "There is still a large class of officers whose duties lie wholly outside of the domain of the courts of justice, or concern the business of the court only incidentally or occasionally, and who are yet called upon by law to exercise, for the benefit of the public or of individuals, power very nearly akin to those of judges in the courts." In the case of *State* v. *Wood*, 110 Ind. 83, 8 West. Rep. 540, this court, in speaking of the power of the board of county equalization, said: "The board was not, nor was it necessary that it should be, a court. It was not, and could not be, sitting as a court. It was in the exercise of statutory powers and duties, which duties perhaps may be said to be quasi judicial." In the case of *Kuntz* v. *Sumption*, 117 Ind. 1, 2 L. R. A. 655, in speaking of the same tribunal, this court said: "We agree with the appellee's counsel that the board of equalization is not a judicial tribunal in the strict sense of the term; but, while this is true, it is also true that it possesses functions of a judicial nature."

It is often a matter of much difficulty to determine whether the functions exercised by a tribunal of this character are such as pertain exclusively to the courts, or whether they are such as it may lawfully exercise. Mr. Mechem on Public Offices and Officers, section 637, says. "Quasi judicial functions . . . are those which lie midway between the judicial and ministerial ones. The line separating them from such as are thus on their two sides is necessarily indistinct; but, in general terms, when the law in words or by implication commits to any officer the duty of looking into facts, but after a discretion in its nature judicial, the function is termed quasi judicial." That it was in the power of the General Assembly to confer on the state board of tax commissioners the power to hear and determine appeals from the county boards of review, to equalize the assessments of real estate, and to assess the railroad property named in the Act, is not doubted, and the question as to whether the Legislature could confer upon it the power to fine and imprison the citizens of the state for contempt of its authority depends upon whether such action is purely judicial or only quasi judicial. A proceeding against a person as for a contempt is ordinarily in the nature of a criminal proceeding, and statutes authorizing punishment for the contempt of the authority of a tribunal are criminal statutes, and are to be strictly construed. *Maxwell* v. *Rives*, 11 Nev. 213; *Holman* v. *State*, 105 Ind. 513, 2 West. Rep. 761. In the case of *Ex parte Doll*, 7 Phila. 595, in discharging the prisoner, who had been committed by a commissioner appointed by the United States circuit court as for a contempt for refusing to appear and testify and to produce certain books, the court said: "I very much doubt the power of Congress to invest a commissioner with authority in a proceeding originally brought before him to summarily commit a citizen for alleged contempt. This was an exercise of the judicial power of the United States, which, under the Constitution, could not be intrusted to an officer appointed and holding his office in the manner in which they were appointed and held their offices." Again, in the celebrated case of *Kilbourn* v. *Thompson*, 103 U. S. 182, 26 L. ed. 384, involving the question of the power of Congress to arrest and punish a witness for contempt in refusing to answer questions before a committee of the house, *Justice* Miller, in speaking for the court said: "The Constitution declares that no person shall be deprived of his life, liberty, or property without due process of law, and it has been repeatedly held by the United States Supreme Court that this means a trial in which the rights of the party shall be decided by a court of justice, appointed by law, and governed by the rules of law previously established." So again, in the case of *Re Mason*, 43 Fed. Rep. 510, in which Mason had been committed by a United States circuit court commissioner for contempt in failing to appear and testify as a witness, the court said: "To arrest and punish for a contempt is the highest exercise of judicial power, and belongs to judges of courts of record or superior courts. Where jurisdiction exists there can be no review. A pardon by the executive is in most cases a mode of release. This power is not, and never has been, an incident to the mere exercise of judicial function, and such power cannot be upheld upon inference and implication, but must be expressly conferred by law." As bearing upon the question now under discussion, see also in *Re McLean*, 37 Fed. Rep. 648; *Anderson* v. *Dunn*, 19 U. S. 6 Wheat. 204, 5 L. ed. 242; *Shoultz* v. *McPheeters*, 79 Ind. 373; *Vandercook* v. *Williams*, 106 Ind. 345, 5 West. Rep. 248, and 106 Ind. 355, 5 West. Rep. 251; *Ex parte Milligan*, 71 U. S. 4 Wall. 2, 18 L. ed. 281; *Gregory* v. *State*, 94 Ind. 385; *Whitcomb's Case*, 120 Mass. 118, 21 Am. Rep. 502.

These cases lead to the inevitable conclusion that the power to punish for contempt belongs exclusively to the courts, except in cases where the Constitution of a state expressly confers such power upon some other body or tribunal. Our state Constitution confers such power upon the General Assembly, but upon no other body. The doctrine that such power rests with the courts alone is based upon the fact that a party cannot be deprived of his liberty without a trial. To adjudge a party guilty of contempt for a refusal to answer questions, the tribunal must determine whether such questions are material, and whether it is a question which the witness is bound to answer; otherwise it cannot be determined that the witness is in contempt of its authority in refusing to answer. So far as we are informed, the trial of a citizen, involving the question of his liberty, by any civil tribunal other than a court, has never been sustained, unless the power to do so was conferred by some constitutional provision. For the reasons above given, our conclusion is that so much of the Act under consideration as attempts to confer on the state board of tax commissioners power to fine and imprison for contempt is in violation of section 1, art. 3, of our state Constitution, and is void. It follows that such board has no authority to fine the appellee, and commit him to the jail of Marion county, and that the Marion superior court did not err in ordering his release.

It is claimed, however, by the learned attorney-general, that the conclusion here reached is in conflict with the conclusion in the cases of *Ex parte Mallinkrodt*, 20 Mo. 493; *Swafford* v. *Berrong*, 84 Ga. 65, and *Noyes* v. *Byabee*, 45 Conn. 382. We have given each of those cases a careful consideration. In *Ex parte Mallinkrodt, supra*, it was held that the powers of a notary in taking depositions were purely statutory, and that the statutes of the state of Missouri did not confer on such officer the power to commit a witness for refusing to produce books. In the case of *Swafford* v. *Berrong, supra*, it was held that the Act of the General Assembly, incorporating the town of Clayton, conferred upon the governing board or council judicial power, with authority to try offenders alleged to have violated the town ordinances; and, inasmuch as it was a court, when sitting for that purpose, it had the power to punish for contempt. No question of the authority of the General Assembly to confer such power, under the Constitution of Georgia, was involved in the case or decided by the court. In the case of *Noyes* v. *Byrbee, supra*, it was held that the statutes of Connecticut did not confer on the insurance commissioners appointed to investigate the financial condition of life insurance companies power to commit a witness for refusing to be sworn to answer questions. In our opinion, these authorities do not conflict with the conclusion we have reached in this case. Striking out the portion of the statute which attempts to confer on the state board of tax commissioners the power to punish by fine and imprisonment for contempt does not necessarily affect the validity of any other provision, but it disposes of the question as to whether the appellee is lawfully imprisoned; and, striking out such provision, the conclusion follows that he is entitled to his release. This is the sole purpose of a suit of this kind. The purpose of the suit being attained, the other questions sought to be presented in this cause, and so ably discussed on both sides, do not arise, and we cannot with propriety discuss or decide them. If this were a prosecution for a violation of other provisions of the statute, or if it were a suit to enjoin the collection of increased taxes made on an increase in the value of property not named in the Act, fixed by the state board of tax commissioners in the exercise of original jurisdiction, then we could perhaps make a binding adjudication as to the other questions discussed, but in a suit like this, where the sole question relates to the right of the appellee to be released from an unlawful imprisonment, inflicted by a tribunal without authority to commit him, we do not think they are involved in such a sense as to render it necessary or proper that they should be decided.

Judgment affirmed.

Elliott, *Ch. J.*, concurring:

A citizen can only be imprisoned by due process of law. Where there is an imprisonment without due process of law, the great writ of liberty will deliver the citizen from an unlawful restraint. If, therefore, the appellee was imprisoned without due process of law, the writ of habeas corpus was properly awarded, and this appeal must fail. There is, it is obvious, one question only that we can with propriety decide, and that is whether the appellee was imprisoned by due process of law. Prison doors open only at the command of the law, and that law must be warranted by the Constitution. It is the law that restrains citizens of their liberty, and the command for the restraint must issue from an officer or tribunal having jurisdiction to adjudge imprisonment. If the state board had jurisdiction to adjudge that the appellee should be imprisoned, there was due process of law; if it had no jurisdiction to imprison, there was not due process of law, and the appellee was unlawfully deprived of his liberty. A judgment of a tribunal—even of the highest in the land—is absolutely void if rendered in a case over which it had no authority. Whether the state board had authority in this instance to consign a citizen to prison depends upon the validity of the statutory provisions assuming to invest the board with the high power of casting citizens into jail. The question is one of legislative power. If the power exists, then the Legislature may authorize a board of town trustees, a board of assessors, a board of road supervisors, or any other administrative officer, to adjudge imprisonment against a citizen who disobeys an order made by it. If it be granted that the power exists, then it inevitably follows that it is one which cannot be limited or controlled by the courts, but is to be exercised without limit or restraint by the legislative department of the government. In my judgment, the Legislature has no power to authorize an administrative or executive officer, whatever his rank or duties, to sentence a citizen to imprisonment. It cannot confer that authority upon the governor of the state, nor upon any other executive or administrative officer, nor upon all the executive or administrative officers of the state combined. The Constitution defines the power of the Legislature to punish for contempt. It expressly provides when the Legislature may punish for contempts committed against its own immediate authority, and thus clearly denies the power to punish save as expressly provided, for the express provision excludes all implied ones. This is the provision of the Constitution: "Either House, during its session, may punish by imprisonment any person not a member, who shall have been guilty of disrespect to the House by disorderly or contemptuous behavior in its presence; but such imprisonment shall not at any time exceed twenty-four hours." Art. 4, § 15. This provision, as every one can see, closely binds and strongly fetters the power of the General Assembly itself, for it restricts the exercise of the authority to the time that body is in session, and limits the duration of the imprisonment to twenty-four hours. As the Legislature can only exercise the authority given it while in session, it is absolutely without power to lodge the authority in any officer or body of its own creation. The authority to imprison resides where the Constitution places it, and the Legislature cannot give it a residence elsewhere. The authority is essentially a judicial one, abiding in the courts of the land. As it is a judicial power, it is not created by the Legislature, nor vested by that body. The Legislature cannot create judicial power, nor

vest it in any tribunal. Judicial power, like all sovereign powers, comes from the people, and vests where the people's Constitution directs that it shall vest. The Legislature may name tribunals that shall exercise judicial powers, unless the Constitution otherwise provides; but the power itself comes from the Constitution, and not the statute. *State* v. *Noble*, 118 Ind. 350–354, 4 L. R. A. 101; *People* v. *Maynard*, 14 Ill. 419; *Perkins* v. *Corbin*, 45 Ala. 103, 6 Am. Rep. 698; *Greenough* v. *Greenough*, 11 Pa. 489, 51 Am. Dec. 567; *Missouri River Teleg. Co.* v. *First Nat. Bank of Sioux*, 74 Ill. 217; *Harris* v. *Vandereer*, 21 N. J. Eq. 424. The Legislature may distribute the judicial power in accordance with the Constitution, but it cannot delegate that power, for the plain reason that it has none to delegate.

If the state board can be regarded as a judicial tribunal in the true sense of the term, the distribution of authority to it to punish for contempt by imprisonment would be valid and effective, but it is not a judicial tribunal. It does, indeed, possess powers of a judicial nature, but so does every officer in the land, high or low, who has the slightest discretion as to the mode of exercising his duty, and yet nothing can be clearer upon principle and authority than that such an officer is not a judicial officer within the meaning of the Constitution. *Eastman* v. *State*, 109 Ind. 278–281, 7 West. Rep. 418, 58 Am. Rep. 400, and cases cited; *Wilkins* v. *State*, 113 Ind. 514–519, 13 West. Rep. 354, and cases cited. We understand the attorney-general to concede in his able and elaborate argument that the state board is not a court. He says tersely and explicitly that "the state board is neither a court, nor can it be made a court." He endeavors however, to prove that the case is not within the rule that only courts can exercise purely judicial powers by this line of argument: "But," as he says, "the proceeding to assess and value property for the purposes of taxation is neither a case nor a controversy. It does not operate through legal forms, nor require the machinery of the courts to put it in operation. Such proceedings are not authorized to settle private controversies, and they do not involve any questions which courts are or ever were authorized to take jurisdiction of." It may be granted that this argument is in part valid, but it is so only in part. The conclusion spreads far beyond the valid premise. In free countries, courts always have assumed jurisdiction of questions involving personal liberty, and so they must, or else free government, securing personal liberty, ceases to exist. When that great right comes in issue, the courts hear and decide, and the authority of executive or administrative officers is at an end. Whatever else such officers may be empowered to do, they cannot be empowered to sit in judgment upon the right of a citizen to his personal liberty. Only the courts can give the command which takes from the citizen his liberty, and places him within prison walls, and they can only give it in accordance with the law of the land. However extensive the authority of the board may be, it is always ministerial or administrative, and hence it goes not far enough to adjudge imprisonment, for it is beyond the power of the Legislature to invest it, or any administrative board, with that high judicial function. It is doubtless within the power of the Legislature to authorize the state board to lodge a complaint against a person who disobeys a rightful order made by it in a court of competent jurisdiction, and thus secure by constitutional methods the punishment of a wrong-doer; but the board cannot be invested with the authority to hear and decide, for that dwells only in courts of justice. The board may be made a complainant by law, in a proceeding to punish a citizen who refuses obedience to its rightful authority, or it may be empowered to require some law officer of the state to invoke the assistance of the courts; but a court or a tribunal of judges it can never be as long as our Constitution remains unchanged, or as long as the great principle of free government forbidding the centralization of the powers of government in one department is respected and obeyed. For the reasons thus hastily stated and dimly outlined, I fully and unreservedly concur in the conclusion reached by the court.

Gustoff FRANK, *Appt.*,
v.
Thomas J. FRAYLOR *et al.*

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

1. A judgment debtor who is in fact only a surety of a co-defendant may on payment of the judgment take an assignment thereof which will be valid al-

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NOTE.—*Right of surety who has paid judgment to enforce it for his own benefit.*

At law.

In Preslar v. Stallworth, 37 Ala. 402, 405, it is said: "At law, it is well settled that the payment of a judgment by or its assignment to one of several defendants, extinguishes the judgment, although the defendant by whom it is paid, or to whom it is assigned, is a mere surety. A court of law cannot substitute such surety in the place of the plaintiff, and allow him to take out execution upon the judgment.

The judgment is regarded as extinguished against all. Bank of Salina v. Abbot, 3 Denio, 181; Hogan v. Reynolds, 21 Ala. 56, 56 Am. Dec. 236; Lyon v. Bolling, 9 Ala. 466, 44 Am. Dec. 444.

At common law sureties who have paid a *fi. fa.* have no right to return it and take out a *ca. sa.* and arrest their principal. Elam v. Rawson, 21 Ga. 139.

One of several sureties against whom judgment has been rendered cannot by paying the debt, without other proceeding, be substituted for the judgment creditor and proceed against his co-judgment debtors by execution. McDaniel v. Lee, 37 Mo. 204.

Where a surety on a note pays a judgment thereon obtained against the maker only, the judgment is extinguished as a cause of action and an assignment thereof gives the surety no right to enforce it. Cleiman v. Murphy, 34 Ill. App. 633.

Payment by a surety of a judgment against himself and his principal extinguishes it, although he did not so intend, so that an assignment of it to himself gives him no right against the property of his principal other than a simple contract creditor has, (Briley v. Sugg, 21 N. C. 366, 30 Am. Dec. 172;) otherwise, however, if he had taken the assign-

See also 44 L. R. A. 459; 45 L. R. A. 285.

though there has been no adjudication of his suretyship and that fact is not indicated on the face of the judgment.

2. **An assignee of a judgment which has been kept alive after payment** in favor of one who appears to have been a principal but who claims to have been a surety, who takes his assignment before the question of suretyship has been adjudged, may raise such question and have it determined in a suit by a subsequent judgment creditor challenging the validity of his judgment as a prior lien.

3. **The assignment of a judgment which does not purport to be satisfied to one of the judgment debtors** is sufficient to put a purchaser of a subsequent judgment on inquiry as to the rights of the assignee as surety.

(January 7, 1892.)

APPEAL by plaintiff from a judgment of the Circuit Court for Pike County in favor of defendants in a suit brought to have a judgment held by defendants declared to be satisfied and removed as an apparent prior lien to a judgment held by plaintiff against the same property. *Affirmed.*

The facts are stated in the opinion.

Messrs. **E. P. Richardson** and **A. H. Taylor** for appellant.

Mr. **E. A. Ely** for appellees.

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

The appellant, who was the plaintiff, filed a complaint against the appellees, in substance, as follows: That on the 24th day of February, 1884, the appellees La Fayette Brenton and another executed a promissory note to one William W. Totten in part payment for real estate that day conveyed by Totten to Brenton. The note was assigned by Totten to one Offill, who, on the 12th day of June, 1888, took judgment on the note against Brenton for $740.85. This judgment was, on the 6th day of Sep-

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ment to a stranger. Hodges v. Armstrong, 14 N. C. 253; Sherwood v. Collier, 14 N. C. 380, 24 Am. Dec. 264.

It is said *obiter* in Uzzell v. Mack, 4 Humph. 319, 40 Am. Dec. 648: "Where a surety pays a bond or discharges a judgment, he extinguishes the only security the creditor has, and that being extinguished, there is nothing to which he can be substituted." Approved in Miller v. Porter, 5 Humph. 294.

It is said in Bittick v. Wilkins, 7 Heisk. 309, 310, that these cases "only hold that the surety is not substituted to the rights of the judgment creditor in such a sense as that an execution can be issued upon the judgment in his favor as an assignee of the judgment," but the surety can pursue in equity any fund of the principal which the judgment creditor could without obtaining another judgment.

The indorser of a promissory note after the payee, against whom and the maker judgment has been rendered thereon, is entitled upon payment by him of the judgment, and assignment to himself, to enforce the judgment in the same manner as could the judgment creditor. Schleissman v. Kallenberg, 72 Iowa, 338.

A surety may acquire a judgment which has been entered against himself and principal and retain it unsatisfied for his own protection, and payment for that purpose will not satisfy and discharge it. Bleckman v. Butler, 77 Iowa, 128.

A surety taking an assignment of a judgment against himself and principal upon payment thereof, may have execution for his use thereon against the principal alone. Duffield v. Cooper, 87 Pa. 443.

A surety paying an execution on a judgment against himself and principal may have the same assigned to him and hold by a levy the property of the principal attached on the original writ. Edgerly v. Emerson, 23 N. H. 555, 55 Am. Dec. 207; Brewer v. Franklin Mills, 42 N. H. 292.

In Bones v. Aiken, 35 Iowa, 534, it was held that while a surety paying a joint judgment might be entitled in equity to be subrogated to the rights of the judgment creditor, yet he could not take an assignment of the judgment and issue execution thereon against the principal since payment of the judgment extinguished it at law. Following this case is Drefahl v. Tuttle, 42 Iowa, 177.

In Des Moines Sav. Bank v. Colfax Hotel Co., 79 Iowa, 497, it was held that one who was payee and indorser of a note upon which judgment has been obtained against the maker only may pay the judgment and take an assignment of it without extinguishing it, and may *garnish* the maker's debtor thereon. The court distinguished this from the cases where the surety was a party to the judgment.

Where separate judgments are obtained against the principal and surety and the surety discharges that against himself, the judgment against the principal is thereby satisfied so that an action of debt thereon cannot be maintained by the surety to whom it has been assigned. Topp v. Branch Bank of Alabama, 2 Swan, 184.

In Clason v. Morris, 10 Johns. 524, it was held that where separate judgments were taken against the maker and indorser of a note, the indorser upon payment of the judgment against *himself* could take an assignment of the judgment against the maker and enforce the same by execution against the maker.

An indorser of a promissory note having paid a judgment thereon against the maker and himself and taken an assignment thereof may enforce an execution thereon against the property of the maker. Corey v. White, 3 Barb. 12, overruling Ontario Bank v. Walker, 1 Hill, 652, and Bank of Salina v. Abbot, 3 Denio, 181.

In this case the court took a distinction between subrogation by operation of law and express assignment, and also between a joint judgment against an ordinary principal and surety and a judgment against the maker and indorser of a note which is *required* to be joint by a statute while expressly reserving the rights of the several parties between themselves.

In Eno v. Crooke, 10 N. Y. 60, ignoring these distinctions it was laid down that an indorser of a note who has paid a judgment against himself is subrogated to the rights of the holder on a judgment against the maker, and may take an assignment thereof and maintain an action thereon.

A surety upon paying a judgment against himself and principal may direct an assignment of the judgment to a stranger, where the intention is not to extinguish it, and it may be revived upon *scire facias* by the assignee for the benefit of the surety. Barringer v. Boyden, 52 N. C. 187.

Payment to the clerk of the amount of the judgment by one of the judgment debtors, who was only a surety upon the original debt, not for the purpose of paying the judgment, but to procure an assignment thereof to his wife, does not amount to a satisfaction of the judgment, but the assignment to the wife and sheriff's deeds to her in its enforcement by her must be treated as valid. Anglo-American Land, Mortg. & A. Co. v. Bush (Iowa) Jan. 23, 1892.

In Baily v. Brownfield, 20 Pa. 41, Black, *Ch. J.*, says:

tember, 1889, sold and properly assigned to the appellant. The said La Fayette Brenton, Emily Brenton, and one Robert C. Conrad, on the 11th day of June, 1887, executed their joint and several promissory notes to one Charles E. Montgomery, on which notes Montgomery recovered a judgment against the makers, November 6, 1887, for $748.73. On the day the judgment was rendered La Fayette Brenton paid thereon $300, and at another time he paid $100. That on the 30th day of July, 1888, Conrad paid $431.60 in full of the principal, interest, and costs, and, instead of having satisfaction entered, procured Montgomery to assign the judgment to him. On the ——— day of August, 1889, Conrad assigned the judgment to the appellee Fraylor, who claims that the judgment is unpaid, and that it is senior to the judgment held by the appellant. The prayer is that the judgment held by Fraylor be declared satisfied. The defendant Fraylor answered this complaint, alleging in his answer, among other things, that Conrad was the accommodation surety of La Fayette Brenton in the note to Montgomery, and that he made the payment of the balance due on the judgment as such surety, and at the time he did not intend that the judgment should be discharged. That, as a matter of precaution and notice to others, he procured Montgomery to assign the judgment to him, intending to become subrogated to all the rights of Montgomery in and to so much of the judgment as he paid as such surety. It is also alleged that the appellant, at the time he purchased the judgment, knew that Conrad was such surety, and that he paid the Montgomery judgment as such. The appellant contends that the various pleadings filed by the appellee, disclosing the facts above set out, were each bad on demurrer for failing to show that the question of suretyship between Conrad and Brenton had been determined by a judicial proceeding prior to the assignment of the judg-

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"The entry of satisfaction on a judgment collected by execution from a surety, such entry not being made at the instance of the surety, is no ground for refusing subrogation. Whether the fact of payment does or does not appear on the record, it cannot be allowed to have any influence on the rights of the parties, except what equity gives it. It is also true that in this state a surety who has paid a debt secured by judgment against the principal, and who is in other respects entitled to be substituted to the rights of the creditor, may revive the judgment without first having a decree of subrogation and try his right as it was tried here on the *scire facias*. This results from our system of mingling equity and law together."

In equity.

In Hayes v. Ward, 4 Johns. Ch. 123, 1 L. ed. 786, 8 Am. Dec. 554, it is said to be "a settled principle of English chancery, that a surety will be entitled to every remedy which the creditor has against the principal debtor, to enforce every security and to stand in the place of the creditor."

By the civil law a surety paying the debt is subrogated to the rights of the creditor, *ipso facto*. Sandford v. McLean, 3 Paige, 117, 3 L. ed. 80, 23 Am. Dec. 773.

A surety upon payment of a judgment against himself and his principal may have the question of his suretyship determined by a suit in equity and be subrogated to all the rights of the judgment creditor. Manford v. Firth, 68 Ind. 83.

One of several co-sureties on a note, who had paid a judgment against the principal and all the sureties, may take an assignment thereof, and by invoking the equitable powers of the court be subrogated to all the rights of the judgment creditor against the maker and have his rights as to his co-sureties determined. German-American Sav. Bank v. Fritz, 68 Wis. 390.

In this case it is said: "Ordinarily, to secure the benefit of a judgment lien against a co-surety or co-accommodation indorser, the one paying the amount of the judgment should proceed by bill, suit, petition, or some proceeding in equity, wherein the equitable rights of the respective parties may be adjudicated and enforced. Cuyler v. Ensworth, 6 Paige, 32, 3 L. ed. 886; Speigelmyer v. Crawford, 6 Paige, 254, 3 L. ed. 973; Goodyear v. Watson, 14 Barb. 481; Townsend v. Whitney, 75 N. Y. 425; Smith v. Rumsey, 33 Mich. 183; Neal v. Nash, 23 Ohio St. 483; Furnold v. Bank of State, 44 Mo. 336; Lidderdale v. Robinson, 25 U. S. 12 Wheat. 594, 6 L. ed. 740. But such relief has been granted by order of the court upon hearing of the parties, Springer v. Springer, 43 Pa. 518."

A surety paying a judgment against himself and his principal is in equity entitled to be subrogated to all the rights of the judgment creditor as against other lien-holders (Dempsey v. Bush, 18 Ohio St. 376), as well as against the principal judgment debtor. Neal v. Nash, 23 Ohio St. 483.

Equity regards the lien of a judgment paid by a surety as still subsisting, and will aid the surety in its enforcement for his reimbursement. Searing v. Berry, 58 Ohio, 20.

Sureties who have paid a judgment against themselves and their principal are entitled to be subrogated to the rights of the judgment creditor and to enforce in equity the same liens of the judgment which the creditor would have enforced. Watts v. Kinney, 3 Leigh, 272, 23 Am. Dec. 266; Perkins v. Kershaw, 1 Hill, Eq. 344.

They are entitled to be substituted for the judgment creditor and may resort to lands fraudulently conveyed by his principal. Lyon v. Bolling, 9 Ala. 463, 44 Am. Dec. 444; McClung v. Beirne, 10 Leigh, 394, 34 Am. Dec. 739.

A surety who has paid a judgment against himself and principal is in equity entitled to be substituted for the creditor, and the lien of the judgment in his hands takes precedence of that of a subsequent judgment creditor. Fleming v. Beaver, 2 Rawle, 128, 19 Am. Dec. 629.

The court says in this case: "An actual assignment is unnecessary. The right of substitution is everything, and actual substitution nothing. By a fiction, to which we are indebted for nearly all our equitable jurisdiction, the law has made the assignment already; and, hence, the right of the party entitled by no means depends on the willingness of the creditor to transfer the security."

Where, on payment of the proceeds of sale into court for distribution, it appeared that a surety for the debtor had paid the judgment against the debtor, which was a lien on the land sold, under an agreement by which debtor was to pay a certain sum on a subsequent judgment lien on which the surety was also liable, the debtor's failure to perform relieves the surety from satisfaction of the prior judgment, and entitles him to have applied on it the money deposited in court as against a subsequent judgment lienor. McCormick's App. (Pa.) 12 Cent. Rep. 471.

A surety who has paid a judgment against himself and taken an assignment of the separate judgment obtained against the principal for the same debt, is entitled to have it paid out of the estate of

ment by him to the appellee Fraylor. The judgment in favor of Montgomery upon its face appears to be against all the makers as principals, and they are all primarily liable for its payment. If, in such case, the relationship of the judgment defendants is as it appears upon the face of the judgment to be, the payment by one of them would work a complete extinguishment and satisfaction of the judgment, notwithstanding the agreement that it should be kept alive, and its assignment to Conrad. *Montgomery* v. *Vickery*, 110 Ind. 211, 8 West. Rep. 878; *Klippel* v. *Shields*, 90 Ind. 81. This, however, is not the question with which we have to deal; for it is alleged that Conrad was in fact a surety who had paid the debt of his principal, although such suretyship had not been judicially declared. It has been held that where this question has not been judicially determined in the original action a complaint may be filed after the term, and after the surety has paid the judgment, to adjudicate that question. *Scherer* v. *Schutz*, 83 Ind. 543; *Richardson* v. *Howk*, 45 Ind. 451; *Montgomery* v. *Vickery*, 110 Ind. 211, 8 West. Rep. 878; *Knopf* v. *Morel*, 111 Ind. 570, 10 West. Rep. 812; *Duffy* v. *State*, 115 Ind. 351; *Kreider* v. *Isenbice*, 123 Ind. 10.

The case of *Manford* v. *Firth*, 68 Ind. 83, is in many respects similar to this one. In that

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the deceased principal as a judgment debt and not as a simple-contract debt. Thomson v. Palmer, 3 Rich. Eq. 139; Goodyear v. Watson, 14 Barb. 481, *contra*, Dinkins v. Bailey, 23 Miss. 284.

Equity will not subrogate a surety who has paid a judgment to the rights of the judgment creditor after the surety has been defeated in an action at law against his principal for the money paid on the judgment. Fink v. Mahaffy, 8 Watts, 384.

A surety who pays a judgment against his principal has a right to an assignment of the judgment which equity will enforce. Creager v. Brengle, 5 Harr. & J. 234, 9 Am. Dec. 516.

A surety on an administrator's bond, who has paid a judgment recovered against the administrator by the administrator *de bonis non*, for failure to account, is subrogated to the right of the administrator *de bonis non*. Cowgill v. Linville, 2 West. Rep. 581, 20 Mo. App. 138.

A surety who executed a bond to escape execution on a judgment against himself and principal, and paid the bond, is in equity entitled to be subrogated to the rights of the creditor under the judgment against the principal debtor. Dodd v. Wilson, 4 Del. Ch. 399.

The decree subrogating the surety to the rights of the judgment creditor is not reviewable at the instance of the latter. Springer v. Springer, 43 Pa. 518.

A surety who has paid a judgment against himself and principal, by resorting to equity may secure the benefit of the lien of the judgment which the creditor had, but as his claim rests upon a promise implied by law he must commence his action in equity before the Statute of Limitations runs against such a promise. Johnston v. Belden, 49 Iowa, 301; Neilson v. Fry, 16 Ohio St. 552.

An action for subrogation is an action for equitable relief and as such must be brought within ten years in Ohio. Neal v. Nash, 23 Ohio St. 483.

But the right given to a surety who is certified as such in the judgment, upon payment thereof "to stand in the place of and for all the rights and remedies against the principal debtor or debtors that the plaintiff therein had at the time of such payment" by the Act of 1868, continues till the judgment outlaws. Peters v. McWilliams, 36 Ohio St. 155.

Under statutes.

An indorser who pays for the principal debtor a judgment against them jointly is immediately subrogated to all the rights of the judgment creditor, by virtue of Miss. Code, 1880, §§ 998, 1140. Yates v. Mead, 68 Miss. 787.

The entry of satisfaction on the execution docket and judgment roll, without the indorser's direction, by simply writing the word "Settled," is not ground for refusing subrogation to an indorser who paid a judgment recovered against himself and the drawer of a draft. *Ibid.*

Failure of the record to show the fact of payment by an indorser of a judgment recovered against himself and the principal debtor does not affect the indorser's right to be subrogated to the rights of the judgment creditors. *Ibid.*

In Pennsylvania provision is made by statute (Brightly's Purdon's Dig. p. 827, § 40) for the enforcement by the surety of the lien of a judgment which he has paid against the land of his principal and co-sureties.

In Indiana provision is made by statute by which a surety who has paid a judgment, by having the fact of suretyship determined, can have execution thereon for his use against his principal. Laval v. Rowley, 17 Ind. 36.

So, too, in Maryland. See Creager v. Brengle, 5 Harr. & J. 234, 9 Am. Dec. 516.

In Georgia by statute a surety who has paid a judgment or execution is entitled to the control of the same in order to remunerate himself out of his principal's property. Davenport v. Hardeman, 5 Ga. 580.

A surety who pays a judgment against himself and his principal has the right, although not certified as such in the record of the judgment as provided by Ohio Rev. Stat., § 5836, to be subrogated to the judgment creditor's place. Hill v. King, 43 Ohio St. —.

If the surety be certified as such in the record of the judgment it seems he may, without the decree of a court subrogating him to the rights of the judgment creditor, under Ohio Rev. Stat., § 5367, issue an execution thereon. *Ibid.*

If part of the sureties on an official bond pay the judgment thereon, and in due time file the affidavits required by Wis. Rev. Stat., § 3024, to preserve their rights of subrogation to the lien of the judgment upon real estate, their affidavits inure to the benefit of another surety who afterwards pays them his share of such judgment; and he need not also file such an affidavit. Mason v. Pierron, 69 Wis. 585.

Under the Louisiana Code a surety paying a judgment is by operation of law subrogated to all the rights of the judgment creditor and may issue execution thereon in the name of the creditor for his own benefit against his co-judgment debtors. Sprigg v. Beaman, 6 La. 63; Connely v. Bourg, 16 La. Ann. 108, 79 Am. Dec. 568.

By statute in Georgia it is provided that a surety paying off a judgment by satisfying a court of common law that he was not interested in the consideration of the debt may have an order giving him control of the *fi. fa.* or a court of equity will compel the creditor to assign the judgment to him. McDougald v. Dougherty, 14 Ga. 674.

So, too, in Kentucky. Alexander v. Lewis, 1 Met. (Ky.) 407; Veach v. Wickersham, 11 Bush, 261.

J. G. G.

case a surety paid the amount due on a judgment against all the makers, there having been no adjudication of his suretyship, and took an assignment executed by the attorney of the judgment plaintiff. The assignment was invalid to transfer the legal title of the judgment, because of want of authority on the part of the attorney to make it. It was held that it was good as an equitable assignment, and as such was notice to all subsequent purchasers that it had not been satisfied, and that when the surety had his suretyship determined he was subrogated to all the rights of the judgment creditor. We regard this as decisive of the objection that the adjudication of suretyship must precede the assignment of the judgment by Conrad to the appellee. We are also of the opinion that Conrad, having paid the amount due on the judgment, and having the right, dependent upon having his suretyship afterwards determined, to hold the judgment under such assignment, was vested with property rights and interests in the same which he might sell and assign to another. *Johnson* v. *Amana Lodge No. 82*, 92 Ind. 150; *Manford* v. *Firth*, *supra*.

The equitable right of the surety to be subrogated to the rights and position occupied by the judgment creditor before payment of the judgment is very strong, and the courts are disposed to look with favor upon any arrangement, not in contravention of some rule of law, to place him in that position. *Harper* v. *Keys*, 43 Ind. 225; *Arbogast* v. *Hays*, 98 Ind. 26. The appellee having been brought into court by the appellant in an action challenging the validity of his claim to hold the judgment as a lien upon the land of Brenton, it became competent for him to have the suretyship of Conrad determined in the action. We have examined the evidence, and are satisfied that it fully sustains the finding of the court. The only objection pointed out in argument is the alleged failure to show notice to the appellant of the suretyship of Conrad, and of the payment of the judgment by him as such surety. If the appellant was a purchaser of real estate upon which the judgment would, if unsatisfied, be a lien, we would have a different question, and the cases of *Dougherty* v. *Richardson*, 20 Ind. 412, and *Thomas* v. *Stewart*, 117 Ind. 50, 1 L. R. A. 715, would be in point. The judgment did not appear to be satisfied. On the contrary, it bore upon its face an assignment to Conrad, and this, of itself, was sufficient to put the appellant upon inquiry as to the nature of his claim. *Manford* v. *Firth*, *supra*. It is not necessary to charge the appellant with notice that we should go to the extent that we would be authorized by the opinion in *Downey* v. *Washburn*, 79 Ind. 242.

Judgment affirmed.

MICHIGAN SUPREME COURT.

Alonzo SANBORN
v.
DETROIT, BAY CITY & ALPENA R. CO., *Plff. in Err.*

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

1. A private crossing of which the railroad company has knowledge, and which is used with its consent by men and teams in drawing logs, is not a railroad "crossing" within the meaning of 3 How. Stat. § 3375, at which signals by bell and whistle must be given.

2. Failure to give warning of the approach of a train to a private crossing which has been constructed with the company's consent for skidding logs along its track for

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NOTE.—*At what railway crossings signals of trains are required.*

A street must be traveled as well as public to bring it within the provisions of a statute requiring signals where a railroad "shall cross any traveled public road or street;" it is not sufficient that it has been dedicated to the public. Byrne v. New York Cent. & H. R. R. Co. 94 N. Y. 12; Cordell v. New York Cent. & H. R. R. Co. 64 N. Y. 535.

A crossing recognized by the railroad company as public for several years must be regarded as within the statute requiring signals at public crossings. Missouri Pac. R. Co. v. Lee, 70 Tex. 496.

A road open and used by the public for a series of years, must be regarded as within a statute requiring signals at public highways. Chicago & A. R. Co. v. Dillon, 24 Ill. App. 203.

A crossing where a highway goes over a railroad by bridge is held in Alabama not to be within the meaning of a statute requiring signals at a public road crossing, as the design of the statute is to warn and protect persons who would be in danger of being struck and run over by a train. Louisville & N. R. Co. v. Hall, 4 L. R. A. 710, 87 Ala. 708.

But on the contrary, in New York a crossing at which a railroad is elevated above the highway over which it passes upon a bridge so as to prevent any danger of collision between travelers on the highway and the engines is within the statute requiring signals at a railroad crossing, as the danger of frightening teams as well of actual collision is to be guarded against. People v. New York Cent. & H. R. R. Co. 25 Barb. 199.

So in Pennsylvania, apparently without any regard to statutory provisions, the failure to give signals of the approach of a train to a crossing where a highway passes over a railroad by a bridge until the train is under a bridge, makes a question for the jury as to the negligence of the company in failing to give the signals sooner. Pennsylvania R. Co. v. Barnett, 59 Pa. 259.

A switch crossing provided by a railroad and across its own ground for ingress to and egress from its depot is not a "traveled public road" within the meaning of a statute requiring signals of the approach of a train at such crossing. Hodges v. St. Louis, K. C. & N. R. Co. 71 Mo. 50.

But to approach such a crossing without any signal may constitute negligence as a matter of fact. *Ibid.*

A railroad junction is a regular stopping place within the meaning of a statute requiring signals of the approach of trains. Ensley R. Co. v. Chewning (Ala.) June 11, 1891.

Private crossings.

Failure to give signals of a train at a private crossing is not generally to be regarded as negli-

See also 17 L. R. A. 539; 18 L. R. A. 771; 20 L. R. A. 587; 29 L. R. A. 695; 33 L. R. A. 191; 38 L. R. A. 302.

transportation, is not negligence as matter of law.

3. One cannot act upon an agreement by a railroad company to give warning of the approach of a train to a private crossing, in determining his course of action at such crossing, if he knows that the warning is habitually omitted.

4. Failure to give the signals required by law at a railroad crossing renders the company liable for injuries in consequence thereof to a person lawfully crossing the track in that vicinity relying upon the performance by the railroad company of the duty to give such signals.

(May 13, 1892.)

ERROR to the Circuit Court for Alpena County to review a judgment in favor of plaintiff in an action brought to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts are stated in the opinion.

Mr. **J. C. Shields,** with *Mr.* **A. M. Henry,** for appellant.

Mr. **Frank Emerick,** with *Messrs.* **Turnbull & Dafoe,** for appellee.

Long, *J.*, delivered the following opinion:

This cause was tried in the Alpena circuit court. Plaintiff had verdict and judgment. Defendant brings error.

The first count of the declaration alleges that "the defendant, at or before the time of committing the grievances, was a corporation organized and existing under the general railroad laws of this state, and was operating and running its railroad and business between Alger and the city of Alpena, portions of its road and tracks passing through Alpena county. And the said portions of its said road and tracks which passed through Alpena county were not, and never had been, fenced, and the public and plaintiff during all of this said time were invited and permitted by the defendant to bring timber and logs to its said track, and pile and skid said timber along the side of said track, so the same could be conveniently loaded upon the cars of defendant for transportation. And the plaintiff says that on the 18th of January, 1890, at the said county of Alpena, he was engaged, by the invitation of defendant, with a team of horses and log boat, in drawing logs and timber to defendant's said track at a point about one mile southwest of the city of Alpena, and was then and there piling and skidding the said timber along the side of defendant's said track, for the purpose of having the same loaded upon defendant's cars and transported to market. And plaintiff says that he had been thus engaged at work for three weeks previous to the said 18th day of January, and that in doing this said work had to use defendant's said track and road, and pass and repass over the same very frequently, and the defendant and its servants knew and had knowledge during all this time while plaintiff was doing his said work, as aforesaid, that plaintiff was thus using its said road and track and doing this said work as aforesaid. And the plaintiff says it was the duty of defendant, in running its trains and carrying on its said business, to have given warning to plaintiff in some manner of the approach of its trains, and not to have run its trains against and into plaintiff, while he was at work as aforesaid, yet the said defendant negligently and carelessly neglected its said duty on said 18th day of January, 1890, while plaintiff was at work as aforesaid, and while observing due care on his part, the defendant negligently and with-

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gence. Hucker v. Railroad Co. 7 Ky. L. Rep. 761; Johnson v. Louisville & N. R. Co. M. S. Op. 1883.

In the absence of a statute requiring it a railroad company is under no duty to give signals of the approach of its trains to a private or farm crossing although it approaches it around a curve. Annapolis, B. & S. L. R. Co. v. Pumphrey, 72 Md. 82.

At a private crossing in the open country guarded by gates, where there is no station for passengers or freight, nor any side track, and where no trains ever stop, and where there is no custom to give signals, a railroad company is under no obligation to give signals of an approaching train. Philadelphia, W. & B. R. Co. v. Fronk, 67 Md. 339.

The public use of a foot-way as a crossing over a railroad track with the acquiescence of the company does not convert it into a public crossing within the meaning of a statute requiring signals of a train. Gurley v. Missouri Pac. R. Co. 104 Mo. 211; Northern Cent. R. Co. v. State, 54 Md. 113.

A place much used as a short cut over a railroad track between highways is not a crossing at which signals are required. Holmes v. Central R. & Bkg. Co. 87 Ga. 593.

But the user by the public of a path crossing a railroad track, although it cannot impose on the railroad company the statutory duty to signal the approach of its trains at a public crossing, may make a failure to give signals negligence in fact. Houston & T. C. R. Co. v. Boozer, 70 Tex. 530.

Although a railroad company is not absolutely bound to ring a bell or blow a whistle as the train approaches a place where the public are notoriously in the habit of crossing the track, but which is not a public crossing, some notice and warning is required in order to constitute reasonable care. Swift v. Staten Island Rapid Transit R. Co. 123 N. Y. 645.

So reasonable care may require signals of the approach of a train at a place which is not a public crossing, but where persons who cannot be regarded merely as trespassers and who are engaged in business at that place may be called upon to pass from one side of the road to the other. Owens v. Pennsylvania R. Co. 41 Fed. Rep. 187.

A way kept open across a railroad track by the company's employés which the public are permitted to use as a highway requires the same care in handling trains across it as though it were a public way, except perhaps as to the statutory duty of ringing a bell or blowing a whistle on approaching it, and it is negligence to keep or shunt cars across it at great speed without any signal or warning with knowledge that a team is approaching the crossing. Schindler v. Milwaukee, L. S. & W. R. Co. 87 Mich. 400.

A private crossing treated as a public highway by a railroad company by establishing a custom to give the usual statute signals there must be regarded for that purpose as a public crossing at which the signals are required. Nash v. New York Cent. & H. R. R. Co. 51 Hun, 594.

out any warning whatsoever run and caused to be run one of its freight trains along its said track into and against said plaintiff and his said team and boat load of logs, while plaintiff was crossing defendant's said track, doing the work aforesaid, thereby violently knocking the plaintiff down, and throwing the said team and log boat and its load of logs violently over and against the plaintiff, thereby greatly and permanently injuring plaintiff."

The second count alleges "that the defendant, well knowing its said duty, and on the 18th day of January, 1890, at the county of Alpena, did not and would not observe the same, but, upon the contrary, carelessly, negligently and unlawfully so conducted its said business and managed and run its trains on its said road and along this portion of its said track when plaintiff was at work, as aforesaid, as not to give plaintiff any warning or notice of the approach of said train, and then and there, without sounding or giving any signal, alarm or notice to plaintiff that any of its trains were approaching, did with great force then and there run into, over, and against plaintiff with one of its said engines (known as No. 14) and train of cars, thereby permanently and greatly injuring plaintiff, and causing all the damage set forth in the first count of this declaration, which said portion of said first count is hereby made a part of this count."

The third count alleges: "The defendant was daily running its engines and trains, transporting logs and lumber to the city of Alpena; and plaintiff says at said time he was by the permission, invitation, and consent of defendant using a portion of defendant's said road and track near the city of Alpena in banking, skidding, and piling logs upon it for the purpose of having the same transported by defendant's said trains to the city of Alpena, and the defendant and its agents knew and had notice that plaintiff was so using its said tracks and premises, and was in the habit of giving plaintiff notice of the approach of the said trains or engines over that portion of its said track being used by plaintiff as aforesaid; and plaintiff says it was the defendant's duty to give him such notice at this said time, but the plaintiff says that the defendant recklessly and unlawfully neglected its said duty, and carelessly, at the said time, January 18, 1890, ran a train of cars over this said portion of its road where plaintiff was at work, as aforesaid, without any notice or warning to plaintiff whatsoever, and caused the said train of cars to run against, over, and upon plaintiff, causing all the damage and injury to him specially set forth in the first count of this declaration."

It appeared upon the trial that at the time of the injury complained of the plaintiff was hauling and skidding pine saw-logs along defendant's track, about four miles from the city of Alpena, in the woods, and from one half of a mile to a mile from any highway and railroad crossing. The logs were being taken off from an 80-acre tract of land, through which the railroad extended north and south, the logs being taken from the east side of the railroad track. The plaintiff was a man about thirty-seven years of age at the time of the injury. He was hauling out these logs for a Mr. Chapman, who had the job. Plaintiff had been at work two or three weeks prior to the injury. Others were there also, putting in logs alongside the railroad track, for the purpose of having them hauled by the defendant company to Alpena. Skidways had been made on both sides of the railroad track across this 80-acre tract, and the logs were being put on the skidways. For the purpose of crossing and recrossing the railroad track with the boats upon which the logs were being hauled, Mr. Chapman had in three places across this tract of land placed planking upon either side of the railroad track, and had called the attention of the section foreman of the defendant company, who had examined them, to see whether they would interfere with the running of the trains. Defendant's road was used and operated as a commercial road, running freight and passenger trains thereon, as well as a logging road for the hauling of saw-logs along its line to Alpena and other points. The logs from these 80 acres were being put upon the skidways at the rate of from 100 to 200 per day. Upon either side of the railroad, and coming up to the defendant's right of way, the lands were covered with timber and brush, so that the railroad track could not be seen until one approached within two or three rods of it, when the track could be seen for a mile from where the plaintiff was employed. The plaintiff's haul of logs was only about 30 rods from the railroad, and he was perfectly familiar with the running of the trains over the road, as during the whole three weeks of his work he had been in the habit of crossing the track every day. The train by which the plaintiff was injured was a logging train. All trains had usually given the statutory signal by ringing the bell and sounding the whistle at Beck's farm crossing, which was from one half to three quarters of a mile north of the place where the plaintiff was working.

On the afternoon of January 18, 1890, at about two o'clock, the plaintiff claims that, having loaded three logs upon his boat, some 30 rods distant from the railroad track, he started to haul to the skidway across the track. Two of the logs were 20 feet in length, and the other 18 feet. He testified that he drove upon a little sharp hill, about three rods from the track, and stopped, and looked for the train; that he was then about a horse or two horses' lengths from the track; that he stepped forward of his horses, so he could see up and down the track; that he heard no sound of the approaching train, but that it was snowing and blowing so that he could only see a few rods in either direction; that he then went back to his load, stepped upon one of the logs, started his team forward, which took him from one to two minutes, and when his horses had so far crossed the track that their hind feet were between the rails and his log boat just entering upon the track, he heard a toot of the engine, looked up, and saw the train almost upon him; that he attempted to swing his horses around, and get them off from the track, and for that purpose stepped from the log upon which he was riding, picked up a switch, and struck them; that his horses were frightened by the toot of the engine, and stopped, when the engine struck between the horses and the boat, overturning the logs upon him,

and injuring him. He also testified that while all the trains had been accustomed to give the statutory signal at "Beck's farm crossing," the train by which he was struck did not ring the bell or sound the whistle at that crossing. He testified upon that subject as follows: "*Question.* During all this time, state where the trains would give you the signals as they came from Alpena. *Answer.* That was at Beck's farm. *Q.* At this general railroad crossing? *A.* Yes. *Q.* State what they did when they came there. *A.* They generally rung the bell and blowed the whistle. The passenger always did there. I never knew it to fail. *Q.* Did you ever know any other train, up to this time, but what did that? Mr. Shields: I object to that as incompetent and immaterial. The Court: I suppose it is the theory of the plaintiff that on this occasion they did not even do that for a mile distant from where he was working. Mr. Shields: I don't think it has any importance. (The last question being read by the stenographer, the witness answered it as follows:) *A.* No, I don't think I did; not that I noticed. I think they all blew at that crossing, for that is the crossing that I went by. When I heard that I always looked up. *Q.* State to the jury whether this train that came there that day on which you got hurt— State to the jury whether that sounded any bell, or gave any whistle up to this crossing, before they reached you. (Which question was objected to as incompetent and immaterial, and not covered by the declaration, by defendant's counsel. Declaration was then read. The court: You may take this. To which ruling defendant did except.) *A.* No sir, they did not,—that is, until they got right on top of me. Just as they got close to me they gave a little toot. *Q.* I am asking you about the crossing. Now, then, state to the jury if they had given you this signal or warning by tooting their whistle or ringing their bell at this crossing— State to the jury whether you would have been caught upon the track, or whether the injury would have been inflicted. Mr. Shields: I object to that as incompetent and inadmissible. The Court: You may show, if they had given any whistle or rang the bell at the crossing, whether he would have heard it. *Q.* You may state, if they had given you any signal at this crossing, whether you would have heard it. *A.* I could have heard it sure. I always heard it when they whistled there. *Q.* State to the jury in reference to you hearing the whistle and bells of the other trains that day at this crossing,—that day when they came down there. Mr. Shields: I object to that as incompetent. The Court: I think it is proper. You may have an answer to it. (To which ruling defendant excepted.) *A.* I did. Mr. Turnbull: Now I want to ask him the question I did before, because our statute is peculiar. It, in so many words, says that the railroad is liable for any injury that they may perpetrate by reason of their not giving those signals at this crossing. Now, then, I want to ask this witness the question whether, if they had given him this signal at this crossing, whether the injury would have taken place. Mr. Shields: Mr. Turnbull cannot make a lawsuit here contrary to the facts and contrary to his declaration. Injuries that happen upon a public highway are one thing; injuries that happen a mile or a half a mile away from the crossing are another thing. The Court: I think you may show that, if the signals had been given at the point that witness has designated, that if he was upon the track he could have withdrawn himself and team,—could have avoided the injury. *Q.* You may state whether, if those signals had been given at this crossing, at the place where you were on the track, or near the track where you were putting these logs, whether you could have avoided and would have avoided being on the track. Mr. Shields: I object to that as leading, incompetent, and inadmissible. The Court: Take an answer. Mr. Shields: I take an exception. *A.* Yes, sir; I would have avoided it." Plaintiff further testified that the afternoon freight usually passed that point about two o'clock, and that the log train by which he was injured usually passed there a little behind the freight train, sometimes a half hour and sometimes an hour later; but that on this day the log train came down ahead of the freight, and about an hour earlier.

Mr. Chapman was called by the plaintiff as a witness, and testified that this "Beck's crossing" was about three quarters of a mile from where plaintiff was injured; that he did not hear the ringing of the bell or the blowing of the whistle at this crossing, and the first he heard of the train was the sounding of the whistle at the place of the injury. He further testified that by spells that day the wind was blowing so desperately that you could not see three feet away, and then it would let up; that the wind did not interfere with the sound of the approaching train, and that one could hear the sound a good deal better that day.

The defendant introduced the evidence of the engineer, fireman, and brakeman on the train. They each testified that it was their custom to ring the bell and blow the whistle at "Beck's farm crossing," but that upon that particular day they were unable to state that this statutory signal was observed at that particular crossing any more than they could at any other crossing. The fireman testified that he looked out of the cab window, and saw the plaintiff about three car lengths from the engine; that at that time the plaintiff was within twelve or fourteen feet of the track, walking along the side of his boat; that he at once pulled the bell, and the engineer blew the whistle, when the plaintiff put the whip to the horses, and tried to run across the track, and when struck by the engine had got nearly across, and the boat had got on the track. This testimony was corroborated by the engineer and the brakeman. At the close of the testimony the defendant, by its counsel, requested the court to charge the jury as follows: "*Fourth.* Whether the bell was sounded or whistle blown on approaching the highway crossing, prior to reaching the place where Sanborn was, is of no importance in this case. Those signals are for persons who may be upon the highway." "*Eighth.* The plaintiff was aware, from his three weeks' work along the track, that trains were regularly running over the road, and it was his duty to care for himself, and avoid any collision. *Ninth.* It

would be negligence for the plaintiff to go upon the track relying upon the fact that he did not hear any signals at the highway crossing or near there. (*a*) If the jury believe the plaintiff saw or heard the train coming before going himself near the track, he cannot recover. (*b*) If the jury believe that the plaintiff, if he had used ordinary care, would or should have known the train was coming, he cannot recover; and in determining this the jury may consider, with other facts, that the train was on schedule time." These requests the court refused to give in charge to the jury, and charged the jury as follows: "Now, the plaintiff further contends that on this day in question the defendant corporation, in running the train which is claimed to have done the injury in this case,—if any was caused,—disregarded the required signals at the public highway crossing, which has been described here to be within half a mile or three quarters of a mile this side—towards the city—from the point of the accident. It is claimed here that the defendant corporation—its employés—in running that train entirely omitted the danger signals at this public highway crossing. I say to you, gentlemen, it was a duty which the law prescribes and imposes upon the defendant corporation at that highway crossing to give the requisite signals by the ringing of the bell and the blowing of the whistle. This is a duty which the law of this state imposes upon every railroad corporation when they seek the right and franchise of laying down and operating a railway and running its trains over their track. Now, it is one of the theories of the plaintiff's case that, if this signal had been given, he would have been warned of the approach of this train which caused the injury. And I say to you, gentlemen, here, that if you find as a fact in this case that the danger signals were not given at the highway crossing, and that, in consequence of the failure upon the part of the defendant corporation to give such signals, this injury occurred, this accident occurred, which resulted in the injury to the plaintiff,—if it has resulted in any injury to him,—the corporation would be liable. It was the omission of a duty which the law prescribes, and if from the omission to perform that duty injury has resulted to this plaintiff, the defendant would be liable. It is further contended and claimed here upon the part of the plaintiff that no warning was given by the train in question which caused the injury as it approached these other crossings, which had been put down, as the plaintiff claims, with the knowledge and acquiescence of this defendant. Now, upon this branch of the case I instruct you, gentlemen of the jury, that, if the defendant corporation knew that a crossing had been made, if the defendant, by its officers or agents, were present, and acquiesced in and recognized the making of a crossing at the point where the plaintiff was injured, if you find that as a fact from the evidence in this case, if you find such to be the fact from the evidence in this case, I charge you that it would then be the duty of this defendant corporation, if they had any notice or knowledge that people were using such crossing and working thereabouts, to give reasonable warning of the approach of trains at that crossing. If that crossing was made there with their knowledge and acquiescence and consent, and they knew it was to be used by men and animals in drawing logs to their railway, and banking them along their railway, it was their duty, when approaching that point, to give such signals and such warning as would give persons to understand or know that a train was approaching, and that danger might be expected, so that they could avoid it." The objection to the testimony, the defendant's request to charge, and the charges as given, raise the important questions for determination here.

It is contended by plaintiff's counsel that the court was not in error in permitting him to show that the danger signals were not given at the highway crossing; that the plaintiff was injured by reason of the failure of the engineer to ring the bell or blow the whistle at this crossing; that the court was not in error in refusing the defendant's request to charge on that subject, and in charging the jury that, if they found that defendant neglected to give such signals, and the plaintiff was injured for such reason, the defendant would be liable. It is also contended that the court was not in error in charging the jury that it was the duty of the defendant, if it knew this crossing, made by Chapman, and used by the plaintiff to haul logs over,—knew that the crossing was made and used by plaintiff in putting in logs,—to give reasonable warning by the whistle or bell of the approach of the train.

Section 3375, 3 How. Stat., provides as follows: "A bell of at least thirty pounds weight, and a steam whistle, shall be placed upon each locomotive engine, and said whistle shall be twice sharply sounded at least forty rods before the crossing is reached, and after the sounding of the whistle the bell shall be rung continuously until the crossing is passed, under a penalty of one hundred dollars for every neglect; provided, that at street crossings within the limits of incorporated cities and villages, the sounding of the whistle may be omitted, unless required by the common council or board of trustees of such city or village; and the company shall be liable for all damages which shall be sustained by any person by reason of such neglect." Counsel for plaintiff contends that under these provisions of the statute defendant, to escape liability, should have given the signals at "Beck's Crossing," and in support of that proposition cites *Ransom* v. *Chicago, St. P. M. & O. R. Co.* 62 Wis. 178, 51 Am. Rep. 718; *Norton* v. *Eastern R. Co.* 113 Mass. 366; *Pollock* v. *Eastern R. Co.* 124 Mass. 158; *Palmer* v. *St. Paul & D. R. Co.* 38 Minn. 415; *Cosgrove* v. *New York Cent. & H. R. R. Co.* 87 N. Y. 88, 41 Am. Rep. 355; *Voak* v. *Northern Cent. R. Co.* 75 N. Y. 320; *Haas* v. *Grand Rapids & I. R. Co.* 47 Mich. 402; *Chicago & N. W. R. Co.* v. *Miller*, 46 Mich. 533; *Klanowski* v. *Grand Trunk R. Co.* 57 Mich. 525; *Schindler* v. *Milwaukee, L. S. & W. R. Co.* 87 Mich. 400. An examination of these cases will show that not one of them bears out the claim made by plaintiff's counsel in the present case. All of the cases above cited are either where the persons were on the highway when injured, or are cases where some other negligence aside from the ringing

of the bell or blowing of the whistle at the public highway crossing was charged. In the case of *Ransom* v. *Chicago, St. P. M. & O. R. Co., supra,* the plaintiff's wife, accompanied by their two minor children, was driving a horse on the highway towards the railway crossing. The road upon which she was driving was an east and west road and ran parallel with the railroad, and the railroad crossed the north and south highway near that point. As the train approached this crossing of the north and south highway, the engineer failed to ring the bell or blow the whistle. The train had passed through a deep cut near this crossing, and, emerging from it, frightened the horse driven by plaintiff's wife, causing him to run, overturning the buggy, killing his wife, and severely injuring his children. The statutes of Wisconsin provide that, before crossing any highway, except in cities and villages, with any locomotive, the whistle shall be blown 80 rods from such crossing, and the engine bell rung continuously from thence until the highway shall be crossed by the locomotive. It was contended in that case that the defendant company owed the duty to the plaintiff's wife and children to give the signals required by the statute of the approach of its train to the crossing, although she was not driving upon the highway which crossed the railroad track, but upon one parallel with the railroad. The court held that persons driving on the highway in the vicinity of the crossing were within the protection of the statute, and that it made no difference that the highway upon which the deceased was driving was one crossing on a level with the railroad, or whether it passed over or under or parallel with it, yet all persons using the highway for public driving were entitled to the protection that the statute affords, which compels the ringing of the bell and the blowing of the whistle at all highway crossings.

In *Norton* v. *Eastern R. Co., supra,* the plaintiff was driving his horse, hitched to a wagon, on the highway crossed by defendant's track at grade, and when within 36 feet of the track a train of cars passed over the crossing, frightening his horse, causing him to kick, breaking plaintiff's leg. It was claimed in that case that no bell was rung or whistle sounded to intimate the approach of the train. It was further claimed in that case that this was a flag station, and no flagman was there. It was also contended upon the part of defendant that, even if the signals by bell or whistle were omitted, and if, in consequence of this omission, the plaintiff approached nearer to the train than he would otherwise have done, the injury being caused by the fright of the horse, occasioned by this proximity, they were not to be held responsible therefor, because they contend that such signals are intended to protect travelers at highway crossings from actual collisions only, or at most from taking any position which involves imminent danger of collisions; and that this is the extent of the protection which the statute affords. It was held by the court that a fair construction of the statutes of Massachusetts (which are somewhat similar to ours) is that these signals are also intended for the benefit of those approaching crossings, for whom their warning would be valuable, and that any one thus situated, who is injured by the omission of that which the statute requires, has just grounds of complaint. The reason of this rule, as stated by the court, is that "at such crossings the railroads are permitted to interfere with the ordinary use of the public easement, and, from the nature of the motive power employed by them; and the difficulties attending its management, the exercise of their right temporarily excludes the ordinary traveler from the use to which he is at other times entitled. But, as this use may often be made with animals liable to be alarmed by the noises of the passing train, it is important for his safety that he should be informed of the approach of the train to the highway, in order that he may take proper measures against injury from such alarm. The signals are intended to give sufficient warning to enable him to do so." The same rule was laid down in *Pollock* v. *Eastern R. Co., supra.*

In *Palmer* v. *St. Paul & D. R. Co., supra,* one of the acts of negligence complained of was the omission to give the signal of the approach of the train by ringing a bell or blowing a whistle before reaching the crossing, as required by statute. That statute is somewhat similar to our own. The action was for killing plaintiff's cattle, then on a highway crossing. It was contended that these signals required by the statute were only intended as a warning to human beings, and not to cattle. The court held that the omission to give these signals might properly be shown, and that it was for the jury to say, under all the circumstances of the case, whether the giving of the signal would have prevented the accident.

In *Cosgrove* v. *New York Cent. & H. R. R. Co., supra,* the negligence imputed to the defendant was the failure to ring the bell or sound the whistle. The deceased and one Barringer were killed by the collision of the horse and carriage, in which they were riding, with defendant's train, upon a public highway crossing. The question was one of contributory negligence, and there was no question in the case but that it was the duty of the defendant company to ring its bell and blow its whistle.

In *Voak* v. *Northern Cent. R. Co., supra,* the plaintiff was riding in a buggy, she herself driving. She approached the track with great circumspection, listening and looking for the train; but, in consequence of certain obstructions, she did not see the train until she was within three rods of the crossing. She could not turn around. Her horse became frightened and restive. She backed it about three rods, and then, at a loud blast of the whistle for the first time given at the crossing, her horse turned around, and she was thrown out of the buggy and injured. The statute of New York provides that, where the railroad should cross any traveled public road or street on the same level with the railroad, the engine bell shall be rung or whistle sounded at least eighty rods from the crossing, and that the bell shall be kept ringing, or that the whistle shall be sounded at intervals, until the engine shall have crossed the road; and for neglect to comply with these requirements the railroad company is made liable for the damages sustained by any person by reason of the negligence. It

was stated by the court "that the purpose of this provision is the protection of persons actually crossing a railroad track, and also of persons approaching such a track,"—citing *People* v. *New York Cent. & H. R. R. Co.* 25 Barb. 199, and *Harty* v. *Central R. Co. of New Jersey*, 42 N. Y. 471. "The warning is required to be given so that all persons lawfully using the public highway may keep out of danger at railroad crossings; danger not only from collisions at the crossings, but also from the fright of horses by passing trains. The law makes it negligence not to give the warning, and then imposes a liability for all the damages which can properly be attributed to such negligence.

In *Haas* v. *Grand Rapids & I. R. Co.*, *supra*, the action was brought by the plaintiff, as administrator of the estate of Adrian Leenders, for causing the death of his intestate by negligently running one of its trains so as to collide with his team while he was crossing defendant's track in passing along the public highway. On the trial in the court below the case was taken from the jury by instructions of the judge that they should return a verdict for the defendant. The defense insisted that the only negligence shown was imputable to Leenders himself, who carelessly drove against the train, though he was fairly warned of its approach. It was said in the case that no signboard, as required by the statute, had been erected at this crossing; but the plaintiff gave evidence that his decedent was familiar with the crossing; that he not only knew about it, but had frequent occasion to pass over it. More than this, it was a part of the plaintiff's case that the decedent had the crossing in mind when he approached it on the occasion in question, and checked his team to listen for the signals of the approach of the train. It was said by this court that, in view of that fact and the showing of the plaintiff himself, it was of no importance in the case that the railroad company had failed to erect the caution board; that the duty to erect it was a duty to the public, and no private action could be grounded upon the negligence in his individual injury, though traced to it.

In *Chicago & N. W. R. Co.* v. *Miller*, *supra*, the injury was one occurring upon the public highway. In that case the complaint was that the defendant company failed to ring its bell or blow its whistle in approaching the highway crossing, by reason of which the plaintiff was injured.

In *Klanowski* v. *Grand Trunk R. Co.*, *supra*, the injury was received upon the highway crossing.

It is upon these authorities that the plaintiff's counsel asks this court to give to the statute the broad construction contended for. We cannot agree with the learned counsel for the plaintiff that the statute was ever intended by the Legislature to be so construed. Similar statutes in other states have received a different construction by the court of those states. In *Harty* v. *Central R. Co. of New Jersey*, 42 N. Y. 468, the statute of New Jersey, similar to ours, was construed by the Court of Appeals of New York. The action was brought by the administratrix against the defendant company for negligently causing the death of her husband. The intestate was struck by one of the defendant's engines, and fatally injured, at a point about 200 feet east from a railroad crossing. The railroad runs easterly and westerly, and the highway crosses it northerly and southerly. The train was going westerly. There were three parallel tracks. Upon the south track there were two gravel trains, standing still; one just east of the crossing, and one partly across and west of it. There was a train from the west upon the middle track, which at the time of the accident had reached a point 1,500 feet west of the crossing, and the whistle upon that engine was blowing. The intestate, for three months, had lived within a quarter of a mile of the crossing, and in sight of the railroad. He worked in a slaughter house near the railroad, and about a quarter of a mile east of the crossing. He and many other persons working in the slaughter house had been in the habit of going to and from the slaughter house, passing over the railroad to and from the crossing. On the day of the accident he started from the slaughter house, to go home. He was passing along west upon the middle track, and it is supposed that he either saw the train coming east upon the same track, or heard its whistle. He stepped upon the north track, and just as he did so he was struck by a train going west upon the north track. The bell upon this train was not rung and the whistle not blown, and there was no signboard at the railroad crossing, as required by law. Earl, *Ch. J.*, speaking for the court, said: "I shall assume that the intestate was lawfully upon the railroad at the time of the accident. There was sufficient evidence to authorize the jury to find an implied license to all persons working at the slaughter house to go upon the railroad between the highway crossing and the slaughter house; but I think the plaintiff should have been defeated at the circuit, both because of failure to show negligence on the part of the defendant and because the negligence of the intestate contributed to the accident. The only negligence alleged against the defendant was that its servants upon the engine did not ring the bell nor blow the whistle, as required by New Jersey law. The sole object of this law, it seems to me, was to protect persons traveling upon the highway at or near the crossing. In the language of Allen, *J.*, in *People* v. *New York Cent. & H. R. R. Co.*, 25 Barb. 199, in reference to a similar law of this state: 'The hazards to be provided against are twofold: *first*, the danger of actual collisions at the crossing; *second*, that of damage by the frightening of teams traveling upon the public highway,' near the crossing. For the protection of such persons railroads were required to put up the signboard at the crossing, and to ring the bell or blow the whistle. The sign-board was to be up 'so as to be easily seen by travelers;' and none of these precautions were required except where the railroad and highway crossed each other upon the same level, thus showing clearly that the law-makers had in mind only the danger to travelers upon the highway by collisions at crossings. Railroad companies were not required by this law to ring the bell or sound the whistle when the highway passed along the railroad, nor when

it passed at an elevation over it or under it. Nor were they required to take this precaution for the protection of persons walking along the railroad. I conclude, therefore, that the intestate was not within the protection of this law; that the railroad company owed him no duty under the law to ring the bell or sound the whistle; but the duty of the railroad is not limited by the measure imposed by this law. They are bound to use at least ordinary prudence and diligence to avoid collisions with persons lawfully crossing their tracks, and hence at road crossings and in the streets of villages and cities, in the absence of any statute law they would be required to use these ordinary precautions to avoid accidents, and, if they omitted to do this, they would be liable to persons injured without their own fault by collisions."

In *Chicago, R. I. & P. R. Co.* v. *Eininger*, 114 Ill. 83, it appeared that the trial court instructed the jury that, if the injury happened because of there being no flagman at the railroad crossing at Twenty-Fourth street, to give warning to those about to cross the street and railroad track of the approach of the train of cars to the crossing, contrary to the city ordinance, then the plaintiff was entitled to recover. The evidence upon the part of the defendant showed that at the time the plaintiff was struck he was traveling along and upon the railroad right of way for his own convenience. It was said by the court that, "under such circumstances plaintiff was not a lawful traveler upon the highway. To such a one the railroad company does not owe the duty in respect to a flagman. Flagmen are for the protection of persons crossing railroad tracks, and are not for the benefit of persons walking along and upon the railroad track, employing it as a footpath. This instruction was calculated to mislead, and should not have been given."

In *Elwood* v. *New York Cent. & H. R. R. Co.*, 4 Hun, 808, it appeared that defendant's passenger train stood at its depot, in front of the platform for the use of passengers. The deceased (plaintiff's intestate) approached from the opposite side, without the knowledge of defendant or its employés, got upon a car from the side opposite the depot platform, found the car locked, got off from the platform of the car on the side from which he had approached it, and undertook to walk between the tracks to the end of the train, without looking behind him. He was struck by the working train approaching him from behind, and killed. It was held that the negligence of the intestate contributed to the injury; and that the fact that the working train did not give the signals required by the statute on crossing a street before reaching the depot was not an act of negligence towards the intestate, who was not on a street where he had any business to be.

In *Bell* v. *Hannibal & St. J. R. Co.*, 72 Mo. 50, it appears that the court below gave the following instructions to the jury: "It is the duty of those in charge of locomotives and trains of cars in approaching crossings of the public street to ring the bell or sound the steam whistle at the distance of eighty rods therefrom, and to keep ringing the bell continuously, or sound the steam whistle at intervals, until the train shall pass over such public street; and if the jury believes from the evidence that in this case, as the train approached and passed over the public street in the town of Meadville, the persons in charge thereof did not ring the bell or blow the whistle as above required, and that the boy, Athan Bell, was struck by the locomotive and killed by reason of said omission, and without fault on his part, then the jury will find their verdict for plaintiff." The court in speaking of these instructions, said: "The third instruction is also objected to on the ground that it had nothing to do with the case. We concur in this view, although its impropriety alone would scarcely justify a reversal. The statute which requires the bell to be rung and the whistle sounded was for the benefit of persons at the railroad crossing or approaching it; but the boy killed in this case was not on the road or at the crossing, but forty or sixty feet west of it."

In *East Tennessee, V. & G. R. Co.* v. *Feathers*, 10 Lea, 103, the action was brought by the husband to recover damages for injuries received by the wife by her horse being frightened by a train on defendant's track. She was riding her horse on a public highway parallel with a railroad, which was crossed by another highway. The noise of a passing train frightened her horse, which threw and injured her. It was held that the statute of Tennessee did not impose the duty on the railroad company to ring the bell or sound the whistle for the protection of any persons except those crossing or about to cross the railroad track on a public highway. Subsection 2 of the Act provides that signs should be placed by the overseer of any public road at crossings, and marked, "Look out for the cars when you hear the whistle or bell." Subsection 3 provides: "On approaching any crossing so distinguished, the whistle or the bell of the locomotive shall be sounded at the distance of one fourth of a mile from the crossing, and at short intervals till the train has passed the crossing." See also *O'Donnell* v. *Providence & W. R. Co.* 6 R. I. 211.

The law is therefore well settled that a traveler upon the highway has a right to assume that a railway company will thus perform its statutory duty; and one on a highway, when he approaches a railroad crossing, and can neither see nor hear any indications of a moving train, is not chargeable with negligence for assuming that there is no train sufficiently near to make the crossing dangerous: One in such a position has a right to assume that a railroad company in handling their cars will act with appropriate care; and that the usual signals of approach will be reasonably given. The learned circuit judge, in the present case, by the admission of testimony, the refusal to charge as requested, and in the charge as given, laid down the rule as above stated, and held the defendant to the same degree of care as if the plaintiff were on a public highway; and not only that, but he gave to the plaintiff all the rights which pertain to one approaching a track on a public highway, and applied the rule that the plaintiff had the right to rely upon the defendants giving these signals at Beck's crossing, as well as the crossings put in by Chapman. The theory of the plaintiff upon which the case was tried was that defendant omitted to give these danger signals at Beck's

crossing, and that such omission was the cause of the injury. This was the theory upon which the court submitted the case to the jury. Upon the trial the court remarked to counsel: "I suppose it is the theory of the plaintiff that they did not even do that [give the signals] for a mile distant from where he was working." If this can be claimed as negligence as matter of law, and for the reason that the statute requires such signals to be given, then at every farm crossing, or at any other place where people may lawfully work upon or across a railroad track, such signals must be given at the nearest highway crossing, and a failure to do so would be negligence, which any party injured might allege as a ground of action. This question has never before been presented to this court. After a full review of the cases arising in the courts of other states under somewhat similar statutes, it appears that the whole weight of authority is against the claim made by plaintiff's counsel. In fact, but one case has been found (and I doubt if any other can be found) where the court of last resort of any state has given such a construction as claimed here to a statute similar to ours. On the contrary, the courts of New York, Rhode Island, Massachusetts, and other states, where the question has been passed upon, have uniformly held that the statute can be invoked only in aid of those actually upon the highway. The case referred to as holding a contrary doctrine is *Cahill* v. *Cincinnati, N. O. & T. P. R. Co.* (Ky.) 13 Ky. L. Rep. 714, in which the rule is laid down that "persons lawfully using a private crossing are entitled to the benefit of signals which they know it is the duty and custom of the railroad to give at the public crossings." This case has been called to my attention since the argument of the present case, and fully sustains the claim made by plaintiff's counsel. The learned judge who wrote the opinion does not cite a single case to sustain the doctrine laid down by him, but contents himself with a statement from 4 Am. & Eng. Encyclop. Law, p. 917: "That there is a conflict of authority on the question; the doctrine of some of the courts being that only travelers on a highway or street approaching or using a crossing can complain of omission to give required signals; while by others it is held that all persons in the vicinity of a public crossing, whether intending to use it or not, are entitled to the benefit of signals, and have a right to rely upon their being given." An examination of the cases cited by this author as supporting the last proposition will show that there is no conflict of authority in the cases upon the proposition that one who is not traveling along or in the highway at the time of the injury complained of cannot invoke the aid of the statute; and the only disagreement between the courts of the several states has been whether these statutes applied to others on the highway who were crossing or about to cross the railroad track. I do not think that the author intended to be understood that there was a conflict of opinion on the question whether a person who was not on the highway at all at the time of the injury could invoke the aid of the statute, but that the disagreement had been whether these statutes applied to persons who were on the highway and not actually crossing or attempting to cross the railroad track, and could not aid one who, though on the highway, was not crossing or attempting to cross the track, but traveling along near the crossing; as, for instance, the cases where recovery has been permitted for frightening horses, some of the courts holding that the statute was intended to prevent only actual collisions. Our statute requires the ringing of the bell or sounding of the whistle at least 40 rods before the crossing is reached. This fixes a reasonable distance for warning to be given before the train reaches the highway crossing; and it cannot be assumed that the Legislature intended that one at any other place than on the highway might claim the right to have it sounded; and as to such person, neither at common law nor under the statute is any duty fixed upon the railroad company to ring the bell or blow the whistle at least 40 rods before the crossing is reached.

Upon the second proposition it is claimed that, if the defendant company consented to the placing of those crossings there, and knew that logs were being hauled along its tracks and across them, it was defendant's duty to give some warning of the approach of its trains, either by ringing the bell or blowing the whistle. It is undoubtedly true that, where a railroad company invites parties to bring freight to it, while so doing it owes the duty of reasonable care, the same as a person who expressly or by implication invites persons upon his premises assumes the duty of warning all who may accept the invitation of any danger in coming of which he knows, but of which they are not aware. It appears, however, that the plaintiff knew of the running of trains over this road. He knew of the regular passenger trains, the freight trains, and the irregular running of this log train. He knew a train might pass there any moment. He looked for one, stopped his team, went forward of the horses, and claims he looked and listened. It is difficult to discover in what the defendant company was negligent. If it were not called upon to ring the bell or blow the whistle at Beck's crossing so far as the plaintiff was concerned, what duty did it neglect? What duty did it owe to the plaintiff? The claim is made that, if the company were not called upon to ring the bell or blow the whistle at Beck's crossing, they were called upon to give these danger signals at the crossings made by Chapman, or to do some other act for the protection of the plaintiff. Admitting that the plaintiff was rightfully upon defendant's grounds, placing these logs there, and that Chapman had been permitted to place these crossings for the purpose of enabling the plaintiff to haul the logs over, yet the defendant was under no obligation to run its trains other than in the ordinary way. If it was the duty of the defendant to have given these danger signals at this point because the plaintiff may have been about to haul logs across the track, it might as well be held the duty of the company to give these danger signals at every farm crossing, or other points on its road where people are permitted to cross the track or travel along it as a footway. Persons so using the railroad track have no right to claim that the

company shall give danger signals at such points. It would be requiring of railroad companies a duty which would be impossible of observance at all times. Highway crossings are very easy to be discovered by those in charge of the engine. Signboards are erected, and the engineer and fireman get familiar with their location. At other places along the route of the road, such as farm crossings, and places where men may be at times temporarily engaged, or where a footway is used by permission, there may be no distinguishing marks. New men may be upon the engines. The work may have just commenced, and the place not known to those in charge of the engine or train. If these signals were to be required of this log train, they would be required of the freight and passenger trains, and the company would have to respond in damages if they were not observed. I can discover nothing in the case which shows any neglect of duty on the part of the railway company or its servants. In fact, the plaintiff testifies that he relied upon the signals at Beck's crossing. He does not claim that the company had been accustomed to give any signals at the Chapman crossings, or that he in any manner relied upon its giving such signals. It is apparent that the engineer and fireman on the engine did all in their power to prevent the accident as soon as the plaintiff was discovered on the track. In *Sutton* v. *New York Cent. & H. R. R. Co.*, 66 N. Y. 246, the plaintiff's intestate was on the track of defendant company, not on a public highway. He was not a trespasser there, but there by license of defendant. It was said that, in order to recover, some breach of duty on the part of the defendant must be shown. The claim of negligence was in letting some loose cars back upon the plaintiff's intestate without warning of danger. It was held that no negligence was shown. I think also that the plaintiff, by his own showing, was guilty of the grossest carelessness. He admits he stopped one or two horses' lengths from the track. He went in front of his horses, and says he looked and listened, but that the snow was blowing so that he could not see more than three or four rods up the track. He went back and started his team, which took from one to two minutes. He stepped upon one of the logs, and drove upon the track. He did not stop when the horses reached the track, though a few minutes before he was looking for a train. The situation there, considering the blowing of the snow, was such as required the greatest care on his part. Not only his own safety, but the safety of the persons who might be upon the passing train, required this. He should have stopped when his horses reached the track, and, before driving them on to the track, should have gone forward upon the track and looked and listened; and, if he could see only a rod or two up the track on account of the blinding snow, he might well have hesitated about driving across with such a load as he had upon his boat. The defendant's requests set out here should have been given. Some errors are alleged in the admission of testimony which we do not deem it important to discuss.

For the errors pointed out *the judgment below will be reversed*, with costs, and a new trial ordered.

Grant, J., concurred with **Long, J.**

Montgomery, J., delivered the following opinion:

The plaintiff adduced testimony tending to show that he was working hauling and skidding pine logs along the defendant's track, at a point where a crossing had been made over the defendant's track for the purpose of hauling logs across; that defendant's agents and servants knew of this track, and that it had been in use for some three or four weeks by plaintiff and others, and that the defendant's trains had daily passed over this portion of the road. The testimony also showed that there was a public highway crossing about three quarters of a mile from where the plaintiff was injured, known as "Beck's crossing." The plaintiff, being upon this temporary crossing with a boat-load of logs, drawn by a span of horses, having gone upon the track, as he claims, after stopping to look and listen, and not being able to see any train coming, was struck by the locomotive of a log train on the defendant's road and received injuries, for which he recovered damages. The evidence also showed that the day was stormy, snow flying in the air, and that it was difficult to see any great distance. Two grounds of negligence were alleged against the defendant, and, under the instructions of the circuit judge, the jury were permitted to find against the defendant upon either ground. The first ground of negligence averred was the omission to ring the bell and blow the whistle at the private crossing. The learned circuit judge instructed the jury: "If this crossing, testified to by Chapman as having been made by him for the purpose of use in the hauling of those logs, if it was made with the knowledge and consent or acquiescence of the defendant railroad company, and they knew . . . that it was to be used, and was being used, as a crossing, the law would impose upon them the duty of giving such warning by giving signal, either by ringing the bell or blowing the whistle, as would fairly warn people in the use of it of approaching trains; and if they failed to do so it would be negligence on their part." The second ground of negligence relied upon was the failure of the defendant's agents to blow the whistle for Beck's crossing, as required by statute. It was clearly error for the circuit judge to instruct the jury, as he did, that the failure to give a signal of the approaching train at the private crossing was negligence as matter of law. *Galena & C. U. R. Co.* v. *Dill*, 22 Ill. 264; Rorer, R. R. § 1012. It was claimed by the plaintiff that the use of this private crossing was such an implied invitation on the part of the railroad company, or at the least amounted to a license to use it for a crossing. But, if so, it was a limited license, the limitations being understood as well by the plaintiff as defendant's servants. The plaintiff's testimony tended to show that the defendant's train passed this point every day at about the hour of this accident, and that there was no custom of giving any signal at such private crossing. How, then, could the plaintiff be

permitted to maintain that he was there under an invitation to cross, with the assurance that warning would be given? On the contrary, if there had been no custom to give such warning, the plaintiff must have been fully assured that no such duty had been undertaken by the company, and, this being so, it should be held that the company had never invited or licensed the plaintiff to make use of this crossing in any such sense as to have assumed the burden or duty of running its trains past this point in any other than the usual way. A discovered and known omission of an alleged duty cannot constitute a proximate cause of an injury which results to one who proceeds, with knowledge that such alleged duty will not be observed, to perform an act which is only safe on the assumption that such duty would be attended to. As is very tersely stated by Mr. Bishop, in his work on Non-Contract Law: "If one discovers another to have been negligent, he must take directions accordingly." Bishop, Non-Cont. Law, § 446; *Cooper* v. *Central R. Co.* 44 Iowa, 134.

The question remains as to whether the failure of the defendant to give the statutory warning at Beck's crossing was such a neglect of duty as would, in the absence of contributory negligence on his part, entitle the plaintiff to recover. Section 3375, 3 How. Stat., provides as follows: "A bell of at least thirty pounds weight, and a steam whistle, shall be placed upon each locomotive engine, and such whistle shall be twice sharply sounded at least forty rods before the crossing is reached, and after the sounding of the whistle the bell shall be rung continuously until the crossing is passed, under a penalty of $100 for every neglect; * * * and the company shall be liable for all damages which shall be sustained by any person by reason of such neglect." It is contended on behalf of the defendant that the omission of this duty cannot support an action on behalf of one who was not injured at the crossing; and there are not wanting cases which sustain this contention, under statutes somewhat similar to the one under consideration. We do not, however, think that this is the proper construction to be placed upon this statute. The statute imposes a positive duty upon the railroad company to sound its whistle and to ring its bell at a certain point. It is a well-known fact that not only those about to cross the railroad track, but those in the immediate vicinity, lawfully there, are frequently induced to rely upon the performance of this statutory duty. If they do so, and without fault of their own suffer an injury, we see no reason why the statute should not be so construed as to protect them. We think the true construction to be that, while a failure to give a signal required by law will not avail a trespasser in an attempt to charge the road, one lawfully in a position where such negligent omission may constitute the direct and proximate cause of the injury to him is entitled to aver such negligent act as the basis of the action. In *Ransom* v. *Chicago, St. P. M. & O. R. Co.*, 62 Wis. 178, 51 Am. Rep. 718, it was held that the failure to give the crossing signal is a negligent act, of which one may complain who is injured by reason of such failure while driving parallel to the track near the crossing, from the fright of his horses. In *People* v. *New York Cent. & H. R. R. Co.*, 25 Barb. 199, it was held that the hazards to be provided against by the enactment of such a statute are twofold: *first*, the danger of collision at crossing; *second*, that of damage by frightening of teams traveling upon a public highway near the crossing. And in the late case of *Cahill* v. *Cincinnati, N. O. & T. P. R. Co.*, (Ky.) 13 Ky. L. Rep. 714, it is distinctly held that persons lawfully using a private crossing are entitled to have the benefit of signals which they know it is the duty or custom of the railroad to give at a public crossing. In *Norton* v. *Eastern R. Co.* 113 Mass. 366, it was said: "When the Legislature has by statute directed that at particular points of their road they shall take especial precautions to notify those using the highways of the approach of a train, we cannot say that such precautions were intended solely for the benefit of certain travelers, even if they constituted the most numerous class, or that most likely to be endangered, if there were others also rightfully using such highways who would be liable to be injured by the neglect of them." And in *Wakefield* v. *Connecticut & P. R. R. Co.* 37 Vt. 330, it was said: "While such accidents are, in the main, likely to happen to persons approaching and about passing such crossing, yet they are not confined to such persons; and we think it would be an unwarrantable restriction of this provision of the statute to hold that the duty thereby imposed has reference only to persons approaching or in the act of passing the crossing. In our judgment, that duty exists in reference to all persons who, being lawfully at or in the vicinity of the crossing, may be subjected to accident and injury by the passing of engines at that place. The gist of each of these decisions quoted from Massachusetts and Vermont is that one lawfully in a position in which the failure to observe the statutory duty might work him an injury has the right to complain of such failure on the part of the company. An attempt has been made to distinguish those of the cases cited which hold that one upon a public highway, though not intending to cross, may rely upon the performance of the statutory duty by the company, and the case at bar; but in my judgment the cases are not to be distinguished in principle. The only possible ground upon which the company is held liable for this omission of duty to one traveling in a public highway parallel to the railroad is that he is lawfully there, and, having knowledge that the railroad company is required by law to give these statutory signals, he is justified in relying upon the performance of that duty, and that the omission to perform the duty is the proximate cause of the injury resulting to him. So, in the case at bar, the plaintiff occupied such a relation to this defendant company. He was lawfully upon this crossing. He knew that the engineer was required by law to sound his whistle, and he relied upon the performance of that duty. The proximate cause of the injury might very properly have been found by the jury to have been this neglect of duty. Every element that is present in an action by one upon the public highway, not intending to

cross, is present under the plaintiff's theory in the present case; and the important question presented is whether we will follow the line of decisions which limits the liability of the company for injuries resulting through its failure to give signals to those about to cross or actually crossing the track at the public highway crossing. We think the better rule is that laid down by the Wisconsin and Kentucky courts, in the cases of *Ransom* v. *Chicago, St. P. M. & O. R. Co.* and *Cahill* v. *Cincinnati, N. O. & T. P. R. Co.* above cited.

Morse, *Ch. J.*, and **McGrath**, *J.*, concurred with **Montgomery**, *J.*

NORTH CAROLINA SUPREME COURT.

STATE of North Carolina, *Appt.*
v.
W. T. CUTSHALL.

(.....N. C.....)

1. **Contracting a bigamous marriage in one state cannot be made a crime in in another state** which can be punished in the latter in the absence of any illegal cohabitation there although the persons come within the state.

2. **Cohabitation within the state under a bigamous marriage contracted in another state is not punishable** under Code, § 988, which attempts to make it a crime to contract a bigamous marriage in another state.

(May 3, 1892.)

APPEAL by the state from a judgment of the Criminal Court for Mecklenburg County quashing an indictment charging defendant with a violation of Code, § 988, defining and punishing bigamy. *Affirmed.*

The facts are stated in the opinion.

Mr. **Theodore F. Davidson**, *Atty-Gen.*, for the State.

No appearance for appellee.

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

The Statute (Code, § 988) provides that "if any person, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in the state of North Carolina or elsewhere, every such offender, and every other person counseling, aiding, or abetting such offender, shall be guilty of a felony, and imprisoned in the penitentiary or county jail for any term not less than four months, nor more than ten years, and any such offense may be dealt with, tried, determined, and punished in the county where the offender shall be apprehended or be in custody as if the offense had been actually committed in that county." The general rule is that the laws of a country "do not take effect beyond its territorial limits, because it has neither the interest nor the power to enforce its will," and no man suffers criminally for acts done outside of its confines. 1 Bishop, Crim. Law, 7th ed. §§ 109, 110; *People* v. *Tyler*, 7 Mich. 161, 8 Mich. 335, 74 Am. Dec. 703; *State* v. *Barnett*, 83 N. C. 616; *State* v. *Brown*, 2 N. C. 100, 1 Am. Dec. 548. In the case of *State* v. *Ross*, 76 N. C. 242, 22 Am. Rep. 678, the court said: "Our laws have no extraterritorial operation, and do not attempt to prohibit the marriage in South Carolina of blacks and whites domiciled in that state;" thus recognizing the principle, generally accepted in America, that a state will take cognizance, as a rule, only of offenses committed within its boundaries. Among the exceptions to this general rule are the cases where one, being at the time in another state or country, does a criminal act, which takes effect in our own state; as where one who is abroad obtains goods by false pretenses, or circulates libels in our own state, and contrary to our laws, or from a standpoint beyond the line of our state fires a gun or sets in motion any force that inflicts an injury within the state for which a criminal indictment will lie. 1 Bishop, Crim. Law, § 110; *Ham* v. *State*, 4 Tex. App. 659; *Cambioso* v. *Maffett*, 2 Wash. C. C. 98.

Persons guilty of such acts are liable to indictment and punishment when they venture voluntarily within the territorial bounds of the offended sovereignty, or when, under the provisions of extradition laws or the terms of treaties, they are allowed to be brought into its limits to answer such charges. As a rule, the validity of marriages contracted in any foreign country must be determined by the courts of another nation with reference "to the law of the country wherein they exchange the mutual consent to be husband and wife, which consent alone is by the law of nature perfect marriage." 1 Bishop, Mar. & Div. §§ 855, 856; *State* v. *Ross*, *supra*. Such marriages may be declared

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NOTE.—The doctrine of the above case so fully accords with the current of authorities as to the lack of jurisdiction of a state court to try a person for a crime committed in another state or country that the most noticeable thing in the case is the assertion by the dissenting judge of the broad claim of power in a state to make the mere presence in the state of a person who has committed a crime in another state sufficient to constitute an offense against the state if so declared by statute. But without regard to other questions in this connection it may be asked whether so far as this might be attempted in respect to citizens of the United States, it would not be a violation of their right under the federal Constitution to pass through a state. Crandall v. Nevada, 73 U. S. 6 Wall. 35, 18 L. ed. 745.

For one phase of the kindred question of larceny by bringing stolen goods into a state, see State v. Tief (Mont.) 15 L. R. A. 722.

For another kindred question, of the right to try a man for a homicide where death resulted within the state although the fatal stroke was given in another state, see *Ex parte* McNeely (W. Va.) 15 L. R. A. 226.

unlawful, not simply because they are contrary to the law of the state in which the question arises, but for the reason that they fall under the condemnation of all civilized nations, like marriages between persons very nearly related or those that are polygamous. 1 Bishop, Mar. & Div. §§ 857–862. So a foreigner, not accredited to another government as a representative of his own nation, is subject to the law of the country in which he may travel or establish a temporary domicil, and may be tried in its tribunals for any violation of its criminal laws while within its territorial limits. Wheaton (in his treatise on International Law § 120, *note* 77) says: "In Great Britain, France, and the United States, the general principle is to regard crimes as of territorial jurisdiction. . . . The question whether a state shall punish a foreigner for a crime previously committed abroad against that state or its subjects also depends upon its system respecting punishing generally for crimes committed abroad; Great Britain and the United States respecting strictly the principle of the territoriality of crime." While, in our external relations with other nations, our federal head, the United States, is the only sovereign, for the purpose of internal government such portion of the sovereign power as has not been surrendered to the general government is retained by the states. 11 Am. & Eng. Encyclop. Law, p. 440, and *notes*.

In the exercise of their reserved powers, especially in the execution of the criminal law, questions arise which are settled and determined either according to the principles of international law or by analogy to them. It is contended that nothing but comity between nations, in the absence of express provisions of treaties, prevents one nationality from making laws to punish persons who commit criminal offenses in another country, and afterwards come within its territory and that, admitting this principle to be correct, there can be no treaty stipulation, and there is in fact no constitutional inhibition, that restricts the Legislature of one of our internal sovereignties from enacting laws to punish a person who comes into its domain, so as to be apprehended there, for a crime committed in a sister state. Article 29 of the confirmatory charter granted by Henry III. provided that "no freeman should be taken or imprisoned, or disseised of freehold or liberties or free customs, or be outlawed or exiled, or any otherwise destroyed, nor will we pass upon him or condemn him, but by lawful judgment of his peers or by the law of the land." In the formal Declaration of Independence the king of Great Britain, after being charged with many violations of fundamental principles and invasion of common rights, was arraigned before the world "for depriving us in many cases of trial by jury; for transporting us beyond the seas to be tried for pretended offenses." This language evinces the purpose of our representatives to risk their lives and their fortunes, in part, at least, to secure, not simply the ancient right of trial by jury, but trial by a jury of the vicinage, within easy reach of all evidence material for the vindication of the accused, where the charge might prove unfounded upon a fair investigation. During the same year these principles were embodied in the Declaration of Rights by the colonial Congress, in what now constitutes sections 13 and 17 of article 1 of the Constitution, which are as follows: "Sec. 13. No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men." "Sec. 17. No person ought to be taken, imprisoned, or disseised of his freehold, liberties or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." Not only has section 13 been construed to guarantee to every person (whether a citizen of this state or of another Commonwealth) a trial by jury in all cases, which were so triable at common law, (such as an indictment for a felony,) but a trial by his peers of the vicinage, unless, after indictment, it should appear to the judge necessary to remove the case to some neighboring county, in order to secure a fair trial. *Judge* Cooley says, (Const. Lim. *319, 320): "Any of the incidents of a common-law trial by a jury are essential elements of right. The jury must be indifferent between the prisoner and the Commonwealth, and to secure impartiality challenges are allowed, both for cause, and also peremptory, without assigning cause. The jury must also be summoned from the vicinage where the crime is supposed to have been committed; and the accused will thus have the benefit on his trial of his own good character and standing with his neighbors, if these he has preserved, and also of such knowledge as the jury may possess of the witness who may give evidence against him. He will also be able with more certainty to secure the attendance of his own witnesses." *Kirk* v. *State*, 1 Coldw. 344; *Armstrong* v. *State*, Id. 338; *State* v. *Denton*, 6 Coldw. 539. This strong language is used in commenting upon the clause, which, in substantially the same terms, guaranties the right of trial by jury in all serious criminal prosecutions in every one of the states.

Mr. Charles A. Dana, published some years since an article in his paper, the New York Sun, which it was claimed was libelous in its strictures upon the conduct of a public official at Washington city; and *Judge* Blatchford, upon his being arrested in New York by virtue of a warrant of a United State commissioner and brought to Washington, heard the facts, after granting a writ of habeas corpus, and discharged the prisoner. *Re Dana*, 7 Ben. 1. Commenting upon this case, *Judge* Cooley said: "It would have been a singular result of a revolution, where one of the grievances complained of was the assertion of a right to send parties abroad for trial, if it should have been found that an editor might be seized anywhere in the Union, and transported by a federal officer to every territory in which its paper might find its way, to be tried in each in succession for offenses which consisted in a single act not actually done in any of them." If every state of the